

# *The constitutional framework for transitional justice in Colombia\**

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## **ABSTRACT**

This paper analyzes the transitional justice dilemma from a constitutional perspective and has the purpose to understand how the Colombian constitutional framework could respond to a transitional process, in particular, with regard to the issue of criminal accountability for the perpetrators of atrocities during the armed conflict in a process of negotiation addressed to achieve peace and reconciliation. In other words, the present exercise is focused on which constitutional mechanisms are provided by the Colombian Constitution to resolve the conflict generated during a transitional process between the right to peace and to justice, how those mechanisms shall be interpreted, and what are the implications of each of them.

**Key words:** Colombian Constitution, Transitional Justice, Amnesties, pardons, Constitutional Block.

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## *El marco constitucional vigente de la justicia transicional en Colombia*

### **RESUMEN**

El artículo aborda el dilema de la justicia transicional desde la perspectiva del derecho constitucional vigente en Colombia. El propósito es presentar cómo dicho marco constitucional puede responder a la aplicación de la justicia transicional, en especial en relación con el problema de la responsabilidad penal de quienes cometieron atrocidades durante el conflicto armado, dentro de un proceso de diálogo y negociación. En otras palabras, el presente escrito está enfocado en presentar cuáles son los mecanismos previstos en la Constitución colombiana para resolver la tensión generada entre el derecho a la paz y a la justicia en un proceso transicional, cómo deben ser interpretados y cuáles son las implicaciones de sus usos.

**Palabras clave:** Constitución de Colombia, Justicia Transicional, Amnistías, Indultos, Bloque de Constitucionalidad.

## INTRODUCTION

Colombia is currently immersed in an armed conflict of non-international character that has been ongoing for more than fifty years, which is one of the longest ongoing conflicts in the world (Guzman, Sánchez & Uprimny, 2010). This conflict is between insurgent groups and the Government of Colombia. As one would expect, the duration and the continuity of the conflict has generated a dramatic scenario in terms of the loss of human life and the suffering of awful atrocities. According to Amnesty International, in the last 20 years, at least 70,000 people have lost their lives due to the conflict (Amnesty International, 2004). The number of displaced people is estimated at 3.5 million, and the number of victims of sexual violence is currently recorded as 33,960 (OXFAM international, 2011). The Colombian government is now estimating the number of direct victims of the armed conflict in millions (Santos-Calderon, 2011). It is reasonable to conclude that the situation in Colombia could be one of the most dramatic humanitarian crises in the world, especially when considering that the number of deaths and victims are continually growing.

Recently, a new effort to achieve peace has commenced. A peace negotiation process is taking place between the Government and the guerrilla of FARC in La Havana, Cuba. One of the most difficult issues during this negotiation will certainly be the accountability of the atrocities committed during the conflict and the effective recognition of the rights

of the victims. The divergence between the parties in the negotiation process is clear. On the one hand, the FARC negotiators have argued that before they could be considered as perpetrators of any crime, they must be recognized as victims of the State and repair it as such. On the other hand, the government has argued that the first step in the negotiation must be the FARC's recognition of their victims and agreement that impunity will not be allowed for the atrocities committed.

For the discipline of transitional justice these issues are not new. In any transitional process, the accountability of the perpetrator for systematic and mass crimes has been one of the most complex topics because "the traumatization caused by widespread past atrocities does not end when the guns [hopefully] fall silent" (Stromseth, Wippman & Brooks, 2006). Thus, in the doctrine of transitional justice this is now a classic dilemma between peace and justice. On one side, the defenders of peace argue in favor of moving forward and promoting the idea of amnesties and clemency for the parties in conflict as a way to achieve reconciliation. On the other side, the defenders of justice promote full accountability for all perpetrators of crimes during the conflict as a way to repair the victims and ensure that such abuses will not be permitted to recur (Lutz & Sikkink, 2001).

From a comparative perspective, none of those extreme positions seem convenient or even possible as an answer to this classic transitional justice dilemma. In one way because the advancement of

the international human rights law tends, each day harder, to prohibit the possibility to concede absolute amnesties for the perpetrators, to the most serious crimes, including, crimes against humanity and war crimes (Mendez, 2011). In the other way, in scenarios of widespread atrocities and long duration conflicts as Colombia it is just naïve to conceive the possibility to investigate and punish any illegal act committed and also a bad strategy in the ideal to achieve a negotiated peace.

However, Colombia is organized as a constitutional democracy, and under the supremacy of the Constitution the exercise of the political power is and should be limited by the constitutional mandates (Sartori, 1962). Any act or decision of a public authority must conform to the content of the Constitution. In other words, any public choice must be, firstly, taken by the competent authority and by the adequate procedure according to the division of powers made in the Constitution; and secondly, must respect in a reasonable and proportional sense the constitutional rights recognized to all citizens. In this sense, the decision about the transitional dilemma is not only a political question; it is also a constitutional matter as long as the Constitution remains unmodified and in force. Therefore, the legality and legitimacy of any public decision, including about the criminal liability for the acts committed during the conflict, will depend on the compliance that this choice has with the Constitution (Fallon, 2005).

This paper analyzes the transitional justice dilemma from a constitutional

perspective and has the purpose to understand how the Colombian constitutional framework could respond to a transitional process, in particular, with regard to the issue of criminal accountability for the perpetrators of crimes during the armed conflict in a process of negotiation addressed to achieve peace and reconciliation. In other words, the present exercise is focused on which constitutional mechanisms are provided by the Colombian Constitution to resolve the conflict generated during a transitional process between the right to peace and to justice, how those mechanisms shall be interpreted, and what are the implications of each of them.

