# Transitional justice and the Colombian conflict: from universal jurisdiction to conflict resolution

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**ABSTRACT:** The aim of this article is to analyze the leading narratives about transitional justice (TJ) and the ways in which parts of these narratives were interpreted in Colombia. This analysis includes the Justice and Peace Law adopted in 2005 and the consequent formation a normative framework centered on the notion of the victim. The theoretical part incorporates insights about the changes in the ways that TJ was conceptualized by various international actors and dwells on the impact of these changes, making them relevant to the case of Colombia. This case study demonstrates how the local actors have employed different narratives of TJ centered on a key symbolical dispute over the notion of victim.

**Keywords:** Colombian conflict, transitional justice, justice and peace law.

## Introduction. Law, politics and transitional justice

The aim of this article is to analyze the narratives about transitional justice (TJ) and the ways in which parts of these narratives were interpreted in Colombia. The analysis starts with the Justice and Peace Law (JPL) and proceeds to examine a normative framework centered on the notion of the victim.

Ruti Teitel (2003), one of the key scholars in the field, defines TJ as "associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes" (Teitel, 2003: 69). It is a definition that emphasizes legal practices. Teitel and Mark Oriel, another leading scholar in the field, point to the legal practices as the *sine qua non* condition of TJ, and they are indeed a crucial part of TJ instruments and how they work. But there are non-judicial mechanisms like truth commissions and public hearings that have played an important role in many scenarios of transition. For example, one important UN document states that "transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"(UNSG, 2010: 2).

Before the creation of international norms to assist the transition from war to peace and dictatorship to democracy, the decisions of political actors in these scenarios were not subject to consistent scrutiny on either domestic or international level. Domestic legal systems did not have instruments to make the executive accountable for its decisions. The instruments associated with TJ, such as tribunals and commissions, attempted to change this situation. The end of the World War II and the Nuremberg and Tokyo trials are often seen as a breakthrough in this field (Kim, 2014). In a sense, TJ mechanisms were created in response to the atrocities committed by the Nazis and their allies. They reflected the attempts by Western victorious powers to build institutions to impose their normative standards upon the regimes in their zones of influence.

The creation of the International Tribunals (even if on an ad-hoc basis) to judge war criminals was a novelty and a controversial decision at the time. According to Catalina Botero (2006), on 11 August 1944, the President of the United States and the Prime Minister of the United Kingdom made a public declaration asserting that the fate of the main Nazi politicians and commanders was a political issue, not a juridical one. However, after the meetings with the other victorious nations they decided to create an international court (Botero, 2006: 285-286). This decision created the momentum for the expansion of the agenda of international law, under the guise of the principle of universal jurisdiction.

Thus, at that time the aim of TJ was to assign responsibility for war crimes and crimes against humanity, thus creating an international norm (Uprimny and Saffon, 2005: 215). However, the dynamics of the Cold War created several obstacles to the consolidation of this universalist approach. In the contexts where confrontation was very violent and bitter, the implementation of such instruments ran the risk of further polarizing society and reinforcing the grievances between the different sides. The transition within these societies required a strategy of stabilization, and the instruments of transitional justice had to be adapted to that end.

During a democratic transition in Argentina, a non-judicial mechanism (a truth commission) was created to help investigations. The National Commission for the Disappeared in Argentina (CONADEP, 1984) was set up to find out what happened to the individuals who disappeared during the rule of the military junta. It became a watershed because it recommended making the top military commanders in charge during the dictatorship responsible for these crimes and punishing them.

However, the incorporation of non-judicial mechanisms created a precedent for a more substantial change within the field of TJ. At the end of the Cold War, internal conflicts increased in numbers throughout the world and became more important on the international agenda. The stabilization of those conflicts created a more difficult challenge than the processes of regime transition in South America. They were of a more "protracted" character with some of the parties organizing themselves along ethnic lines (e.g., civil wars in Central America, like in Honduras and Guatemala). Their termination usually led to profound divisions in society. Therefore, for TJ to fulfill its role of creating normative standards to

make regime transition possible, its mechanisms would have to be reformed to foster social reconciliation.

The experience of South Africa changed the debate about TJ. The South African Truth and Reconciliation Commission (TRC), presided by Desmond Tutu, was designed to allow different actors involved in the confrontation to communicate their grievances and incorporate their narrative in the reconstruction of the memory of that society. These mechanisms were intended to stabilize the process of transition not by assigning responsibility and avoiding repetition of human rights violations, but by performing a reconstruction of a common social identity and promoting reconciliation. In order to create an incentive for both parties to express their grief publicly and narrate their violent actions, the Commission did not recommend the punishment of the perpetrators.

