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Beyond Transitional Justice

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Inhaltsverzeichnis

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Beyond Transitional Justice?

1. Introduction

During the last decade, the term 'transitional justice' has become a kind of buzzword. It is extensively used within the UN system as well as within many International NGOs and national governments to describe a wide range of measures of how to deal with a violent past. Interestingly, the concept of transitional justice was coined and elaborated mainly outside the academic context. While closely linked to academic debates, many features of the concept are actually a result of developments in the field and on the political level. Moreover, during the last 20 years the meaning of transitional justice has been broadened, something made explicit by the Kofi Annan Report *The rule of law and transitional justice in conflict and post-conflict societies* from 2004, where not only a variety of judicial, but also non-judicial mechanisms are proposed (Annan 2004). Hence, one of the first questions that arises is precisely whether there are any normative, institutional, psychosocial or social strategies that are not covered by the notion of transitional justice.

One major problem of such an inclusive definition of transitional justice – not the least for academics – is that its analytical value is quite limited. This amorphous notion might be seen more as a proxy for an ambiguous and messy compilation of almost any measure, method or other approach of coping with massive violence in a country. If this is so, why bother using the concept at all? The answer, in short, is that such an influential concept employed by powerful organisations becomes itself – irony aside – a battlefield where meanings are constructed, imposed or sanctioned. Thus, looking at what the debates on transitional justice are and, even more importantly, at what lies beyond, becomes not only a formidable academic

task but also necessarily an exercise in analysing political power. This latter assertion is exactly the opposite of what some proponents of transitional justice would espouse.

With this volume we want to present a small but hopefully meaningful contribution to the discussion on transitional justice. Each contribution is based on extended periods of fieldwork and/or direct involvement in the processes – and problems – of transitional justice at the local level. Although the charge of a certain eclecticism can be levelled against this volume, nevertheless, the geographical range of the examples is fairly wide. More importantly, the topical coverage is broad. What is most important though, is that there is a common leitmotif linking the articles: namely, the question of what lies beyond the notion of transitional justice and how that can elucidate the processes of transitional justice.

2. The two histories of transitional justice

Before discussing the main assumptions, approaches and contradictions inherent to transitional justice, it is certainly helpful to look at the history of the concept. The first major question that arises in this regard is probably that of how old the concept might really be. As with many other concepts from the multilateral or bilateral security and development policy context, transitional justice, much like other concepts such as Good Governance or Sustainability, seems to have been always there.

Going by age, transitional justice can be considered as a young adult. The first explicit mention of the term dates back some 20 years, to the early to mid 1990s. While this seems to be a quite long time-span, especially given the dynamics of the international policy discourse, it has to be taken into account that transitional justice at that time had a very different meaning compared to nowadays. In fact, it might even be advisable to speak about two histories of transitional justice; histories that, on the one hand, share some important similarities, but, on the other, deal with different contexts and challenges.

The 1990s history of transitional justice is intrinsically linked not only to the fall of the Iron Curtain and the democratisation processes in Eastern Europe, but also to the end of military dictatorships in Latin America and

Asia. During the 1980s, the US policy apparatus developed the concept of 'democracy promotion' as one of its main approaches in foreign affairs (cf. Robinson 1996: 73ff) The democratic transitions in Argentine and Chile became the first test cases on the American continent and, via instruments like truth commissions, also the first occasions when the democratic transition became linked to the concept of transitional justice (cf. Stotzky 1993: 187ff).

Of course, the Nuremberg Trials, which held accountable leading figures from Nazi Germany after their defeat in World War II, served as the key background against which these new processes unfolded (cf. Teitel 2002: 373). Mainly relevant in that regard was, as Thomas Carothers (2002) has called it, the 'transition paradigm': the process of (re-)democratisation in the sense of the denazification (historically) or demilitarisation (in Latin America) of domestic politics through the instruments of the judiciary.

It was in the early 1990s that these processes of transitional justice in Latin America were linked to the transition processes in Eastern Europe. Neil Kritz (1995: xxix) for example recalls a conference in Salzburg, Austria, in March 1992, where politicians, journalists and other members of the civil society from Latin America (e.g. Uruguay, Argentine) and Eastern Europe (Hungary, Bulgaria, Lithuania, Czechoslovakia) met to discuss how "to cope with the legacy of that ousted system" (ibid.).

It was one of the first occasions when contemporary problems of transitional justice – who is to be seen as a victim, or what to do with the mass of 'little' perpetrators – were addressed and systematically discussed. Additionally, questions about the financing and the internationalisation of such processes came into play. It is not by chance that the publication of Kritz's three volumes on *Transitional Justice* from 1995, based on research results from a multi-year project on transition processes at the US Institute for Peace, was the first occasion when the term was explicitly mentioned in the scientific discourse in a more prominent way.

While the focus on democratic transitions in Latin America and Eastern Europe was rather straightforward, the inclusion of the then-relevant case of Ethiopia (after the fall of the Mengistu-regime, cf. Kritz 1995: xxxvi) already offered a case were such a transition was not so clear-cut. At first, in the heyday of the democracy promotion paradigm, cases like Ethi-

opia were understood in the context of democratic transition. As Carothers critically points out, by the end of the 1990s nearly 100 countries worldwide were defined within the transition label by US policy actors – what Carothers sees as a sign that "the transition paradigm has outlived its usefulness" (Carothers 2002: 6).

In foreign policy terms, particularly regarding the United States, Carothers' statement might be right or wrong – it proved to be irrelevant in any case, since the promotion of democracy, with the primary test cases of Afghanistan and Iraq and a renewed focus on this since the onset of the Obama presidency, with its focus on 'fragile democracies', has remained a highly relevant raison d'être for international (military as well as civilian) interventions from the early 2000s until now.

Nevertheless, the de-linking of the concept from the democratic transition context was the start of the second history of transitional justice. In that regard, the genocide in Rwanda acted as the main watershed, since it confronted the concept with unforeseen and in fact unimaginable challenges. It was not primarily the number of victims and the inconceivable cruelties of the event, rather, it was the high number of perpetrators (tens of thousands of people, a significant part of the post-genocide population in the country), together with a completely depleted political and in fact non-existent juridical system that caused the difficulties.

While Nuremberg also played an important part as a historical precedent in this case (although not mainly in terms of denazification, but more because of its way of dealing with the crime of genocide), it was obvious that the sheer number not only of murders, but especially of immediate perpetrators of acts of concrete violence, called for new approaches in dealing with the potential judicial consequences.

At that point, transitional justice comes into play as a process not (or at least not only) for dealing with the judicial consequences of a process of democratisation, but mainly as a way of elaborating and linking the various avenues in the post-conflict transition from war to peace, with its main focus on perpetrators of mass violence in often internal and asymmetric civil wars on the periphery. This shift had two important consequences for the concept: firstly, it was opened to other forms or systems of justice that promised at least the possibility of dealing with the huge number of perpetrators (and the complex intertwining between perpetration and victim-

hood in many situations) in a more pragmatic way. In particular, it was Rwanda and the remarkable success of the so called Gacaca courts which paved the way for the integration of Traditional Justice mechanisms into the realm of transitional justice.

Secondly, the question of financing and internationalisation came back on the agenda since from Rwanda onwards the main focal points of Traditional Justice were moved from comparably rich regions of soon-to-be EU-members in Eastern Europe and the more successful economies in South America to poor countries in so-called underdeveloped regions, often devastated by long periods of warfare or violent conflict. Consequently, transitional justice became one of the main sectors of international development cooperation with such countries, alongside related challenges like Disarmament, Reintegration, Security Sector Reform and wider measures in the context of 'Rule of Law'. Transitional justice's inclusion as part of the donor agenda has had important consequences for its content, approaches and vision, as we will show in the discussion of some of its main contradictions below, and as some of the papers will demonstrate with specific case studies.

Today's most relevant definition of transitional justice was delivered by UN's Secretary General Kofi Annan in his report *The rule of law and transitional justice in conflict and post-conflict societies* in 2004. Here, transitional justice is explicitly placed in the context of peace and state building interventions in a post-conflict setting. Its aim therefore is to deal with the "legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation" (Annan 2004: paragraph 8). The measures and methods proposed clearly demonstrate the evolution of the concept beyond the democratic transition context; thus, not only judicial, but also "non-judicial mechanisms" are to be included, "with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof" (ibid.).

Annan's overview indeed highlights all relevant focal points of contemporary discussions of transitional justice as a concept and the implications it already has, should have or should not have. In particular, there are three critical challenges and contradictions – also shown by the contributions in this volume – that demand further discussion: the relationship of

justice, truth seeking and peace building; the, as Annan has called it, level of international involvement, in particular in its relation to traditional justice, but also in regard to the current rise of international criminal law; and the question of reparation, especially in its relation to the question of victimhood, personal as well as structural.

3. What about truth? And justice? And peace?

From the 1970s on, but mainly during the 1980s and 1990s, especially in Latin America, the so-called truth commissions were all the rage in transitional democracies. Today, they number more than 40. In hindsight, one safely assumes with the Annan Report that truth commissions could now be considered part of a transitional justice programme. The simple fact stated there is that "[i]t is now generally recognized, for example, that truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest" (Annan 2004: paragraph 26).

However, this was not always the case, as truth commissions were held to be only second best options as compared to actual prosecutions (cf. Kaiser-Whande/Schell-Faucon 2008: 11). Nevertheless, since Uganda 1974 truth commissions have had a respectable career as tools in reconciliation processes, engaging closely with society. These truth commissions are working more on the level of reparative and restorative justice than on the level of (penal) retribution.

Surprisingly, and in spite of being heralded as a self-evident tool for overcoming civil strife or mass atrocities, there has not been much empirical evidence of the importance of truth-commissions for furthering the peace processes (cf. Fletcher et al. 2009). Mendeloff elaborates 17 assumptions inherent in the reasoning of defenders of institutional truth telling and truth seeking (Mendeloff 2004: 364). Coincidentally, it can be argued that these claims sum up most assumptions of liberal peacebuilding. For convenience broken down into three groups (Psychological, Identity, and Institutional and Normative assumptions), they constitute the core claims of any truth-seeking, truth-telling mechanism. After dismantling or dismissing all of them, Mendeloff concludes that there might still be

some value for peacebuilding in truth commissions, although such value is likely to be overestimated.

It is then hardly astonishing that when examining handbooks dealing with peace or conflict resolution, the term transitional justice hardly shows up. Neither the *Handbook of Peace and Conflict Studies* (Webel/Galtung 2007) nor the *Handbook of Conflict Analysis and Resolution* (Sandole et al. 2009) contain a chapter on transitional justice, but what is even more significant, is that not even the indexes of these books give any reference to this concept. The only exception is *The SAGE Handbook of Conflict Resolution* that features one single article on *Peace vs. Justice – and Beyond* (Albin 2009), where the concept of transitional justice makes it into a short chapter.

4. Levels of justice – levels of involvement

Since its first use – in fact dating back to the Nuremberg trials – transitional justice has been characterised by a sometimes complex interplay of different levels. This is not least due to one of the main rationales behind transitional justice: that it comes, or has to come into, play if or when the national systems of justice are overwhelmed by the scale of violations (cf. Simpson 2008: 74). It was also after Nuremburg, but at the latest during the emergence of the international ad-hoc-tribunals in the 1980s that such powerlessness was not only interpreted in a quantitative way, but also qualitatively, in the sense that a national justice system might not be willing to prosecute mass scale perpetrators, mainly for political reasons.

Following this line of argument, international involvement seems to be a logical step. Such a step could and should assist the national and the local levels in multiple ways, like offering neutral localities where courts and tribunals could be established, by bringing in neutral judges as well as legal expertise, or by offering financial assistance, thus significantly lowering the national costs of any process of transitional justice.

Such technical support seems to be rather self-evident and unanimously supported and it would probably be perceived that way if it limited itself to only this technical dimension. However, like most other forms of technical support on an international level, such self-limitation remains a delusion. We have to take into account here that most processes of transitional

justice in the past two decades have taken place in so-called development countries, thus placing international support for such processes within a donor-recipient-relationship. It particularly because of this relationship that the interplay between the various levels – the local, the national, the international – becomes not only complex, but also complicated.

Furthermore, there is a truly global dimension to this internationalisation of transitional justice, connected to what Ruti G. Teitel (2002: 360) has called a new "humanitarian regime" against the background of a "global rule of law" that "both enables and restrains power in today's political circumstances in order to manage new conditions of political disorder through the rubric of law" (ibid.: 371). Such management, along with the transformation of the international order since the end of the Cold War, now no longer stops at state borders but instead demonstrates a "heightened enforcement of the expanded norms, which are directed beyond states to persons and peoples" (ibid.: 363).

Transitional justice thus becomes an integral part of a 'global rule of law' regime that is transforming the much older global regime of Human Rights into a more concrete, interventionist endeavour. Consequently, this new global rule of law regime goes along with the creation of various levels of international institutions that "range from the international courts to nongovernmental organizations" (ibid.: 363). These new groups of actors are designed to constitute and execute a global regime, but – and this is their most important feature regarding transitional justice – they are executing it in most cases not on a global level, but rather negotiate and implement it on the local and national levels.

Such transformed implementation of a global regime on a local level by international institutions, partly on their own, partly via the funding and guiding of local and national institutions, carries various risks. Of these, the main problem might be what we call the 'double simplification' of internationally implemented processes of transitional justice.

The first process of simplification is mainly due to the international/local divide and the inevitable particular interests of the respective institutions. For example, the intervention of the International Criminal Court (ICC) in Uganda – the case against the leadership of the Lord's Resistance Army (LRA) – became a highly contested issue since it interfered with regional attempts to start a peace process between the Ugandan Govern-

ment and the LRA. As a consequence, various concerns and criticisms of the court were raised (cf. Allen 2006: 96ff). Such local criticism soon became an international problem and a serious concern for the court, since it was its first high profile case and was initially regarded as quite uncontroversial. Therefore, stepping back was not an option, and Chief Prosecutor Moreno-Ocampo got engaged in a highly political debate, not only about the crimes of the LRA, but also about their (according to him, non-existent) political agenda and the prospects of peace talks.

Besides the obvious problem that the Chief Prosecutor had now become practically associated with the ICC as a whole in the public debate in Uganda, Moreno-Ocampo was in no way, either through his position or his expertise, able and/or qualified to seriously comment on such issues. His political interventions hence proved to be counterproductive, not only for the situation on the ground, but also for the ICC itself –because of the simplifying and, for the informed public, sometimes embarrassing statements but also because of the fact that, against this background, the potential war crimes of the Ugandan government in their fight against the LRA (but also in the course of their interventions in the DRC) became neglected in the juridical debate. Later, the court tried to correct this mistake with extensive outreach programs to the communities in Northern Uganda.