With this purpose in mind, the first section will present the norms and dispositions that compose the constitutional framework of transitional justice. Doing so, it will start with the scope and meaning of the rights to peace and to justice. Then, will be presented the three mechanisms provided in the Constitution to solve the possible tension between both rights in a transitional context. The second section of this paper will be focused on how the jurisprudence of the Colombian Constitutional Court has interpreted and decided cases related to the use of transitional mechanism as the authorized interpreter and guard of the Constitution. This will require a review of the landmark decisions that the Court has made in this regard; firstly, about the constitutionality of the International Criminal Court Statute; secondly, about the constitutionality of some legal restriction to the power to grant amnesties; and thirdly, about the

revision of the "Justice and Peace" Law. In the third section, this paper will present some international instruments, decisions and materials that, in virtue of article 93 of the Constitution, have become an active part of the Constitution, and therefore, must be taken into account for a systematic interpretation of any constitutional institution. In this sense, it will be revised some norms and decisions made referring to transitional justice from the Universal System for Protection of Human Rights and the Inter- American System of Human Rights.

## 1. *THE CONSTITUTIONAL FRAMEWORK FOR TRANSITIONAL JUSTICE*

### 1.1 *The right to peace and to access to justice in the Colombian Constitution*

Before 1991, the previous Colombian Constitutions could be considered as "Battle Charts" rather than truly constitutional agreements. As Professor Hernando Valencia-Villa held, those charters were created and imposed exclusively by the winning party of previous political or armed struggles at the exclusion of the losers (Valencia-Villa, 2012). In this trend, the Colombian Constitution of 1991 is an exception due to the participatory, pluralistic and democratic process that preceded it (Cepeda-Espinosa, 2004).

Indeed, the Colombian Constitution of 1991 was conceived as a peace agreement itself among different and even antagonist political and social movements including some insurgent groups (Valencia-Villa,

2012). Therefore, peace occupies a fundamental place in the Constitution. For instance, the Preamble invokes peace as one of the national purposes:

In the exercise of their sovereign power represented by their delegates to the national Constituent Assembly, invoking the protection of God, and in order to strengthen the unity of the nation and ensure its members life, peaceful coexistence, work, justice, equality, knowledge, freedom, and peace within a legal, democratic, and participatory framework that may guarantee a just political, economic, and social order and committed to promote the integration of the Latin American community (Republic of Colombia, 1991).

Similarly, article 2 of the Constitution also defined "peaceful coexistence" as an essential objective of the Colombian State. As a result of those ideals, the Constitution then includes the right to peace, establishing explicitly in article 22 that "Peace is a right and a duty whose compliance is mandatory". From this content, and according to the jurisprudence of the Constitutional Court (Colombian Constitutional Court, 2006A), it is possible to hold that (i) peace is a "collective right" whose entitlement belongs to the Colombian people as a Third Generation Human Right; (ii) peace is a subjective and fundamental right whose entitlement belongs to any Colombian citizen; and (iii) peace is also a civic and institutional duty aimed at the achievement and maintenance of peace in accordance with article 95 of the Constitution.

Hence, peace must be considered as a fundamental value in the Colombian Constitution that shall irradiate the content and purpose of the Colombian legal system and political institutions. Therefore, any Colombian citizen has the right to live in peaceful coexistence, harmony, and free from the use of arbitrary violence to solve any dispute. Simultaneously, both citizens and public institutions have the correlative duty to guarantee the necessary conditions to achieve peace in any time and with any actuation.

The Colombian Constitution also includes the right to a judicial remedy. Article 229 explicitly establishes, "The right of any person to have access to the administration of justice is guaranteed". The constitutional jurisprudence has distinguished between two dimensions of this right: (i) any citizen has the power to access the judicial system; therefore, the judicial authorities have the duty to receive and to process the claims and demands presented by all citizens; and (ii) all citizens have the right that their claims must be adequately and timely resolved by the judicial authorities. The State, through the judicial system, must adhere to both dimensions of the right for all Colombian citizens (Colombian Constitutional Court, 2011).

When any citizen becomes a victim of a criminal conduct, the right to a judicial remedy acquires a wider scope. The rights of victims have constitutional relevance. On one side, article 250 of the Constitution states a duty of the State, through the General Attorney Office [*Fiscalía General de*

*la Nación*], being to guarantee assistance for the victims, the restoration of their rights, and the integral reparation of the damage caused. Also, the duties to guarantee the protection of the victims, the opportunity to intervene in the criminal procedure, and the existence of restorative justice mechanisms are guaranteed in the same article. Furthermore, the Constitution determines the obligation of the public authorities, in particular to the judicial ones, to tend to the effective enjoyment of the rights of all residents in Colombia and to bring them the legal protection that they require to ensure peaceful coexistence and the enforcement of a just order.

As a consequence of the internal armed conflict, a significant and an increasing number of Colombian citizens have become victims of the most horrible crimes, including war crimes and crimes against humanity. The Constitutional Court determined that the victims of the internal armed conflict represent one of the most vulnerable sectors in society and, for the most cases, are in a situation of extreme vulnerability. As a response to the massive violation of their constitutional rights, the Court declared the status of "subjects of special constitutional protection" to the victims of the armed conflict. In this regard, the Court held, "[...] the victims of violence in an internal armed conflict are in a situation of extreme vulnerability and, as such, require special treatment by the public authorities, which should provide the help needed to recover their minimum subsistence and rights" (Colombian Constitutional Court, 2007).