The South African experiment created a TJ model that relied on a different notion of justice. Instead of retributive justice (that focuses on making the perpetrators responsible, like Nuremberg and the Argentinian truth commissions), Desmond Tutu opted for a commission based on restorative justice (which aims at repairing the damage that was caused and promoting the reconciliation of society). Currently there is a scholarly debate on how to reconcile these two ideas (Botero, 2006; Kim, 2013; Orozco, 2009; Osiel, 2005).

TJ found its way into Colombia through a counter-intuitive route: the demobilization of paramilitary groups that began in 2003.[1] The application of a set of norms associated with TJ became part of a struggle between the victims' associations, the government, the judiciary and the armed groups over the basic issues behind the conflict and possible solutions to it. It is noteworthy that TJ mechanisms are internalized in Colombia without a proper process of democratic transition, because there was no regime change.

This marks a new moment in the trajectory of TJ, when its instruments are deployed outside of the context of democratic transition. Inside of the conflict, the application of TJ mechanisms changes the configuration of the power struggle among the different actors on two levels. As the rights of the victims are consolidated as an issue to be addressed regarding the problem of violence in Colombia, the justice system (in particular the constitutional court) and non-governmental organizations (NGOs) directly involved with the victims acquire a new power of agenda-setting that they did not have before. In addition, the trajectory of normative framework of TJ is not linear. There are different ways to assign meaning to the TJ instruments as they are deployed in the field. Therefore, the implementation of TJ in Colombia becomes an arena of struggles where

[1] Paramilitarism has been part of the landscape of the Colombian conflict at least since the 1970s. In 1997 these several groups were reorganized in a centralized organization under the leadership of the Castaño Brothers called United Self-Defenses of Colombia (AUC). In 2003, the then President Alvaro Uribe, in an attempt to redefine the security strategy and concentrate the official forces in a military struggle against the FARC, launched a negotiation to promote the demobilization of the AUC (El Gobierno Nacional, 2003). It was this initiative, and the reaction of part of civil society against it, that created the political conditions for the debate about TJ.

different actors dispute the legitimacy of the ways to apply and enforce the rights of the victims: through a focus on restorative justice, on retributive justice or by emphasizing the possibility of the victims of voicing their own narratives.

To gain a deeper understanding of this crucial turning point in TJ, the remaining sections of this article trace the relevant struggles that resulted in different articulations of TJ in the international agenda. It will be demonstrated how the instruments of TJ were affected by the idea of universal jurisdiction and how this concept changed as it was applied in various contexts outside of its intended use. Finally, the article discusses how the concepts associated with TJ were applied to the Colombian conflict. It describes the processes of internalization of TJ concepts as the demobilization of the paramilitary and the design of the JPL were taking place (El Congresso de Colombia, 2005). In addition, the article demonstrates how the application of TJ concept continued to transform the configuration of the conflict and the actors' agendas.

## Transitional justice and universal jurisdiction

The Nuremberg Tribunal was the first attempt to set up such a judicial mechanism to make the transition to democracy easier. It was set up to judge Nazi officers accused of atrocious crimes during the war. In the immediate post-war period some institutions and norms that later contributed to the creation of the instruments used to regulate international conflict were created. An important example is the Convention for the Prevention and Punishment of the Crime of Genocide, also known as the Genocide Convention (UNGA, 1948). Article I of the Convention stated that genocide was an international crime that all signatory states should be committed to prevent and prosecute. Moreover, in Resolution 260 A (iii) from 9 December 1948, in which the General Assembly of the UN approved the adoption of the document, there was a recommendation to create a Commission of International Law to study the possibility of creating an international criminal court in charge of judging people accused of the crime of genocide (Botero, 2006: 292).

However, in the 1970s and early 1980s, the creators of the TJ framework had to adapt to the structural constraints necessitated by the logic of the Cold War. Although it was clear that TJ mechanisms could play a role in democratic transitions, there was no consensus regarding the universal jurisdiction of their application. Furthermore, there was no agreement regarding non-judicial mechanisms, such as truth commissions.

During that time, other actors, and among them some NGOs from the "Global North" played an important role in keeping the hope of harnessing the transitional process with some kind of criminal justice procedure alive in the international agenda. In 1973, the International Convention for Suppression and Punishment of the Crime of Apartheid (UNGA, 1973) was signed. It stated that people accused of the acts described in the document could be judged by a competent tribunal in

any signatory state who has jurisdiction over these persons, or by any international criminal tribunal recognized as competent by the signatory parts (Article V).