Secondly, the specific discourse of criminal law was also designed to present a simple rationale. What is a general feature of criminal law, and of the main arguments of criminal law experts in their calls for the self-restraint of the discipline, takes on a special flavour when combined with the global rule of law regime and the complexity of conflict or post-conflict situations. "The discourse of global criminal law that informs ICC interventions embodies a specific epistemology that interprets situations of violence through certain categories – namely, the criminal, the victim, and the transcendent judge" (Branch 2007: 190). Obviously, the room for manoeuvre in terms of political negotiation processes turns out to be rather slim when applying such categories to the various actors. This not always proves to be detrimental though, given that groups accused of such crimes might indeed change their behaviour in order to get back to (or at least increase their chances of) negotiations.

Nevertheless, such a strict criminal-victim divide is of course unable to deal comprehensively with processes of mass violence. The re-disco-

vering of the local in the context of peace-building in the mid 1990s (cf. Mac Ginty 2008: 140) offered a potentially rewarding road to follow by including traditional methods of justice and reconciliation in processes of transitional justice. The above-mentioned Gacaca courts in Rwanda proved to be remarkably successful in this regard, thus leading to the increased popularity of traditional justice, particularly within the donor community. Nevertheless, the problems of simplification also remain significant in that regard, as Tim Allen (2006: 138ff) showed in the case of the perceptions of traditional justice methods (the so called *Mato Oput* in Northern Uganda, cf. also Buckley-Zistel 2010: 113) and the attempts of achieving an international criminal prosecution of the LRA leadership. The perceptions and also the expectations of the people living in the area were mixed and showed no clear preferences whatsoever.

Nevertheless, traditional justice at times was offered as the panacea of transitional justice by sections of the donor and NGO community, a phenomenon that Roger Mac Ginty (2008: 142) has explained by referring to a certain shared interest of the actors involved: "At a superficial level, this 'popularity' may reflect a prosaic and mutually beneficial relationship between local and international actors: the former may be motivated by a desire to secure any resources and kudos the latter can offer, while the latter may regard traditional and indigenous actors as a means of achieving donor-driven conditions on local participation and acceptance."

Such aspects show that the various levels of transitional justice are in no way coherent or complementary from the outset. Any international involvement leads to severe problems, on the ground as well as on the structural level, while on the other hand the local level in most cases is simply unable to deal with the challenges that accompany any post-conflict-situation. Hence, conclusions are difficult to draw, and the call for self-restraint, in particular in the case of international actors, might be the only option possible. Any process of transitional justice will consist of negotiations between different groups of actors, acting on different levels. A pragmatic approach seems to be the best way to move forward in that regard, notwithstanding the fact that such a "pragmatic approach (often embedded in negotiated processes) is testing the boundaries of how much justice is enough to satisfy the obligations of international law" (Simpson 2008: 79).

5. Reparation and victimhood

A central theme running through all forms of transitional justice is the reparation for victims of mass atrocities, war crimes, and human rights violations in general. These reparations are awarded in varying modes, but these modes share one condition: they are given to victims. Victimhood is thus ontologised. It is also elevated onto a moral pedestal. The construction of victimhood, especially beyond the individual case, becomes a political power game, both on the side of national and international actors.

Interestingly, there have been changes in perspective during the last decades. Meister (2002) illustrates this by analysing a major change in the definition of a perpetrator and a victim for the period of the Cold War and after. During the Cold War many revolutionary groups resorted to violence as the only promising means of gaining political power and deemed this choice of method as just, as a "weapon of the weak" (ibid.: 92). After the transition to democracy and especially after 9/11 all political violence is called terrorist and terrorism becomes a bad thing in itself and has to be prosecuted. The 'good terrorist' has irrevocably become an oxymoron. The victim in the 21st century has to be an innocent victim.

While individualising guilt has grown into a major concern for international courts dealing with violent pasts, such as the ICTY and the ICC (cf. Leebaw 2008), victimhood has become a lump category for all who have lost their lives, families, homes. Unsurprisingly, the problems that arise from both lumping together all sorts of victims and at the same time insisting on the innocence of these victims can turn into a mission that is hardly manageable. Not only is the line between the perpetrator and victim in many cases a thin one – forcibly recruited child soldiers are a prime example – but the changing political climate may change the perspective on a violent conflict (see above) and thus alter the meaning of perpetrator and victim completely. Additionally, the category of gender has only recently received closer attention (cf. Buckley-Zistel/Oettler 2011).

Moreover, there can be parallel processes of reparation that possibly overlap in intricate ways. To give just one example that is also included in this collection of articles, though from another point of view, let us consider Colombia. In that country, many laws for the reparation of victims have been passed, the most inclusive just recently (in June 2011, cf. Wlaschütz

this issue). However, these reparations deal with the injustices of the last two decades at most. Nevertheless, there has been a parallel effort for the reparation for African Colombians to compensate for their historic enslavement (cf. Mosquera 2007). Because of the historical nature of slavery there can be no penal component to this process, but reparative justice measures are heatedly discussed. Unfortunately, for the defenders of reparative measures, the categories get fuzzy. One obvious reason is the historical distance and the fact that no direct survivors of slavery are still alive. The demographic process has lead to complicated identities and the question of who is African Colombian is far from banal. Indeed, it is the locus of academic as well as political disputes (cf. Arocha 2005). The portion of African Colombians varies from around one per cent to up to fifty per cent. Even if these two numbers are extremes, they illustrate well the difficulty of reaching a workable definition of 'Africanness' for an eventual reparation.

To complicate matters even more, the historical claims of African Colombians also compete with the historical claims of the indigenous populations. The land issue in particular is a thorny one, and this despite the existing regulations that try to do justice to the rural populace of both sides; consequently, two collective identities are pitted against each other in the name of victimhood and the various claims this entails.

As Díaz (2010: 300ff) rightly points out, African Colombians have suffered disproportionately from the violent civil conflict of the last decades. They have been made a priority for sped up reparation by national courts precisely because of their historical subjugation. Claudia Mosquera (2007) takes the same line when she argues that African Colombians have to receive reparations both for being 'rescued' from enslavement and having been 'forcibly displaced' during the war. The challenging difficulties of defining who is African Colombian aside, a central problem is that African Colombians also acted on the side of the perpetrators. This is patently clear in the case of the ongoing armed conflict, but it is also true for the historical example. Sergio Mosquera (1997) shows that, although Africans freed themselves by various means such as buying their freedom from their master or running away, when free some resorted to the use of slave labour themselves.

6. Preview of papers

The four articles compiled in this issue deal with the phenomenon of transitional justice from different angles. Though some problems such as the contested political nature of all cases come up more than once, the focus of each text is different, just as each country has a particular history of violent conflict. Another issue surfacing in every text is truth: truth as an indispensable ingredient to reach justice and at the same time its role at the centre of political dispute. The papers also have in common a perspective that extends beyond transitional justice in the normative sense. This new perspective is precisely how this notion – which has degenerated into a buzzword – can reclaim analytical meaning and may once again be a valuable concept and tool for dealing with atrocities.

Sandra Rubli's article, empirically based on her research in Burundi, proceeds to tell the intricate history of conflict in Burundi and the dealings with the violent past there. The case of Burundi could make a neat example of transitional justice were it not for the controversies surrounding this process. Truth is not a neutral matter when political parties compete for power, especially if these parties are all involved in one way or another with past violence. The notion is that whoever wins the power over truth wins political power or, conversely, whoever holds political power avoids dealing with certain aspects of truth about the past in order not to endanger their position.

Any international intervention can then be perceived as meddling with national or local politics and will be challenged in one way or another. Even an internationally brokered accord like the Arusha Peace and Reconciliation Agreement that was signed by parties of the earlier conflict in Burundi has not been implemented, except for minor measures. This might be due to the fact that not all parties concerned were included in the process and thus were reluctant to accede to the Agreement. On the other hand, all parties see different opportunities in the workings of transitional justice and try to influence the process to their advantage. The conclusion is, that in order to ensure that transitional justice can work reasonably well, one has to understand the concerns, motivations, interests and intentions of all the parties (in the broad sense) involved. Otherwise, such a process is doomed to fail.

The contribution written by Susanne Schmeidl sheds light on the case of customary justice in Afghanistan. Despite the fact that Afghanistan features prominently in many academic and political analyses and that the operation of transitional justice there is at the centre of attention of the UN, the rigour of the political situation has dealt harsh blows to many core aspects of transitional justice as laid out by the UN system. Instead of truth for everybody, reparation for the victims and punishment for the wrongdoers, amnesty laws without accompanying mechanisms to reveal the truth have been passed by the national government in order to gain political leverage. Earlier attempts to establish justice and reconciliation also failed miserably because of the meddling of local politicians.

It may seem an ironic twist when Schmeidl then advocates locally based customary justice practices as a new approach for transitional justice. She argues that customary justice institutions have shown persistence and accessibility and so she, instead, focuses on restorative, not retributive, justice. The latter may also be interpreted as a lack of effective enforcement of legal decisions by customary law institutions, but nonetheless this does not equate to impunity. The perpetrators usually have to ask the victims' families for forgiveness and in many cases have to pay 'blood-money'. However, customary law is not a panacea. There are problems, for instance the fact that the community cohesion must be strong enough in order to resist tensions arising from the processes and judgments. Another problem is the gender bias within traditional institutions. Women tend to be excluded or discriminated against. Finally, the cases may be too many for the traditional system to handle, especially because some of the institutions have already other obligations they must cope with. Schmeidl concludes positively, arguing that such a view, beyond the beaten track of transitional justice practices that have not met with impressive success, might offer new directions of how to overcome a difficult impasse.

Katja Seidel describes local practices of justice in Argentina, one of the classic examples of a democracy in transition. Within a few years after the end of the dictatorship, the country had a tribunal and also a Truth Commission that dealt with the horrors of the military dictatorship. A legal framework that effectively barred attorneys from prosecuting the perpetrators of human rights violations was set up not much later. Despite the fact that the law made it difficult for the national legal system to act against perpetra-

tors, a local practice called 'escrache' developed into an instrument of establishing justice. This exercise is not backed by the state but is anchored in local community practices that not only 'pillory' the culprit but also bring about a consolidation of the community. Again, truth in this context is broken down to very specific individuals, local contexts and histories. The National Commission has no more authority in this particular form of action.

Quite from the opposite side on the spectrum of legal systems comes an initiative that seeks to establish the atrocities committed during the era of the military dictatorship as genocide. From this it could follow that national legal provisions that protect perpetrators from further prosecution could be undermined by International Law. Here again, local interests enter the political arena and a transitional justice process that had apparently ended is re-opened and re-negotiated. The contestation in the Argentinean case comes thus from both the local and the international level.

Finally, Christian Wlaschütz's article is on Colombia. Despite the fact that both countries are located on the same continent, the cases of Argentina and Colombia are quite divergent. Contrary to Argentina, the conflict in Colombia is still ongoing and agreements between parties have only been partial until now. This feature hardly makes it a role model for transitional justice. There has never been a truth commission or a practice comparable to 'escrache' but rather court hearings for the penitent wrongdoers so that they can receive a remission or reduction of a prison sentence. The word 'genocide' has not been frequently used for the Colombian case and would probably not fit the complex history of armed conflict in that country.

The problem that Wlaschütz poses himself is whether transitional justice can contribute anything to a process of reconciliation between victims and perpetrators. His contention is that there is already enough truth around; in other words, it is well known who committed which crimes. However, there is also a lack of political will at the higher echelons of national politics to acknowledge crimes against humanity, mistakes, or even blunders by the official armed forces. The author, in general, detects a certain deficiency in the application of measures against perpetrators. Ironically, the most severe punishments against the political leaders of the paramilitary forces have been imposed on them by the US legal system, albeit for drug crimes barely related to the grave crimes against humanity which are of concern in the Colombian processes.

The cases of Burundi and Colombia also show the difficulties of complex, multiparty peace processes after at least partial agreements have been reached. Argentina and Afghanistan are starting to open an expressly local perspective for transitional justice while at the same time being firmly embedded in the international context. Then there is the ethnic dimension of the population in Burundi as well as in Afghanistan. These intersecting themes open another aspect for possible comparisons and debates among scholars of transitional justice, something that cannot be explored here but which seems a promising option.

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Knowing the Truth – What For? The Contested Politics of Transitional Justice in Burundi[1]

1. Introduction

In the 1990s and early 2000s Burundi experienced a deadly civil war which was preceded by various cycles of violence following the country's independence in 1962. As a measure to fight impunity and to break these vicious cycles of violence and revenge killings, the Arusha Peace and Reconciliation Agreement establishes provisions for a series of transitional justice mechanisms. However, until today, neither a truth and reconciliation commission nor a special criminal tribunal has been established.

Transitional justice has become a prominent element in liberal peacebuilding (see Sriram 2007). It aims to promote social and political integration and reconciliation, to enhance the rule of law, to fight impunity and to increase trust in government institutions. This normative model is mainly based on humanitarian law, international criminal law and human rights law (Bell 2009). However, transitional justice is not a value-neutral process, but rather a political process through which historical 'facts' and 'truths' are produced. Therefore, it is open to negotiations and contestation because, on the one hand, it touches on fundamental interests of politicians, especially those who have been implicated either personally or through their respective parties' armed wings in the civil war. On the other hand, transitional justice may be contested, because the politicians' understandings of the basic concepts of transitional justice, such as justice, reconciliation and truth, do not fit with international transitional justice norms or the liberal peacebuilding model. Through the contestation and negotiation of the process of 'dealing with the past' process, political actors may try to depict certain 'pasts' which are most favourable for them.

In Burundi, transitional justice is a widely contested issue among political parties and politicians. They view it as a complex and delicate matter (Interview C). There is thus no consensus for the normative transitional justice model propagated by liberal peacebuilding and international donors. It is true that most of the political actors in Burundi have been implicated in the violent past and that a transitional justice process would certainly touch their interests. But behind this 'lack of political will' for the normative model are also divergent conceptions and understandings of justice, reconciliation, truth and even transitional justice itself.

This paper is mainly based on interviews with high-ranking representatives from political parties, interviews conducted during extensive empirical field work in Burundi.[2] The empirical part shows that, in addition to the workings of power politics, divergent conceptions of transitional justice lie at the basis of the contested transitional justice process. After a brief overview of the Burundian transitional justice process and a consideration of some structural reasons for its deadlock, the paper looks at the different stances of four main political parties. Political parties do not only disagree about transitional justice mechanisms and their mandate, but also have divergent understandings of justice and reconciliation, as well as truth. Moreover, an important question is what one 'does' with the truth. As an interviewee asks, one knows the truth in order "to do what? How would this truth be oriented and used?" (Interview A). This implies a variety of questions. Should the truth be known in order to prosecute alleged perpetrators; to rewrite a certain version of history; or to gain legitimacy and votes during elections? Political actors, by appropriating the normative concept of transitional justice, may use it as an instrument for partisan interests. The first section of the paper explains, on a theoretical level, why transitional justice might be contested due to fundamental interests of political actors and because of a different conceptualisation of justice, reconciliation and truth. Furthermore, it elaborates how transitional justice might be used as an instrument for political struggles. Finally, following the empirical part, the conclusion puts those different conceptions of the respective political parties in the wider context of the discussion of the contestation of transitional justice.

