

## **Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case<sup>1</sup>**

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This paper aims at answering the following question: is it appropriate and convenient to use the restorative justice model as the dominant paradigm to analyze and solve the problems of transitional justice and reconciliation? We believe this is a relevant question, since many argue, especially after the South African transition, that transitional processes should be founded on restorative justice. This is the case of Colombia, where the restorative justice model has been defended by many as the best way to face the atrocities committed by paramilitary groups, which are currently negotiating peace with the government.

Indeed, in recent years, the restorative model has reached its pinnacle in discussions regarding justice. It is thought of as a better way of facing the criminal system’s dysfunctions and inequities, by replacing its punitive and retributive components. That is why restorative justice mechanisms were recently included in the Colombian Constitution.<sup>3</sup> And that is why, more over, many analysts and government have proposed to use these mechanisms not only to face the problems of the ordinary criminal system, but also to face the dilemmas imposed by transitional justice. For instance, an important Seminar on the contributions of restorative justice to transitional justice problems was recently organized in Colombia, and many renown actors of the South African

transition –such as Tokio Sexwale and Archbishop Desmond Tutu- were invited.<sup>4</sup> Furthermore, in many occasions, the Colombian government has defended the convenience of applying the restorative justice model to the Colombian transition. It so did when arguing in favor of the first bill presented to Congress in 2003 concerning the legal treatment of atrocities committed by demobilized paramilitaries, in the following terms:

The legislative proposal is oriented towards a restorative conception, which supersedes the assimilation of punishment with vengeance. This assimilation is typical of a discourse, which mainly reacts against the criminal with a similar pain to that which he/she inflicted on the victim and, only in a second place, seeks non recurrence (prevention) and victims’ reparations. It is important to take into account that, when doing justice, law points towards reparations, and not towards revenge. In face of evidence regarding the frequent failure of prison, as the only answer to crime, to achieve resocialization of delinquents, contemporary criminal law has advanced in the issue of alternative sanctions (Colombian Congress Gazette No. 436, 2003).

It is thus important to analyze the possibilities and limitations of privileging the restorative justice paradigm to design transitional justice processes. To do so, we will first define the concepts of restorative justice and transitional justice, by briefly attending to their separate origins and developments. We will then identify several complementarities between restorative justice and transitional justice, which explain why it is reasonable to recur to restorative mechanisms during transitional processes. However, we will subsequently emphasize on the important tensions that exist between restorative justice and transitional justice. We will especially refer to the tensions generated by the different notions of reconciliation, democracy and punishment that underlie restorative justice and transitional justice. This will lead us to conclude that using restorative justice as the main paradigm of transitional justice has important limitations. We will then show that these limitations are particularly acute in the Colombian case. That is why we will conclude by arguing that, in general, restorative justice should not be the main paradigm from which transitional processes should be designed, and in particular, that Colombia's fragmentary transition should be based on what we call *responsibilizing pardons*.

## **I. Transitional Justice and Restorative Justice: Brief History and Conceptual Approximation**

The expressions transitional justice and restorative justice have a rather recent but quite successful history. In fact, it is not very likely that twenty years from now academic texts on justice, transitional processes or the criminal system would mention these notions. In contrast, the majority of recent texts on those subjects include references to either transitional justice or restorative justice. Furthermore, important institutions with the specific mission of working on these forms of justice have been created.<sup>5</sup>

The bibliography on restorative justice and transitional justice is thus abundant and in continuous expansion. And there are often significant differences among authors who use these expressions. That is why it is not easy to reconstruct the history or to suggest a definition of restorative justice and transitional justice that may produce consensus among specialists.

Aware of this fact, we will, however, suggest a brief historical genealogy of these expressions, which will allow us to identify the main elements that define them.

### ***Brief History and Conceptualization of Transitional Justice***

Transitional justice refers to a very old problem: how should a society face the legacy of grave crimes against humanity? Should it punish perpetrators? Should it forget atrocities in order to favor reconciliation?

These questions do not have an easy answer, and different thinkers and societies have given them different solutions. There is, nonetheless, a relevant question: why is it that, in spite of the fact that it refers to such an old problem, only in recent years has the expression transitional justice appeared? Is it just a fashionable neologism that refers to an old phenomenon? Or is the massive acceptance of this expression derived from a new way of dealing with the problem?

In our view, there has occurred a very important transformation of the framework within which mass atrocities are dealt with in periods of transition from authoritarianism to democracy or from war to peace. This transformation justifies the creation of the transitional justice category. In fact, if one carefully analyzes the expression, the novelty of transitional justice consists in the justice component it now includes. In the transitional justice paradigm, the demand for justice qualifies contemporary transitional processes, which, at the same time, profoundly influence that demand for justice. In that way, the concept of justice acquires a particular meaning and implications in transitional processes, which are different from those of the demands for justice in contexts of normality, as well as from those of the demands of justice in transitional processes taken place more than thirty years ago.

As it is contemporarily understood, transitional justice refers to those transitional processes through which radical transformations of a given social and political order are carried out. In these processes, the need of equilibrating the contradictory demands of peace and justice is present. On the one hand, in many cases, transitional justice processes imply political negotiations among different social actors. These negotiations are aimed at achieving agreements that are satisfactory enough for all parties concerned, in such a way that they are willing to

accept the transition. On the other hand, however, transitional justice processes are ruled by the legal demands of justice and the protection of victims' rights, which are contained in international legal standards. These demands are materialized in the legal imperative of individualizing and punishing perpetrators of war crimes and crimes against humanity, which were committed prior to the transition. In that way, while the latter legal demands aim at fully protecting victims' rights to justice, truth and reparations, the former needs of peace and national reconciliation pressure in an opposite direction, at least in the short term. Indeed, in order for perpetrators of atrocious crimes to accept a peace agreement, there must exist attractive incentives to do so, such as indults or amnesties.

That is why we believe that the expression transitional justice was only recently created. Throughout history, there have been many transitional processes from war to peace, and from authoritarianism to democracy. Moreover, with the First and Second World Wars, the twentieth century faced two of the most important transitions from war to peace. Nevertheless, only those transitions that have taken place in the last twenty years have given the demand of justice the specific meaning it nowadays has.