During this period truth commissions were created by transitional authorities (sometimes with the supervision of international organizations, as in the case of peace processes in Central America). Started in Chile, Argentina and El Salvador, this trend led to the spread of such commissions in more than twenty countries by the 1980s and 1990s (De Greiff, 2006: 207). In these cases, the application of TJ was related to democratic transitions. The 1984 Report by CONADEP, Nunca Más (Never Again), in Argentina was a watershed because the information collected by the Commission played a major role during the trial of the military junta, the first trial of this kind since Nuremberg. It indicated the responsibility of the highest levels of military command.[2]

This process of constructing norms to make the individuals responsible for war crimes and crimes against humanity achieved an important victory on 17 July 1998, during the Diplomatic Conference of Plenipotentiaries of the United Nations, where the Statute of Rome was approved, foreseeing the creation of the International Criminal Court (ICC). The Treaty (and thus the Court) entered into force 1 July 2002, and it created a permanent tribunal linked to the UN system, empowered to try the most severe crimes that transcended domestic criminal jurisdictions (Rome Statute, 1998). The ICC was made responsible for guaranteeing international justice when the states concerned were "proved" unwilling or unable to judge those responsible for genocide, crimes against humanity, crimes of war or aggression. It was also awarded jurisdiction in the cases when a juridical process is enacted with a concrete purpose of providing impunity for the crimes perpetrated, as in the case of general or partial amnesties (Botero, 2006: 300).

## Transformation of the TJ framework

As instruments associated with TJ moved from being used to assist democratic transitions in Latin America to operating in scenarios of intense violence where a complete reconstruction of the social fabric was necessary, their functions changed. The South African experience became another key point in the genealogical analysis of TJ. The TRC was created in 1995 to deal both with the crimes of the government and the opposition movements. It was designed to emphasize public hearings, and its symbolic nature was essential to the reconciliation of society. In order to prioritize the willingness of individuals from the different groups to publicly confess their crimes, it had the power to grant amnesty to those who agreed to do so. In terms of how it dealt with the idea of justice and the relationship between justice and reconciliation, it meant an important transformation for the TJ framework.

[2] The report recommended the prosecution of the cases, but amnesty laws granted to the military in 1983 avoided that many of them were judged by their actions during the period. In 2003, however, amnesty laws were repealed by the civilian government.

International lawyers resisted the creation of a truth commission based on the logic of reconciliation. They argued for the creation of a national system that would provide lasting reconciliation and in which impunity for atrocious crimes would not be tolerated. According to them, the existing system undermined the reconciliation efforts in the long run, as it did not establish conditions for guaranteeing that the previous situation does not occur again (Uprimny and Saffon, 2006: 357). This position was articulated in a report "Question of the Impunity of Perpetrators of Human Rights Violations" (1997), also known as the "Joinet Principles," (United Nations Commission on Human Rights, 1997) which was submitted to the former UN Commission on Human Rights. The report argued that the victims of violent regimes had three inalienable rights: the right to know the truth, to justice and to reparation. The "Joinet Principles" reinforced the individual rights of the victims and the criminal nature of the acts committed.

But in many occasions, this vision of international experts was resisted at the local level. Societies torn by war needed reconciliation and closure as much as they needed justice (Osiel, 2006: 55). In various transitions, truth commissions and policies of reconciliation acquired legitimacy in the eyes of both domestic and international actors.

In light of these developments, those concerned with institutional design in the UN attempted to come with a new understanding that would provide a synthesis of truth commissions and policies of reconciliation. In the Report by the UN Secretary General "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" (UNSC, 2004), addressed to the UN Security Council, such accommodation was proposed. This document had two main characteristics: 1) It pointed to the necessity for transitional justice to be more flexible in order to incorporate considerations from the local level (paying attention to the positions of key groups in the society in question); 2) it also asserted the complementary nature of the different mechanisms used in the processes of transition, such as the international tribunals and the truth commissions.

A powerful narrative started to develop, asserting that "the effectiveness of the right to the truth may be achieved through different strategies" (Botero and Restrepo, 2005: 43). According to this narrative, the "judicial strategy" (which emphasizes remembering the past by bringing crimes to justice, assigning responsibility and promoting punishment for individual reparation) and the "truth commission strategy" (which focuses on authorizing and opening institutional space for the narrative of the victim, promoting empathy and forgiveness as a means to collective reconciliation) not only could be reconciled, but did in fact complement each other.