In response to this situation, the Colombian Congress has developed constitutional mandates and has enacted some legislation about the particular rights of the victims of the armed conflict. For instance, Act number 975 of 2005, also called the "peace and justice law", was enacted with the purpose of facilitating the peace process with the paramilitary groups and their reincorporation to the civilian life, but ensuring the rights of the victims to truth, justice, reparation and non-repetition. (Colombian National Congress, 2005) This law explicitly provides the right to justice:

The State has a duty to conduct an effective investigation leading to the identification, arrest and punishment of those responsible for crimes committed by members of armed groups outside the law to ensure the victim's welfare through the access to effective remedies to repair the damage done, and take all measures to avoid the recurrence of such violations [...]

This law thus places special attention on the rights of victims regarding the administration of justice. Article 37 states the particular rights of the victims in a judicial process as being; (i) dignified and humane treatment; (ii) protection and privacy, including their families and witnesses; (iii) prompt and comprehensive reparation of the damage caused by the perpetrator or accomplice of the crime; (iv) to be heard and to be allowed to provide evidence to the prosecution; (v) to know the truth of the facts that caused the circumstances of the crime of which they were victim;

(vi) to be informed about the final decision of the prosecution and to use the court actions when it is possible; (vii) to be assisted during the trial by a trusted attorney; (viii) to receive assistance aimed to their full recovery; and (ix) to be assisted without charge by a translator or interpreter in the event of not knowing the language of the prosecution. All these legislative dispositions, as will be presented later, were declared in accordance with the Constitution by the Colombian Constitutional Court (2006A).

Summarizing, the Constitution established the right to justice for any Colombian citizen. This right is reinforced when the citizen becomes a victim of a crime, especially in the context of the armed conflict. In this situation, the State, through the judicial system, has the duty to avoid impunity and thus guarantee the right to truth, reparation, non-repetition and justice for the victims. As part of the right to justice, the State has the particular duty to investigate, prosecute and punish the perpetrator of the crime.

## 1.2 *The power to concede amnesties laws according to the Constitution*

As was said, the rights to peace and to justice are likely to collide in a transitional scenario. On the one side, the right to peace would suggest policies of pardon and forgiveness for the past conducts as a strategy to achieve the demobilization of the parties in conflict and in favor of reconciliation. On the other, the right to justice would avoid any possibility of impunity and, therefore, demands the inves-

tigation, prosecution and punishment of any unlawful conduct committed. Those kinds of conflicts between rights are common to the practice of constitutional law and under the premise that no constitutional right is absolute. Some limitations and restrictions are allowed to them in these collisions. Precisely, the idea of transitional justice starts admitting the existence of an inherent tension between both rights, and from there explores a full range of processes and mechanisms to ensure some accountability and to serve justice, but also to achieve reconciliation in the best way possible.

Taking into account the own history of the Constitution, the Constituent foresaw this tension between the right to peace and to justice in the future transitional process and arranged three constitutional mechanisms to settle it. The first mechanism chosen was through the power granted to Congress to concede amnesties for some crimes. According to article 150.17 of the Constitution the Congress is able by law to "Grant by a two-thirds majority of the votes of the members of one and the other chamber and for serious reasons of public convenience, amnesties for political crimes." From this disposition, it is possible to hold that: (i) the National Congress is the only public organ that can concede amnesties; (ii) the decision corresponds to a qualified majority of two thirds of the members of the Senate and the Chamber of Representatives; (iii) the decision must be justified on motives of "public convenience"; and (iv) the crimes subject to this special treatment are restricted to "political crimes".

An amnesty has the effect to extinguish the *ius puniendi*, meaning the right to punish by the State and thus implies that the "State forgives the crime" (Colombian Constitutional Court, 2006A). In a practical sense, an amnesty law could have three different manifestations. Firstly, it prevents the beginning of any future criminal investigations or prosecutions for the crimes and individuals benefited with this law. Secondly, it precludes any investigation or prosecution that is already opened for the crimes and individuals benefited with this law. Thirdly, if at the moment when the amnesty is granted some individuals are already condemned, those sentences must be cancelled and any penalty lifted. Taking into account that those three situations refer to the exercise of the *ius puniendi*, in all cases this law will be required subsequent actualization by the judicial authorities who must apply it to each judicial case (Colombian Constitutional Court, 2005A).

One of the most troubling issues about this mechanism is the definition of the crimes that could be subject to amnesties. Although the Constitution established that these measures only proceed for "political crimes", its definition and the possibility to include "connected crimes" are not regulated in it. Therefore, this issue has to be defined initially by the political organs and then by the constitutional judge. Since 1991 until today, no amnesty law has been formally enacted invoking the power granted on article 150.17 of the Constitution and, therefore, there is no legal precedent on this matter.



The level of affectation that this mechanism has over the right to justice of the victims is high, particularly in the sense that it prevents even the start of future investigations and prosecutions, and therefore, any possibility of any judicial punishment. In doing so, the rights to a judicial truth, the participation of the victims in the judicial process and the judicial punishment will all be affected. In a practical way, the duty to investigate, prosecute and punish by the State will be suspended for the cases and individuals subject to the amnesty in detriment of the right to justice of the victims under the argument of achieving peace.

### **1.3 *The power to grant pardons by the executive branch according to the Constitution***

The second transitional mechanism provided in the Constitution refers to the powers to grant pardons by the executive branch represented by the President of the Republic. According to article 201.2 of the Constitution, the government has the power to grant pardons for political crimes in the way that the law establishes it. The reprieve or pardon is an institution that redeems a judicial penalty or sanction, meaning that the State does not forgive the commission of the crimes, only their legal consequence. This idea implies that the pardon requires that a judicial process and a legal sanction already exist against a person and, therefore, is a particular and concrete action. Constitutionally, this power belongs to the executive branch because technically, when a judicial prosecution ends, and there is an enforceable condemn, the competence of

the judicial branch is exhausted and thus it is competence of the executive branch the enforcement of the sanction itself.