For instance, the transitional process to peace after Second World War –which is considered by some authors as a first period of transitional justice<sup>6</sup>- gave the demand of justice a strictly retributive component, which was not tempered with any other value, especially not with the value of peace. This can be explained by the fact that the transition of the second postwar was imposed by the victorious party, and did not require any peace negotiation among actors.<sup>7</sup> That being so, retributive justice was seen as a universal value of primary importance (Teitel, 2003: 72-4), and many perpetrators of crimes against humanity were held responsible and severely punished.<sup>8</sup>

In contrast, many transitions carried out at the end of the twentieth century and at the beginnings of the twenty-first have faced the difficult need of solving the tension between the international legal imperative of punishment to perpetrators, and the pragmatic demand of amnesty imposed by transitional contexts. In fact, since the second postwar, public international law has shown a constant tendency towards the universalization of the duty to punish atrocious crimes. This

tendency is manifested with the utmost clarity in the recent creation of the International Criminal Tribunal. Moreover, this legal tendency has been promoted and strengthened by the ethical claims of social organizations in favor of the protection of victims' rights. However, the contexts in which contemporary transitions have taken place have imposed serious practical obstacles to the effective compliance of this duty. These obstacles are related to the need of creating justice formulas, which are accepted and viewed as satisfactory precisely by those who have committed the atrocities. Such is the case of contexts as different as the Southern Cone, South Africa and Northern Ireland. In all those cases, the fundamental question has been to find a politically viable solution, which, while precluding absolute impunity and recognizing the duty of punishing crimes against humanity, can allow for durable peace to be attained. In those contexts, the justice demand has been confronted with equally important values, and has thus acquired a particular content and meaning.

That is why the transitional justice neologism is defensible, since it designates a specific form of justice, which is characterized by appearing in exceptional contexts of transition, and having the hard task of finding a middle point between full retributive justice and absolute impunity. Indeed, in between these two poles there are multiple possibilities of transitional justice formulas, which depend to a large extent on power relations among actors, as well as on the commitment possibilities each context offers. None of these formulas is absolutely satisfactory or immune to criticism, given that they all imply a degree of sacrifice of the values in tension. Such is the dilemma of transitional justice (*see* Uprimny, 2006).

### ***Brief History and Conceptualization of Restorative Justice***

In spite of the current tendency to defend the application of the restorative paradigm to transitional justice processes, the problems that both types of justice intend to solve are very different. Indeed, transitional justice has the essential purpose of finding equilibrium between the (most of the times opposing) demands of justice and peace in exceptional contexts of transition from war to peace and/or from authoritarianism to democracy, in which massive and systematic atrocities have

been committed. In contrast, restorative justice emerged as an alternative and critical paradigm vis-à-vis the functioning of the criminal system in contexts of normality and, in particular, vis-à-vis its methods for punishing ordinary crime.

In fact, restorative justice is framed within a much broader movement of criticism of the repressive and retributive character of criminal law. This movement has fundamentally emerged from practice (Ashworth, 2002: 578), and its theoretical sources are quite diverse –they include religious, cultural and ethical perspectives (Minow, 1998: 91-2; Teitel, 2003: 82). That is why the notion of restorative justice responds to a plurality of meanings, theories and cultural processes (Ashworth, 2002: 578). In general terms, however, restorative justice refers to an alternative model for facing crime, which is based on the social importance of reconciliation between victim and perpetrator. In its various versions, restorative justice advocates for an alternative criminal law model, which, instead of focusing in the criminal act and the perpetrator, turns its attention towards the victim and the harm she suffered (see Minow, 1998; Gilman, 2003; Braithwaite, 2001; Zehr, 1990).

According to these visions, the main objectives of State's response to crime should be the satisfaction of the victims' needs and the reestablishment of social peace. In that way, more than punishing the perpetrator, criminal law should seek recognition for the victim's suffering, reparation of her harm and restoration of her dignity. As for the perpetrator, he or she should be reincorporated in society in order to reestablish social bonds.

From the restorative perspective, retributive punishment is seen as insufficient for reestablishing a peaceful social coexistence, for it does not give primary importance to the victim's suffering and needs, nor does it allow for the adequate reincorporation of the delinquent in the community. In contrast, the restorative paradigm is only concerned with the future, instead of the past. In so doing, it does not focus on evaluating the guilt of the offender, but promotes all those mechanisms capable of making him conscious of the harm he caused, admitting his responsibility and trying to repair the harm.

Among those mechanisms are those founded on the participation of community in conflict resolution, and particularly

those, which aim at creating a space for dialogue among the actors directly involved in crime –that is, victims and offenders-. The typical example of a restorative justice mechanism is victim-offender mediation. It consists in the creation of a space in which victim and offender try to reach an agreement regarding reparation of the harm caused, with the participation of a third party in charge of facilitating communication between them. Sometimes, the formula of the agreement includes a reconciliation founded on the demand for forgiveness by the offender, and the subsequent pardoning by the victim. Community reparation boards, family group conferences and restitution programs are other examples of restorative justice practices (see Morris, 2002:597).<sup>9</sup>

Besides those mechanisms, restorative justice includes additional instruments, such as the participation of the offender in communitarian work and psychological therapy. According to the restorative perspective, all these mechanisms allow for assignment of responsibility to the offender in a non-retributive way. Indeed, through them, the offender assumes his or her responsibility and repairs the harm he or she caused, without being submitted to punishment.

As previously shown, restorative justice was created and has usually been utilized as an alternative paradigm to confront ordinary crime in societies. Nonetheless, in one opportunity, this paradigm was applied in a transitional process: that through which the South African apartheid ended. From then on, and in spite of its mixed results and the criticisms it has been subject to (*see* Crocker, 2002; Wilson, 2002; Hamber, 2003), many have defended the political convenience and ethical superiority of using the restorative justice model as the dominant paradigm of transitional justice (*see* Minow, 1998; Tutu, 1999).

According to them, societies are able to heal deep wounds left by atrocities committed in the former regime through dialogue between victims and perpetrators, and especially through the concession of pardons by the former to the latter. That healing process allows for a stable and lasting peaceful social order to be attained. In that way, restorative justice legitimizes transitional justice and, more important, it keeps it focused on human rights. Indeed, even if victims' right to justice is sacrificed to an extent, it is done so in order for the rights of victims to truth and reparations to be guaranteed. Thus, according to

this perspective, transitional justice should be forward looking instead of backward looking. This implies that pardon should be applied to war crimes and crimes against humanity<sup>10</sup>, in so far as this might be the only way in which social ties that were destroyed by war and/or authoritarianism can be rebuilt.

