

## Selected briefs from the seminar *Law in peace negotiations*, Bogotá, 15-16 June 2007

### Uprimny and Saffon: *Uses and abuses of transitional justice discourse in Colombia\**

*Uprimny and Saffon look critically at the use of transitional justice (TJ) discourses in Colombia. Is it mainly rhetoric or does it bring true normative constraints into political action? They do not reject TJ discourses altogether, but distinguish two types of use and call for increased attention on the discourse user's interests and agenda.*

#### Transitional justice without transition?

Colombia has experienced a protracted conflict with several armed actors. Prior to the talks that opened the current peace process with the paramilitary United Self-Defense Forces of Colombia (AUC) in 2002, there were two active insurgency groups, the ELN and the FARC. At this point no peace accord with the FARC is within sight, and therefore *the current transition to peace can at best be only partial and fragmentary*. The conflict with the FARC will continue, possibly with higher intensity than before.

It is not even clear whether under the terms of the current peace process there will be a genuine, if fragmentary, transition. The recent peace agreement in Colombia was signed with a pro-system actor. The existence of forms of collusion between the paramilitaries and members of the State, particularly at the local level, has long been well known, and now the legal proceedings attached to the peace process have produced important legal evidence of collusion and complicity. *There will be a genuine transition only if the deep-seated power structures produced by these illegal ties and complicities are dissolved.*

Giving weaponry away and demobilizing troops is no guarantee that a transition is in the making. It is also necessary to dismount large political and economic structures, especially the increasingly unequal regime of land ownership caused by the conflict and the strong ties between paramilitaries and regional political and economic elites. Otherwise, the current process may give the paramilitaries — particularly its leaders — a veneer of legitimacy without there being a truly legitimating transformation.

#### Two uses of transitional justice discourse

The distinguishing mark of TJ approaches to peace processes is the readiness to limit the demands of justice for the sake of future peace and stability. To the extent that such approaches can justify leniency in punishment and may allow for diluted remedies to victims of rights violations, there is an incentive for some political actors to appropriate them manipulatively: they may invoke TJ discourse with the sole purpose of securing impunity. The risk of bad faith appropriations is all the more acute because the application of TJ requires complex situational judgments.

Two general types of use of TJ discourse may be defined. They can be distinguished by (a) the interests and goals pursued by the user, and (b) by how they respond to the well known tension between peace and justice in transitional contexts.

##### *Manipulative use*

- (a) TJ is invoked with the aim of securing impunity. The juridical content of TJ is trumped by political considerations. Rather than propelling a transformation of relations of power, the discourse serves to preserve the unequal power relationships prevalent in the extant regime.
- (b) Only once peace is secured should one be concerned with the application of justice. Victims' rights cannot become obstacles to peace and reconciliation. If required by peace and stability, one must be flexible in the provision of victims' rights.

- (a) TJ is invoked in order to prevent impunity. TJ discourse empowers victims of rights violations and contributes to deliver some of their claims. The discourse takes the rights of victims seriously and seeks to constrain the political process by the imperative to protect and satisfy these rights, particularly those to justice, truth, reparation, and guarantee of no repetition.
- (b) Peace cannot be an excuse to forgo the rights of victims. Peace does not obtain if the basic demands of justice are not met. Constraints of justice may in fact push peace negotiations along a virtuous path: if a minimum of justice becomes non-negotiable, then all actors in a negotiation will adjust their interests and demands accordingly. Hence the constraints of justice limit the maneuvering space of peace actors, but also allow the different actors' interests and expectations to come closer together.

## Uses in the Colombian case

The government, the paramilitary leadership, and wide sectors of civil society have engaged in manipulative uses of TJ discourse. There has been a generous rhetoric of truth, justice, reparation, and reconciliation that in reality is ineffective and instrumental to hide impunity.

In the first draft law produced by the government to regulate the transition — the so-called Alternative Penalty Law, given to Congress in August of 2003 —, the concepts of reconciliation, repentance, forgiveness and symbolic reparation played the central role. No true penalties were contemplated; benefits to paramilitaries were not conditional on full confessions, and clear mechanisms of reparation were not included. The basic idea was to make the alleged pursuit of reconciliation and forgiveness a reason for giving up retribution and exaction of individualized monetary reparations.

The Alternative Penalty Law failed to pass in Congress. A new law was presented by government and approved in Congress in July of 2005 (Law 975 of 2005, known as Justice and Peace Law, JPL). Even though more demanding than the previous bill, the JPL still fell short of basic legal standards. The law is generous in its declared intention to protect the rights to truth, justice, and reparation, but is defi-

cient in providing concrete institutional mechanisms for assuring the satisfaction of these rights.

As originally conceived, the law really had no teeth. A ruling by the Colombian Constitutional Court in May of 2006 gave it some teeth and moved it closer to contributing effectively to the protection of rights. The government, however, has continued to emphasize the idea of reconciliation and to use TJ discourse manipulatively, and may erode the Court's ruling by issuing executive decrees specifying a lenient application of JPL.

Victims' movements — it is estimated that there are over three million victims, including forcibly displaced people —, NGOs, the Constitutional Court, and a minority within civil society have engaged in *democratic uses* of TJ discourse. They have struggled to assure the efficacy of the legal contents of TJ discourse.

In its review of JPL, the Constitutional Court ruled that the general idea behind the law was acceptable but said that it had to be more stringent in order to comply with constitutional and international legal standards. Its ruling stated that a false confession was a basis for denying a demobilized fighter the benefits offered by JPL. It also declared that, when it came to reparations, all the wrongdoer's assets should be available, not only the ones obtained illegally, as the original version of JPL had it.

The Court's ruling aside, democratic users of TJ discourse have rejected wide conceptions of reconciliation and forgiveness and have insisted on the individual right to disagree with these practices; suggestions to engage in local processes of reparation and truth recovery have been made, as well as proposals to purge the State of agents with proven links with paramilitary groups. So far these proposals have had little effect.

## The two uses on balance

After the Constitutional Court's ruling, there has been some convergence in the uses of TJ discourse in Colombia. A wider consensus has been reached on the need to balance properly the imperatives of peace and justice, and also on the importance of securing and protecting the rights of victims.

The placement of victims' rights at the centre of the peace agenda has been a victory, perhaps modest, for democratic users of TJ discourse. The government's shift has some purely rhetorical elements, but it is also a consequence of its recognition of the weight of legal standards that limit the set of available

political options. The strength of victims' movements has been instrumental in this recognition.

### To conclude

- The struggle for the application of international and constitutional human rights standards has important democratic effects.
- The pursuit of justice does not necessarily constitute an obstacle to peace. Justice can contribute to peace through the establishment of virtuous restrictions on the political process. Such restrictions may have the effect of bringing closer together the interests of victims and victimizers.
- Manipulative uses of TJ discourse, which still have wide currency in Colombia, tend to undermine the struggle for satisfaction of victims' rights.

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