In this reasoning, the differences between amnesty and pardon is that the first supposes the oblivion of the crime committed, legally the extinction of the criminal action, and thus is general and abstract; but the pardon is the reprieve of the sanction already imposed by the judicature for the commission of a crime and is a particular and a concrete act. Both cases are examples of grounds for the early termination of a criminal prosecution; both proceed only for political crimes, and both correspond to transitional mechanisms (Colombian Constitutional Court, 2006B).

For instance, in 2002 the National Congress enacted the Law Number 782, which regulated the power of the President to grant pardons. In this regard the law states,

The National Government could concede, in each particular case, the benefit of reprieve to the nationals who were convicted by an enforceable sentence for conducts that constitute political crimes when in its judgment the illegal armed group of the applicant has demonstrated its willingness to rejoin civilian life.[...]

Those dispositions do not apply to who committed conducts constituting atrocious acts, ferocity, barbarism, terrorism, hijacking or murder committed outside combat or placing the victim in a helpless

situation. As this legal disposition shows the reprieve, first, it is a privilege or faculty of the government represented by the President; second, it uses a case by case methodology; third, it applies only for political crimes and "connected" crimes; fourth, the nature of the "connected" crimes could have some restriction due to the seriousness of the conducts.; and fifth, it is a transitional mechanism based on the consecution of peace and the re-incorporation to the civilian life.

The level of affectation that this mechanism has over the right to justice of the victims is less than the mechanism of granting amnesties. This is because, in a reprieve, the judicial process is already finished, the judicial truth is already achieved, the responsibility of the defendant is established, and even the conviction is now proffered. In this sense, the restriction of the right to justice is only about the effective enforcement of the judgment, which is one of the components of the right to justice of the victims.

#### **1.4 *The "legal framework for peace" in the Colombian Constitution***

The third mechanism provided in the Constitution to settle the eventual collision between the right to peace and to justice in the context of a transitional process is more recent. This mechanism was created by a constitutional reform enacted by the Congress in 2012. This reform was called as "The legal framework for peace" because, for their authors, the main objective was, "[T]o establish a Constitutional framework for the strategy of the transitional

justice that facilitates in the future the achievement of a stable and long lasting peace" (Colombian National Congress, 2012). However, this future tense was not so real. Today it is well known that this reform corresponded to a strategy of the Government to extend its legal maneuverability in the secret negotiations that was ongoing at that time with the guerrilla of FARC. This process continues today.

From a legal perspective, this reform supposed the inclusion of two provisional articles to the Constitution, number 66 and 67. Although the Congress has not developed those constitutional articles, from the content of both norms, it is possible to hold that the mechanism created by the reform implies, inter alia: (i) the possibility to establish by the Congress in further norms extra-judicial mechanisms of investigation and sanction for crimes committed during the conflict; (ii) the criteria of "prioritization" and "selection" to decide which crimes will be investigated, prosecuted and punished judicially from the universe of crimes committed during the armed conflict; (iii) the possibility to suspend or to alternate with extra-judicial sanctions the execution of the convictions, even for crimes prioritized and selected; and (iv) the cessation of the criminal prosecution to the responsible for cases non-prioritized or non-selected.

In terms of rights, this third transitional mechanism established that the right to justice, understood as the duty to investigate, prosecute and punish by the State, is suspended indefinitely for the

conducts that will be non- prioritized or non- selected. In these two cases, the practical effect will be the renounce of the State to prosecute and punish the commission of those crimes by judicial mechanisms, which in fact is the same as the effects of an amnesty law. Therefore, it will depend on the scope of the criteria of prioritization and selection the number of conducts and perpetrators that will benefit from this measure in detriment of the right to justice of the victims. For instance, if the crimes selected will only be the conducts that acquire the connotation of crimes against humanity, genocide and war crimes committed systematically as the content of the article seems to suggest, any member of the FARC will be condemned because as the General Attorney said no member of the FARC have any conviction for these kinds of crimes (El Tiempo, April 12 of 2013). In consequence, due to the implications that the developments of this mechanism will have on the rights of victims, especially in the right to justice, the Congress and further the constitutional judge shall make a careful balancing between the constitutional rights and principle involved to settle the tension between peace and justice in a transitional context.

## **2. THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT ABOUT TRANSITIONAL JUSTICE**

The Colombian Constitution establishes in article 241 that the Constitutional Court is the ultimate guardian of integrity and supremacy of the Constitution. The jurisprudence of the Court is a relevant

criterion for the interpretation of the constitutional dispositions. Therefore, in this section will be analyzed some decisions in which the Constitutional Court has addressed the issues related with the institutions mentioned in the previous section and from there, some conclusions will be extracted about how those institutions shall be interpreted in future instances.

### **2.1 *Decision C-572 of 2002 about the constitutionality of the Statute of the ICC (Rome Statute)***

The Colombian Congress enacted in 2001 the Act Number 742 with the objective to ratify the international treaty that adopts the Statute of the International Criminal Court [hereinafter ICC] also known as the Rome Statute. According to the Colombian Constitution, any law that ratifies an international treaty, still to be approved by the Congress and sanctioned by the President before it becomes enforced, requires the automatic and general control by the Constitutional Court. This control implies the formal and material revision of the law according to constitutional mandates and at the end decides if the new treaty is constitutional or not. Therefore, by the Decision C-578 of 2002, the Constitutional Court revised the constitutionality of the Act 742 of 2001 in which the Statute of the ICC was adopted.