Without neglecting the enormous qualities and potential of restorative justice, and admitting that, for many reasons, it was an interesting perspective for framing the South African transition, we believe that restorative justice should not be used as a substitute to, but rather as a complement of, transitional justice. Transitional justice takes place in exceptional political and social circumstances, and it faces crimes that go against the most essential content of human dignity. In contrast, restorative justice was designed to face small-scale criminality in peaceful societies. Thus, whilst for the latter cases it is plausible to use forgive and forget as efficacious strategies for overcoming crime, for the former cases that strategy seems politically and legally impossible, as well as ethically questionable (on this, see Uprimny, 2006). The differences between restorative justice and transitional justice are illustrated in Table No. 1:

**Table No. 1**

|                         | <b>Restorative Justice</b>  | <b>Transitional Justice</b>   |
|-------------------------|---|---|
| Faced conducts          | Ordinary crime  | Massive and/or atrocious crimes   |
| Contexts of application | Normality   | Exceptional contexts of transition  |
| Dilemma                 | How to replace the repressive and retributive character of the criminal system? | How to reckon with past wrongs, achieving an equilibrium between justice and peace?   |
| Underlying logic        | Inadequacy of punishment for reestablishment social harmony                     | Need of a minimum dose of punishment to achieve equilibrium between justice and peace |

That is why we believe that restorative justice is not in itself an adequate or sufficient paradigm of justice capable of facing the complex dilemmas transitional justice confronts. In fact, even if restorative mechanisms can be useful to accompany and improve transitional justice processes, they cannot replace the latter, as they do not offer an adequate equilibrium between the opposing demands of justice and peace. Furthermore, restorative justice alone does not seem sufficient to supersede, by itself, the social traumas left by massive and systematic violations of human rights. The following paragraphs document this position.

## **II. Some Complementarities between Restorative Justice and Transitional Justice**

Restorative justice can complement transitional justice, although it cannot fully substitute it, given that they have different natures and ends. Those complementarities are possibly the reason why these two kinds of justice tend to be united.

In a first level, there is a conceptual complementarity between restorative justice and transitional justice, which refers to a concern they share. Both justice paradigms are especially interested in achieving reconciliation. Indeed, transitional justice shares restorative justice's desire to overcome the past and be forward looking, in order to build an entire society's future on strong communitarian ties. Thus, every transitional justice formula is oriented towards achieving equilibrium between the demands of justice and peace, with the primary aim of achieving reconciliation and lasting peace. This explains the importance that the guarantee of non-recurrence has in transitional justice analyses. According to this guarantee, peace negotiations should have the main purpose of preventing atrocities from being repeated. That is why it is possible to ascertain a conceptual complementarity between restorative justice and transitional justice.

This conceptual complementarity is materialized at the practical level in two different ways. On the one hand, in certain cases and under certain circumstances, transitional justice admits the concession of pardons to perpetrators of atrocities, whenever it is necessary for achieving peace. The admission of pardons can be crucial for a transitional process's success. It can in fact make demobilization an interesting option for armed actors, and it can also reduce the costs of transitional justice, as well as the judicial system's problems of inefficiency.

On the other hand, as Iván Orozco (2002) has noted, there are certain transitional contexts in which, due to the nature of the previous conflict, restorative justice tools can be useful to bring about a successful transitional justice process. Such is the case of transitions that take place after armed conflicts or civil wars, in which violence is symmetrical or horizontal, that is, each armed actor and its social bases are, at once, victims and perpetrators of atrocious crimes. In those contexts, restorative transitional formulas based on reciprocal pardons are seen as plausible.

In a second level, restorative justice and transitional justice have additional complementarities. Restorative tools can accompany transitional processes, and thus guarantee their long lasting success. In certain contexts, demobilization of armed actors can leave important vacuums of social control, wherever armed actors exercised this kind of control. Indeed, that is what would probably happen in Colombia if paramilitary groups were to fully demobilize. Vacuums left by these actors' demobilization cannot always be satisfied by the judicial system, due to its precariousness. In those cases, restorative justice tools are quite useful for facing delinquency in a non-coercive way.

In these situations, restorative justice would act as an important complement of transitional justice. It would fill-in the vacuums of ordinary justice produced by the transition, and would thus promote a legal culture based on dialogue and on alternative conflict resolution in communities where, before transition, conflicts were solved in violent ways. In that way, restorative justice would help to impede the emergence of new germs of violence that could endanger the success of the transitional process. However, it would not deal with atrocious crimes committed before the transition, which would be faced by transitional justice.

This is precisely what happened in Northern Ireland, where the problem of how to deal with the social control vacuum generated by the demobilization of illegal armed groups during the peace process arose. These armed groups, particularly the IRA, exercised social control of delinquency in their zones of influence, by applying a very violent punitive justice. To a large extent, this has been replaced by the development of community-based restorative justice mechanisms (see McEvoy and Mika, 2002). In situations like these, restorative justice mechanisms operate as alternative responses to crime that are, at the same time, effective social control tools (Ashworth, 2002:580).

### **III. The Limitations of Restorative Justice in Transitional Processes**

In spite of the complementarities mentioned above, there are serious conceptual limitations for restorative justice to be

the dominant paradigm of transitional justice in any transitional process. These limitations especially refer to the different conceptions of reconciliation that underlie each model of justice, which, in turn, determine the meaning of democracy, the role of punishment and the extent to which the regime prior to the transition can be stigmatized. The Colombian case is, without doubt, an actual illustration of these conceptual limitations, and of the serious risks that are implied in employing the restorative model in transitional processes.

#### ***Conceptual Differences Regarding the Notion of Reconciliation***

Although there is an important coincidence between restorative justice and transitional justice regarding their generic purpose of reconciliation, there are deep conceptual differences between the various conceptions of reconciliation that underlie each of these models of justice. The notion of reconciliation that underlies restorative justice generally implies an absolute agreement among all social actors –including victims and perpetrators- regarding the need and utility of pardons, and the value of the reestablishment of social ties and harmony. Thus, as Professor Crocker (2002) has pointed out, the reconciliation language used in the South African transition by actors like Archbishop Desmond Tutu strove for such hard to attain values as friendship, hospitality, magnanimity and compassion.

This is a very problematic way of understanding reconciliation, especially when it is used in transitional processes. In fact, it seems particularly difficult that, after having been involved in atrocious crimes, all victims and perpetrators will be able or willing to establish strong ties of solidarity and confidence among them. As Professor Crocker (2002) noted regarding the South African case, although some actors of the transitional process might decide to make an effort to materialize those values, as was actually the case of many apartheid victims, it is not plausible to believe that all citizens will do the same. Besides, it often takes more than one generation for societies to overcome atrocities and fully reconcile (Crocker, 2002a).

Furthermore, this notion of reconciliation demands from citizens an excessively exigent commitment to reconcilia-

tion, which is not ethically, nor politically justifiable. Crocker (2002) has characterized this kind of commitment as a “thick”, “maximalist” or “communitarian” concept of reconciliation, which is seriously inconvenient for a democratically conceived transition. This way of understanding reconciliation demands that all persons affected by crimes against humanity be capable of building strong social ties with their aggressors. And it claims to be the only “real” way in which reconciliation can be achieved. It does not admit discrepancies; we must all agree that pardons are the most praiseworthy mechanism to achieve peace.

