

CHAPTER 8

Transitional Justice in Conflict: Reflections
on the Colombian Experience

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Toward the end of the last decade, victims' rights defenders in Colombia faced a difficult dilemma. Although a series of transitional measures born of the paramilitary's demobilization process had been underway for several years, victims still faced dire circumstances. One of their main grievances was the absence of reparations. At the time, despite the partial demobilization of some combatant groups, a solution to the armed conflict seemed distant and large-scale violence persisted. The dilemma was, therefore, whether it was appropriate to push for a reparation model within a transitional justice framework when it was very unlikely that the conflict would come to an end soon. For many, the answer to this question was no; for practical and political reasons, it made more sense to aid victims through humanitarian assistance measures and postpone reparation efforts until the cessation of hostilities. Others, on the contrary, thought it was unacceptable to delay reparations until some uncertain date in the future. Many of the victims had been displaced from their homes and dispossessed of their land for more than a decade. Condemning them to an indefinite wait for reparations seemed unfair.

Although the concept of transitional justice was initially intended for post-conflict or post-repression situations, in some instances where certain conditions allow, like Colombia, developing a transitional justice process while conflict rages seems almost unavoidable. Furthermore, Colombia's brief experience indicates that the application of a transitional justice framework in the midst of a conflict may help to set the stage for a future peace process, even if at the same time the conflict makes it difficult to achieve all of the goals of transitional justice. This is the premise of this chapter.

THE COLOMBIAN EXPERIENCE¹

In the mid-twentieth century, Colombia went through a period called *La Violencia* ("The Violence"), which stemmed from the violent confrontation

between armed groups aligned with the main political parties. This was followed by a national reconciliation process that led to an agreement between liberals and conservatives, known as the *el Frente Nacional* ("National Front"), to divide state power and alternate control of the government between them for 16 years. As these events were transpiring in the 1960s, three guerrilla movements took up arms against the state: the National Liberation Army (ELN), which followed Cuban revolutionary ideology; the Armed Revolutionary Forces of Colombia (FARC), founded on agrarian communist ideals; and the Popular Liberation Army (EPL), of maoist leanings.

The Colombian state tried to confront this violence through state-of-exception laws, issuing decrees that allowed and encouraged the creation of self-defense groups. Under the protection of these laws and regulations, which became permanent in 1968, these self-defense or paramilitary groups, with the support of the Colombian Armed Forces, gained strength in several areas of the country. Over the next two decades, the country saw the consolidation and strengthening of both the guerrilla groups and the anti-insurgency movement. By the end of the 1980s, the violence perpetrated by the paramilitary groups demonstrated the need to undo the legal framework that had fostered their creation. Nevertheless, the violence did not stop, especially that which was connected to paramilitary groups, drug traffickers, and their flourishing cartels.

Despite the promulgation of the 1991 Constitution, political violence persisted in the 1990s, even intensifying in the second half of the decade. Paramilitary groups and guerrillas expanded to the point that they became true armies. The FARC, for example, maintained steady military gains, increased recruitment levels, and improved its equipment, allowing it to achieve important military victories over the Armed Forces. Similarly, paramilitary groups increased their armed actions and created a unified command organization, the United Self-Defense Forces of Colombia (AUC). At the beginning of the new century, paramilitaries had approximately 10,000 combatants distributed in 10 blocks, while the guerrillas had 21,000 combatants distributed over more than 100 fronts.

On December 1, 2002, AUC leaders publicly expressed their intention to negotiate the demobilization of their forces with President Álvaro Uribe Vélez's government and declared a unilateral ceasefire. After negotiations, the parties agreed to a demobilization process that was to conclude on December 31, 2005. However, the demobilization of these combatants did not end the armed conflict or the violence associated with it. Although the state's security and counterinsurgency policy dealt strong military blows to the guerrillas,

these groups maintained a large number of combatants, considerable offensive power, and important military and political structures.

On July 22, 2005, Law 975 of 2005—known as the “Justice and Peace Law”—came into force. It was meant to provide the legal framework for the demobilization and reintegration process and the prosecution of the worst violations. Out of the more than 50,000 combatants who were to lay down their arms, the framework would only apply to those who participated in it willingly and applied for benefits. All other former combatants—at least, the ones for whom there was no information incriminating them in egregious crimes—would reintegrate into society based on an amnesty model for political criminals that was recognized in the constitution.² Due to various institutional, legal, and political factors, however, by the end of 2015 only 130 of the initial 5,000 applicants had concluded criminal justice and peace proceedings.