However, the question about the degree to which the processes in truth commissions could obstruct decisions on the responsibility of a perpetrator according to the ICC is essentially a matter of the interpretation of the statutes and the institutional design of the transitional processes. There are no guarantees that producing reports by these commissions will permanently release a perpetrator from his or her responsibility before the ICC. The absence of such guarantees makes the adoption of the South African model in other contexts unlikely

(Stahn, 2005: 131-132). The documents created by the UN tried to accommodate new procedures within an existing institutional design. But there were deeper contradictions between the two approaches to justice that were difficult to address, and they had to do with different conceptions about the meaning of justice.

## Retributive and restorative justice

Restorative justice has been designed and used as an alternative paradigm to fight ordinary crime inside a community.[3] It is part of a wider critique of the repressive and retributive character of criminal law, and which emerged through an attempt from American scholars to conceive methods of Alternative Dispute Resolution (ADR), such as mediation or arbitration. The problem they were trying to solve is that litigation was expensive and time consuming, and designing informal alternatives to the judicial route might help reach agreements that were more desirable to both parties (Spangler, 2003).

Instead of grounding itself in the traditional idea of retribution and punishment, it assumes that reconciliation between the victim and the perpetrator helps to create cohesion within society. There are authors and groups that defend the claim that criminal law must not be focused on the criminal act and its author.[4] Instead, the attention should be shifted towards the victim and the damage she or he has suffered. According to this perspective, the needs of the victims and the reestablishment of social peace are the basic goals that must lead the fight against crime. Because of that, the acknowledgement of the suffering caused to the victim, the reparation of the damage and restoration of dignity are more pressing issues than punishing those responsible for the crimes (Uprimny and Saffon, 2005: 217-218).

It was argued that such a synthesis could allow transitional societies to heal their wounds and guarantee stability. Contrary to what was being advocated by the Joinet Principles, the approach that informed the design of the TRC emphasized the idea of empathy and forgiveness to promote reconciliation at the collective level and laid the foundations for the reconstruction of a coherent social identity. It was understood that restorative justice provides TJ with an important degree of legitimacy that may be crucial for the successful implementation of new policies (Uprimny and Saffon, 2005: 219).

[3] Conceptually, most see restorative justice as an alternative to TJ, as a variation and an attempt of disputing the original meaning of TJ. Some, however, embrace a different position, as they conceive transitional justice and restorative justice as opposing each other: "While the concept of restorative justice- born in the scope of the small cases courts to provide reconciliation between the victims and the perpetrators, as well as between the latter and the communities- emphasizes the reparation of the victims, the concept of transitional justice emphasizes the punishment of the perpetrator" (Orozco, 2009: 5).

[4] The notion of restorative justice was developed by the Critical Legal Studies movement that was associated with the Civil Rights movement in the United States and had a significant impact on the critique of Criminal Law. The importance of restorative justice is discussed in the key works by Sullivan and Tifft, 2001, and Braithwaite, 2002.

However, there are costs and risks associated with the creation of truth commissions informed by the idea of restorative justice. The "truth" produced through such commissions can be called into question once it does not follow the requirements of a legal process, such as the presumption of innocence and a standard procedure to establish the facts and measure evidence. Besides, by emphasizing a non-confrontational logic, it is possible that the truth commissions can prevent useful controversies and tensions between the different points of view (Uprimny and Saffon, 2006: 361). Truth commissions can also lead to irresponsible accusations, and public hearings can stigmatize the accused (Osiel, 2005: 68).

# Transitional justice and the victims in Colombia

## The tradition of informal arrangements in Colombia

During the nineteenth and twentieth centuries in Colombia, multiple rounds of negotiation between armed adversaries or between the state and rebel groups were held. During these processes, the representatives of the government and the parties involved in the conflict deliberated over the content of the peace agreements without the interference of other state institutions such as the judiciary. According to Gutiérrez (2006), the repeated celebration of agreements between the state, the armed groups and the different sectors of society resulted in an indiscriminate use of amnesties and pardons. These amnesties and pardons had nothing to do with transitioning to peace. They became the manifestation of a social habit that accepts and reproduces this behavior. In the nineteenth century, for example, there were seventeen amnesties and forty-nine pardons; and in the twentieth century, nine and fourteen, respectively (Gutiérrez, 2006: 397).