The problem is, however, that we might not believe this is the best way of overcoming previous conflict. Thus, this vision of reconciliation may end up excluding, marginalizing and even de-legitimizing many people’s point of view. Certainly these consequences are highly anti-democratic, given that they do not allow for all citizens’ opinions and dissatisfactions regarding the transitional process to be expressed, or for deliberation on the different ways of conceiving reconciliation. In such a context, dissident citizens are seen as undesirable obstacles for reconciliation. There are evident examples of this situation in the current Colombian context, in which victims’ organizations that have firmly opposed the legal framework of the peace negotiations between paramilitary groups and government have often been referred to as enemies of peace by members of government and even of the Reparations and Reconciliation Commission.

The risk of these anti-democratic results do not only affect the transitional process, but rather they may have enduring effects in the aftermath of transition, in which, for instance, the new political regime might adopt these negative attitudes towards dissent.

That is why Crocker (2002) has proposed a much “thinner” way of understanding reconciliation, which may be more convenient for transitional processes that aim at being democratic and at having long-lasting democratic effects. This conception of reconciliation is based on “democratic reciprocity”. As such, it implies that, in spite of not having identical points of view, all citizens are able to recognize others –perpetrators included- as co-citizens. This allows for all citizens to deliberate under conditions of equality and to make democratic decisions regarding the future of their society. These decisions may

bring as a result the option for pardons and the establishment of strong social ties between victims and perpetrators; but they can also bring about a different result. In either case, however, the decision would be legitimate and seem fair.

We believe this is a very important perspective for analyzing the notion of reconciliation in transitional processes. On the one hand, it defends the idea that the notion of reconciliation must be necessarily related to the notion of democracy, since the latter is vital not only for the design of the transitional formula and for the development of the transitional process, but also for the pos-transition political regime.

On the other hand, it shows that different conceptions of reconciliation refer to different conceptions of democracy, and that it is important to be aware of the fact that not all of them may be appropriate for a transitional context. Thus, Crocker’s notion of reconciliation, based on democratic reciprocity, excludes a unitarian or communitarian conception of reconciliation, which would demand for all citizens to agree with a thick conception of reconciliation, and to interpret as their own the values of friendship, solidarity, compassion confidence, etc. that underlie it. It also excludes a very thin conception of reconciliation, which he calls non-lethal coexistence, and which only requires of former enemies to no longer kill each other, to tolerate one and other. Although this *modus vivendi* type of reconciliation may be an initial achievement of transitional processes, it should by no means constitute the dominant vision throughout the process, as it would not require for transitional justice formulas to be designed through the democratic deliberation of all citizens.

However, we believe that the notion of reconciliation based on democratic reciprocity is far more complex than what it seems.

### *Different Formulas of Democratic Reciprocity*

Many democratic reconciliation formulas fit in the notion of democratic reciprocity and some of them may prove to be more appropriate than others. We thus believe that traditional discussions regarding democratic models may well enrich the discussion on the notion of reconciliation. There are two criteria, which are usually used for evaluating the quality of democracy reached by different democratic models: the de-

gree of citizen participation, and the degree of protection of citizens' rights. Different combinations of these two variables will lead to different democratic models.

As table No. 2 illustrates, conservative democratic models are characterized by a weak protection of citizens' rights, and by a weak citizen participation (I). Meanwhile, liberal democratic models are characterized by a strong protection of citizens' rights, but a still weak citizen participation (II). In contrast, republican democratic models are characterized by a weak protection of citizens' rights, but a strong citizen participation (III). Finally, deliberative democratic models are characterized by a strong protection of citizens' rights, and an equally strong citizen participation (IV).

**Table No. 2**

|                                     | <b>Weak protection of citizens' rights</b> | <b>Strong protection of citizens' rights</b> |
|-------------------------------------|--|--|
| <b>Weak citizen participation</b>   | I. Conservative model                      | II. Liberal model                            |
| <b>Strong citizen participation</b> | III. Republican                            | IV. Deliberative                             |

As you may see, all the above-mentioned democratic models fit in Crocker's notion of democratic reciprocity. In all of them, citizens are required to think of each other as co-citizens, to deliberate under conditions of equality –deliberation would off course take different shapes in the various models-, and to reach democratic decisions regarding the future of society. However, there are some democratic models that are, redundantly speaking, more democratic than others. According to the previously mentioned criteria, the deliberative model of democracy is, no doubt, the most democratic of those models. Indeed, it allows for more citizen participation, whilst strongly protecting citizens' rights. Given the transcendental importance that transitional justice has for all members of society, we believe that transitional processes should privilege such a model. In transitional contexts, all citizens should be able to participate in the process of designing the transitional justice formula, and their rights –including victims' special rights to justice, truth, reparations and non-recurrence- should be protected during that period of time.

That is why that, for instance, the Uruguayan transition, although very democratic in terms of the strong participation of citizens in the design of the transitional formula –by means of

a plebiscite-, may be evaluated as not very democratic in terms of the protection of the rights of citizens in general, and of victims in particular –since the plebiscite resulted in the concession of a general amnesty to perpetrators of atrocities-.

In that sense, we believe that a transitional process's notion of reconciliation should always try to coincide with that of a deliberative model of democracy. Apart from guaranteeing a high degree of participation while strongly protecting citizens' rights, and particularly victims' rights, this may provide the transitional justice process with an important degree of legitimacy, due to the greater social consensus it may generate, and to the stronger international community support that may consequently exist. This is precisely what happened in the South African case.

However, in deciding which should be the democratic model of a transitional process, it is always important to bear in mind the restrictions that each context may pose. Indeed, there are factual elements that may prevent a very democratic transitional process from producing democratic results. This can be clearly illustrated by the Colombian case. Colombia's current negotiations between paramilitaries and government could hardly be identified as a transitional process, in so far as, even if they turn out to be successful, they will not produce a full transition from war to peace. This is so because there are still other armed actors that have not started any kind of peace negotiations with government –and apparently will not do so in the near future-.<sup>11</sup> But it is also so because it is highly unlikely that the peace negotiations will bring about, at least in the short run, the full dismantlement of paramilitary groups and their political and economic power structures. In such a context, some voices, most of them coming from paramilitaries themselves, have proposed the use of direct democratic participation mechanisms –such as referendums- for deciding on the transitional justice formula. Ideally, these would probably be the most adequate mechanisms for guaranteeing citizen participation. However, in Colombia's current context, where armed actors influence political elections through violence and threats, it is likely that those mechanisms could be use to manipulate and restrict citizens' electoral freedom. Thus, the use of those mechanisms could have counterproductive effects, unless it is preceded by the creation of spaces of deliberation in which free and informed participation of the



people is guaranteed.