In mid-2010, Colombians learned of initial contacts regarding peace between the national government and the FARC, the largest guerrilla group in the country at the time. Since 2012, negotiations supported by guarantor and observer countries centered on five negotiating points: 1) land tenure reform, 2) political participation guarantees, 3) illegal drug policies, 4) end of the conflict, and 5) victims' rights. Colombia at this point faced the challenge of implementing a set of transitional justice measures that had been in force for almost ten years, while, simultaneously, negotiating and designing another set of transitional justice measures that would allow peace negotiations with the FARC guerrillas to continue. The negotiations ended in late 2016 with the parties signing a final peace agreement, which, at the time of writing, was in its initial regulation and implementation stages.³

In many respects, the Colombian situation is very different from the experiences of its Latin American peers. First, most of the countries in the region implemented transitional justice mechanisms and conducted their peace processes (the ones that faced armed conflicts) or democratic transitions (the ones that transitioned from military regimes to more open societies) more than three decades ago. This means Colombia has had to make decisions based on legal standards that were created or consolidated by other Latin American countries when they went through their transitions. Colombia also grapples with a paradoxical “abnormal normality” that sets it apart from other countries' experiences in the region. The country is the site of one of the longest-running armed conflicts in the world, marked by its sheer scale and the cruelty of the means of warfare.⁴ However, it has never experienced radical political breakdowns, like dictatorships (which are quite common in the region), while

some of its institutions—mainly in the major cities and especially the capital—have a long history and high level of sophistication. In that sense, Colombia seems to be a regular democratic country with a strong institutional structure.

Second, the conflict itself and the manner in which the mechanisms to deal with its legacy have been established have peculiar characteristics. The scale and duration of the Colombian conflict is unparalleled in the region. Although there is some controversy regarding the precise beginning of the conflict, there is consensus, at least according to the most conservative estimates, that it has lasted about four decades.⁵ The length of the conflict presents a challenge when establishing policies meant to address such a distant past and exponentially increases the number of victims to be included in those policies,⁶ as well as the number of crimes and perpetrators that should be included in the accountability process.

Third, Colombia's conflict involves not just two factions—as is the norm—but several: the state, the guerrilla groups, the paramilitary groups, and the groups that formed after these demobilized, which are called emerging bands or criminal bands (*Bacrim*) or post-paramilitaries. The classic formula for peace negotiations between an insurgency and a government therefore becomes more complex, raising many questions regarding political convenience and legal issues surrounding the application of transitional justice measures to pro-state groups. For example, it must be asked whether it is possible to apply a negotiating framework to talks with an armed group that never truly confronted the state; whether it is possible to apply measures to that group that were designed for political criminals; what the relationship is between politically motivated and common crime in the context of creating a transitional framework; and whether the victims of both types of violence should be covered by transitional policies.

Fourth, measures labeled as *transitional justice* have only been implemented in a partial and non-systematic way over the past decade. As a consequence, many questions remain—as described below—about how to harmonize these initiatives and whether in Colombia a minimally coherent transitional justice system actually exists (for example, should the same punitive standards apply to guerrillas and paramilitaries?). Not only have opportunities to advance the justice agenda been scarce and dispersed, but, in some cases, the transitional justice discourse has been used to legitimize agendas that do not truly align with notions of accountability and justice.⁷

Finally, due to diverse factors connected to the institutional context noted above, the transitional process in Colombia has been characterized by hyper-legalistic and hyper-judicial tendencies.⁸ Many of the discussions on

institutional arrangements, intervention modalities, and political convenience have been constantly read in the light of legal standards—national and international—and have been challenged before the national courts. Judicial evaluation has been extensive. Simultaneously, the accountability mechanisms now in effect (for holding perpetrators accountable, seeking and accessing the truth, and awarding reparations measures) have privileged judicial proceedings over other mechanisms. This can be seen in the elaborate judicial proceedings established by the 2011 Victims and Land Restitution Law (Law 1448) for the restitution of land dispossessed during the conflict, as well as in the complicated judicial proceedings that the Justice and Peace criminal trials have turned into.⁹

THE CHALLENGES AND RISKS OF IMPLEMENTING TRANSITIONAL JUSTICE DURING CONFLICT

The characteristics of the Colombian context have given rise to a set of transitional justice mechanisms despite the continued existence of a large-scale armed conflict, which has maximized the risks that are implicit in the dilemmas faced by transitioning societies. Below are some of these challenges, specifically with regard to the Colombian experience, but which may be relevant for other countries.

ACHIEVING JUSTICE IN A CONTEXT OF WIDESPREAD VIOLENCE

One of the most obvious, and most important, practical tensions involved in applying a transitional justice framework during an ongoing conflict is the recurring threat of violence faced by victims, those implementing the justice measures, and the population at large. Colombia experienced this firsthand, in part because its transitional framework has been applied only partially—the demobilization process was set in motion with only one of the armed groups and left out the largest group in the conflict—but also because the peace talks between the government and the FARC guerrilla were premised on the understanding that a ceasefire would only take place once the stakeholders had reached a final agreement. Furthermore, peace negotiations with the other guerrilla group, the ELN, are still in an early stage, and the group is still engaged in military hostilities, including attacks on the population and military elements and the commission of human rights violations, like abduction of civilians.