2. Producing 'truths'

Most practitioners and advocates who propagate a normative transitional justice model confirm that political will is a precondition for a transitional justice process to take place (cf. UN Secretary General 2004). It is assumed that the political actors would contest the principles of transitional justice, as many of them might be responsible for past crimes. A transitional justice process, especially criminal prosecution, would touch on fundamental interests of political actors. For example they can lose their office position if, through a vetting process, it is discovered that they are responsible for human rights violations. Or, they may even risk long prison sentences if a special tribunal discovers their past crimes. Finally, they may lose credibility among their voters if a truth commission sheds light on their role during the conflict. Such arguments for a lack of political will for 'dealing with the past' according to international transitional justice norms all stem from a logic of rational choice. Consequently, actors who do not benefit from transitional justice or even may be harmed by it will not be in favour of such a process and will try to block it or at least to influence it in their own favour. The intuitive assumption is that the more power actors hold, the more capable they are of shaping the transitional justice mechanisms in a way that serves their interests (cf. Sieff/Vinjamuri Wright 1999; Rubli 2010).

Various actors, including state authorities, political parties, or civil society organisations, negotiate, shape and compete for the nature and direction of a transition, as "whoever can win the transition, can win the peace, and whoever can win the peace, can win the war" (Bell 2009: 25). According to the premise of 'never again', transitional justice is supposed to reform the system which allowed gross human rights violations and to design a legal and political system that prevents violent conflict. Such reforms may be contested either in terms of the intrinsic values of reasserting the rule of law or in terms of the broader political affirmation or denial of a certain constitutional or political past (Bell et al. 2004). Thus, transitional justice has the capacity to adjudicate the rights and wrongs of the conflict and more generally the 'truth' about the past. It assesses and judges individual guilt and social and institutional responsibilities (Bell 2009). Such produced 'truths', 'facts' and interpretations about the past

are then translated into institutions and institutionalised norms, such as the rule of law or the new constitution. Consequently, transitional justice does not only affect the past but also affects the future. Historical lessons are framed in relation to the needs of the present (Leebaw 2008). The past is framed in such a way that it serves as a basis with which to construct the present political apparatus and the state. For example, in the Arusha Agreement (2000), the parties agreed that the conflict in Burundi was a political conflict with a strong ethnic dimension. This framing of the conflict as political in nature made a reform of the political system a valid option. Moreover, the difficult question of identity transformation after a purely ethnic conflict was thus avoided. In this sense, political parties may use a truth commission and transitional justice as instruments of political struggle. For example, if the produced 'truth' posits that the killings of Tutsi in 1993 was a genocide, this official narrative will give more legitimacy to the ethnic quota which gives the Tutsi minority a huge over-representation in political institutions compared to their share of the population (14 percent Tutsi; Sculier 2008).

Norms, institutionalised rules and law regulate our behaviour, shape our political relations, our language and even the way we think; thus they have the capacity to regulate violent behaviour and expose arbitrary state practices (McEvoy 2007). In the transitional justice language, they fulfil the functions of the 'never again' or 'non-recurrence' premise (cf. Joinet 1997). At the same time, formalised norms and laws represent a way of conceptualising and articulating how we would like the social world to be (McEvoy 2007). Thus, transitional justice is not a mere "(value-) neutral process" (Bell 2009: 6) to deal with past human rights abuses, but instead reflects certain social and normative values. As it is mainly in the field of politics that we decide about the organisation of a society and how and which norms and perceptions will be translated into legally binding institutions or regimes, transitional justice should be understood as an inherently political process. As a social engineering project (Rubli 2011), transitional justice reflects different perceptions and conceptions about justice and reconciliation or more generally about what the post-conflict society should look like. Consequently, transitional justice may be contested by political parties because their conceptualisations of justice or reconciliation does not fit with the ones of the normative transitional justice model.

The following empirical part of this paper looks at different understandings of justice, truth and reconciliation expressed and espoused by Burundian political parties and how – in addition to fundamental power interests – they might inform these parties' stances on transitional justice. Moreover, it shows how the political parties may use the produced 'truths' and discourses to further certain partisan interests.

3. Burundi's transitional justice process

Burundi experienced several cycles of violence. In 1965, an unsuccessful coup d'état by a group of Hutu gendarmeries triggered retribution by the Tutsi-dominated army. This pattern repeated itself several times in the following decades. In 1972 a Hutu-led insurrection, caused by the more or less systematic exclusion of Hutu from the institutions of government, triggered a violent response by the army and led to the killing and disappearance of many Hutu intellectuals (Uvin 2009). In 1988, in an outburst of violence, around 20,000 Hutu were killed by the army. After democratisation efforts at the beginning of the 1990s, a civil war broke out in 1993 with the assassination of the first democratically elected president, Melchior Ndadaye (Daley 2007).

In August 2000, Burundian political parties signed the Arusha Peace and Reconciliation Agreement (Arusha Agreement 2000), which included provisions on transitional justice. The agreement claimed that, as a mechanism for national reconciliation, a Truth and Reconciliation Commission (TRC) would shed light on the truth about grave violence, promote reconciliation and forgiveness, and clarify the entire history of Burundi (ibid.: art. 8, protocol 1, chap. 2). Moreover, the agreement also claimed that an International Judicial Commission of Inquiry (IJCI) should be set up to investigate and establish the facts relating to genocide, war crimes and crimes against humanity. Based on its findings regarding the occurrence of such acts, an international criminal tribunal would then try and punish those who are responsible (ibid.: art. 6, protocol 1, chap. 2). The TRC and the IJCI were planned to be established during the transitional period following the signing of the Arusha Agreement (2000: art. 18, protocol II, chap. 2).

However, during the transitional period (2001–2005), neither the TRC nor the IJCI was established. As a reaction to the request by the government to establish the IJCI, the UN sent an international assessment mission to evaluate the advisability and the feasibility of the IJCI (Vandeginste 2009). The resulting so-called Kalomoh Report (2005) called for a reconsideration of the Arusha formula (TRC, IJCI and the International Criminal Tribunal) by proposing a twin transitional justice mechanism consisting of a TRC and a special chamber in the court system of Burundi.

Following the endorsement of the Kalomoh Report, the UN and the Burundian government negotiated, in 2006 and 2007, on the implementation of the report's recommendations. The idea of the special chamber seems to have been yielded in favour of a special criminal tribunal (Tribunal Penal Special – TPS) (Ndikumasabo/Vandeginste 2007). The main issues of discord were the question of amnesty for war crimes, crimes against humanity and genocide; the independence of the special tribunal's prosecutor; and the interrelationship between the TRC and the TPS (ibid.). In 2007, as the lowest common denominator of the negotiations between the UN and the Burundian government, they agreed to hold popular consultations on the establishment of the transitional justice mechanisms. In 2009, a representative sample of all different Burundians societal sectors were invited to express themselves on issues such as the modalities and composition of the TRC and the TPS. However, the issues of discord between the Burundian government and the UN as well as on the opportunity of utilising one or the other mechanisms (TRC and TPS) were deliberately excluded (Comité de Pilotage Tripartite 2010). In this regard, the consultations have only a minor role to play in the construction of 'the truth'.

4. Transitional justice impasse

Except for the national consultations, there has been no progress in the transitional justice process since the signing of the Arusha Agreement in 2000. This delay in implementing the transitional justice mechanisms is possibly due to several structural reasons. Firstly, the Arusha Agreement did not end hostilities, as armed rebel groups, namely the CNDD-FDD (Conseil

National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie) and the FNL (Forces Nationales de Libération), were deliberately excluded from the negotiations (Sculier 2008: 8). During the transitional period the government did not consider transitional justice as a priority; instead, its preoccupation was with ending the violent hostilities, integrating the rebels into the state structures and preparing the elections and the new constitution. This also holds true for the armed groups; their focus was "not talking about truth", but rather, first to integrate into the government and state structures in order to "be in a position of strength", as a former vice-president (1998–2001) states (Interview B).

Even after the elections in 2005, which brought to power the former rebel group CNDD-FDD, the political climate was considered to be too unstable for a transitional justice process. As a representative of the CNDD-FDD says: "While the country was still at war with the FNL, it was at the very least impossible to establish a truth and reconciliation commission and transitional justice mechanisms" (Interview C). Priority was given to the achievement of a peace agreement with the last remaining rebel group, FNL, and its reintegration. In 2006 the Burundian government and the FNL finally signed the Dar es Salaam 'Agreement for the Attainment of lasting Peace, Security and Stability' (2006). However, fighting continued and it was not until April 2009 that the armed group was accredited as a political party (Vandeginste 2011). During both periods – the transitional period and the first mandate of Pierre Nkurunziza – the Burundian government gave priority to ending hostilities, and transitional justice was considered as an obstacle, or at least as a potential threat, to the goal of achieving peace. This raises the question of timing, such as when to establish transitional justice mechanisms within the wider peacebuilding process. However, as this paper will show, the transitional justice process might be blocked not only because of unfortunate timing, but also because of an inappropriate conceptualisation of transitional justice by the international normative discourse.

Secondly, with the first post-transition elections and the victory of the former rebel group CNDD-FDD and its leader Pierre Nkurunziza, a new power constellation emerged (African Elections Database 2011). The CNDD-FDD does not feel that it is bound by the Arusha Agreement (cf. The Economist 2011), because it was excluded from the negotiations (Sculier 2008). This might also hold true for the transitional justice issue. Although

the CNDD-FDD signed a global ceasefire agreement (Pretoria Protocol 2003) which did not challenge the provisions on transitional justice in the Arusha Agreement, the CNDD-FDD did not insist too much on their application (Vandeginste 2009) in its first term. From a rational point of view, this is understandable, since, as a former rebel group, the party is not interested in having a judicial mechanism that punishes human rights violators (at least from its own ranks). Although the Arusha Agreement (and later the Kalomoh Report) foresees two mechanisms, the CNDD-FDD questioned the TPS in a memorandum in 2007: "The choice has to be made between national reconciliation through the Truth and Reconciliation Commission and repression by means of the special criminal tribunal. Another possible solution would consist in favouring reconciliation and submitting to the special criminal tribunal only the disputes which could not be resolved through reconciliation." In this regard, the long negotiations between the UN and the CNDD-FDD government (2006 and 2007) and the national consultations can be seen as a delaying tactic. As a civil society representative says: "The process of the consultations started in April 2007, and today it is June 2010, thus three years of consultations. I think the consultation process has only slowed down the transitional justice process. We have lost another three years in establishing the transitional justice mechanisms" (Interview D).

Thirdly, the Kalomoh Report altered the game of transitional justice in Burundi. The idea of the IJCI was abolished in order "to avoid the establishment and operation of two virtually identical commissions – a national truth and reconciliation commission and an international judicial commission" (Kalomoh Report 2005). This proposition opened up an important sequencing question, namely the relationship between the TPS and the TRC and the definition of acts as genocide, crimes against humanity and war crimes (Ndikumasabo/Vandeginste 2007). The IJCI would, according to the Arusha agreement, have the mandate to determine whether these three international crimes had been committed in Burundi. Thus, the Kalomoh Report opened up new opportunities for the political actors to negotiate the terms and conditions of transitional justice in Burundi.

As several transitional justice advocates and human rights organisations state, such a deadlock would in such cases be due to the lack of political will for transitional justice. Human Rights Watch (2009) claims that "the [Burundian] government has shown little political will to hold account-

able those alleged to have committed these crimes". Underlying this statement is the assumption that political actors do not want to deal with the past, as many of them have been implicated in past crimes and therefore potentially fear prosecution. Thus, there is no support for a normative transitional justice model which promotes a rather adversarial, retributive mode of formal legal justice (Lambourne 2009). This conceptualisation might be largely contested by Burundian political parties because they have divergent understandings of justice, reconciliation and truth, which exacerbate this 'lack of political will'.

5. Different understandings of justice, reconciliation and truth

The transitional justice provisions in the Arusha Agreement (2000) represent some sort of compromise between the negotiating parties. The main dividing lines during the negotiations between the political parties were along ethnic lines (OAG 2009). As the biggest parties represented in the negotiations, FRODEBU (Front pour la Démocratie au Burundi) headed the Hutu dominated block while UPRONA (Union pour le Progrès National) represented the pro-Tutsi block. With the democratisation attempts in the early 1990s and the following civil war, the number of political parties rocketed and, as of today there are around 43 officially registered political parties (OAG 2009). The history of the evolution of political parties is marked by many splits into different branches, defections of important figures from one party to another and the foundation of new parties by former members of others (Vandeginste 2011). Most of the political parties are quite small however, and do not have great influence; thus, this paper only looks at the position of four of the most important parties, namely the FRODEBU and UPRONA, as two parties representing the ethnic blocks during the Arusha negotiations, and the CNDD-FDD and the FNL representing two former rebel groups.

5.1 UPRONA: punishment as a guarantee of non-recurrence

UPRONA (Union pour le Progrès National) was founded in 1957 and imposed itself in 1966 as the only party until – with the democratisation efforts during the 1990s – other political parties were permitted

(OAG 2009). Its leadership became increasingly Tutsi dominated, not least because Hutu were systematically excluded from higher political, educational and economic positions (Uvin 1999).

Over the question of whether or not to negotiate in Arusha, a small group broke away from the party to form the faction of UPRONA-Mukasi led by Charles Mukasi (OAG 2009). They opposed and denounced the negotiations, saying they were "aimed at institutionalising genocide and destroying the Burundi nation" (IRIN 2000). This small but rather extreme wing claimed publicly that in 1993 a genocide was carried out by the Hutu of FRODEBU and requested the establishment of the TPS (UPRONA 2009). This wing represents an often evoked discourse by Tutsi political elites (McKinley 1997). It says that the majority of Hutu would like to physically eliminate the Tutsi minority and makes reference to the genocide in Rwanda in 1994. Such parties seek to interpret the violent events in 1993 as a planned genocide against the Tutsi minority by referring to a report of a UN-led commission of inquiry in 1996 (UNICIB 1996: art. 473). Some of the Tutsi dominated parties firmly requested, during the Arusha negotiations, that the tribunal be put in place before the elections in 2005, as they expected that Hutu politicians (especially those who joined rebel groups) were to face criminal prosecution, which would end their political career. Once sentenced or jailed, they would no longer be political competitors in elections for the pro-Tutsi parties (Vandeginste 2007). Thus, these political parties used the concept of transitional justice, especially the TPS, to strengthen their power and gain more political influence through elections by 'eliminating' political adversaries and competitors. Not surprisingly, the Mukasi wing of UPRONA (2009) reiterated in 2009 its request to establish the TPS before the 2010 elections.