### *Conceptual Differences Regarding the Notion of Punishment*

The various conceptions of reconciliation that underlie the restorative and transitional justice models also determine the way in which punishment of wrongdoers is understood in transitional processes. Thus, from a restorative justice's point of view, punishment is contradictory to the objective of reconciliation. In fact, given that reconciliation implies social harmony, based on strong social ties between victims and wrongdoers that result from pardons given by the former to the latter, punishment does nothing but impeding this harmony to be attained. That is why punishment should be considered as undesirable in transitional processes.

As professor Crocker has noted, the problem of restorative visions is that they identify punishment with vengeance<sup>12</sup>, and thus hide the important functions punishment can accomplish in a transitional process. For many reasons, it is inappropriate to identify punishment with vengeance, especially due to their different characteristics and aims. Punishment is characterized by the exigencies of impersonality, proportionality and individuality, which are absent in vengeance. Besides, while vengeance's principal objective is retaliation, punishment aims at retribution, but also at the satisfaction of victims' rights to truth and reparations, by promoting the prosecution of perpetrators. Moreover, in certain contexts, the retributive component of punishment has a great reconciliatory potential -even greater than that of forgetting and forgiving-. Indeed, punishment publicly censures certain unacceptable actions, and thus generates a social reproach towards them. In that way, far from being opposed to reconciliation, in the transitional justice paradigm, punishment can be seen as an appropriate and even necessary mechanism for achieving reconciliation. This is so for many reasons.

Firstly, given the deep traumas left by a civil war or a dictatorship, many citizens may see with inconformity all those transitional formulas, which seek to exclusively privilege peace, in detriment of justice. Thus, it is quite possible for national reconciliation to be truer and more durable, in so far as the prosecution and condemnation of perpetrators of atrocious

crimes precede it. This is so, even when -because of the conditions imposed by armed actors in order to accept the transition- this prosecution eventually and exceptionally leads to some forms of amnesty or punishment reduction. In fact, if victims know that perpetrators will be punished in some kind of way, they might be more willing to reconcile with them, once they have paid their condemns. In contrast, if their claims of justice are denied or ignored, it is more likely that victims will not be able to pardon perpetrators, to abandon their desire for vengeance, and to accept the legitimacy of the new political regime. As Neier said, referring to the Bosnian process, "(j)ustice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them".<sup>13</sup>

Secondly, punishment may prevent the emergence of a culture of impunity in the post-transition regime. Indeed, it sends a clear message, according to which, from then on, the violation of human rights will have serious repercussions. Such a message is important not only because it promotes the respect for human rights, but also and especially because it guarantees non-recurrence, which is crucial for the success of a transitional process.<sup>14</sup> It is important to remember that the main objective of all transitional processes is the establishment of a new, democratic regime, capable of leaving the former political regime and atrocities therein committed in the past for good.

The guaranty of non-recurrence of atrocities is, in consequence, at the heart of transitional justice. It consists in the believable promise that there will be no more victims. The existence of that promise allows for the leniency of punishment in transitional processes. However, precisely in order for that promise to be believable, a proportionate dose of punishment seems inevitable. This is so because of the functions of prevention -in both a general and a special way- that, according to some currents of contemporary criminal law, punishment accomplishes.<sup>15</sup>

Punishment of atrocious crimes, and especially the threaten of its future application, may have a preventive effect against human rights violations in two different ways: on the one hand, it may discourage perpetrators from relapsing into crime, through creating fear of punishment. On the other hand, it may reinforce citizens' adherence to democratic values, and thus impede the creation of a culture of

impunity, as well as the reemergence of victims' desire of revenge, due to feelings of wrath and unfairness.

It is true that it is difficult to reach empirically founded conclusions regarding the potential preventing effects of punishment of atrocious crimes. The reason is quite simple: until very recently, the *de facto* rule around the world was that those crimes were never punished. The successive amnesties applied in Colombia in previous conflicts, as well as in other Latin American countries not many decades ago are a prove of this. So is the sporadic character of Criminal International Tribunals such as Nuremberg's, Rwanda's and Yugoslavia's, which have not yet created a consolidate international practice of punishment of massive and/or systematic human rights violations.

Therefore, we do not have solid empirical evidence of what would happen if atrocious crimes were systematically punished. Nevertheless, it does not seem unreasonable to associate the commission of those crimes, at least partially, with the absence of an international punishment tradition. Indeed, previously, the generalized conjecture that perpetrators would escape punishment favored the commission of atrocities. Furthermore, in the total absence of justice, victims could become perpetrators themselves. Finally, characterized as they were by absolute forgetting and forgiveness, transitional processes did not create spaces for the repudiation of those atrocities and the adhering to essential democratic principles. In contrast, if a contemporary universal or regional tendency to punish atrocious crimes is created the logic could be reversed. The high probability of punishment would have dissuasive effects, victims would not yearn for vengeance, and society as a whole would strengthen its adherence to human rights.

Thirdly, punishment of atrocious crimes favors the emergence of a generalized environment of respect for democratic institutions created during the transition. It does so by drawing a clear distinction between the former regime –characterized by unfairness and atrocity- and the new regime –founded in justice and human rights-. Punishment assures society that human rights are not mere rhetorical instruments used to legitimize the transitional process, but mandatory norms, whose non-compliance will be effectively sanctioned. In that way, transitional justice may be able not

only to overcome war or authoritarianism, but also to promote a project of radical transformation of the Rule of Law, through its commitment to human rights since the very beginning of the transitional process (*see* Wilson, 2002).<sup>16</sup>

### *Punishment and the Stigmatization of the Former Regime*

Punishment also tends to be a more adequate formula for generating a stigmatization of the former political regime or structure of power, which allowed for atrocities to be committed, than amnesties. The stigmatization of the former regime is crucial for a true reconciliation process to take place, as it assigns the responsibility of atrocities to a determinate political project, and not only to individual actors. This certainly reinforces the guarantee of non-recurrence of atrocities, since it identifies and negatively evaluates the framework in which atrocities could be committed.

As professor Michael Fehrer (1999) has argued, in the absence of stigmatization of the prior regime, atrocities committed in countries where the State is not yet fully consolidated can be explained as the result of conflicts in pre-democratic regimes, rather than a result of undemocratic or authoritarian regimes. The effect of these kinds of explanations is to exclude “nascent democracies”, such as Colombia and many other countries of the global south, from the requirement of applying the Rule of Law to perpetrators of atrocities (Fehrer, 1999). Indeed, atrocities are interpreted as the product of a stage of civil strife among factions, prior to the consolidation of the state and the Rule of Law (Fehrer, 1999). Thus, reconciliation can be thought of as a civilizing process, as a cultural heap from barbarianism to the consolidation of a democratic regime (Fehrer, 1999).