Consequently, two parallel phenomena have occurred: the implementation of a broad transitional justice model for demobilized paramilitaries that includes measures directed at satisfying victims (of this group and also of the entire conflict) and measures for the reintegration of former combatants—all against the backdrop of a military confrontation between the state and guerrillas that are not party to this process. Adding to the complexity, the FARC (the main guerrilla group) and the state engaged in peace negotiations in Havana, while in Colombia they continued waging war.¹⁰

The consequences of the violence committed by armed factions against the civilian population has been terrifying. Illegal armed groups—the paramilitary or the bands that emerged after their demobilization, and the guerrillas—and members of the Armed Forces continued to be involved in the perpetration of crimes, human rights violations, and infringements of international humanitarian law—actions that translated into violations of the rights to life, personal integrity, and freedom, and perpetuated the internal displacement crisis.¹¹ In particular, this violence has been acutely suffered by those leading efforts to restore rights (like land restitution leaders), the authorities responsible for transitional processes, and demobilized combatants, all of which has led to very slow implementation of justice policies. Moreover, the persistence of the armed confrontation meant that the state had to continue fighting the war and allocating resources to it.

This context created two problems with regards to reparations in particular. First, the conflict continued producing victims. The number of people who should be provided with reparations increased day by day.¹² This gave rise to important questions regarding the public policy's time limits: Should future victims be included? How can fiscal projections be made when the number of victims has not been determined? Is it possible—and should Colombia try—to repair existing victims partially and, at a later date, implement measures to do the same with future victims?

Second, it was highly unlikely that a successful reparation effort could be conducted against a backdrop that was so violent and intimidating, considering in particular the difficulty in seeking the truth, which in turn is a preliminary guarantee for the satisfaction of the rights to justice and reparation. Additionally, due to the dynamics of the conflict, there was a risk that the actors involved in the violence could coopt the bureaucracy responsible for guaranteeing victims' rights or that these officials would not be able reach victims in a timely way due to the ongoing violence. Further, the intimidating and violent environment that has prevailed in large parts of Colombia has

prevented victims from expressing their reparation expectations in public or even from condemning the violations or the perpetrators.

SEQUENCING MEASURES

In post-conflict situations, the manner in which different transitional measures are sequenced is fundamentally important. For many reasons, decision makers should weigh the competing interests and options and, on that basis, decide what will happen immediately and what will happen in the future, despite the urgent or impending nature of many of the measures. In the midst of an armed confrontation, these decisions can appear to be more pressing and the dilemmas more difficult.

In Colombia, this can be seen with regard to the implementation of the land restitution policy. Land restitution was used as an entry point to the peace talks and as evidence that if the transition agenda bears fruit from the beginning, justice measures could bring the parties closer to a peace deal.¹³ However, at the same time, restitution requires certain ceasefire conditions. This creates a circular argument: to achieve peace we need restitution, but to achieve restitution we need peace. The government's model has been based on an analysis of the conditions in the area where restitution is to be conducted, carried out by an interinstitutional committee composed of restitution authorities and security forces. If the committee approves the safety conditions, the area is selected and restitution efforts move forward. If the committee determines that safety conditions are low, the area is not selected. The problem has been that the most dispossessed areas are also the ones where hostilities have persisted and that are still controlled by guerrillas.¹⁴

The question of how to sequence various policies under such circumstances also arises with regard to institutional reform and guarantees of non-recurrence. Usually in Colombia it is perceived that to nurture trust—and due to the precarious conditions that characterize the vast majority of victimized families—measures of truth, justice, and reparation should be implemented first. The sequence should then be closed with long-term transformations (which involve lengthier and more complex processes), such as guarantees of non-recurrence and structural state reforms. However, in the face of recurring violence and the difficulty in initiating truth, justice, and reparation measures, it is valid to ask whether guarantees of non-recurrence should be prioritized in order to allow for the implementation of other measures.