Although UPRONA does not evoke this Tutsi elimination discourse as prominently as the UPRONA-Mukasi faction, it nevertheless strongly advocates the setting up of a tribunal. According to UPRONA (Interview E), inquiries should be undertaken in order to classify the crimes which are potentially acts of genocide and crimes against humanity. This process should distinguish between those who executed the crimes and those who commanded them, with the intention of attributing guilt and responsibility to the latter. Justice should come first, as nothing else would dissuade those who have killed people from repeating their crim-

inal acts. For UPRONA, punishment is a guarantee of non-recurrence and a measure for preventing the still ongoing fear of genocide. Only after justice has been applied "we can speak about negotiations, reconciliation and forgiveness" (Interview E). Forgiveness cannot be enforced (Interview E) and it may not prevent recurrence, since someone who asks for forgiveness may not be sincere (Interview C). In this sense, forgiveness is equated with lack of punishment thus, with an amnesty for past crimes. Reconciliation is, for UPRONA, "knowing the truth in order that the Burundians are finally freed from the trauma of criminality and the cycles of violence" (Interview E). Thus, UPRONA considers the TRC and knowing the truth as necessary for reconciliation and for breaking the cycle of violence. However, the 'truth discovered' by the TRC should not be used to simply advance forgiveness; at least a minimum of judicial accountability is needed to reconcile Burundians. Thus, the TRC and the TPS are seen as complementary (Interview C).

5.2 FRODEBU: knowing the truth as a basis for prosecution or forgiveness

The second party which played an important role in negotiating transitional justice in Arusha was the mainly Hutu-dominated FRODEBU (Front pour la Démocratie au Burundi). The party was accredited in 1992 and won the first democratic elections in 1993 (African Elections Database 2011). During the transitional period, FRODEBU was part of the government (Uvin 2009). Today, the party is a member of an alliance of opposition parties which claims that the 2010 elections were rigged (ADC-Ikibiri 2010). The Arusha Agreement stipulates that the transitional justice provisions should be put in place during the transitional period. However, at this time the country was still considered to be at war with the two rebel groups CNDD-FDD and FNL. According to a representative of FRODEBU, the priority of the government was, during the transitional period, to definitively end the war (Interview B). Here, FRODEBU cites an argument which fits into the debate on peace versus justice: justice is only possible if there is peace and, yet, justice itself can hinder the achievement of peace (Sriram 2009). Whether this argument served as a pretext to not set up the transitional justice mechanisms, especially the tribunal (since FRODEBU is accused of having committed

crimes during the civil war; c.f. Hara 2005) or whether this is simply not the case, is difficult to judge.

Generally, FRODEBU is in favour of a TRC in order to "to put together again the different components of society" (Interview F). Moreover, "during the war people lost their goods, abandoned their land, all this should be known in order to envisage a solution" (Interview G). The TRC should thus be established in order to ascertain the truth, following the example of South Africa (Interview F). In contrast, the party supports the TPS only if it is "necessary" (Interview G); that is, if there have been crimes against humanity, war crimes and acts of genocide which would then be judged by the tribunal. FRODEBU considers that, with the Kalomoh Report, the TRC and the IJCI would have been "merged" (Interview C). According to FRODEBU the IJCI should judge whether the crimes are acts which could be forgotten, which could be forgiven or which could be "described as unforgivable" according to international law (Interview F). Knowing the truth would then allow for the qualification of the crimes which would have originally been the mandate of the IJCI and the evaluation of which perpetrators are to be prosecuted by the tribunal and which one are granted amnesty or forgiveness. Thereby, the TRC would also execute legal tasks limiting the tribunal prosecutor's independence in carrying out their own investigations. It would become quite a powerful body in producing and interpreting truths. Thus, the mandate of the TRC might be designed in such a way that it serves particular political interests and the TRC might be staffed accordingly. A representative of FRODEBU reflecting on the current political context, said that, if UPRONA and the CNDD-FDD are implicated in crimes in some way, and both hold governmental power today, would they not design "a TRC that protect themselves?" (Interview F).

5.3 CNDD-FDD: truth and justice only for reconciliation

Originally, as an armed wing, the CNDD-FDD (Conseil National pour la Défense de la Démocratie – Forces pour la défense de la démocratie) emerged in 1994 and was, as an armed group, excluded from the negotiations in Arusha (Sculier 2008). After signing an agreement with the transitional government in 2003, the movement became a political party before the elections in 2005 and emerged victorious (African Elections Database 2011). During its first term and the election campaigns of 2010, the CNDD-FDD,

and especially its leader, Pierre Nkurunziza, successfully presented itself as the one that brought peace and reconciliation to Burundi (cf. Reyntjens 2005; Interview A), although fighting with the FNL continued until April 2008. Moreover, the CNDD-FDD has succeeded in moulding an image of itself as a national populist party which represents both ethnic groups. This is in contrast to former claims to fight for the Hutu cause (The Economist 2005). This inclusive stance is also reflected in the CNDD-FDD's understanding of reconciliation. A representative of the party explains that reconciliation does not start at a precise moment, but instead starts the day when the parties are able to sit together to negotiate. It is a kind of rapprochement between people which is in 'in progress' and to which something new would be added every day (Interview A). He indicated with his hands a steadily rising linear process describing reconciliation. For the CNDD-FDD the reconciliation process between Hutu and Tutsi has already progressed considerably and the cleavage between them has been closed or at least been significantly reduced. Consequently, this understanding of reconciliation influences the party's position on transitional justice. A party member says: "We have to push the pedal of reconciliation, thus, let's push the pedal of truth and reconciliation" (ibid.). The question of truth and reconciliation would, as with many other issues, be dealt with and thus "emptied" (ibid.) during the legislature 2010–2015, as reiterated by Pierre Nkurunziza (2010) in his presidential inauguration speech.

In contrast, the CNDD-FDD opposes the TPS which punishes, because the party's members might be among the first to be judged, since they are accused of having committed crimes during the civil war in Burundi (Watt 2008). However, this may not be the only reason; additionally, such a tribunal does not fit with the party's understanding of reconciliation. One interviewee expressed the view that reconciliation in Burundi has already reached a certain level and that people would steadily reconcile (Interview A). He asserts that establishing the TPS would "destroy what has already been achieved in terms of reconciliation" because individuals would simply be accused (ibid.) and these 'accusations' would once more tear apart the people. The CNDD-FDD considers that the reconciliation process is already too advanced for a tribunal and claims that the justice promoted by the TPS would risk reframing the conflict once more in ethnic terms by opposing (Hutu) perpetrators to (Tutsi) victims (ibid.).

Hence, the CNDD-FDD is only in favour of a tribunal as long as the party considers that it would contribute to (their understanding of) reconciliation. However, the tribunal's perceived conception of a punitive form of justice does not fit with the CNDD-FDD's conception of reconciliatory justice. Additionally, the ultimate aim of finding the truth should further enhance the reconciliation process: "this truth is used in a wise way in the sense that it would lead Burundians to reconcile" (Interview C). If the 'discovered' truth would cause conflicts again, then the TRC would not be useful for Burundi (Interview C). Thus, the TRC should produce a truth that would reconcile society and bridge the gaps between former adversaries (meaning ethnic groups). Moreover, the truth should be used in order to rehabilitate certain individuals that have been unjustly accused, but also in order to identify the criminals (Interview C).

5.4 FNL: social justice for past injustices

Burundi's so-called 'last rebel group', FNL (Forces Nationales de Libération) was founded in the late 1970s in Tanzania by Burundian refugees that fled the violent events in 1972 (ICG 2007) which it claims were a genocide against Hutu (cf. Lemarchand 1998). In order to be allowed to participate in the 2010 elections, the rebel group turned into a political party (Vandeginste 2011). After the elections it joined the alliance of opposition parties which claims that the elections were rigged (ADC-Ikibiri 2010).

The Dar es Salaam Agreement that the FNL signed in 2006 proposes some amendments concerning transitional justice issues. The most important one is the renaming of the TRC as the Truth, Forgiveness and Reconciliation Commission. Its mission shall was stated as being "to identify the responsibility of the different individuals with a view to forgiveness and reconciliation" (ibid.: art. 1). Nevertheless, this renaming seems not to have been taken up by most actors, as they continue referring to it as the TRC. However, the notion of forgiveness is a central element in the FNL's understanding of transitional justice. The party strongly opposes the TPS which punishes perpetrators; instead, it proposes that those who ordered the crimes should show regret and remorse and ask the population for forgiveness (Interview G). In addition to the fact that its members are accused of having committed crimes (Human Rights Watch 2010), there are possibly three reasons underlying this rejection of a tribunal. The first one is a rather

pragmatic one; the party considers that if everybody who has committed a wrongdoing in the past is accused, then there would only be a very few innocent people left (Interview G). Thus, there would be too many people to be judged by one tribunal and Burundi would be deserted except for the overcrowded prisons. Secondly, for the FNL, some of the past crimes that should be dealt with are difficult to define, as they concern the exclusion of one ethnic group from education, economic wealth and the access to the state (Interview H). The FNL, which claimed to have fought for social justice (for the Hutu), is convinced that the TPS would not address such past social injustices. Finally, the FNL does not trust the Burundian justice system, as it considers it to be biased and partisan. As a party member puts it, "like the army was monoethnic, also the justice [the judicial sector] was monoethnic, thus talking about the independence of the magistracy would be very difficult" (ibid.).

One of my interviewee explains that it would be insulting to talk about transitional justice, as it is an "unjust justice". He reflects: "would it be only justice for a certain political context and [real] justice would only come into function afterwards?" (Interview H). In the meantime, individuals who have not been condemned because they occupy high-ranking positions, may have developed self-protecting systems (ibid.). This interviewee is referring here to members of the CNDD-FDD who are accused of having committed human rights violations, but have never been judged (ibid.). Double standards may emerge due to the fact that crimes committed in the past will be prosecuted but risk going unprosecuted when committed in the present, as transitional justice only applies to a certain time period (ibid.). Hence, for the FNL, transitional justice does not contribute to restoring the country's judicial system and rule of law, as the transitional justice literature suggests (e.g. Van Zyl 2005). In order to have at least the opportunity of a 'just' (transitional) justice system, the FNL proposes that all "sit together and first look for the truth" (ibid.).

However, the party's understanding of truth is not a simple one in the sense of 'knowing what happened'; indeed, according to a party member, there would be two different phenomena; the reality and the truth. Knowing the truth is a process which is always unfinished, whilst reality is constituted by facts. He exemplifies this by saying that the body of a dead person found in the river would be a fact. In contrast, truth would be the

process of knowing who killed this person, in which circumstances, with what kind of motives and intentions, and whether the murderer acted on the command of somebody else (Interview H). By distinguishing between the reality (the violence and crimes) and the truth (the motives), the party might try to morally and politically justify certain past crimes and the party's violent rebellion.

6. Conclusion

This paper has looked at different perspectives on transitional justice among Burundian political parties. Only one out of the four parties is clearly in favour of the TPS. The planned TPS in Burundi is contested, not only because it may prosecute members and representatives of the political parties, but because it does not reflect or fit the parties' conceptions of justice. Although none of the four political parties oppose the TRC as such, they differ about its task or more generally about what kind of truth should be sought and what should be done with the 'produced' truth. It is striking that the majority of the four political parties fears that the transitional justice mechanisms would be negatively exploited. They are concerned that the 'produced' truth may hamper their own interests or even contradict their political claims. In addition, they dread the possibility that the TRC may produce a truth that protects political adversaries. On the other hand, this means that the version of the past which is constructed by transitional justice could constitute an opportunity to legitimise other political claims and interests.

This paper has shown that political parties contest the norm of transitional justice on the basis of divergent conceptualisations of basic transitional justice elements such as justice, reconciliation and truth. Furthermore, they refer to and position themselves in favour or against the normative international discourse of transitional justice in order to gain legitimacy for their stances, political claims or power interests. However, on a conceptual level it might be difficult to distinguish whether political parties evoke certain discourses only as an instrument of political struggle, or because they are a reflection of the party's conceptualisation of justice, truth and reconciliation. For example, a party that is accused of having committed crimes

would, rationally, not support a tribunal that may target its members. On the other hand, the party may not support it because it thinks that reconciliation is a process which would be hampered by prosecuting wrongdoers through retributive justice.

Indeed, further research is needed on issues such as the social construction of truth, the use of transitional justice as a political instrument and the framing and conceptualisation of basic elements of 'dealing with the past'. These might all have an impact on the (future) design of a transitional justice process. For example, the mandate of a truth commission might differ according to the underlying understanding of which kind of truth should be produced and what end this truth should serve. This is even more important if we consider that transitional justice and the historical narratives it produces do not only concern the past, but also affect the future. As a political process, transitional justice institutionalises certain rules and norms and frames historical lessons, narratives and truths in relation to the perceived needs of the present (Leebaw 2008). Questions for further research might include how to reconcile different transitional justice concepts; whether the normative transitional justice discourse and its tool box are the only way to conceptualise 'dealing with the past' and what its potential limitations are; and how to understand the different local conceptualisations without falling back into a culturally relativistic approach.

For transitional justice advocates and practitioners it is crucial to identify the different discourses and understandings of the various actors concerned, especially if they are confronted with a lack of political will for the normative transitional justice model. This gives them entry points for the lobbying of transitional justice and allows them to address the lack of political will by adapting the mechanisms to the beliefs and understanding of political actors. Finally, it ensures the legitimacy of transitional justice, which is crucial for the success of the process, as it takes up local understandings of justice, reconciliation and truth.

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2 All interviews have been conducted in French, as French is Burundi's second official language and politicians are used to expressing themselves in this language. Due to the tense political context during and after the elections in 2010, it was not possible to interview all the presidents of the parties as some were out of the country. Therefore, the people interviewed are the presidents, vice presidents or secretaries general of those parties. It is clear that political parties are not unitary actors and the opinions and positions expressed during the interviews may not reflect the official stance of the party, as most of them do not have an explicitly formulated position regarding transitional justice. Therefore, I triangulated the information with various kinds of additional data.

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Abstracts

In Burundi mechanisms to deal with the violent past are much contested by political parties. It seems that there is no 'political will' for a normative model of transitional justice based on international criminal, humanitarian and human rights law. On the one hand, transitional justice is contested because it touches on fundamental interests of politicians, especially those who have been implicated in past crimes. On the other hand, political parties differently conceptualise basic elements of transitional justice, such as justice, truth and reconciliation. As a political process, transitional justice mechanisms produce certain 'truths', 'facts' and interpretations about the past and reflect certain norms and values. This paper analyses the different political parties' stances on transitional justice, stances influenced by rational choice factors and divergent conceptions of justice, truth and reconciliation. Moreover, it shows how they use the normative concept of transitional justice as an instrument for political struggle.