However, in the 1990s the Colombian state, following the international tendency of reinforcing human rights protection after the end of the Cold War, initiated a process of constitutional reform. In 1991, the newly created Constitutional Court introduced changes regarding the reform of military institutions (to make them more accountable to civilian authorities and avoid human rights violations) and constraining the prerogatives of the executive to make definitive decisions on matters of war and peace. The state could only offer amnesties or pardons for political offenses (Botero and Restrepo, 2005: 27). Even the illegal armed groups' members demobilized in the peace negotiation of 1990 had to face trial for crimes such as kidnapping.

The Constitution of 1991 led to the progressive disuse of the discretionary powers of the executive to manage situations of waging war and negotiating peace inside of the territory of the country, as well as to the suppression of individual rights by claiming an emergency situation. The government and its supporters had to look for alternatives that could provide them with room to maneuver in the negotiations. It can be observed, for example, that the Congress, during the previous twenty years, "normalized" all the exceptional legislation elaborated and accumulated over decades through the permanent use of the image of the

state of siege, the concept under which the state of exception was conjured in the Constitution of 1886.[5]

In 2003, one year after his rise to power, President Alvaro Uribe decided to confront the Revolutionary Armed Forces of Colombia (FARC), the guerrilla group active in the country since the late 1960s, by denying them any kind of political legitimacy. Within the context of the discourses about the global war on terror, he declared that contemporary Colombia was not at civil war nor subjected to any kind of insurgent activity. Instead, his country was a "democracy" under attack by narco-terrorist groups called FARC (Ministerio de Defensa Nacional, 2003: 24). However, during the same year (2003), the government, represented by the High Commissioner for Peace Luis Carlos Restrepo, conducted secret negotiations with a paramilitary group called United Self-Defenses of Colombia (AUC) in Santa Fe de Ralito. During these negotiations, it guaranteed a good measure of impunity to the rebels in exchange for the deposition of their weapons and reintegration from their ranks into civilian life. When the negotiations took place, the strategy of the government was to grant the paramilitaries the status of political criminals (which was denied to the guerrillas under the rhetoric of "anti-terrorism") in order to justify the concessions the government intended to make.

The High Commissioner promoted the creation of the "Decree 128 of 2003" about the normative foundations for the application of the offense of "sedition," supposedly applicable to the AUC. According to this document, their actions were to be characterized as "political offenses" by a group whose behavior affected regular functioning of the legal constitutional regime, but did not resort to acts of terrorism (Restrepo, 2005: 85-87).

However, by issuing this document, the executive was claiming autonomy in the matters of war and peace it did not have since the promulgation of the 1991 Constitution. It was in this context that the Congress and the Constitutional Court (mainly the latter) decided to intervene in the matter and undermine the efforts of the Executive by limiting its capacity to negotiate and deliver on its promises. This is when groups within the Colombian civil society saw the opportunity to try to enforce an agenda focused on the rights of the victims in the debates concerning the conflict in the country.

The Constitutional Court started to create barriers to the negotiation, and a series of debates took place about the legality of the agreement. Since then, the paramilitary leaders who participated in the negotiations in Santa Fe de Ralito claimed to have been betrayed by the government who failed to offer the guarantees it had promised (Orozco, 2009: 170). Many of them rebelled and revealed the links between their operations and the influential politicians in Congress. At that point, the government started to extradite some of the high ranking AUC members

[5] The recent attempt of the Uribe government to use of the notion of "State of Internal Commotion" to disperse a prolonged strike of the judicial branch, a situation that has little or nothing to do with the war itself or the political violence (the classical referents of the state of exception) indicates that these practices can be reactivated (Orozco, 2009: 3).

to the U.S. for the crime of drug-trafficking[6] while trying to protect some of the politicians involved in their activities. This was the start of a fierce battle between the Executive and the Constitutional and Supreme Courts of Justice in Colombia (Valencia, 2009: 205). The extradition of fourteen paramilitary leaders obliged the government to expose publicly the disagreements between their position and those of the AUC in the negotiation process, in a clear sign that it was not going as smoothly as claimed by the government propaganda.

After the contestation of the Santa Fe de Ralito agreement and the legal and political disputes that followed, the Law 975 of 2005 (El Congresso de Colombia, 2005) was passed. It became a singular experiment in TJ when there was no regime change or power transition of any sort. TJ, which is commonly associated with mechanisms implemented in the post-conflict scenario (Pizarro, 2009; Valencia, 2009), was being articulated as an instrument of conflict resolution within an ongoing conflict. It framed Colombia as a "transitional society" and called for an application of a transitional legal framework to regulate it, including an alternative penalty system for those willing to demobilize and a specific set of procedures to guarantee the rights of the victims to justice and reparation. Individuals condemned through an alternative system using JPL for atrocious crimes or crimes against humanity became subject to two simultaneous penalties: a regular sentence from forty to sixty years, and an alternative one from five to eight years, subject to the requirements of the JPL.