In this Decision, the Court starts its analysis by noting that the ICC was conceived as an instrument against impunity and thus to achieve the respect and the effectiveness of human rights and International Humanitarian Law. In doing so, the ICC

complements the national judicial systems in the prosecution and punishment of the perpetrator of the most serious human rights or laws of war violations when the national courts are unwilling or unable to investigate and prosecute such crimes.

In consequence, for the Court it is clear that the functioning of the ICC implies a limitation of the national sovereignty because it will be the ICC who decides when any State is unwilling or unable to investigate and prosecute the crimes stated on the Statute. This limitation is adequate with the Constitution due to the constitutional principles and values that this ICC pursued. Hence, the Court established that any actuation addressed to subtract from the justice a perpetrator for crime enlisted in the Statute or the incapacity of the State to impart justice in those cases will be contrary not only to the Colombian Constitution but also to the international commitments binding for the country because both include the obligation to investigate and to punish grave violations of human rights and humanitarian law (Colombian Constitutional Court, 2002A).

Attending to the consequences of the reasoning above, the Court tries to "harmonize" this position with the constitutional norms that allow granting amnesties or pardons for political crimes according to articles 150.17 and 201.2 of the Constitution. The Court held that any domestic instruments that would be use to achieve reconciliation must guarantee to the victims of any criminal conduct the possibility of access to justice, to know

the truth and to obtain effective judicial protection. In the other way, if any law denies the right to a judicial remedy to the victims it will be a violation of the international duty of the States to provide effective judicial remedies for the protection of human rights. Therefore, the Court concludes by saying,

Without prejudice about any eventual amnesty law, this Court does not find that the ratification of the Rome Statute could imply an obstacle for future peace and reconciliation processes that would consider measures like amnesties or judicial pardons if those follow the constitutional parameters and the principles and norms of international law binding for Colombia (Colombian Constitutional Court, 2002A).

From this conclusion, the Courts seems to accept that the power to grant amnesties or pardons must in any case follow, first, the constitutional parameters, and second, the principles and norms of international law binding for Colombia. About the constitutional parameters, from the decision it is clear that those are not only the conditions stated in articles 150.17 and 201.2 of the Constitution, but also, the rights involved, particularly the right to justice even in those cases. With regard to the international principles and norms, at least the Court made direct reference to the content of the Rome Statute, meaning that the amnesties and pardons have an explicit limit in the conducts listed and under the conditions of the ICC Statute.

## **2.2 *Decision C-695 of 2002 about the constitutionality of the exclusion of some crimes for amnesties.***

By the Decision C-695 of 2002, the Constitutional Court resolved a constitutional claim against an article of the Act Number 733 of 2002 which establishes some measures to fight crime, particularly hijacking, terrorism and extortion. The disposition demanded was article 13, which states:

In any case the perpetrator or accomplices of the crimes of terrorism, hijacking, extortion, in whatever modality, could be subject to benefices with amnesties or judicial pardons, or could be consider as "connected" with political crimes due to its condition of atrocities (Colombian National Congress, 2002).

In a divided decision, the majority of the Court held the constitutionality that the article demanded. To support this decision, the majority focused its reasoning on three arguments. First, that the Congress has discretion to concede amnesties as long as those laws respect the limits established on the Constitution. Second, that the constitutional restrictions for the Congress in this matter: (a) cannot grant amnesties for "common crimes"; (b) cannot prohibit the concession of amnesties for "political crimes"; (c) can extend amnesties or judicial pardons to "connected crimes" with the political crimes as long as this decision respond to criteria of reasonableness and equality; and (d) must respect the right to truth, justice and reparation to the victims of

the crimes amnestied. Third, because the mentioned article does not violate any of these constitutional limits the disposition must be declared as constitutional (Colombian Constitutional Court, 2002B)

Even more interesting than the Decision itself were the arguments presented by the Justices in their dissent and concurring opinions. Apparently the Court was not able to achieve an agreement in the decision about whether the crimes listed in the article demanded could be consider as political crimes or "connected" with them in future amnesties laws. On one hand, a group of three Justices known for its conservative positions, held that crimes like terrorism, hijacking, extortion, but also, intentional homicide, enforced disappearance and torture, cannot be consider as political crimes or "connected" because those conducts are incompatible with the conceptual, philosophical and legal definition of political crimes that arise from the Constitution and international instruments binding for Colombia.

On the other hand, three other Justices expressed separately their position that not only crimes like terrorism, hijacking and extortion could be subject to amnesties, but also any other crimes that the legislative branch decides in the future could. For these judges, the fact that the Constitution does not explicitly exclude any conduct for be subject to amnesty or general pardon makes that this decision remain exclusively in the power of Congress, under the conditions established in article 150.17 of the Constitution. In this reasoning, the right and value of peace

could prevail over the right to justice and over the duty to investigate and to punish by the State even for the most serious crimes. The three remaining Justices decided not to address this particular issue because it was outside the subject of the present case.

The concurring opinion wrote by the former Justice Eduardo Montealegre Linett and whom today serves as the General Attorney is particularly interesting. Justice Montealegre argues that any interpretation of the Constitution should correspond to the social and historical conditions of the country. In any case, peace must be considered as the supreme extra-legal value and any citizen or institution must address its actions to achieve this goal as the Constitution mandates. By this reasoning, if the Congress considers in the future that atrocities or crimes against humanity shall be subject to amnesty in order to achieve peace, the Constitution do not establish any obstacles for that except for compensation for the victims. With regard to the duty to investigate and to punish by the State, the former justice said that, in a reconciliation process, this duty, including the prison penalties, must be replaced by the repentance of the perpetrators.