In Burundi scheint bei den politischen Parteien der „politische Wille“ zu fehlen, um anhand eines normativen Models der Übergangsgerichtsbarkeit („Transitional Justice“), basierend auf humanitärem Völkerrecht, Völkerstrafrecht und Menschenrechten, die gewaltsame Vergangenheit aufzuarbeiten. Einerseits ist die Übergangsgesetzgebung umstritten, weil sie fundamentale Interessen von Politikern und Politikerinnen tangiert, besonders wenn diese in vergangene Straftaten involviert waren. Andererseits interpretieren politische Parteien grundlegende Elemente einer Übergangsjustiz, wie Gerechtigkeit, Wahrheit und Versöhnung, anders als von einem normativen Model propagiert. Mechanismen einer Übergangsjustiz stellen einen politischen Prozess dar, der bestimmte „Wahrheiten“, „Fakten“ und „Interpretationen“ der Vergangenheit „produziert“ und bestimmte Normen und Werte reflektiert. Dieser Artikel analysiert die unterschiedlichen Positionen der politischen Parteien, welche rationale Gründe und unterschiedliche Auffassungen von Gerechtigkeit, Wahrheit und Versöhnung reflektieren. Zudem wird dargelegt, wie sie das normative Konzept der Übergangsjustiz für ihre politischen Ziele nutzen.

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The Quest for Transitional Justice in Afghanistan: Exploring the Untapped Potential of Customary Justice[1]

1. Introduction

The quest for peace in Afghanistan has been a long one. The country has endured several cycles of war over the past 30 plus years. The most recent attempt at building peace started in 2001, with the now somewhat infamous 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions' (Bonn Agreement). Today, nearly 10 years later, security is still elusive and it seems that Afghanistan is further away from finding peace than it was a decade ago. The Taliban has re-emerged with new strength, backed by foreign sponsor nations and benefiting from a weak and corrupt Afghan government. They are fighting a government that has lost legitimacy, because, amongst other reasons, it absorbed many *jihadi* personalities whose inability to agree on power sharing after the defeat of the Communist government in 1992 gave rise to the first Taliban movement.

What has been falling by the wayside in all these discussions about peace is the issue of reconciliation and justice. While "[t]he UN mission in Afghanistan had from the beginning been mandated to 'promote national reconciliation and rapprochement throughout the country' [...] the Bonn conference, which was structured as a meeting of victors and set the framework for the transition period, made this role difficult" (Suhrke et al. 2009: 3). The fact that the Taliban, believed to be defeated at that time, were not party to the Bonn peace talks emphasized, even at this stage, a lack of focus on reconciliation. Backed by international supporters, the Afghan government has continued to argue that peace is more important than justice, and that dealing with past crimes and

those who committed them would only damage the fragile and fledgling new state.

For many Afghans, history is repeating itself and there are questions as to whether the new Afghanistan Peace and Reintegration Program (APRP) will indeed be able to bring about reconciliation and peace. Until now, all government programmes on peace and reintegration – most importantly the 2007 Amnesty Bill passed by Parliament for those involved in past wars (Suhrke et al. 2009), as well as discussions about the implementation of the APRP – have implied a focus on amnesty over justice, emphasizing job creation and development projects as a way to reconcile fighters, while ignoring existing grievances, both amongst communities and some insurgents. How can the Afghan people trust that their government is genuine in its interest in peace and reconciliation if it has once before firmly closed the door on justice for *jihadi* commanders, arguing that the government tent was big enough to accommodate everybody,[2] regardless of their past human rights records (Wilder/Lister 2007)?

The question remains this: if the Afghan government and its international supporters are unable to achieve transitional justice at a more national level, why there has been such little exploration of tapping into bottom-up approaches such as using customary justice providers to achieve some 'dealing with the past' at the grass-roots level? Even though, in principle, the APRP programme speaks of negotiations and addressing grievances at the community level as a first step to peace and reintegration, it remains unclear how this is to be done.

Building on calls by The Liaison Office (2011a), this article explores the possibility of using customary justice mechanisms as a form of grievance resolution in order to bring peace at least at village/community level, with an effective reintegration of some medium and lower-level commanders as well as fighters. It would also lay the foundations of a bottom-up reconciliation process until political will at the national level is strong enough to develop a more formal mechanism of transitional justice. This would at a minimum address some of the calls of Afghan citizens, as expressed by one who attended a '*jirga* for the victims of wars' on 9 May 2010: "I want to know why they did what they did and I need them to at least admit it and apologise to the people" (Frogh 2010a). Much like Truth and Reconciliation Commissions undertaken in South Africa, working

with customary mechanisms, which emphasize restorative justice, would achieve some form of accountability for past crimes, even if punishment in the western sense is not forthcoming.

2. The failure of transitional justice in Afghanistan

It has been argued that, in order to "substantively address the past, political will needs to be developed and political institutions will need to be involved" (Winterbotham 2010: 20). The Afghan government, however, has quite a poor track record in this regard. Despite extensive consultations by the Afghanistan Independent Human Rights Commission (AIHRC) in 2004, which found a "rich understanding of and strong desire for justice among the people for both past and current crimes" (AIHRC 2005: 41), the Afghan Government has failed to tap into such popular support for transitional justice, succumbing instead to the pressures of those within their ranks that wanted amnesty for crimes committed.

While a National Action Plan for Peace, Reconciliation and Justice in Afghanistan was developed in 2005, and also included in the 2006 Afghanistan Compact and the 2008 Afghanistan National Development Strategy (ANDS), it was never implemented. "President Karzai subsequently refused a request from the Afghanistan Independent Human Rights Commission (AIHRC) and civil society groups to extend its deadline" when it expired in March 2009 (Winterbotham 2010: 18). This failure to address the legacy of impunity in Afghanistan is also visible in the rather superficial programmes to date attempting to reintegrate fighters of the past Afghan wars.

In the beginning, substantial funds were poured into two programmes – Disarmament, Demobilisation and Reintegration (DDR) and Disbandment of Illegal Armed Groups (DIAG) – both implemented through the Afghan New Beginnings Program (ANBP), which focussed exclusively on *mujahideen* fighters and not Taliban. While high-ranking commanders were allowed to enter the political arena early on, due to their predominance at the Bonn talks and subsequent support from the Afghan President, lower level fighters were not always successfully reintegrated into Afghan society. Some even argue that the recent proliferation of community

militias, such as in Afghanistan's North, is ample evidence of the failure of DDR and DIAG and the fact that many former *jihadi* commanders simply lacked prospects in a peaceful Afghanistan and so once again took up arms for personal gain (Schmeidl/Miszak 2011).

The first national programme focussing on reintegrating Taliban fighters, the *Proceay-e Tahkeem-e Solha* (PTS), or National Commission for Peace and Reconciliation, was established in 2005 (Suhrke et al. 2009; Waldman 2010). The programme, however, was immediately subject to wide criticism, such as that it failed to provide guarantees, that it was open to being subverted by local strongmen, that it did not provide for community involvement and, above all, that it failed to bring in genuine Taliban fighters, or at least not high ranking ones (Suhrke et al. 2009; Waldman 2010; The Liaison Office 2010b).

The proposition of 'The National Stability and Reconciliation Law' put forth by a coalition of powerful warlords and their supporters in 2007 to Parliament in order to prevent the prosecution of individuals responsible for large-scale human rights abuses in the preceding decades further underscored the push for amnesty and impunity over justice. When Afghan President Hamid Karzai quietly signed this 'Amnesty Law' in 2010, after repeated promises that he would not support it, he finally slammed the transitional justice door firmly shut by stating that "all those who were engaged in armed conflict before the formation of the Interim Administration in Afghanistan in December 2001 shall 'enjoy all their legal rights and shall not be prosecuted'" (Human Rights Watch 2010).

Enter the new Afghanistan Peace and Reintegration Program (APRP), trying to offer a way back into society for those Taliban fighters who have tired of war or no longer see fighting as way of achieving their goals. While the programme does speak of "good governance and legitimate grievance resolution with assistance to subnational formal and informal governance structures to promote peace, reconciliation and manage reintegration" (Islamic Republic of Afghanistan 2010: 4), the Minister of Education, Farooq Wardak "told a gathering of civil society representatives that 'justice' and 'human rights' were not on the agenda and would not be discussed" (Mojumdar 2010). Furthermore, at the 2010 Peace Jirga "[t]here was no mention of the war crimes during the civil war, nor the injustices and violence inflicted on Afghan nation in the past nine years" (Frogh 2010b: 8).

In light of the above, Afghan communities have developed considerable scepticism about government-led top-down reconciliation attempts, and particularly those that put government authorities in charge of reconciliation, thus dictating who would spearhead programmes (Theros/Kaldor 2011: 31). The selection of those sitting on the High Peace Council (HPC) and the Provincial Peace Committees (PPCs) that have been established in 28 of Afghanistan's 35 provinces (Afghan Peace and Reconciliation Program 2011) only re-emphasizes a tendency to put in charge those who likely benefit most from the current status quo and continued conflict (Nixon 2011). It also begs the question as to why Taliban fighters should be brought to justice if their *mujahideen* counter-parts were able to get away with the crimes they committed, including those against the very Taliban they are now trying to reintegrate. Indeed, the programme itself does not speak of justice, but only of grievance resolution.

With national processes in question and impunity continuing to prevail, the calls to tackle transitional justice and reconciliation from the bottom-up, with communities settling their grievances first and engaging government at a later stage until "we can move up to national discussions", are growing (Theros/Kaldor 2011: 31; The Liaison Office 2011a). Pressured by civil society and international lobbying, the APRP has now recognized the need to "[m] obilize civil society organizations to facilitate customary justice providers to support restorative justice as a mechanism to reconcile insurgents into communities" (Afghanistan Peace And Reintegration Program 2011: 9). That being said, the same document (APRP) also highlighted the need to fine-tune the terms of interaction between the government and customary justice systems and develop a more specific action plan.

Drawing extensively on the previous work of The Liaison Office, this paper suggests the use of restorative customary mechanisms, focussing on restorative justice as a way to initiate such a grassroots process of transitional justice, even if these bodies, at first, only deal with relatively minor offenses and are unable to address more massive human rights violations and war crimes (e.g., a larger number of killings). It is worth emphasizing that reconciliation in many ways "harmonizes with Afghan traditions that stress pragmatic bargaining and flexible alliances" (Suhrke et al. 2009: 12).

3. The need for some form of transitional justice and accountability

As noted, there is a tendency by the Afghan government, and its international supporters, to focus reintegration programmes mostly on disarming fighters, compensating them for their 'loss' of weapons and trying to integrate them through development programmes. The notion of accountability for crimes committed is either intentionally or unintentionally overlooked. Assuming that a majority join the Taliban because of a lack of jobs or out of poverty is, however, fundamentally flawed. The new Taliban insurgency is more diverse than the first movement in the 1990s (Schmeidl/Miszak 2011).

"Afghans clearly differentiate between Taliban with a political or ideological objective, often accused of being externally steered and funded, and mid- and low-level commanders and foot soldiers who join and support the Taliban for other reasons" (The Liaison Office 2010a: 3). There are, for example, 'political opportunists', such as former *mujahideen* commanders or local strongmen that hope to gain political clout through joining the insurgency, and/or attempt to gain advantages in local resource conflicts. Communities may need the political backing of government officials in order to deal with strongmen, as some may very well be 'spoilers of peace' that benefit from the status quo on which their supremacy rests and are thus unlikely to willingly address the grievances that are driving some of the insurgency.

Then there are 'economic opportunists' and criminal elements (e.g., drug and weapons dealers) that find it opportune to hide within the Taliban. Some of these elements cannot be reintegrated without addressing their past actions; otherwise they might disturb the peace in communities in the future. In particular, criminal elements (*Taliban-e duzd* or thief Taliban; van Bijlert 2009: 160) need to be punished in some form, as more often than not the Taliban itself cleanses its ranks of these individuals once they have gained control in an area.

Especially problematic are those Taliban that have political (because they were sidelined from political processes and government positions) or justice grievances, especially if they suffered past injustice at the hands of government officials or strongmen linked to the government. Communities

will be hard-pressed to address their grievances without the support of the Afghan government. Reintegration might be impossible, without some form or admittance and apology, if the local process is led by the very government officials that have committed rights violations. Here, a lengthier process of dealing with the past (especially injustices) is necessary.

In light of the above, "[r]eintegration needs to be understood as a process rather than a one-time event", which involves an understanding of the grievances that have led an individual (or community) to join the insurgency and the conditions that are needed to bring them back to peace (The Liaison Office 2011a: 2). It is here that customary justice may be of assistance.

4. Customary mechanisms and transitional justice

Customary law (*rawaj*) in Afghanistan is a rather complex set of rules and regulations based on group norms and accepted community practices that are rarely codified and tend to differ between communities and over time (Wily 2003; Wardak 2004).[3] It rests largely on the oral history of those using it (*spin giri/rishsafed* or white-bearded elders) in each community.

Though customary justice seems a potent tool for reconciliation, due to its focus on restorative justice rather than retributive justice, its use for transitional justice has been largely left unexplored. While the Afghan government has acknowledged the need to engage with customary structures (Islamic Republic of Afghanistan 2008), and elders have offered their services to the state, the pending 'Draft Law on Dispute Resolution Shuras and Jirgas' does little to utilize the strength of customary justice providers and more to control something the state feels threatened by. There are further concerns by both women and human rights advocates about the violation of women's rights under customary laws and about the fact that customary justice lacks alignment with national and international law (Barfield et al. 2006). There is also the occasional critique – not so much in the international community as from some government officials – of customary justice's lack of alignment with *sharia* (The Liaison Office 2011b).

This section first outlines the elements of customary justice that are beneficial for transitional justice purposes, using the example of the *Pashtunwali* of the Pashtun ethnic group (Glatzer 1998; Steul 1981), while also

highlighting the areas of traditional justice practice that need some refinement in order to meet the needs of a genuine reconciliation and transitional justice process.

4.1 The benefits of customary law and its institutions for transitional justice

First, customary justice institutions have shown considerable persistence and accessibility. While formal state law collapsed during the Afghan wars, customary justice has shown remarkable resilience, even in the light of internal and external challenges from various actors, including the Taliban. Even today, after extensive international assistance has been poured into the formal justice system while relatively little attention and funding was paid to the informal system, the latter still handles the vast majority (an estimated 80 to 90 per cent) of all disputes in areas not controlled by the Taliban (Barfield et al. 2006; The Asia Foundation 2010; Wardak 2004).

In Afghanistan's rich and layered legal history, formal state law has always co-existed with religious (*shari'a*) and customary law (Barfield et al. 2006). As the Afghan State, and with it the formal court system, never fully reached beyond urban areas (and still does not), it, in many ways, has been irrelevant for the rural majority (Wardak 2004; Wimmer/Schetter 2002). Traditional customary institutions, in contrast, are not only considered more accessible, but also more swift in dispensing justice (Schmeidl 2011). Many government officials (e.g., governors and chiefs of police), including the independent department of Huqooq (rights) of the Ministry of Justice, which is tasked with helping to resolve civil disputes outside the courts, frequently refer disputants to customary resolution mechanisms, with the reference to the shari'a principle of *sulh* (peace; Barfield et al. 2006: 19; The Liaison Office 2009a, 2011b).