## Collective memory, confession and victimhood

In theory, following the JPL, to obtain the benefit of the alternative penalty, the defendant must meet five requirements: contribute to the demobilization of his armed group, confess the truth, return what was acquired illegally, ask for forgiveness, and avoid repeating the offense charged against him (Pizarro, 2009: 85). The introduction of the idea of confession as a legal requirement indicates some of the transformations that have resulted from the internalization of the TJ framework.

As noted earlier, amnesties and pardons have been an integral part of conflict resolution in Colombia for a long time. The processes associated with conflict resolution were informal, and no legal instruments were used. This tradition promotes an strategic forgetting of violence, leaving it in the past so that society could move on to the future. The groups were expected to deal privately with their grievances, adjust to the status quo and "erase" the violent events from collective memory.

[6] There is a treaty regulating the extradition of individuals arrested for the crime of international drug trafficking from Colombia to the United States that dates back to the early 1990s. The possibility of extradition was exactly what the paramilitaries wanted to avoid in the first place, being the whole agreement with the government centered on the promise that they would not face extradition.

The introduction of the idea of confession as a legal requirement in the JPL has an important normative role in the internalization of the TJ framework because it forces the groups that are expected to benefit from it to acknowledge the existence of the victim. The law described the necessity of confession and asking for forgiveness as a pre-requisite for accessing the alternative penalty system. It foresaw that, in order for a demobilized combatant to have access to the alternative sentence, he or she must first give an unrehearsed account of his or her crimes to the authorities. In the following days, the Attorney General's Office would investigate all atrocious crimes that the alleged perpetrator could have committed, and formulated charges against him or her, which could be accepted or rejected by the demobilized individual (Uprimny and Saffon, 2006: 365). This procedure did not have the symbolic dimension of a public ritual, but it did reinforce the idea that the individual has to confess his or her crimes before he or she could be "re-admitted" into society.

In addition to the confession, the JPL has other provisions regarding the rights of the victims to truth, justice and reparation. However, how adequate the strategies of JPL regarding the victims have been is a matter of dispute. Eduardo Pizarro, a researcher who later became the head of The National Commission for Reparation and Reconciliation (CNRR), claimed that the JPL was an achievement within the TJ framework. He argued that due to this legislation for the first time in contemporary history an armed group that had not been militarily defeated agreed to demobilize and even answered before a jury for its crimes (Pizarro, 2009: 85). Pizarro also pointed out that in order to shape historical memory, the Council hired researchers and investigators to publish books that would retell the story of emblematic and tragic events, like the Massacre of Trujillo (CNRR, 2008).[7] The search for historical truth was complemented with legal attempts to restore justice, as AUC members were investigated for their alleged involvement in atrocious crimes.

The group of experts brought together by the government to produce official documents about the historical memory of the country was the way devised by the JPL to build a narrative of the conflict and its victims. However, this did not mean that the instruments set up by the government took into account the *perspective* of the victims, or incorporated their narratives about their condition, their own accounts of their victimhood. As argued by Maria Tereza Uribe, nowhere in the JPL it was foreseen that the victims should speak, tell their stories, or present publicly their suffering (Uribe, 2006: 343). The narration of their victimhood is always mediated through the state. On the one hand, there is a strong emphasis on the judicial truth (reaching a verdict is more important

[7] Massacre of Trujillo is the name attributed to a series of assassinations perpetrated by paramilitaries and the Cali Cartel in the town of Trujillo from 1989 to 1994. In 1997 the Inter-American Court of Human Rights accepted the case and found the Colombian State guilty of negligence, arguing that the Armed Forces and the Police were accomplices in the assassination of at least 250 people, and thousands of victims among those killed and tortured. Since then it became an emblematic case about the responsibility of the government in the political violence in the country.

than telling the story), and on the other, the government selects experts to serve on the state-supported historical commission instead of setting public hearings or installing a truth commission.[8]

The critique of Maria Tereza Uribe is very pertinent because it identifies what is at stake in the different ways of dealing with the problem of the victim, and then highlights the singularity of the Colombian context within the genealogy of TJ. In *History, Memory, Forgetting,* Paul Ricoeur (2006: 314-32) established a distinction between the truth of the judge and the truth of the historian. The function of the truth of the judge is to assign responsibility: to decide who is guilty and innocent, and to what extent. The truth of the historian does not make moral judgements: it re-tells the story through an objective and de-personalized reconstruction of the facts.