Another example of this sequencing and timing dilemma involves the coordination of justice and truth mechanisms. In an ideal scenario, it would

be logical to have a nonjudicial truth mechanism (for example, a truth commission) give demobilized former combatants an opportunity to tell their side of the story. This, in turn, could be the basis of punitive benefits, including the conditional cessation of criminal action. Information gathered from these accounts would allow the truth commission to issue recommendations on how to conduct any future judicial investigation against the perpetrators. However, the logic of peace indicates that if the transition intends to stop the armed conflict, the guerrillas are likely to demand legal certainty and a clarification of accountability, which will also allow them to participate in politics. Therefore, if the process is suspended until a commission conducts its work, the transition could be delayed for at least two years (experience indicates this is the amount of time needed to reasonably perform a complete truth-seeking exercise).¹⁵

This issue was discussed at length by the government and the FARC when designing the System for Truth, Justice, Reparation and Guarantees of Non-Recurrence that was agreed to, and which provides for the creation of both a truth commission and a special criminal jurisdiction. One question was which of these two measures should come first. For some, the truth commission should begin its work first and then make way for the jurisdiction. Others, conversely, thought it best to start with the implementation of justice measures to demonstrate to society that the accountability process was serious. Ultimately, political pressure and the difficulties faced in starting to implement the agreement meant that no sequencing order or prioritization of the mechanisms was established in the agreement. As a result, the peace agreements provide that the Jurisdiction for Peace and the truth commission must coordinate their work together, because both are part of the same system. However, it is unclear how, in real time, this coordination will operate. For the time being, it is clear only that the truth commission cannot forward the witness statements it receives under its mandate to the special jurisdiction. Nevertheless, the inverse relationship has not been prohibited.

THE SUBORDINATION OF TRANSITIONAL MEASURES TO MILITARY STRATEGY

In the midst of an armed conflict, strategic military decisions tend to prevail over other considerations; consequently, subordinating the agenda of transitional measures to military strategy can prevent the implementation of those justice measures or see them ultimately being used to advance military goals. The government is a strategic stakeholder in the conflict and, therefore, certain transitional justice measures, particularly the ones that address victims' rights,

are not always separated from the government's military decisions.

A good example of this was already mentioned: the targeting of land-restitution efforts has been done by a committee in which the Ministry of Defense establishes the zones where it can guarantee the safety and conditions necessary for such efforts. Also, two additional examples help illustrate this issue. The first one is the unwillingness of the government of President Álvaro Uribe to accept the existence of an internal armed conflict.¹⁶ This political position—which was a very important part of the government's strategy, in particular its military discourse—had concrete consequences for the design of transitional policies, particularly the failed Victim's Statute.¹⁷ The discussion around the designation of the armed conflict created much uncertainty regarding the universe of victims subject to reparation. The initial version of the project was aimed at providing reparations to the "victims of human rights violations and international humanitarian law infringements occurred by virtue of the armed conflict," but was modified to read "the victims of violence." This small but fundamental change introduced a great deal of ambiguity in the concept of victim and excluded from the benefits of the statute individuals who had suffered infringements of international humanitarian law at the hands of warring groups.

A second example is related to the alleged potentially demoralizing message sent to the official troops by certain policies. The government maintained that in an armed conflict, it was counterproductive to recognize certain measures. For instance, in the government's view, recognizing the administrative liability of the state for violations perpetrated by state agents communicated a negative message to its troops, which would have been tantamount to recriminating the actions of the Armed Forces and would have led to reduced military effectiveness. This was a key reason for the failure of the initiative. Uribe held that approving legislation that recognizes victims of state agents through non-judicial means would make it impossible to continue fighting illegal groups.¹⁸

A third example is a particular military justice reform promoted by the government of President Juan Manuel Santos. Although the reform was heavily criticized by the international community (including all the United Nations rapporteurs with human rights mandates) and would have been contrary to the basic principles of non-recurrence guarantees, the government considered it a necessary mechanism to fight the war and advanced its approval in Congress. It did so despite the fact that peace talks were underway and other post-conflict reforms were being proposed.

DISTINGUISHING HUMANITARIAN AND REPARATIVE MEASURES

In any large-scale conflict that impacts civilians, the state and society must deploy emergency response and humanitarian assistance systems that reach a large part of the population.¹⁹ In addition to being a significant financial burden, this can entice the state to conflate its duty to provide humanitarian assistance with its duty to provide reparations. Additionally, implementing humanitarian assistance and reparations policies simultaneously can increase the risk that they will be distorted. For example, in violent contexts, it can lead to the creation of systems of regularized humanitarian assistance that may contain perverse incentives that result in “assistentialism,” that feed off corrupt and rent-seeking systems and that, finally, trivialize the significance of economic reparations if beneficiaries simply see this as another assistance payment—that is, if they view reparations as payments or measures meant to alleviate their temporary situation and not necessarily connected to acknowledgement of responsibility for a past harm or aimed at holding accountable the actor that caused it.

DIFFERENT COMBATANTS, DIFFERENT PROCESSES: A SINGLE STANDARD?

Starting negotiations with one party to a conflict raises difficult questions regarding the extent to which standards can be differentiated or if all stakeholders should receive equal treatment. In contrast to the Justice and Peace process with the paramilitary, the process with the FARC brought Colombia closer to a true transition to peace. Decisions on the guerrillas’ legal status should therefore be considered in the context of an overall solution, which includes the various perpetrators, all of the victims, and the demands of a complete transition. Would this justify an approach other than punishment or the arrangements that were negotiated with the paramilitary?