An annual survey by The Asia Foundation (2010), supporting more qualitative findings by other sources (The Liaison Office 2009a, 2009b), concluded: "More than four-fifths (86%) of respondents agree that the local customary mechanisms of *jirga/shura* [see Box 1] are accessible. Around three quarters agree that local *jirgas/shuras* are fair and trusted (73%) and more than two-thirds agree that they follow local norms and values (70%), are effective at delivering justice (69%) and resolve cases promptly (66%)"

(The Asia Foundation 2010: 132). Disruptions caused by the Afghan wars have started to reduce the number of *jirgas*, with more and more disputes being settled by *shuras* or individual tribal or religious figures.

Customary justice bodies

A *jirga* is an *ad hoc* and temporary decision-making mechanism[4] chiefly focussing on resolving communal disputes. The form and composition of a *jirga* depends on the dispute dealt with, but by and large includes tribal elders, community notables and sometimes religious figures and, since the Afghan wars, also commanders (Jones-Pauly/ Nojumi 2004). Once a *jirga* decision or ruling (*prikra*) is reached, it is binding for the entire community and the *jirga* is dissolved (Wardak 2004: 326). Before the proceedings begin, all parties involved must agree on which version of tribal laws (*narkh*) will be used in the mediation or resolution process. This may even include elements of *sharia,* which is increasingly invoked in the south.

A *shura* is a more permanent local council that was introduced during the Afghan wars as a way for commanders to influence community decisions (Barfield et al. 2006). Today, *shuras* have become semi-formal, as the government has created district and provincial *shuras* under various programmes, such as the Afghan Social Outreach Programme (ASOP) of the Independent Directorate for Local Governance (IDLG). There are also *ulema shuras*, councils of religious scholars, which are linked to the Ministry of *Hajj* and Religious Affairs. More recently, non-governmental organizations, such as The Liaison Office, and USAID contractors (USAID 2011) have also set up *shuras* working on alternative conflict resolution using customary law elements integrated with *sharia* and statutory law, the latter promoted through training.

Shuras also mediate disputes (mostly property, family and business but also a sizeable criminal caseload), similarly disputing parties can also approach individual elders (*spin giri)* or religious figures to help them settle a dispute.

Secondly, customary law focuses on restorative and not retributive justice. As with any community rights approach the emphasis is less on punishing individuals than restoring harmony and peace in communities (Barfield et al. 2006). Retributive justice here is secondary, as most customary justice providers lack the enforcement elements of formal justice (e.g., police and jails). Instead, the mechanisms and rulings emphasize the accountability of the offender while also giving him a way back into the community (Monaghan 2008). While nobody goes to jail, however, there is still 'punishment'. Wrongdoers are 'sentenced' for crimes committed and have to ask for forgiveness from the family of the victim (Wardak 2004 provides a detailed description of the process of asking for and granting forgiveness, which involves multiple family and community members, both men and women). In addition, customary law stipulates clear compensation (or blood money) to be paid for crimes committed and occasionally also the death penalty for severe crimes (Rzehak 2011; International Legal Foundation 2004).

However, how and what form of compensation is paid will likely need some more improvement in order to comply to International Human Rights Laws. A much-criticized practise under *Pashtunwali* for example, is the exchange of women (*baad*) as a form of compensation, which violates individual rights. This is often practised, however, in the absence of other valuables, as non-compensation can lead to a blood feud between communities, hence provoking conflict escalation and (further) bloodshed.[5] With increasing prosperity in communities, however, elders are using this practice less today than in the past (USAID 2011).

4.2 Limitations of customary justice mechanisms for transitional justice

Despite some clear benefits, customary mechanisms should not be engaged uncritically. Their limitations vis-à-vis reconciliation need to be clearly understood and addressed, in order to ensure that they do not fail due to being overburdened.

The effectiveness of the informal system rests on community cohesion and the sharing of common values and attitudes, which tend to disintegrate when communities are fragmented, as has happened throughout the years of the Afghan wars and also under the current Karzai administration. There is evidence that strong individuals can and will "subvert the

principles of equity upon which the [customary justice] system relies for its popular legitimacy" (Barfield et al. 2006: 3), with *jirga* mediators no longer functioning independently, but rather as puppets of strongmen, for either patronage or financial interests (The Liaison Office 2008). Thus, bringing to justice strongmen, whether former *mujahideen* or Taliban commanders, may be difficult without the backing of the Afghan State and its international supporters. As a result, a customary system may be more effective in dealing with reintegrating foot soldiers than higher level individuals.

Secondly, as each tribe has its own version of *Pashtunwali*, community-based customary mechanisms are already hard pressed for addressing inter-tribal, little alone inter-ethnic or inter-sectarian grievances, as well as crimes committed far away from the community where an ex-combatant comes from, and so wishes to reintegrate into (Barfield et al. 2006). While possible in principle, the need for a greater *jirga* would be given, with elders from both communities who are well versed in the specific *narkh* of their tribe in attendance. As the Taliban is aware of the limitations of 'customary jurisdiction,' they often send fighters from one community further away for battle, with 'local' Taliban taking over once an area has been taken control of. Thus, customary justice may only be able to deal with such local Taliban, who may also have only committed lesser crimes.

Thirdly, while the customary system may be considered, on the whole, as being less corrupt than the formal system, corruption and bribery have also made inroads into the *jirga* system (even if they are less prevalent than among state judges). While in the past tribal notables saw resolving conflicts as a community service, in recent years *tijaraati* elders (commercial elders) have set up shop in district centres rendering their services purely for financial benefit (The Liaison Office 2009a). Furthermore, in a society where hospitality is particularly valued and seen as a sign of grandeur, it seems important that a local customary mechanism tasked with reconciliation involves offering food to those in attendance, as such gestures of generosity can create trust, even among the most difficult and hardened conflict parties, and hence set the stage for an amicable solution (The Liaison Office 2009b: 12-13). Thus, there would be a need to provide support for customary mechanisms to offer their services free of charge. This is only possible through some form of external or government funding, as can be provided via the APRP.

Lastly, and possibly most importantly, customary mechanisms in general, and *Pashtunwali* in particular, have also been much criticized for their exclusion of women. In theory, all Pashtun (men) have an equal status (especially in front of the law) and no one should possess more rights and power than others (Schmeidl/Karokhail 2009). This equality, however, is often limited to male elites of a certain age and standing and, by extension, is inapplicable to all women and younger males (Barfield et al. 2006). In addition to the law itself being applied unevenly, customary bodies (*shura* or *jirgas*) traditionally included neither women nor young men.

4.3 The way forward: the devil always lies in the details

The above discussion shows that customary justice has some important reconciliatory elements, yet also holds clear limitations. For example, while customary institutions can address, and already have successfully addressed, community disputes, such as resource conflicts (The Asia Foundation 2010), they are limited to dealing with rights violations by strongmen and former government officials. This may limit reconciliatory processes to foot soldiers and low-level commanders at first and, additionally, to those ex-combatants who don't see rights violations by government officials as their main grievances. While here customary mechanisms can clearly build a bridge between insurgent fighters and the Afghan Government, the latter needs to be willing to address 'spoilers' within their ranks and possibly to hand out compensation on their behalf.

In addition, the Afghan Government needs to realize the independence of customary justice providers when dealing with reconciliation. Only then can they seen to be neutral when addressing grievances, rather than working on behalf of an already discredited government. This, however, is not to say that oversight should not exist.

Thus, The Liaison Office has been exploring the establishment of an 'Association for Customary Justice Providers' (The Liaison Office 2011a) which could work on setting clear standards, both as to who is best skilled as well as to who can engineer solutions and ways of reconciliation that most community members will perceive as just, while also setting standards for *jirga* procedures more generally. Such an association, if independent, can then decide on whom to include (rather than relying on government appointees) and begin recording decisions made, which

would help to improve transparency. Rather than individual customary justice providers being controlled by the Afghan State, the association can help to supervise conflict resolution provided by its (accredited) members, much along the lines of a professional association (e.g. of mediators and arbitrators) ensuring the quality of service delivery.

For this purpose TLO has also proposed the creation of '*jirga* houses' where this association could not only hold its meetings, store its records and reference documents, as well as undertaking additional capacity-building activities such as training courses on Afghan statutory and *sharia* law, but also on how to best work towards transitional justice.

If such an association were to be initially supported by donors, the problem of payments and corruption would be irrelevant. The association, however, could also work on setting fee structures with the long-term aim of being self-funding; and it might also explore the possibility of establishing a legal aid fund for those unable to afford the services of association elders.

While initially such an association can work to support village justice providers, it can also move to join district and provincial justice bodies, with the ultimate aim of being able to deal with inter-community problems. There is also a possibility of linking up with different regional associations to jointly work on inter-ethnic and inter-sectarian reconciliation, albeit this being more a long-term goal as it would necessitate strong local associations in the first instance, and efforts of trust building between the different groups of justice providers. The Liaison Office tried such a first dialogue in March 2011 (The Liaison Office 2011c), which indicated a willingness to exchange experiences and expertise.

The gender bias of customary justice providers may also not be as insurmountable as some may think. While women's groups in particular criticize customary justice for this all-male ethos, some do see it also as a form of conflict resolution where women can be involved (The Liaison Office 2011d). In most cases the process of asking forgiveness involves not only individuals, but entire families, hence also women. Furthermore, participants at a recent workshop of The Liaison Office identified numerous historical mediation roles that women have played – both in Pashtun and non-Pashtun communities – that could be employed to bolster local reconciliation and grievance resolution efforts (The Liaison Office 2011d).

All of this could be built upon to give women a larger role, not just in the process of forgiveness, but also, for example, in deciding how much compensation needs to be paid in order to reintegrate an offender back into the community without violating the rights of women.

There are already cases in Afghanistan's Southeast of women sitting on *shuras* alongside men. Furthermore, many Community Development Councils of the National Solidarity Program (NSP) include women. These have been increasingly approached for conflict resolution, even though their main mandate is development. Under APRP, NSP is the recipient of some 50 Million US Dollars for the purpose of assisting communities with reintegrating ex-combatants. Here, following a correct sequence is of great importance. "Outside assistance should come only after communities have resolved underlying conflicts and grievances that facilitated insurgency recruitment, as opposed to the current practice which is to give aid first and hope that this will prompt stability" (The Liaison Office 2011a: 5).

Furthermore, the association of customary justice providers can also be encouraged to include women mediators. Some elders have already expressed considerable enthusiasm for the idea, and have shown a willingness to pilot women's subcommittees in local associations that could be consulted and brought into negotiations in order to ensure that women's rights are not violated. First pilots of this will start in some provinces of Afghanistan's Southeast where The Liaison Office has worked longest with elders, both on the setting of standards and the opening up of public spaces for women. The idea is to start small and then have elders share their experience of working with women with other elders in order to encourage them to include women in their associations elsewhere. The sharing of such concrete experiences of men who have worked successfully with women is often more powerful in bringing women into previously all-male bodies than top-down quotas, even though this is often lobbied for by women's groups. When working with customary justice providers it is thus crucial to identify male allies in the attempt to promote the advancement of women.

Traditional justice institutions have also made headway vis-à-vis the reduction of discriminatory practises such as *baad*. Exchanging women was largely intended as a way to provide valuable but non-monetary compensation. However, as communities have grown more prosperous,

they have access to other resources (e.g., property, valuables such as cars) that can be used to pay compensation. Furthermore, some communities have questioned the long-term durability of a settlement where women have been exchanged, especially given that the exchanged girls are often not treated well and sometimes even commit suicide. As a result, rather than lessening conflict, *baad* can actually lead to a renewed dispute. These concerns have led elders to abolish this practise in some parts of Afghanistan (Afghanistan Today 2011; USAID 2011).

It is here again, that the association can help by working on a standard setting that disallows practices that violate women's rights. Contrary to popular belief, elders do have the right to break new ground in customary law as long as this is met with general agreement by other customary justice providers and the communities they represent (Schmeidl 2011). Those elders consulted about the association have already noted the wish to align their practises with *sharia* and statutory law, especially the Afghan constitution. Hence, the seeds are sown for a change within which will very likely be more sustainable than imposing rules and regulations from above.

5. Conclusion

This article has explored the advancement of reconciliation and transitional justice in Afghanistan through the utilisation of customary justice. Up to now, the issue of transitional justice and dealing with the past has been a taboo in Afghanistan, with the Afghan government preferring providing amnesty to past *mujahideen* fighters and warlords.

Nevertheless, the argument of peace first and justice second has not helped the peace process ushered in by the 2001 Bonn Agreement. Instead, insecurity has been on the rise and the Taliban insurgency has partially reemerged as a result of poor governance and unaddressed grievances. Especially in the area of justice provision, the Taliban, with its *sharia* courts, has been clearly 'out-governing' the current Karzai administration.

While it may indeed be true that it is difficult to combat impunity at a national level, especially as long as past 'offenders' are part of government bodies (up to and including ministries, Parliament, and the High Peace Council), this should not preclude working at the grassroots level

with customary mechanisms that have survived the past years of war and political upheaval. In particular, their focus on restorative rather than retributive justice and community harmonization shows that such mechanisms can play a valuable role in furthering transitional justice at a community level.

Taking the above limitations of customary justice into account, as well as the troubled history of state-civil society relations in Afghanistan (Schmeidl 2007, 2009), this article has discussed the possibility of developing a process that can provide communities with the space to reintegrate insurgent fighters, especially those that have committed crimes and/or damaged ties to their families and community. For this, however, the limitations of customary justice providers – such as their representativeness, reach and qualifications – need to be understood and overcome. Here, the article has introduced the idea of a best practice association, which The Liaison Office is currently setting up in some parts of Afghanistan. Such an association can not only function as a tool for setting standards, but can also break new ground on aligning customary justice more with *sharia* and Afghan state law, including the constitution. As noted, such an association can also work toward including women, and ensuring their rights are not violated.

With the strength of customary justice institutions in rural and hard to reach areas, international actors are encouraged to overcome their reservations about customary justice and embrace a process that could bring peace to communities. Here, however, donor support to the Afghan Peace and Reintegration Program should be used wisely and funds (or projects) only provided to communities that have started to address reconciliation and justice issues first. Otherwise, the cycle of violence will be hard to break in Afghanistan.

1 I would like to thank my colleagues Nick Miszak and Peyton Cooke for useful input into this article.

2 The '"big tent" approach to government' largely focused on the inclusion of strongmen, trying to bring them into government (rather than fighting them). Inadvertently though many in the end held far more power than a fledgling state could potentially manage, managing to spoil from within.

3 It has been influenced by the turmoil of the Afghan wars and resulting displacements. Within the Pashtunwali, the customary law of the Pashtuns, for example, each tribe has their specific narkh (set of customary rules, comparable to a civil code), which only their own elders are allowed to interpret.

4 Jirga originates from jirg, 'which means a wrestling ring', or 'circle', but is commonly used to refer to a gathering of people. There is a similar word in Turkish, which makes some scholars believe it originates from there (Wardak 2004: 326).