For this decision, and despite the divergence of positions, the majority of the Court held that any amnesty law must respect the right to truth, justice and reparation to the victims of the crimes and perpetrators amnestied. In this sense, the duty of the State to investigate, prosecute and punish must be somehow articulated

with the future amnesties to be constitutional. However, criteria like differentiate to "common crimes" and the relevance of the rights affected, are significant to political branches when they decide to grant an amnesty or even a pardon.

### ***2.3 Decision C-370 and C-575 of 2006 about the constitutionality of the "Justice and Peace" Law***

In 2004, the government of the President Alvaro Uribe- Vélez opened a process of peace negotiation with the paramilitary groups. After a year of negotiations, the Colombian Congress enacted the Law No. 975 of 2004, called as the "Justice and Peace" Law [JPL Hereinafter]. This law was conceived as a transitional framework to the demobilization of the members of those groups. The main features of JPL about the right to justice are: (i) use a fact- by- fact and case- by-case methodology for all the crimes committed by the demobilized people; (ii) establish an alternative penalty, consistent in five to eight years in prison, for individuals who leave their illegal activities and bring an effective contribution to truth, justice, reparation, and non- repetition of the crimes committed without any consideration for the nature or severity of the crimes committed; (iii) if any demobilized person does not fulfill with any of those conditions he or she must be expelled from the "Peace and Justice" program and will be prosecuted under the ordinary jurisdiction and legislation; and (iv) the JPL regulates a special procedure and jurisdiction for the investigation and prosecution of the crimes committed by the demobilized people.

As was expected, this law generated huge controversy because it was seen by some people as a hidden way to grant impunity for the crimes committed by the paramilitary groups. As part of this national debate, the entire JPL was deemed as unconstitutional before the Constitutional Court claiming that the content of the law violates the constitutional rights of the victims to justice, reparation and truth. In the Decisions C-370 and C-575 of 2006, the Constitutional Court held that JPL as a whole was in accordance with the Constitution, however, declared some parts of the law un-constitutional and conditioned the interpretation of others.

In its judgment, the Court established that JPL is an ordinary law regulating criminal proceedings and cannot be compared to a law granting amnesty or pardon because it does not prevent ongoing criminal prosecutions from continuing and it does not eliminate penalties; rather, it grants juridical benefits in order to achieve peace. In this regard, the Court said, "the law does not establish the extinction of the criminal action in relation with the crimes that could be indicted to the members of the armed groups that decide to be beneficiaries of this norm, therefore, it is clear that the State does not decide by this law forgive the criminal actions committed" (Colombian Constitutional Court, 2006B).

The Court also established that the benefit of an alternative punishment was constitutional because it did not disproportionately affect the rights of the victims to truth, justice, reparation and non-repetition. With regard to the right to justice,

the Court considered that this right was preserved by the ordinary penalty in the case that the perpetrator would not fulfill its obligations with truth, reparation and non-repetition for the victims. Finally, the Constitutional Court emphasized that JPL is a law related to transitional justice and examined the content of the law in light of the rights to truth, justice, reparation and non-repetition.

Although the Court considered that this law was not an amnesty, it could be highlighted first that the right of the victims to truth, justice, reparation were used as parameters to evaluate the constitutionality of this transitional norm. Second, that the Court conceived the scope of the right to justice from judicial mechanism and not only from extra-judicial means. Third, that the Court adopted some international norms and jurisprudence as parameters to evaluate the constitutionality of the law. This applies particularly to the standards developed by the Inter-American Court of Human Rights about amnesties, as will be presented in the next chapter.

#### ***2.4 Decision C-579 of 2013 and C-577 of 2014 about the constitutionality of the "legal framework for peace"***

According to article 241.I, the Constitutional Court is competent to hear and judge about claims made to a Legislative Act or any other constitutional amendment for flaws committed during the approval process. Although, according to its jurisprudence, procedural defects are not the only grounds to declare the unconstitutionality of a constitutional reform.



Attending to a jurisprudence developed since 2003, the Court has held that the power to reform the Constitution has competence limits because attending to the words of article 374, the Constitution only could be "modified" by the constituted powers but not substituted. In this respect, the Court has stated that "to know if the power to reform incurred on a defect of competence, the constitutional judge shall analyze if the Constitution was or not substituted by other, and doing so, is needed to take into account the principles and values that the Constitution include and the ones that arise from the Constitutional Block" (Colombian Constitutional Court, 2003).

Agreeing with this doctrine, new provisional articles 66 and 67 of the Constitution, also known as "legal framework for peace", were revised by the Constitutional Court under *ultra vires* charges. For the claimers, the amendment exceeded the reform power of the Congress because those new provisions changed essential and structural elements that define the Colombian Constitution and therefore substitutes it for a new one. The Court on Decision C-579 of 2013, analyzed the constitutionality of the instruments of transitional justice that, on one hand, restrict the duty of the State to investigate, judge and punish all crimes committed by an armed group and focus its effort on the criminal investigation of crimes against humanity, genocide and war crimes committed on a systematic way, and on the other hand, restrict the prosecution of criminal offences to the "most responsible" ones.

The claimers argued that those instruments substituted an essential element in the Constitution and the Constitutional Block, whereby that State has the commitment and duty to respect, protect, guarantee the rights of the community and victims, and therefore, assure the reparation, truth, non-repetition, but also, the investigation, prosecution and punishment for grave breaches to Human Rights and International Humanitarian Law. In this respect, the majority of the Court considered that balancing the rights to justice and to a long-lasting peace, those mechanisms do not suppose a substitution of the Constitution because, in first place, crimes against humanity, genocide and systematic war crimes will be in all cases investigated and punished, and second, the renounce of criminal prosecution for the other conducts is conditioned to demobilization, truth and reparation to the victims.