Ricoeur's distinction can be correlated with the role of judicial procedures and truth commissions in TJ. Judicial procedures are designed to assign responsibility and judge those who committed severe violations, while truth commissions usually serve the process of bringing the facts that are not of public knowledge to light and allowing that hidden chapters of the history of a given society are revealed. Let us consider South Africa's TRC. On one hand, a new principle of justice was incorporated into the framework, but on the other, the fundamental principle behind this institution remained the same: historical reconstruction (by the TRC) was not accompanied by legal responsibility.

Within the framework of the JPL in Colombia, the government tried to control the narrative of the victims by avoiding the creation of a truth commission and imposing the expertise on a group of researchers in charge of investigating the facts. Thus, it created a new opposition between the truth finding and judicial procedures that was not present in the South African case: that between the truth of the historian and the truth of the victim. The truth of the historian was concerned with an objective reconstruction of the facts. The truth of the victim consisted of narratives that were necessarily partial and emotional, but were validated as an important truth about the conflict by the processes through which they were suppressed by the government in the past.

## The legacy of the JPL

The analysis of the JPL reflected the struggle between the different forces that were part of the debate about TJ in Colombia. Pushed into accepting a legal framework, the government still managed to design a legal arrangement with strong incentives for the AUC to demobilize. The law applied only to the crimes

[8] It is noteworthy that the establishment of the Truth Commission, an extra-judicial mechanism, while the conflict is still ongoing and the groups involved were still in process of demobilization might be dangerous, exposing the victims to retaliation from the AUC or even other armed actors (Uprimny and Saffon, 2006: 358).

the individual voluntarily confessed to the judge, and little time was given for further investigation of the crimes. Except for those who confessed or whose crimes fit into a certain category of what was considered to be a "serious" crime, such as torture or kidnapping, the remaining perpetrators stayed outside of the reach of the justice system. This means that the great majority of those who demobilized did not and will not face trial.

As illustrated in the analysis above, the JPL accommodated both retributive and restorative justice, but it pursued them only partially. Considering retributive justice, only a few individuals faced trial; the incentive for them to confess the unknown crimes was small, and the penalties for these crimes were greatly reduced. Considering restorative justice, there has been an effort to acknowledge the victims. This effort can be described as unprecedented in the history of the conflict and compensatory measures. Paramilitaries confess their crimes, and this gives credibility to the story of the victims. In addition, the government engages in symbolic acts of public recognition and builds monuments in honor of the victims.[9] But without a real truth commission, the victims are not being heard, and an official narrative is a poor replacement for the stories of victims as it allows the government to control the public expressions of their suffering.

The judiciary and the civil society organizations engaged in this case did not get exactly what they wanted (which was a TJ system focused on retributive justice and material reparations for the victims), but their engagement built a powerful precedent that empowered them in the matters concerning the construction of a normative framework regarding the victims and the violence perpetrated by illegal armed groups and state agents in Colombia. As they brought, through TJ, the figure of the victim to the center of the stage, the experiment of the JPL led to the other initiatives to internalize the TJ framework in Colombian domestic politics on a more permanent basis. In addition, TJ norms are playing a major role in the current dialogues between the government and FARC, and this makes these norms even more embedded in Colombia.

Admittedly, demobilization of the armed groups is a limit to the application of the JPL. In 2009, still under Uribe's government, some human rights groups proposed that the rights identified in this law were extended to all victims of the

[9] One of the significant symbolic measures representing "the new era of reconciliation" in Colombian society was the use of the arms seized during the demobilization process by recommendation of the United Nations (UN) and the Organization of American States (OAS). In the recent past, there were sophisticated programs available that could record not only the serial numbers, but also "digital signatures" of the weapons (in case of an investigation into the crimes of the past). However, there was no need to keep the weapons any longer. That is why the UN Conference on the Illegal Trafficking of Small and Light Weapons and the OAS Mission for Colombia recommended these weapons be destroyed, and the steel be used for works of art paying tribute to the victims of the conflict. These works of art were also to be, preferably, inaugurated with a public act including the participation of the victims, as a symbolic measure of reparation (Pizarro, 2009: 146)

conflict, thus aiming to internalize this mechanism in the Colombian domestic law. However, President Alvaro Uribe sabotaged the initiative. First of all, Uribe argued that Colombia was not living in an armed conflict. Instead, he asserted that it was a consolidated democratic country facing the threat of a specific terrorist organization (FARC). Besides, creating such a law would open the possibility for an individual to accuse the government forces of human rights violations and require reparations.