This conclusion is problematic because of the obvious ethnocentric perspective from which it is made, and because of the possibility it opens for nascent democracies to admit atrocities without it being required to impose justice. But it is especially problematic, as it tends to see amnesties as a more than adequate way of achieving reconciliation in transitions in which the State is not fully consolidated. Indeed, it is assumed that reconciliation in a transition that takes place in a precarious State does not imply the application of the Rule of Law to wrong doers, but merely the decision or pact

to cease hostilities and to consolidate a democratic State.

The result of this assumption is not only the undermining of the States' obligation to prosecute perpetrators of atrocious crimes. With the total absence of individual accountability, it is not possible to identify and consequently stigmatize the political project that enabled the commission of atrocities. Even in precarious States such as Rwanda, Bosnia or Colombia, massive and systematically committed atrocities often correspond to such a political project, which should therefore be condemned in a transitional process. Indeed, that condemnation is necessary in order to guarantee non-recurrence, through the construction of an official truth about the past regime that at least does not lie about it.

It is true that, as Fehrer (1999) argues, punishment of perpetrators of atrocities does not necessarily lead to the stigmatization of the former regime, as happened, for instance, in the Bosnian and Rwandan transitions. Thus, even if individual punishment can lead to the stigmatization of the past regime, as happened in the Nuremberg trials, it needs more than punishment itself to achieve this goal. Individual cases must be treated and shown as enabled by a political regime, which is itself reproachable.

On the other hand, it is also true that punishment of perpetrators is not the only way of assuring the stigmatization of the former regime, as the South African transition illustrates. However, we believe that the South African case is an exception in this regard, given that stigmatization of apartheid was possible thanks to the full exposure of perpetrators to the criminal system and to the assignment of responsibilities—even if they did not lead to the application of sanctions-. In that way, the South African case sharply differs from amnesty formulas, which assume that the Rule of Law should not be applied to atrocities committed in a nascent democracy. In fact, one could even say that the stigmatization of the previous regime through perpetrators' full confessions justified the admission of amnesties in the South African case.

#### **IV. The Discussion of the Colombian Case**

The Colombian case is useful for illustrating the inappropriateness of using restorative justice as the dominant

paradigm of transitional justice, as it has a series of specific characteristics that make evident the risks of such an undertaking.

Some Colombian authors, like Iván Orozco (2002), argue that the Colombian transition should be framed in a restorative justice model based on the concession of reciprocal pardons among armed actors. According to Orozco (2002), the Colombian conflict is a result of violent action of various armed actors, produced in a context of an unconsolidated State, which is therefore incapable of dominating the different groups—or factions- that struggle. That is why, rather than a mere transition to peace, a double transition takes place, which also includes the passage from authoritarianism to democracy (Orozco, 2002).<sup>17</sup> This renders restorative justice the most appropriate tool for dealing with past atrocities, for two main reasons. On the one hand, under these circumstances, overcoming hostilities among factions constitutes an initial step towards the consolidation of the State – or towards civilization, according to Fehrer's (1999) terminology-, which should precede the full implementation of the Rule of Law (Orozco, 2002). On the other hand, in such a conflict, violence is seen as symmetrical or horizontal, instead of being asymmetrical or vertical—which is the case of stable dictatorships-(Orozco, 2002). This means that violence is not mainly produced by the State through repression, but is the result of a conflict in which those who commit atrocities and their social bases of support are, at the same time, perpetrators and victims of the other party(ies) in conflict (Orozco, 2002). This leads Orozco (2002) to the conclusion that the most appropriate transitional formula for Colombia is for the different armed actors to reciprocally concede pardons to one and other.

As interesting as Orozco's interpretation of the Colombian conflict is, we do not agree with it for many reasons. First of all, in our view, rather than a symmetrical or horizontal violence among the different armed actors and their social bases of support, we believe that what happens in Colombia is a multiple victimization of civil society by the different armed actors. In fact, the Colombian war is not characterized by a massive social mobilization in favor or against armed actors. Civil society does not actively support either side of the conflict, but rather suffers the attacks of them all indiscriminately. Thus, a model based on reciprocal pardons exchanged among armed

actors would exclude the participation of civil society in the transitional justice process. Civil society would not participate in the concession of those pardons and, moreover, it would not necessarily feel represented by the armed actors. Instead, the pardoning process would probably go against some of the victims' claims of justice, truth and reparations.

Second, Orozco's interpretation of the Colombian conflict has the very problematic effect of suggesting that perpetrators should not be submitted to the Rule of Law, which should be seen as a future step in the consolidation of the State, subsequent to the cease of violence. As we mentioned earlier, this prevents both individual accountability and the stigmatization of the political project that allowed for atrocities to take place. In the Colombian case, this would mean that paramilitarism, which is an economic and political structure of power, with a definite political project, with State agents and elites as beneficiaries and collaborators, would not be stigmatized. It would also mean that all the State's anti-democratic components that allowed for paramilitarism to exist would not be exposed, stigmatized or reformed. Instead, as Orozco has suggested, given the actual stage of the Colombian State's consolidation, paramilitarism, as a structure of power, will be necessarily legalized through the current peace negotiations.

Third, Orozco's interpretation of the Colombian conflict as a war among factions, which the weak and unconsolidated State has not been able to subdue also seems to suggest that the Rule of Law is not an immediate and necessary objective of the State, since it has to pacify and civilize its people first. We believe that, as precarious and fragile as democracies in the 21<sup>st</sup> century may be, they cannot expect for their process of consolidation to be staggered. Contemporary nascent or weak democracies are ruled by international law, which currently demands of them the application of the Rule of Law since their very existence. They have ratified, at least in the case of Colombia, international human rights treaties that impose on them the duty to prevent atrocities from taking place in their territories, and to prosecute, judge and punish all those who commit them. That is why we believe that, as hard as it may be, the different elements of the Colombian State have to be built and put together all at the same time: the consolidation of the State, in a way in which it reaches and reigns over the entire territory, and the protection of human rights (*see* García

& Uprimny, 2006). The latter task cannot be left for a later period of full State consolidation, which could probably take place several decades (or even centuries) from now.

Fourth, due to the massive and systematic character of Colombian violence, it is highly complex to even identify the actors who would participate in restorative processes of reciprocal pardons. In effect, the conflict's nature makes it difficult to know who would have to ask for forgiveness, and who would have the faculty of conceding it.