Although the majority of the Court declared the constitutionality of the amendment for those charges, in ruling the Court fixed some parameters for due interpretation and statutory development of the provisions. Among others, the Court established that the criteria of "prioritization" and "selection" of the conducts subject to criminal prosecution must be transparent and participative with the victims, and also, that all, without no exceptions, crimes against humanity, genocide and war crimes committed on a systematic matter must be investigated and punished through the most responsible offenders.



Later, on Decision C-577 of 2014, the Court revised other claim against provisional article 67 of the Constitution. This time, the charge was that the provision did not prohibit that crimes like terrorism, drug trafficking, war crimes and other transnational felonies could be considered in the future as political crimes and therefore the offenders for those crimes could, eventually, participate in politics or be elected for a public office, substituting the democratic and participatory principle of the Constitution. For the majority of the Court, the provision that crimes against humanity, genocide or systematic war crimes will be the only constitutional restraint to conducts that cannot be considered as political crimes do not affect, on the contrary, guarantee the principle of participatory democracy for the demobilized people. Some dissent justices of the majority decision, proposed in their dissent opinion that leaving behind the arguments on the claim, the Court must declared as unconstitutional the exclusion of some conducts to be considered as political crimes in the future because this decision avoid permanently the political rights of the people that committed it and that this provision restrict gravely the development of the current and future peace processes with armed groups.

### **3. THE INTERNATIONAL STANDARDS BINDING FOR COLOMBIA ABOUT TRANSITIONAL JUSTICE**

#### **3.1 *The "Constitutional Block" in the Colombian Constitution***

According to article 93 of the Constitution, international treaties and agree-

ments ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. Also, article 94 states that the enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which are inherent to the human being and despite are not expressly mentioned in the Constitution.

From those norms, the Constitutional Court has developed the doctrine of the "Constitutional Block" (Colombian Constitutional Court, 2008). To the Court, "[T]he constitutional block consists of those international rules and principles, without formally appear in the articles of the Constitution, are used as control parameters of the constitutionality of laws, because they have been normatively integrated into the Constitution, in various ways and mandate of the Constitution. They are true principles and rules of constitutional value, that is, rules that are located at the constitutional level" (Colombian Constitutional Court, 1995). Therefore, for the Colombian constitutional law to make a systematic interpretation of any constitutional institution it is necessary to take into account the norms that belong to constitutional block (Colombian Constitutional Court, 2003A).

#### **3.2 *Universal System of Human Rights***

Colombia ratified the International Covenant on Civil and Political Rights [Hereinafter ICCPR] with Act Number 74 of 1968 and this norm has been recognized

as part of the Constitutional Block by the Constitutional Court (Colombian Constitutional Court, 2005B). Although the Covenant does not explicitly establish the duty of the States to investigate, prosecute and punish the violations of Human Rights, this obligation is based on article 2.3 of the ICCPR which establishes a duty of each State party "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

Hence, for the Human Rights Committee the failure of the State to investigate and to bring to justice the perpetrators of violations of human rights will be a breach of the ICCPR, especially when violations refer to the most serious crimes. Together with the Committee, other organs of the United Nations System had spoken in the same sense. As an example, the General Assembly has held since the Resolution 2583 (XXIV) of 1969 that the investigation and punishment of war crimes and crimes against humanity "constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms" (United Nations, General Assembly, 1969).

Also, the Universal System of Human Rights has been working since 1988 with the specific purpose to create a set of principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law, which will be binding for all State party. As part of this

project, different drafts were entrusted to prominent international jurists. In 1997, the Professor Luis Joinet filed a final report to the Commission of Human Rights which has become a relevant criterion of *soft law* about this matter (United Nations, Economic and Social Council, 1997). According to the report, the rights to the victims are: to know, to justice, to reparation and other measures aimed at guaranteeing the non- recurrence of violations.

About the issues of conceding amnesties and how they affect the right to justice of the victim, some organs of United Nations System have referred to this issue and although these statements are not binding, they might be considered as relevant on the international trends. In this sense, the Secretary-General, in addressing the Security Council in 2004, recommended that should be "Reject[ed] any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court" (United Nations, Security Council, 2004). Also, the General Assembly by the Resolution 60/147 of 2006, approved the Basis Principles and Guidelines on the Right to a Remedy and reparations of Victims of Gross Violations of International Human, and stated in this regard, "Statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes

under international law” (United Nations, General Assembly, 2006).

In Consequence from the Universal System of Human Rights, the ICCPR on article 2.3 includes the right to an effective remedy. This right implies the duty of each State party to guarantee that the claims for violations to human rights must be investigated and prosecuted effectively by independent and impartial authorities, and consequently that the perpetrators must be brought to judicial authorities. Therefore, a State will be breaching the Covenant when it does not investigate, prosecute, punish or repair the victims of a violation of human rights.

### 3.3 *Inter-American System of Human Rights*

Colombia ratified the Inter- American Convention of Human Rights with the Act Number 16 of 1972 and this norm has been recognized as part of the Constitutional Block by the Constitutional Court. Under the Convention, State parties have the obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1) (Inter-American Court of Human Rights, 1988).