One justification for asymmetric treatment may be in the anti-state nature of the guerrillas, as opposed to the pro-state nature of the paramilitary. Another is that, historically, there have been more prosecutions against the guerrillas than against the paramilitary. Moreover, the guerrillas have been subject—with varying degrees of intensity and territorial differences—to enemy criminal law that denies or limits their procedural guarantees, whereas with paramilitaries there has been a greater tendency towards impunity. These differences could lead to the conclusion that certain differentiated treatment for the actors may be legitimate.²⁰

Another issue is what to do with members of the Armed Forces and whether they should be subject to the same standards. The reduction of

punitive standards in transitional contexts is primarily justified as an incentive to lay down arms and permanently disassemble illegal armed structures. This implies recognizing if not the existence of a policy directed towards the perpetration of atrocious crimes, at least the existence of certain structures entrenched within the military forces. Consequently, requirements for accessing benefits should be the dismantling of those structures through a vetting process.

In the end, the state's negotiations with the FARC acknowledged the differences between actors, but maintained a kind of symmetry in the duration of punishment. Thus, the FARC did not accept the same justice model that was imposed on the paramilitaries; instead, it negotiated a special court and punishment system that does not necessarily require imprisonment but does require restrictions on movement and an obligation to personally contribute to restorative justice measures. However, the FARC accepted that the duration of this penalty would equal that which was agreed to in the Justice and Peace Law—that is, the penalties will range from five to eight years. The Armed Forces explicitly refused to accept the same punishments and treatment as the FARC, but agreed to a system that would provide special, differentiated, simultaneous, balanced, and equitable treatment. This also includes penalties ranging from five to eight years of imprisonment for state agents who voluntarily decide to participate in the process and contribute to the truth and reparation of victims.

TENSIONS BETWEEN JUSTICE AND DEMOBILIZATION

There is very active debate over whether current justice standards are too rigorous in terms of investigation and punishment. This could severely limit a society's options to negotiate approaches to demobilization that include incentives sufficient to encourage political solutions to armed conflicts.²¹ Critics maintain that toughening punitive standards during transitions prevents successful negotiations with subversive groups. They maintain that, even when applying principles such as prioritization and selection, tough standards combined with a focus on the most responsible perpetrators make it impossible to offer demobilization options to the military's high command (who generally lead the negotiations but simultaneously end up being the parties most politically accountable for human rights violations perpetrated during the conflict).

The question is how to formulate a criminal justice policy that establishes a balance between socially significant justice and sensitivity to the needs of peace. This dilemma is, of course, not uniquely Colombian; it is intrinsic to

transitional justice contexts. It is, however, accentuated in the Colombian case. Because negotiations occur amidst a large-scale conflict that involves several types of criminality, there is a risk of undermining the principle of equality before the law as well as transforming transitional justice into a permanent and routine matter. In the middle of a conflict that may not appear to be coming to an end, it is difficult to explain to society the application of light penalties for atrocious crimes alongside very severe penalties for ordinary crimes. In exceptional circumstances, society may accept certain punitive benefits as the extraordinary cost of dealing with the past once a transition has occurred. But when the conflict remains intense and compromises are made almost routinely, it is unacceptable from the perspective of a coherent criminal justice policy.

THE RISK OF LOSING SUPPORT AND MOMENTUM

An additional risk of implementing transitional justice measures in the midst of conflict is the exhaustion of society in the medium and long term. Transitional policies are based on a type of collective vision of breaking with the past. Although the processes associated with transitional justice can be long term, their social message is tied to historical moments in which the public's desire for change reaches a tipping point. When such conditions occur, processes can develop until they reach a climax or achieve a certain level of momentum that allows public efforts to join together with a specific purpose. However, these historical moments are rare and, additionally, brief. Public attention, social expectations, and hope are scarce resources. Societies generally become discouraged easily and lose hope quickly when transitional processes become complex and drawn out over time. This is even more likely when the implementation of measures begins before society has even reached that initial moment of hope brought about by a peace agreement or ceasefire. Thus, the risk is not being able to leverage the support that the implementation of the measures could and should have in a postconflict period.

POSITIVE CONSEQUENCES OF IMPLEMENTING TRANSITIONAL JUSTICE DURING CONFLICT

Despite the risks and challenges discussed above, the implementation of a transitional justice framework in Colombia is not an experience that has failed or should be regretted. On the contrary, we would argue that transitional

justice measures have made a significant contribution to the consolidation of certain processes aimed at the democratization of society and opened the doors to a political negotiation of the conflict between the state and guerrillas. Additionally, the measures have brought at least some justice in response to victims' grievances.