5 The alternative would be a blood feud that can easily escalate into a full-blown tribal conflict. Since other ethnic groups in Afghanistan do not use baad and it is in violation of the religious sharia law, Pashtuns have been under some pressure to abandon it (including by the Taliban), so it is an outcome that is justified on a cost-benefit basis.

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Abstracts

Based upon an analysis of the peace process in Afghanistan since 2011, the article argues that past top-down approaches have failed to achieve the twin goals of peace and justice. Thus, customary justice and its associated structures offers an alternative approach to furthering reconciliation and addressing grievances, as well as to ensuring accountability for wrongs committed at the community level. Drawing from the work of The Liaison Office, the article highlights the advantages of customary justice institutions, but also cautions that their limitations (e.g., discrimination against women, an inability to reign in strongmen and address inter-ethnic conflicts) need to be addressed. The article concludes with the recommendation to establish a best practice association that can set standards for customary justice providers and guarantee the inclusion of women.

Anhand einer Analyse des Friedensprozesses in Afghanistan seit 2011 zeigt dieser Artikel, dass Top-down-Ansätze in den letzten Jahren weder Frieden noch Gerechtigkeit geschaffen haben. Eine Alternative bietet das Gewohnheitsrecht (*customary justice*) und dessen Institutionen, um die Versöhnung weiter voranzutreiben und Ungerechtigkeiten, die auf Gemeinschaftsebene stattgefunden haben, aufzuarbeiten. Ausgehend von der Arbeit des „Liaison Office" beleuchtet die Autorin die Vorteile von traditionellen Rechtsverfahren, dabei müssen aber auch deren Einschränkungen

bedacht werden (zum Beispiel Benachteiligung von Frauen, eine Unfähigkeit Kriegsfürsten die Stirn zu bieten und inter-ethnische Konflikte zu bearbeiten). Der Artikel schließt mit dem Vorschlag, einen Zusammenschluss von traditionellen Rechtsschlichtern zu gründen, der Standards für die Anwendung des Gewohnheitsrechts und die Einbeziehung der Frauen garantieren kann.

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Practising Justice in Argentina: Social Condemnation, Legal Punishment, and the Local Articulations of Genocide[1]

The auditorium of the Federal Court of Buenos Aires is filled with people attending the ESMA trial of the perpetrators of the 1976–1983 military dictatorship. Today we will hear the testimony of Ricardo. His parents were disappeared and killed in 1977 and, aged just 14 months, he too was kidnapped and given to a military family. Alongside of me are approximately 40 of Ricardo's friends, the majority of whom are the children of disappeared and activists in the association H.I.J.O.S. – Children for Identity and Justice, against Oblivion and Silence.

During Ricardo's moving testimony various people in the audience burst into tears, and an atmosphere of grief and companionship fills the room. Towards the end of his testimony, after more or less two hours, Ricardo becomes increasingly forceful. He directs his words to the audience, turning his testimony into a political performance. Ricardo speaks of the perpetrators in derogatory terms, as 'ratas' (rats) and 'mierdas' (shitty people).

To my astonishment he is allowed to talk on like this, without interruptions, as if testimony should allow for traumatic relief. He concludes by asking the judges: "How can a society live with this injustice? – Because we have to live together with these types in one society! – How, as they are responsible for a genocide?" (Field-notes, June 2010).

This testimony given by an activist or *militante* of H.I.J.O.S., shows a wide range of emotions, stretching from hope to despair. It speaks of doubts, poses questions and shows his own ideology and self-empowerment. But it also represents 'history', a history remembered as 'genocide'. When I began my fieldwork[2] on the struggle for justice in the aftermath of state terror in Argentina in spring 2010, I was astonished by the frequency with which I heard the term genocide – in the streets, the newspapers, in many recent

publications, and even within the justice system. Recalling my knowledge of Rwanda, Cambodia, and the Shoah, I was initially puzzled by the uneasy relation between the concept 'genocide' and the signified event, namely, Argentina's last military regime with its 30,000 political disappearances.

My interest in the current Argentine practices of transitional justice grew as new connections raised more questions about the local application of international legal conventions in Argentina. Legal anthropologist Sally Merry (2000) stresses the importance of analysing local articulations of transitional justice models, which she calls the 'process of vernacularization'. This process of transmission is highly complex as it involves the mediation, translation and modification of transitional justice idioms as well as a variety of actors such as human rights groups, mediators, international organisations and local legal systems. As 'frictions' (Tsing 2004) and conflicting interpretations are involved in the process, it is important to connect the legal level to the everyday social practice of societal agents and to look at the ways in which justice is experienced, perceived, and produced in a specific locality, ranging from the kitchen table discourse, to the media, to the court-rooms and street manifestations, as well as the international organisations (see also Hinton 2010: 1).

I do not intend to hand down judgement on whether or not it is appropriate to use the concept of genocide, nor do I question the legitimacy of the term in describing the human rights abuses that took place in Argentina. Rather, I aim to analyse the ways in which 'genocide' became part of Argentina's symbolic inventory and how its contribution to a popular and legal discourse facilitates a reconfiguration of collective memory and juridical practice.

In order to contextualise this current development, I will retrospectively reflect on previous attempts of promoting justice, accountability and appropriate punishment, as well as efforts for truth and reconciliation in the southern cone of Latin America. My focus in this historical overview will be twofold: firstly, I show, that the use of the term 'genocide', even though it appears to be a recent concept for Argentina, reveals a long-established yet emergent historical consciousness within collective memory and juridical processes. Secondly, I describe the inter-connections between the civil rights movements, social scientists' influence on 'transitional justice', and the practices of the local legal system. As a final step, I will examine the discourse of

genocide by unpacking not only the local impact but also the possible retroactive effects of these developments at an international level.

1. State terror and the construction of 'subversion'

On March 24, 1976 a *coup d'état* brought to power a military junta composed of Jorge Videla, Emilio Massera, and Orlando Agosti. The coup overturned Isabela Perón's government, which was marked by a growing atmosphere of uncertainty and fear generated by the seemingly uncontrollable violence of various armed left-wing guerrilla groups and revolutionary forces such as 'Montoneros' or 'ERP'. The Junta promised to end the daily violence and to restore security and order. Their coming into power was thus at first welcomed by a majority of Argentineans, especially as the society had long become familiar with the unholy alliance of military power and politics. In his inauguration speech, Videla articulated the motivation behind the military coup: "The armed forces, in fulfilment of an indispensable obligation, have assumed the leadership of the state. […] This decision pursues the goal of putting an end to misrule, corruption and the subversive flagella, and is only directed against those who have committed crimes and abuses of power. It is a decision for the *patria*[3] […] Therefore, at the same time as the fight against subversive delinquency will continue without a rest, open or concealed, all demagoguery will be banished" (Videla et al. 1979, Translation K.S.).

A few days after the coup, Videla announced the 'Process of National Reorganization' aimed at the construction of a society built upon an ideology of Western and Christian values and a neo-liberal economic system. The new discourse openly proclaimed the need to 'heal the national body' by eradicating all subversive forces and served to legitimise the state terror that was implemented thereafter. Rear Admiral Guzzetti in 1976 articulated it this way, echoing the Nazi germ theory: "The social body of the country is contaminated by an illness that in corroding its entrails produces antibodies. […] As the government controls and destroys the guerrilla, the action of the antibody will disappear. […] This is just the natural reaction of a sick body" (Feitlowitz 1999: 33). Presented in such a way, the killing of individuals is not a criminal act or matter of moral

ethics but simply an action to 'cure' a sick nation or to clean society from its contamination (see Hinton 2002: 19).

The production of enemy groups and the legitimising discourses enacted by totalitarian regimes together involve a variety of different strategies such as propaganda speeches, dehumanisation, body analogies and other 'scientific' explanations in order to construct difference and essentialised ethnic categories (Arendt 1962). Basing his approach on the Cambodian Khmer Rouge regime, Hinton examines the production of a clear distinction between us and them, friend and enemy, true citizen and traitor as necessary preconditions for genocidal regimes to succeed. 'Manufacturing difference' thus crystallizes disparity as it methodologically and imaginatively eradicates all kinds of what normally are more complex and fluid forms of identity (see Hinton 2005: 211).

In Argentina a "Manichaean discourse of cultural differences" (Robben 2009: 6) was implemented that supported a good and evil essentialisation of 'us' and 'them' categories, built upon the term 'subversion'. By means of propaganda, the spreading of rumours and false information, fear and doubt were systematically inflicted upon society producing the ever more common saying *por algo será* – 'it must have been for something (that he/she/they did wrong)' in order to cope with yet another story of a disappearance. Videla put it this way: "The enemy is not only a terrorist with a weapon or a bomb [but] anyone who spreads ideas which are contrary to our western and Christian civilization" (cited in Feierstein 2006: 153). Hence, political opposition, trade unionists, students, and other civilians, all apparently suspect of delinquent activities, were persecuted by the regime in order to "completely eradicate subversion, making it impossible for Marxism to make a comeback in the country in the future" (Menendez cited in The Ledger 1979).

As a result, Argentina was paralysed for seven years by a 'culture of terror' (Taussig 1987) perpetrated by a brutal military regime. The announced 'Process of National Reorganization' became the epitome for one of the worst dictatorial regimes in the southern cone of Latin America. The military apparatus employed a clandestine system of repression, dividing the country into zones and sub-zones with approximately 350 secret detention centres all over Argentina (Feierstein 2000). According to Human Rights Groups some estimated 30,000 people were

tortured, kidnapped, murdered or 'disappeared' as a consequence of the announced 'war against subversion'.

2. The return to democracy: efforts for truth and justice

By 1983 the military regime had finally come to an end and the Argentine people celebrated the return of democracy under the civil government of President Raúl Alfonsín. The new government immediately initiated the process of social restoration, set up the National Truth Commission on the Disappeared, known as CONADEP, and opened trials against hundreds of military men and guerrilla forces.

In 1984, Alfonsín's government established a military tribunal, later known as 'the Argentine Nuremberg', to prosecute the nine leading figures of the former military government. During the trial, attorney Julio Strassera and his assistant, Luis Moreno Ocampo, accused the junta members of a systematic and organized plan of persecution and extermination carried out throughout Argentina. In their final speech, the public prosecutors were the first to use the term 'genocide' before a court: "The Argentine Community but also universal juridical consciousness have entrusted me with the just mission to present myself before you to claim justice. Technical and practical reasons such as the absence of a specific type of penalty law within our national legal rights which fully describes this form of delinquency that we are judging here today and the impossibility to consider one by one the thousands of individual cases, have induced me to exhibit over a period of 17 dramatic weeks of hearings only 709 cases, which by no means exhaust the appalling number of victims, which caused, what we could denominate the worst genocide of the recent history of our country" (Strassera quoted in the documentary *El Nuremberg Argentino*[4], Translation K.S.).

In 1985, the tribunal convicted the main perpetrators and leading figures of the authoritarian regime, and sentenced five of them to life imprisonment. The judgement did not mention 'genocide'. However, the judges concluded that there was a systematic plan behind the crimes committed by the armed forces which was based on the intention to economically and ideologically reorganize the Argentine society, a judgement which was a juridical statement of lasting importance and influence.

At the same time, during the first commemoration march of the coup, human rights groups voiced the need for truth and the legal punishment of the perpetrators. They raised their voices, pointing towards a comparison with the genocidal practices of the National Socialist regime while expressing the wish for retributive justice, singing: "*Como a los Nazis les va a pasar, a donde vayan los iremos a buscar!*" (Just like to the Nazis it will happen to them, wherever they go we will go looking for them!). This well known slogan is still frequently heard nowadays and asserts the belief that massive human rights violations will not go unpunished.

3. Times of impunity: the failure of institutionalised jurisdiction

"Reconciliation, if it is not preceded by true justice, is a vulgar shady deal between criminals." Thomas Aquinas

In the immediate aftermath of the military regime, legal rehabilitation, accountability and truth seemed to be achievable goals, but this initial phase of implementing justice was soon brought to an end. As more and more complaints (by then over 2,000) were filed against more than 600 defendants (Robben 2005: 331), President Alfonsín, fearful of antagonizing the still powerful armed forces, passed the two amnesty laws, namely 'Full Stop' (Ley Punto Final 1986) and 'Due Obedience' (Ley Obediencia Debida 1987). Due to their limitations of time and responsibility these laws greatly reduced the legal accountability of members of the military.

The succeeding government of Carlos Menem supported a version of history as a war between revolutionary forces and the military, introducing thereby the 'theory of two demons', which acted on the assumption of an apparently equal dispersion of guilt and responsibility on both sides. In the name of national reconciliation and peace, the newly elected president pardoned hundreds of convicted officers and guerrillas in 1989 and released the imprisoned junta members one year later (Soledad Catoggio 2010: 9; Robben 2010: 188).

This meant, as the Argentinean social scientist Soledad Catoggio (2010: 13) puts it: "In the midst of these conflicting versions, the battle for meaning was won, temporarily at least, by the interpretation which went

down in history as the 'theory of two demons'. This saw the whole society as the 'victim' of two twin evils: guerrilla violence and state terrorism". With the discharge of the prisoners and the amnesty laws mentioned above, a decade of impunity began in which all possibilities for juridical accountability and legal prosecution of the members of the security forces were suspended. The process of the local prosecution of perpetrators for crimes against humanity was only taken up again in 2001 with Judge Cavallo's judgement, which declared the laws 'Full Stop' and 'Due Obedience' unconstitutional for the first time (ibid.: 14).

4. H.I.J.O.S.: popular resistance and creativity as empowerment

For many years the juridical framework of impunity ruled official politics in Argentina. Still, opposition to the imposed silence and to reconciliation without justice were kept alive on a socio-political and international level.

In 1995, Adolfo Scilingo, a former Argentine naval officer, came forth confessing his participation in the systematically organised death flights ordered by the military regime. According to his testimony, unlawfully imprisoned and 'disappeared' people were dazed by injections, put into small planes and flown out off the coast of Argentina. There they were thrown to their deaths into the Rio de la Plata, to die without evidence (Verbitsky 1995). Scilingo's confession generated social outrage as details of the brutal methods of the former regime in killing and torturing its enemies were admitted for the first time by a perpetrator. As one consequence of this avowal, Judge Baltasar Garzón made use of the doctrine of universal jurisdiction and decided to process 98 Argentinean 'Dirty War' perpetrators in Spain for crimes of genocide, torture, terrorism and other offences. By 1998 he opened the trial against Adolfo Scilingo, who in 2005 was sentenced to 640 years of prison (TRIAL 2011). The work of Judge Garzón is still regarded today as an important stepping-stone in the fight against impunity and for the legal punishment of the human rights violations committed by the military dictatorship.

Locally however, the trigger of Scilingo's confession and the atmosphere of public discontentment with the still widely felt impunity and distrust in state institutions gave birth to a new wave of human rights protests. Within

the same year, the association H.I.J.O.S. came into being, extending Argentina's list of human rights organisations with its reference to kinship ties (such as the 'Mothers' and 'Grandmothers of the Plaza de Mayo').