Fifth, crimes against humanity, which have been committed during Colombia's armed conflict, are abominable and unpardonable. That is why, with some exceptions, punishment should be imposed in a transitional process. Indeed, it would produce the public condemnation of those atrocities, and it would also become the base on which the new democratic regime should be founded: a regime that would imply the absolute exclusion of past atrocities and that would have human rights at its center.

Sixth, the use of restorative justice mechanisms could have counterproductive results, in terms of the objective of national reconciliation. In fact, Colombian society still ignores the truth about the armed conflict; we do not yet share a common history regarding our past atrocities. Thus, while for some reconciliation is the preponderant objective of transition, for others justice, truth and the democratization of society are equally important objectives. In the former case, democracy will follow reconciliation; in the latter case reconciliation is a result of democracy.<sup>18</sup> That being so, to choose the restorative paradigm would probably imply a reproach of the latter sectors, who could be seen as obstacles for reconciliation, and could even be silenced. Such a situation would not only make of restorative mechanisms instruments of impunity; it would also incubate germs of resentment and violence from the silenced persons, which would seriously put the durability of reconciliation at risk.

Seventh, it is not clear that the use of the restorative justice model as the dominant paradigm of transitional processes could guarantee non-recurrence of atrocities. Colombian history illustrates that pardons of serious violations of human rights do not necessarily bring about the end of violence and the instauration of a culture of respect of those rights.

In contrast, in many cases, pardons have precisely left open wounds and generated a culture of impunity towards atrocious crimes. This has allowed for violence to continue, and even to intensify.

Eighth, following the neo-institutionalist idea, individuals may take advantage of weak or obscure rules (North, 1993). Thus, it is highly plausible that, in the face of the existence of rules that do not contemplate sanctions, armed actors end up taking advantage of them, instead of submitting to their mandates. In that sense, far from guaranteeing the transition from war to peace and from impunity to the respect of rules, armed actors could use restorative justice as a mechanism to perpetuate their disrespect for the Rule of Law.

Finally, there are legal reasons that restrict the possibility of using restorative justice as the dominant paradigm of transitional justice, which have to do with the recent evolution of international law. Today, in spite of certain controversies, it seems clear that victims' rights and State's duties to punish their violation limit the possibilities of pardons regarding the most grave human rights violations. For that reason, to pardon atrocities is not only incompatible with current international law, but it would also activate the International Criminal Tribunal's jurisdiction. This tribunal is competent to assume cases of internally judged persons when "the national decision has been adopted with the purpose of removing the person from criminal responsibility of crimes that pertain to the Tribunal's jurisdiction" (article 17.2.a. of the Rome Statute). An amnesty regarding war crimes or crimes against humanity is certainly included in this hypothesis. This does not mean that all amnestied crimes fall in the jurisdiction of the Tribunal, for the Rome Statute's effects are not retroactive, and Colombia did not admit the jurisdiction of the Tribunal regarding war crimes for the seven years following its ratification. However, this shows the legal and political fragility of a peace process founded in premises of general pardons: not only could the International Criminal Tribunal intervene in many matters, but there is also the possibility that, in application of the universal jurisdiction principle, other cases could be prosecuted by any judge in any State, in the name of the international community. This principle applies to many international crimes, such as genocide, torture or forced disappearance.

For all the reasons previously mentioned, it seems appropriate to conclude that, in transitional justice processes in general, and in the Colombian case in particular, punishment of atrocious crimes plays a crucial role, which strengthens, instead of contradicting, the objective of national reconciliation. That is why, for theoretical and practical reasons, it does not seem appropriate or convenient for restorative justice mechanisms to replace transitional justice, and particularly its retributive component. This does not mean, as we will see in the next section, that the concession of pardons to perpetrators of atrocities is inadmissible under any circumstances, nor that restorative justice tools do not play an important role of complementarity and accompaniment in transitional justice processes.

## **V. Conclusions: the possibility of pardons, if proportional and *responsibilizing***

This document has pointed out the relations that exist among transitional justice, reconciliation, democracy, punishment, and State consolidation. It has shown that the currently popular idea of using the restorative justice model as the dominant paradigm of transitional justice is highly problematic conceptually, for it implies a fundamentalist conception of democracy, it criticizes punishment, and, when it refers to transitions regarding unconsolidated States, it does not allow for the stigmatization of the regime prior to transition. In particular, it has shown the way in which these criticisms are present and become particularly acute in the Colombian case.

Transitional justice faces the complex dilemma of finding equilibrium between justice and peace requirements. However, this equilibrium cannot be reached if one of those requirements is absolutely privileged over the other. In that way, just as general amnesties of atrocious crimes are not viable as transitional justice's formulas, the other extreme, consistent in absolute and inflexible punishment of those crimes, is also not plausible. In fact, this formula omits the important restrictions a political context can impose on excessively exigent transitional formulas.

That is why we propose a different justice model as a

more adequate paradigm for transitional processes in general, and for the Colombian transitional process in particular. We call it the “responsibilizing” pardons model (on this *see* Uprimny & Lasso, 2004; Uprimny, 2006). According to it, the concession of pardons to perpetrators of atrocious crimes should always have an exceptional and individualized character, and should always be ruled by the principle of proportionality. This means that pardon should exclusively proceed when it is the only existing mechanism to achieve the objectives of peace and national reconciliation. And it should always be proportionate to the gravity of crimes, the rank of the perpetrator, and her contributions to peace (Uprimny & Lasso, 2004; Uprimny, 2006). These proportionality criteria are materialized in the following maxims:

(i) The more serious the crime, the less pardon there should be; (ii) the greater the military, political or social responsibility of the perpetrator, the less pardon he or she should receive; (iii) the greater the perpetrator’s contribution to peace, truth and reparations, the greater the possibilities of pardon there should be (Uprimny & Lasso, 2004; Uprimny, 2006). We have therefore no objection to the concession of amnesties to mere combatants. Even certain minor infractions of humanitarian law could be pardoned. In contrast, crimes against humanity and war crimes should not receive total pardons. In these cases, only partial pardons in the form of punishment reductions or criminal subrogates, should be admitted. And partial pardons should be conditioned to the perpetrator’s contribution to peace, truth and reparations, which implies his or her total confession of atrocities and the payment of a minimum dose of retributive punishment. Pardons should also be accompanied with the implementation of additional mechanisms that assign responsibility to perpetrators and stigmatize the previous political regime, such as truth commissions, reparation programs and institutional guarantees of non-recurrence (Uprimny & Lasso, 2004; Uprimny, 2006).

It is also desirable that the responsabilizing pardons model of transition be complemented by restorative justice mechanisms. These mechanisms should be additional to punishment, and should promote the assignment of responsibility on the perpetrator, and for the satisfaction of the rights to truth and reparations. Besides, restorative justice

mechanisms should be implemented in order to guarantee the accompaniment of transition, in those social regions in which the end of conflict implies the existence of vacuum of social control.