BRINGING STAKEHOLDERS CLOSER BASED ON LEGAL STANDARDS

One of the positive aspects of the implementation of transitional justice measures, especially those related to the satisfaction of victims' rights, has been the strengthening of legal standards that channel polarized political discussions. As long as conflict persists, and even in the initial stages of the post-conflict period, polarization makes it very difficult to reach agreements. In Colombia, as discussed in a previous paper written by one of the authors and María Paula Saffon,²² the legal standards associated with transitional justice discussions were useful in bringing the paramilitaries and government closer to discussion and arriving at potential discussion points.

The existence of a minimal, non-negotiable core of legal standards applied to victims' rights can serve as a virtuous restriction that channels peace talks, rather than obstructs them. In effect, the defense of a core of legal standards is important because it strengthens the notion that peace negotiations are taking place within a legal framework, one that is influenced by the international context. This pushes armed actors towards less radical positions and a common ground where all the parties recognize that it is impossible to ignore victims' rights in favor of peace.

The congressional discussion that resulted in the Justice and Peace Law and the peace talks with the FARC are concrete examples of this. The negotiations center mostly on the standards' interpretation and none of them deny the existence of the overall framework. This enables the parties to have a discussion with a common reference point that grounds the negotiators' political expectations.

MAKING VICTIMS CENTRAL TO THE PUBLIC DEBATE

Since transitional justice discussions were introduced in Colombia, victims' rights have been at the center of all political and legal discussions on how to confront past atrocities. This has led to the recognition of victims as relevant political stakeholders that need to be party to all discussions surrounding this question. This is a radical shift in Colombian political dynamics, as the

perspective, needs, and interests of victims had never been taken into account before in a peace negotiation process. It has contributed to the empowerment of victims, the strengthening of their movements, and the establishment of important transnational networks with international nongovernmental groups, all of which are essential elements in transforming the unequal power relationship between victims and perpetrators.

The social acknowledgement of the consequences of the conflict on those who directly suffer the atrocities is a major democratizing advance. As was seen after the first victim statute failed, this point is very important, even if it does not translate into legal developments. Once the vindication of victims' rights as an issue permeated society, the formulation of concrete measures in response did not take long, and only months after the first victim statute was voted down by a parliamentary majority a very similar project was passed into law almost anonymously by the same congress.²³

VICTIM-CENTERED AGREEMENTS

In close connection to the previous point, one of the main characteristics of the transitional justice process in Colombia has been the centrality of victims' rights in the parties' negotiation agenda. In both the discussion of the paramilitary demobilization framework and the talks held with the FARC guerrilla, victims' rights have been a fundamental issue. Negotiations about reintegration, punitive pardons, or political participation as legal solutions have centered on their implications for victims' rights. This represents a major shift. During the negotiations held in the late 1980s and early 1990s, for instance, the issue of victims' rights was never as visible as it is today at the negotiating table, even from the perspective of the guerrillas, who have for many years denied the legitimacy of both Colombian law and international law (which they claim only serves capitalist interests). This is demonstrated by the fact that victims' rights were a specific point on the negotiation agenda with the FARC and by historical declarations from the group's spokespersons that recognize victimization. It is not only society, then, but also the parties to the conflict that have incorporated victims' rights as one of the central axes of a transition arrangement.

A TRANSFORMATIONAL AGENDA

Discussions in Colombia about victims, legal standards, and institutional arrangements have gone beyond the traditional transitional justice issues of

accountability or criminal responsibility. A broader agenda has emerged that addresses more structural deficits in Colombian democracy, such as inequality in access and tenure of land and political participation. The political agenda had been so polarized for so many years that it seemed impossible to revisit the parties' positions on certain issues. For example, equitable distribution of land tenure was seen to be absent from public discussion, without any chance of being discussed at a negotiation table. However, discussion channels began to open as the grievances expressed in the justice and reparation agenda shined a light on the issue of land dispossession and the reforms that were required to bring a massive land restitution policy to life. While this does not mean that restitution has become an integral land-reform process or that, to date, the land status quo in Colombia has undergone true transformation, the inclusion of the issue in the talks and the relative ease in reaching an agreement on it show how the justice agenda provided an effective entry point for dialogue. Other structural topics were also submitted for consideration in the talks through this channel.

FINAL REFLECTIONS

The Colombian experience illustrates that the implementation of transitional justice mechanisms during an ongoing armed conflict is very complex, because it tends to accentuate many of the risks and challenges associated with these instruments. However, using these or similar measures when victims demand recognition and reparation in the midst of conflict seems unavoidable. Furthermore, in such contexts transitional justice may contribute to setting the stage for a negotiated peace. Due to the progressive empowerment of victims and the crystallization of legal standards regarding victims' rights, using transitional justice instruments during a conflict will not only be more common but might even be necessary to ensure fairness in peace talks. The Colombian experience, which today seems exceptional, may indicate a way forward for many future cases.