In 2010, upon his assuming his duties as the President, Santos signaled that he would develop a different approach to these issues. He immediately declared publicly that an armed conflict was still going on in Colombia. Then he incorporated TJ mechanisms into domestic law in a permanent basis using two instruments: the Legal Framework for Peace and the Law of Victims, and Land Restitution. The latter extends to all victims of conflict, past and present, the rights to truth, justice and reparation. The land issue has generated great controversy and gained prominence in the drafting of the Law because segments of society feared losing control over lands appropriated through the violation of human rights, the use of threat, and forced removal (Dario, 2014).

The Legal Framework for Peace consists of a constitutional amendment that aims to create legal mechanisms to regulate the demobilization of armed groups by establishing favorable conditions for their crimes to be presented and judged, and for their reintegration into society. The Law generated a lot of controversy because the government was accused of being negligent regarding the severity of the crimes committed and was criticized for offering the members of armed groups a type of amnesty. The Colombian government insisted that the Framework did not neglect the rights of victims and that it was a guarantee that victims would have access to justice.

The victims are now a central part of any negotiation between the government and armed groups. In the ongoing peace talks with FARC, the rights of the victims are one of the key topics. In February 2015, a new cycle of talks on the issues of TJ and the rights to truth, justice and reparation started in Havana. In May 2015, the participants of these talks announced that a truth commission with a mandate to investigate the facts relevant in the trajectory of the conflict will be created. However, so far, no details about the roles of the victims or other details about the functioning of this committee were released.

At the end of September 2015 the negotiators reached a partial agreement. According to the publicly available information, there will be an alternative penalty system where sentences can range from 5 to 8 years of imprisonment for the most serious crimes. But this time, there will be a special tribunal for peace. Its composition is still disputed. Another key announcement was made on 18 October 2015. The government reached an agreement with FARC regarding the individuals who “disappeared” during the conflict. FARC promised to return the remains of those who died in their captivity to the families of the deceased.

# Conclusion

The aim of this article was to propose a genealogical analysis of the transformations in the frameworks of TJ and analyze their contemporary applications to the Colombian conflict. The notion of TJ was developed by the victorious powers of World War II to impose normative legal standards on the processes of transition from war to peace and dictatorship to democracy. TJ instruments were conceptualized as legal practices operating in a political vacuum. As a legal normative framework, TJ was designed to associate justice with assigning responsibility and imposing reparations on the guilty parties.

But when forced to deal with societies divided by war where resentment between the groups was a key obstacle to stabilization, TJ had to be reformulated in a way that helped to rebuild the social fabric rather than undermine it. This shift involved a new understanding of justice as restoration (in opposition to reparation). Rituals and practices of memory (re)construction and collective reconciliation became a key part of a transnational normative framework of TJ.

The internalization of this framework within the Colombian conflict sets a new shift in this genealogy as it expands the use of these instruments to scenarios of consolidated political authority where there is no democratic transition. TJ is displaced from its usual role in post-conflict scenario and becomes an instrument of conflict resolution while the conflict is ongoing. The government tries to "manage" the narratives of the victims and build its own version of the "historical truth." The Colombian conflict therefore can be interpreted as a crucial case in understanding the current transformations within this normative framework.

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# Pereinamojo laikotarpio teisingumas ir Kolumbijos konfliktas: nuo universalios jurisdikcijos prie konflikto sprendimo?

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**SANTRAUKA:** Šio straipsnio tikslas yra aptarti svarbiausius pereinamojo laikotarpio teisingumo naratyvus ir būdus, kuriais šie naratyvai buvo interpretuoti Kolumbijoje. Analizuojamas Teisingumo ir taikos įstatymas, priimtas 2005 m., ir po to pradėtas normų sistemos formavimas, kurio centre atsidūrė aukos samprata. Teorinėje straipsnio dalyje aptariama, kaip skirtingi tarptautiniai veikėjai keitė pereinamojo laikotarpio teisingumo (PLT) sąvoką ir kokią įtaką šie pokyčiai turėjo Kolumbijai. Ši atvejo studija atskleidžia, kaip skirtingi veikėjai naudojo skirtingus PLT naratyvus esminiame simboliniame ginče dėl aukos sampratos.

**Pagrindiniai žodžiai:** Kolumbijos konfliktas, pereinamojo laikotarpio teisingumas, teisingumo ir taikos įstatymas.