We believe the responsabilizing pardons model tries to obtain adequate equilibrium between the demands of justice and peace. In effect, such a model contemplates punishment of atrocities as a general rule, but exceptionally admits responsabilizing pardons, if necessary and proportionate. Additionally, the responsabilizing pardons model is entirely compatible with international law requirements and, consequently, seems legally “armored”. Finally, this model adapts to the particularities and restrictions imposed by the Colombian context.

## Notes

1 This text is based on an article that has been published in Spanish in the following books: Rettberg, Angelika (comp.). 2005. *Entre el perdón y el paredón. Preguntas y dilemas de la justicia transicional [Between Forgiveness and the Wall. Questions and Dilemmas of Transitional Justice]*. Bogotá: Universidad de los Andes – CESO – IDRC, pp. 211-232; Uprimny, Rodrigo (dir.), Botero, Catalina, Restrepo, Esteban, Saffon, Maria Paula. 2006. *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia [Transitional Justice without Transition? Truth, Justice and Reparations for Colombia]*. Bogotá: DeJuSticia, pp. 109-138.

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3 *See* the Colombian Constitutional Reform No. 2 of 2003, which explicitly established that “law will establish the terms in which victims may intervene in criminal processes, as well as restorative justice mechanisms” (free translation).

4 *See Revista Semana* (2005).

5 The International Center for Transitional Justice and the Prison Fellowship International Centre for Justice and Reconciliation are good examples of this.

6 This is the case of Rutti Teitel, whose genealogy of transitional justice identifies three historical periods: the second post-war period, which saw in punishment of perpetrators a universal value to be demanded with no restrictions; the post-cold war period, which, in contrast, had to deal with the tension between the

legal demands of justice and the political need of peace; and the current period, which shows a tendency towards the normalization of transitional justice and, particularly, towards the use of war language in peaceful contexts, just like in the case of terrorism (Teitel, 2003). In spite of Teitel's important contributions to the issue, we disagree with her in some aspects. On the one hand, although her characterizations of each transitional model are rather precise and enriching, it is some times problematic to reduce the classification of transitional processes to a mere historical matter. To offer just one example, even though chronologically speaking both the Rwandan and Yugoslavian transitions occurred in the post-cold war period, they fit much better in the retributive justice model of what Teitel calls the first transitional justice period. On the other hand, as we understand it, Teitel's three models refer to forms of transition (in the wide sense of the word), rather than to specific forms of transitional justice. That is why, for the purposes of this document, only Teitel's second period coincides with what is here understood as the transitional justice paradigm. Indeed, only in that period is the transitional justice dilemma, consisting in the need of finding equilibrium between the demands of justice and peace, evident. In our estimation, it is this need that which gives specificity to the novel category of transitional justice.

7 In previous texts, in which one of us developed a typology of transitional processes throughout history, this type of transition was labeled –just like the Rwandan and Yugoslavian transitions- a “punitive transition”. For a “punitive transition” to take place, certain factual conditions need be present in the transitional context, such as victory of one side of the conflict over the other, legitimacy of the former to judge the crimes committed by the latter, and great efficacy of the judicial system so as to be capable of judging all the crimes committed before the transition. *See* Uprimny (2006); Uprimny & Lasso (2004: 111-2).

8 In spite of their retributive rhetoric, Nuremberg trials were not so punitive in practice. In fact, criminal punishment was centered in the main leaders, and was not applied to every perpetrator of atrocities.

9 In New Zealand, these restorative justice mechanisms have been applied as alternative ways of responding to ordinary crime in a much wider way than they have in most countries. This country's experience is thus very illustrative (*see* Morris, 2002).

10 According to Teitel (2003: 82), for those who defend this point of view, law incorporates demands of mercy. *See also* Minow (1998: 92).

11 That is why we wonder if the Colombian current situation can be characterized as a context of transitional justice without transition. *See* Uprimny, Botero, Restrepo & Saffon (2006).

12 For a detailed analysis of the differences between punishment and vengeance, see Crocker (2002), whose analysis is based on that of Nozick (1981).

13 Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (1998), 212-3, cited in Crocker (2002).

14 As Crocker (2002) argues, it was the absence of this guarantee what led the 1999 Sierra Leona transition to failure. Based on the concession of a general amnesty to Foday Zanco and

other leading members of the rebel group, who were responsible of numerous atrocious crimes, the transition did not last longer than a couple of months. It was abruptly interrupted by the amnes-tied, who took advantage of government's collapse to incur in a new massacre of civilians and in the take of 500 UN personnel as hostages. This finally ended up in the creation of an international criminal tribunal for Sierra Leona.

15 For an explanation of these notions see, for all, Ferrajoli (1995:262 y ss.). Apart from the eventual retributive end of punishment, criminal theory discusses over five possible preventive functions of punishment. On the one hand, there are special preventive doctrines, which are aimed at the offender, so as to prevent him or her to reoffend. These doctrines may be (i) negative, if they simply pretend to neutralize the offender, or (ii) positive, if they seek his or her resocialization or correction. On the other hand, there are general prevention doctrines, according to which punishment is directed to all citizens, in order to prevent them from engaging in delinquency. This can happen either through the dissuasive effect of punishment, following the negative general prevention doctrine (iii), or through punishment's function in reaffirming social cohesion and citizens' adherence to certain values, following the positive general prevention doctrine (iv). Besides the afore mentioned doctrines, Ferrajoli identifies another preventive function of criminal punishment, which is sometimes forgotten: the prevention of vengeances and informal or uncontrolled punishments.

16 Authors like Wilson (2002) have identified the absence of such a commitment as a limitation of the South African transition. According to Wilson (2002), given that punishment was somehow sacrificed in favor of truth, in South Africa, human rights were reduced to the language of political commitment and nation rebuilding. In consequence, the transition's rhetoric of human rights did not actually produce a legal culture based on the respect of those rights. Wilson (2002) asserts that this is why the index of criminality has augmented in South Africa since the transition.

17 Orozco bases his argument on Rajeev Bhargava's typology of symmetrical and asymmetrical barbarism, and on Terry Carl's typology of double and simple transitions. According to Orozco, in stable authoritarian regimes, violence is asymmetrical or vertical, given that the State does not face resistance of an armed actor. There is not an armed conflict, but mere repression. The transition is then simple; it passes from authoritarianism to democracy. In civil wars, violence is more horizontal and, since States that face an armed conflict are usually authoritarian, the transition is double: from war to peace, and from authoritarianism to democracy.

18 We owe this idea to Iván Cepeda.

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