Translated by Paula Corredor

NOTES

- 1 It is difficult to explain the characteristics of the Colombian context, armed conflict, and transition framework in a succinct way. In this section, we present a schematic summary of the arguments we have expressed elsewhere. For a more complete and systematic approach, see: Rodrigo Uprimny et al, *¿Justicia transicional sin transición?* (Bogotá: Dejusticia, 2006); María Paula Saffon and Rodrigo Uprimny, "Uses and Abuses of Transitional Justice in Colombia," in *Law in Peace Negotiations*, ed. Morten Bergsmo and Pablo Kalmanovitz, (Oslo: FICJC Publication Series, International Peace Research Institute in Oslo (PRIO), 2007); Diana Guzmán, Nelson Camilo Sánchez, and Rodrigo Uprimny, "La justicia transicional en Colombia," in *Las víctimas y la justicia transicional: ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?* (Washington, DC: Due Process of Law Foundation, 2010); Nelson Camilo Sánchez and Rodrigo Uprimny, "Justicia transicional sin transición?: la experiencia colombiana en la implementación de medidas de transición," in *Contribución de las políticas de verdad, justicia y reparación a las democracias en América Latina*, Carlos Berinstain (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 2011); Rodrigo Uprimny and Nelson Camilo Sánchez, "Ley de víctimas: Avances, limitaciones y retos," in *Entre Uribe y Santos: La hora de la paz o la solución imposible de la Guerra*, ed. Ricardo García Duarte (Bogotá: IPAZUD – Universidad Distrital, 2013). See also Jemima García-Godos and Andreas Knut, "Transitional Justice and Victims' Rights Before the End of a Conflict: The Unusual Case of Colombia," *Journal of Latin American Studies* 42, no. 3 (2010): 487–516.
- 2 The government's initial proposal was to treat rank-and-file members of paramilitaries as political offenders. However, the Constitutional Court ruled that paramilitaries were not political offenders but rather common criminals, because their main offense, and the crime for which they should be prosecuted, was criminal conspiracy. For a more detailed explanation, see: Nelson Camilo Sánchez, Jemima Garcia-Godos, and Catalina Vallejo, "Colombia: Transitional Justice Before Transition," in *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*, ed. Elin Skaar, Jemima Garcia-Godos, and Cath Collins (London: Routledge, 2016).
- 3 On the basis of this agreement, apart from a series of additional extrajudicial mechanisms, such as a truth commission and a special unit for the search for missing persons, the Colombian state will establish a Special Jurisdiction for Peace as a judicial system composed of several chambers and a tribunal with a trial chamber and an appeals chamber. This jurisdiction will have a special chamber to receive information on relevant crimes (including confessions of those who demobilize and state agents who want to participate in the mechanism) and will decide whether acts that were perpetrated can be subject to amnesty (in which case they will be sent to a chamber that will decide on amnesties and pardons) or if the principle of opportunity can be applied (in which

case they will be sent to another chamber specializing on the point). Finally, if the facts refer to responsibility for crimes against humanity, war crimes, genocide, or other grave human rights violations, it will refer the case so that an investigative unit can submit the case to the tribunal.

- 4 Centro Nacional de Memoria Histórica, *¡Basta ya! Colombia: memorias de guerra y dignidad* (Bogotá: CNMH, Imprenta Nacional, 2013).
- 5 In addition, there is a discussion that has toned down politically, but still stirs academic controversy and was very politically charged a few years ago: what type of violence does Colombia face? The difference stems from the way in which the conflict is defined: some refer to it as a civil war, others speak of a terrorist threat, and yet others describe it as a war against society. See, for example, a book with an evocative title: *Nuestra guerra sin nombre* [Our Nameless War]. *Transformaciones del conflicto en Colombia* (Bogotá: IEPRI – Editorial Norma, 2006).
- 6 In accordance with the official count as of mid-2012, the number of conflict victims surpasses 6,200,000 cf. Centro Nacional de Memoria Histórica.
- 7 For this reason, a previous paper referred to the use and abuse of transitional justice mechanisms (Uprimmy and Saffron, “Uses and Abuses of Transitional Justice in Colombia”).
- 8 For a critical view of the Colombian transitional model with its hyperjudicialism and the central role the courts have played in its design and evaluation, see Ivan Orozco Abad, *Justicia Transicional en tiempos del deber de memoria* (Bogotá: Editorial Temis, 2009).
- 9 The legal discussions (brought to the courts) have even led to the discussion of difficult dilemmas on how to advance the negotiation process with the guerrillas. Because of this, it was necessary to pass a constitutional amendment (known as the “Legal Framework for Peace”) to find a “legal solution” to issues such as: the legal uncertainty over the possibility that the state could grant criminal benefits to demobilized individuals who had perpetrated serious crimes; the lack of clarity regarding whether the General Attorney’s Office could conduct its massive investigations with greater efficiency by using tools to prioritize its activities; the uncertainty over the possibility of offering political reintegration to demobilize groups so that they could eventually stand for election for public office; and in connection to these three topics, the risk that any agreement achieved in a negotiation with an armed group would be breached after a judicial decision adopted a different interpretation from the one promoted by the government.
- 10 After more than three years of negotiations, the parties achieved a progressive de-escalation of the conflict. It began with a unilateral cease-fire by the FARC, which was followed by the government’s decision not to conduct aerial bombardments of guerilla camps. Finally, after the agreements were signed, the two parties decreed a definitive cease-fire.