The Convention also established the Inter-American Court as a jurisdictional organ and the authorized interpreter of the

Convention. In this role, the Court calls access to justice a peremptory norm of international law. About the right to investigate and punish as a component of the right to justice, the Court has held even in the context of gross and systematic violations of human rights that the state has the duty to avoid and fight impunity, characterized as “an offence within the obligation to investigate, persecute, capture, prosecute, and sentence those responsible for violations of the rights protected by the American Convention” (Inter-American Court of Human Rights, 2006B).

Further, the Court addressed in several opportunities the issue of transitional justice and particularly the compatibility of the Convention with amnesties laws that impeded the investigation and punishment of those responsible for atrocities. The first remarkable case was in 2001, when the Court in the judgment known as *Barrios Altos v. Peru*, decided, “amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible under the Inter- American Convention of Human Rights” (Inter-American Court of Human Rights, 2001) In 2006, the Court decided in the same way in the case called *Almonacid- Arellano v. Chile*, where the Court decided “that the States cannot neglect their duty to investigate, identify, and punish those persons responsible

for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions" (Inter-American Court of Human Rights, 2006B).

Recently, the Court has reaffirmed its position in two more cases. The first was in the case of *Gomez Lund v Brazil* in 2010 with the Court reaffirming, "The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention" (Inter-American Court of Human Rights, 2010). In the second and most recent case, the Court maintained the same position deciding that even "The fact that the Expiry Law [which, for all purposes constitutes an amnesty law] of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law" and again struck down the law as contrary to the Inter-American Convention of Human Rights (Inter-American Court of Human Rights, 2011).

Therefore, in the Inter-American System of Human Rights, the rights to an effective judicial remedy includes the duty by the State party to investigate, prosecute and punish those responsible for human rights violations even in the context of mass and systematic human rights violations. According to the Inter-American

Court, this duty is reinforced when the conducts committed constitute crimes against humanity, genocide, torture or forced disappearance because in those cases any legal or factual obstacle for the investigation, prosecute and punishment is contrary to the Convention.

## CONCLUSIONS

The transitional measures that will be implemented to overcome the situation of armed conflict must not only respond to the political convenience. While the Constitution remain in force and unmodified, those measures must also be consistent with the Constitution to be legal and legitimate. During the ongoing peace negotiations, one of the most complex issues will be the judicial accountability for human rights abuses committed by the parties in the context of the armed conflict. This issue implied serious constitutional aspects like the rights involved and the constitutional mechanism provided in the Constitution to address this situation. Therefore, to understand the constitutional framework around that issue and how this framework affects the interpretation of the constitutional institution is not only convenient but also necessary during the current peace negotiation process.

About the rights involved, on the one hand, the Colombian Constitution provides the value of peace. This constitutional value is regulated on the Constitution as a collective right, a subjective right, and a duty to all institution and citizens. In this sense, the value of peace coexistence must be understood as a national purpose

and thus shall irradiate the Colombian legal system and the public institutions in their actions. On the other hand, the Constitution also states the right of access to justice. This right acquires a precise content when any citizen becomes a victim of any illegal conduct. In this situation, the State has the duty, through the General Attorney office, to guarantee all the rights to redress the damage caused, including the investigation, prosecution and punishment of those responsible. According to the constitutional jurisprudence, the right to justice has to be reinforced in relation to the victims of the armed conflict in Colombia due to the vulnerability of this group of citizens.

The conflict between the right to peace and to justice in a transitional process was predicted by the Constitution. The Constitution establishes three different institutional arrangements to deal with this tension. First, the Constitution grants the Congress the power to enact amnesty laws for political crimes with a qualified majority and only for "public convenience" reasons. Second, the government has the power to concede executive pardons for political crimes. Third, the Constitution provides the possibility to regulate in a context of transitional justice the criteria of prioritization and selection for the crimes that will be investigated, prosecuted and punished by the judicial system.

Each of these transitional mechanisms must be interpreted in a systematic sense with the whole content of the Constitution. The meaning and scope of those mechanisms must be harmonized with the

constitutional rights involved, seeking for the less restrictive interpretation. In this sense, the right to justice for the victims, understood as the duty of the State to investigate, prosecute and punish, could be affected in different levels by each mechanism. First, an amnesty law may assume the complete suppression of the right to justice for the crimes subject to the amnesty because this measure impedes any judicial process from the beginning. Second, a pardon measure ordered by the President, could suppose a less restrictive impact in the right to justice, because the execution of the condemned will be the only part affected. Third, in the case of the "legal framework for peace", the impact of the right to justice would be equally severe than in an amnesty for the crimes non-prioritized or un-selected.

The Colombian Constitutional Court in previous rulings has created some relevant criteria for the interpretation of those mechanisms. First, the Court has adopted a criterion based on the rights involved in each mechanism and has established that even in the application of transitional measures like amnesties, the rights of the victims, including the right to justice, must be respected. Second, the Court has established that the international law binding for Colombia is another explicit limit to the transitional measures because *in virtue* of the "Constitutional Block" they make it an active part of the Constitution. In this sense, (i) the obligation of the State to investigate, prosecute and punish the perpetrators of the crimes enlisted on the ICC Statute, (ii) the mandate by the Universal System of Human Rights to prosecute

and punish the international crimes, and (iii) the prohibition suggested by the Inter-American Court to concede amnesties for the most serious human rights violations, are constitutional parameters that must be considered for the implementation of the transitional mechanisms included in the Colombian Constitution.

In consequence, the combination of the constitutional dispositions, the constitutional rights involved, the distribution of powers and the constitutional parameters of interpretation presented above constitute the Constitutional Framework for transitional justice in Colombia. Therefore, it is within this framework that political powers must adopt the transitional decisions to guarantee their legality and legitimacy, unless the peace process includes a constituent exercise, in which case the constitutional framework itself will be uncertain.

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