- 11 UN General Assembly, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, A/HRC/25/19/Add.3, January 24, 2014.
- 12 In the year 2010, when formal negotiations with the FARC began, the victims' registry had 6,800,000 registered victims; by the year 2016, when the negotiations concluded, the number of registered victims was 8,299,334.
- 13 On the use of land policy as the negotiation's entry point, see the speech by Sergio Jaramillo, Peace Commissioner, and one of the heads of the government's negotiation team, at the "La Paz Territorial" conference at Harvard University, March 13, 2013, www.eltiempo.com/archivo/documento/CMS-13791996
- 14 This problem has seen improvement with the cease-fire between the FARC and the government but has not been completely overcome due to the additional violence already mentioned.
- 15 This is not an exclusively Colombian dilemma. El Salvador faced a similar situation, with a largely unsuccessful solution that did not necessarily originate in the model's design. In that country the transition assigned significant weight to the truth commission, even allowing it to name specific individuals and suggest that they be restricted from political participation or that their cases be submitted to judicial authorities. However, the agreements were violated and consequently there was a lot of controversy over the mechanism's effectiveness.
- 16 In this regard, the Inter-American Commission of Human Rights' annual report is very illustrative. It describes the government's response to the commission's use of the term "armed conflict." For the government "the term 'armed conflict'" does not apply in Colombia because it is a democracy—with separation of powers and guarantees for political opposition—that is "under threat by the terrorist actions of illegal organized armed groups . . . financed [by] illicit drug trafficking and the kidnapping of civilians, [which are] rejected by the Colombian people completely and repeatedly" (ICHR, 2009, par. 55)
- 17 In 2008 and 2009, the Colombian Congress discussed a bill intended to create reparations measures for victims as a transitional measure. However, it threw out the bill under pressure from the government, which argued that the policy weakened the state's armed confrontation with the guerilla. Cf. Nelson Camilo Sánchez, "Perder es ganar un poco: avances y frustraciones de la discusión del estatuto de víctimas en Colombia," in *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusion*, ed. Catalina Díaz et al (Bogotá: ICTJ/Dejusticia, 2009).
- 18 In the words of Uribe: "The practical effect of the situation [the approval of the victim's law] is that when a soldier and a police officer have to face a terrorist, the soldier and the police officer would say, 'how do I confront them?' Do you know what they will say with this new law? 'I violated their human rights, I assassinated them in a non-combat situation.'" Political Redaction, *Diario El Espectador*, June 20, 2009.

- 19 According to the 2011 estimate of National Economic and Social Policy Council, the cost of humanitarian assistance and attention to Colombia's universe of victims, as of 2011, was approximately 27,976 million pesos (approximately USD \$15 million) and the cost of reparations was estimated at 24,672 million pesos (approximately USD \$13 million). In other words, humanitarian aid and assistance numbers were slightly higher than total reparations numbers. See Consejo Nacional de Política Económica y Social, "Plan de financiación para la sostenibilidad de la ley 1448 de 2011," Documento Conpes 3712, Bogotá, 2011.
- 20 Regarding the differences between the actors it is worth reviewing Leopoldo Múnera, "Proceso de paz con actores armados ilegales y parasistémicos (los paramilitares y las políticas de reconciliación en Colombia)," *Revista Pensamiento Jurídico* no. 17 (2006).
- 21 Internationally, for example, the legal status of amnesties under international law is a recurring subject of debate. In this respect, see Louis Mallinder, "Can Amnesties and International Justice be Reconciled?," *International Journal of Transitional Justice* 1 (2007): 208–230; and Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2010). A critical application to the Colombian experience can be seen in Orozco Abad, *Justicia Transicional en tiempos del deber de memoria*, and a legal vision of the problem with alternatives for the Colombian context is in Rodrigo Uprimny, Luz María Sanchez, and Nelson Camilo Sánchez, *Justicia para la paz: Crímenes atroces, derecho a la justicia y paz negociada* (Bogotá: Dejusticia, 2014).
- 22 Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia."
- 23 Sánchez and Uprimny, "Justicia transicional sin transición?: la experiencia colombiana en la implementación de medidas de transición."