In the period up to and including 1995, many young adults all over the country, each of them affected by the loss of a family member, came together in search of a trusted circle of friends who would understand their loss and the meaning of 'absence'. The children of the disappeared first met during human rights protests, at the Thursday marches of the *Madres de Plaza de Mayo*, at university, or simply at a friend's party. To meet their common needs, they began to organise their own meetings. There they exchanged their experiences and life-stories and as a group began to gather more information on their parents' lives, ideals, and forced disappearances (Interview Peer group H.I.J.O.S. 2011).

In 1995, H.I.J.O.S.' first annual national meeting officially established the new Argentinean association. Within the course of one year this egalitarian social network counted more than 600 activists, with branches all over Argentina but also abroad, such as H.I.J.O.S. France, H.I.J.O.S. Mexico, and H.I.J.O.S. Madrid. Today, the association might best be described as an 'open population' of activists, as its members come from a variety of backgrounds and include "children of disappeared, murdered, exiled, and imprisoned parents or any other person who wants to be part of the association" (Interview Matías 2010).

Members of H.I.J.O.S. do not necessarily agree upon political standpoints, but they share the common goal of keeping the spirit and ideals of their parents alive and of seeking participatory democracy built upon justice, historical consciousness, dignity, and truth. Their web-page contains the following lines: "We recall the spirit of the struggle of our parents: because they wanted to change the society, they wanted that things would have been different, and that's why they have taken them. Our parents fought so that we could work with dignity, so that we all could study […] They fought for a better life!"(Hijos-capital 2011a).

During H.I.J.O.S.' weekly meetings, the shared anger against the national impunity that protected all former perpetrators who killed, tortured, and disappeared thousands of people and harmed their own generation led to their dictum: "We don't forgive, we don't forget, and we don't reconcile!" (Hijos-tucumán 2011). In cooperation with GAC (Grupo de Arte Callejero),

a group of non-conformist artists, they designed their emblem, an altered regulatory traffic-sign consisting of a white round disc with a red circle framing a military hat and displaying their demand: *Juicio y castigo* – 'judicial proceeding and punishment'.

4.1 Escrache: social condemnation and the practice of popular jurisdiction

As all institutionalised paths for legal penalisation were closed in the 90s, H.I.J.O.S., in an attempt to break the imposed silence and to stand up against impunity, decided for a different practice of social condemnation. They invented a far-reaching, symbolic, non-state jurisdiction: the *Escrache*. *Escrache* is a slang word, meaning "to make evident, reveal in public, make visible" (Hijos-capital 2011b). The intention is to reveal knowledge about the perpetrators and to socially and symbolically mark the murderers and *genocidas* (perpetrators of genocide) in order to ostracise them in their own neighbourhoods. "By means of social condemnation we work to achieve legal condemnation which puts into prison the murderers responsible for this genocide" (hijos-capital 2011a).

This form of collective justice, grounded in months of research and preparation work, is realised in cooperation with ad hoc working-groups (*Mesa de Escrache*), including local human rights organisations, social movements and individual volunteers from the neighbourhood, and is described as a form of social activism that allows for a narration from below. From their own lived experience, participants express the opinion that performing the *Escrache* means practising a politics of memory and self-empowerment, as it enables the citizens to renew their local district and the social bonds that have been violated by the terror (see Colectivo Situaciones 2004).

Members of H.I.J.O.S. and the *Mesa de Escrache* then start the *Escrache* by handing out flyers that display the photograph and phone number of the person concerned and inform the people of the quarter about the background of the perpetrator who is to be condemned. About a week later, the work culminates in the *Escrache* itself, where a group of people, sometimes reaching thousands, march through the neighbourhood of the addressed perpetrator towards his place of residence. The social denunciation includes the installation of street-signs indicating the address of the perpetrator (e.g. "In five hundred metres – Rafael Jorge Videla – *genocida* – Cabildo 639"),

the announcement of indictments by megaphone, and the spray-painting of the house of the murderer, *genocida*, or torturer.

In so doing, the *Escrache,* as described by participants and activists, displays a dynamic of collective power by a realisation of justice on a social level. According to H.I.J.O.S., the public and civil denunciation of the *Escrache* raises awareness for the mostly still unknown identity of the perpetrator, symbolically and publicly stigmatising the *genocida* who lives peacefully, exempt from juridical punishment: "*Si no hay justicia, hay Escrache!*" (If there is no justice, there is *Escrache!*) (GAC 2009: 60). By 2003 more than 60 *Escrache* have been undertaken all over Argentina.

Being met by the *Escrache* changes the lives of the concerned oppressors. In many cases the marked murderers had to leave their houses and move to another part of the city as a consequence of the public shaming (Interview Rolando 2011). The case of Jorge Rafael Videla provides a good example for this, as the *mesa de Escrache* followed him from home to home and, over the years, ostracised him three times in different locations.

Not surprisingly, the practice was frequently met with resistance. I was told that in some cases the protest march was even kept away from its target subject. Such was the case of the *Escrache* performed in San Miguel de Tucumán in 1998 against the *genocida* General Antonio Domingo Bussi, at the time the democratically elected governor of the Province of Tucumán. On the appointed day, all streets leading to the centre were blocked by heavily armed police forces, who prevented the 300 activists from proceeding towards the central square of the city, where the final act of the *Escrache* should have been performed in front of the government building (Fieldnotes 2011; Interview Sara 2011). This was a devastating experience for the local activists, as it showed the continuum of structural violence and the consequences of impunity after genocidal regimes. According to a founding member of H.I.J.O.S. Tucumán, it was therefore even more important to her to see Bussi face trial in 2008 and watch him enter the court room, officially accused of murder and torture (Interview Clara 2011). Today, Antonio Domingo Bussi has been sentenced to life imprisonment for the crimes of illegal deprivation of liberty, torture and homicide (Sentencia 2008).

Nevertheless, the political non-state practice of bringing justice "to the doorstep of amnestied torturers and pardoned repressors", as Robben (2010: 188) called it, had an enormous impact on society. The process of aware-

ness building through powerful slogans, knowledge transfer, street manifestations, and radio broadcasts directed the collective historical consciousness and its corresponding narrative. The constant use of the term *genocida* strongly influenced the societal discourse and the legal perception and handling of these dark times. Thus, H.I.J.O.S. demands 'carcel perpetua' (imprisonment for lifetime) in a state-run prison and a legal platform for the victims to tell the truth and to be heard.

Since the opening of the trials under the Kirchner government and the possibility to legally convict the perpetrators the work of H.I.J.O.S. has therefore changed in many aspects (Interview Alan 2010). Members of the association started to believe that the perpetrators would finally see punishment. For them, the trials are of central importance, as members of H.I.J.O.S., who emphasize that they are 'not like them', never sought revenge but always fought for legal punishment and fair trials in front of a civil court. The practice of *Escrache* will continue in some cases of ongoing injustice, but supporting the juridical work and giving testimony, publicly, in front of a judge and the accused perpetrators, just as the example of Ricardo's witness statement shows, have now become the focus.

5. A new era: the trials for crimes against humanity

With the advent of the millennium, Argentina saw a new era. When Nestor Kirchner was elected president in 2003 he promised to change the course of the country's dealing with the past. In an important early symbolic act of his government he ordered the taking down of the portrait of Videla from the gallery in 'Campo de Mayo', a military base in the outskirts of Buenos Aires. This gave back confidence to the Argentine people and displayed the new government's true intention to take human rights seriously and to put an end to impunity.

In 2005, with the conviction in the trial 'Simón' (Sentencia 2005), the Supreme Court of Buenos Aires declared unconstitutional the laws 'Full Stop' and law 'Due Obedience', and ruled that human rights abuses committed by the military regime between 1976–1983 shall be considered crimes against humanity, turning them into criminal acts not protected by the statute of limitations. This judgement was the starting signal for

the nation-wide prosecution of former military officers in the federal courts of Argentina.

These trials for crimes against humanity – including homicide, torture, the appropriation of minors, and the intentional extermination of a group of people – are the current focal point of Argentina's fight against impunity, as the perpetrators, murderers and torturers, economic collaborators and high-ranking organisers of the 'Argentine Genocide' are being tried locally, by their own successor-government, for their human rights violations. Hundreds of victims, survivors, and witnesses give their testimonies and turn their memories and suffering into legally valid evidence.

According to up-to-date information from CELS, more than 1600 people are currently accused, processed and/or tried for crimes against humanity committed during the Argentine Genocide (CELS 2011). Since 1985, Argentina has brought on cases against 217 perpetrators, of which 196 were found guilty and 21 were absolved. The yearly increase in legal convictions and cases is remarkable. Up to the year 2009, the convictions secured did not outnumber 98, whereas in 2010 alone 19 trials concluded and more than 119 convictions were secured (Unidad Fiscal 2010a, 2010b), which means they more than doubled in 2010. This is a juridical improvement not least thanks to the work of the governmental institution 'Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos durante el Terrorismo de Estado', presided over by Jorge Auat and Pablo Parenti, which was created in 2007 in order to assist, homogenise, and monitor these legal processes (MPF 2010).

5.1 Crimes against humanity vs. genocide: international legal concepts and the anthropological view

When talking about the struggle for justice in the context of crimes against humanity and genocide in Argentina, it is important to spend some time on the core definitions and differences between the two concepts.

After World War II, a long and still ongoing discussion attempting to achieve a definition of genocide, started on an international level. Agreement was reached in 1948 and the definition of genocide both in Article 2 of the *UN Convention on the Prevention and Punishment of Genocide* (UNCG 1948) and in Article 6 of the *Rome Statute* (Rome Statute 1998) reads as

follows: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. a) killing members of the group b) causing serious bodily harm to members of the group c) imposing conditions on the groups calculated to destroy it d) preventing birth within the group e) forcibly transferring children from the group to another group" (UNCG 1948: art2).

For a distinction between crimes against humanity and genocide it is the 'special intent' that most legal scholars point at, meaning that murder, extermination, and other atrocities are directed against members of a specific group with the "specific intent to destroy in whole or in part that group as such" (Schabas 2004: 39). The above given analysis of the 'Process of National Reorganization' in Argentina and the promoted war against subversion (both physically and psychologically) makes it hard to deny the junta's 'intention' behind the terror, with all the practical implications of systematically organized secret detention centres, death lists, torture, and other forms of persecution of apparently 'subversive' men, women, and children.

Criminal punishment for the crime of genocide also implies the specific character of group persecution and continuous violent acts against a group as such (contrary to crimes against humanity, by which the perpetrators can be tried for crimes directed against individuals or random groups). However, due to the narrow phrasing of the genocide definition, only four groups are recognised by the UN Convention: national, ethnic, religious, or racial groups. Political groups or social collectives have been left out from the treaty, mainly due to the political motives of some countries members of the Convention (see also Jones 2010; Shaw 2007; Schabas 2004, 2009). The definition of group identity is hence a central obstacle for lawyers and judges willing to apply the concept of genocide to the Argentinean state terror of the 70s.

The 'subversive' – a political collective?

If linked by anything at all, the persecuted individuals said to form part of the 'subversive' group during the 70s in Argentina are connected by a shared political belief and revolutionary ideology in a just and more equal distribution of economic power and political rights. As these demands are of a political nature, the international convention does not encompass this case.

However, as we will see in the following examples, the definition of group membership recognised in the convention, has been met by other criteria (such as 'a national group in part', Interview Feierstein 2010) and might be countered by the evolution of the term or by other legal precedents.

The narrow definition of groups in the UNCG has often been criticized, especially at the tribunal for Rwanda, as it excludes the fluidity, openness, and constructed character of ethnic and other collective identities and fails to recognize that all too often 'membership' and 'identity' are defined as such by the perpetrator (see ICTR 1998). For the last quarter of a century, anthropologists have repeatedly addressed this question and presented alternative definitions for group persecution. One of them, first coined by Steven Katz in 1994 and later adopted by Adam Jones, addresses the crime very accurately, without modifying the international definition of the UNCG too much. "[Genocide is] the actualization of the intent, however successfully carried out, to murder in whole or in part any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means" (Jones 2010: 18). Just as the definition put forth in the UNCG, this alternative definition recognises the intention as the core characteristic of genocide, referring to an organized and systematic plan of persecution of a group or collective, but manages to make use of a more fluid approach to identify the affected collectives.

Genocide and the collective memory

When it comes to the punishment and penalties of the accused perpetrators, a comparison of 'crimes against humanity' and 'genocide' shows no difference. Both concepts are internationally recognized, do not fall under the statute of limitations, and allow for the prosecution of crimes such as murder, torture, appropriation of children, and other human rights violations. However, qualitatively speaking and with emphasis on historical consciousness building and on the symbolic capital gained for the collective memory during retributive justice, they display an unequal impact for the victims of state terror. Argentina's military still presses for a representation of the violence as a necessary war against subversion, which happened to produce 'excesses of war' (Fieldnotes 2011). Achieving recognition of the state terror as genocide, labelled by the International

Tribunal for Rwanda as "the crime of crimes" (Schabas 2004: 37), provides precious social capital in countering these arguments.

Today, in Argentina, the recognition of the disproportionate use of violence by the military government seems to be widespread on a socio-cultural level, as can be seen in street demonstrations, human rights organisations' speeches, and in the media. Newspapers using headlines such as "The Argentine Genocide" (Pagina12, 4.11.2007, Translation K.S.) or "Prison is the only possible place for a mass-murderer [*genocida*]" (Pagina12, 8.11.2010, Translation K.S.), help underline that view.

Still, when it comes to genocide, not everyone in Argentina agrees upon a description of the state terror as genocide, be it because of political discontentment or out of concern for the endeavour to heal society. Recent insight by genocide scholars and their 'on the ground' research also shows that a narrative of genocide runs the danger of repeating genocidal practices on a symbolic level through its clear categorisation of victim and perpetrator, leaving little to no room for people from the 'grey zone' (e.g. Burnet 2009; Sanford/Lincoln 2009; Feierstein 2009). Therefore, the realization of legal punishment and social condemnation of genocide might be criticised for putting a further hold on the attempt to achieve reconciliation and the healing of social bonds (Daly/Sarkin 2007; Huyse 2008).

5.2 Judgements in "the frame of genocide" – the 'Etchecolatz' and 'von Wernich' cases

Daniel Feierstein argues in an interview in the newspaper *Pagina12* (4.11.2007, Translation K.S.): "The law is as much the possibility for punishment as it is the possibility to construct a discourse of truth". In so doing he repeats Foucault's notion of the law as the 'producer of truth' (Foucault 1993), a claim that was supported by the sentence of the Federal Court of la Plata in 2006 where 'genocide' first appeared in a national judgement against the military dictatorship (Verdict 2006).

The judgement constituted a precedent. It was delivered by the Argentine judge Rozanski, who in 2006 presided over the trial against 'Etchecolatz', a former Argentine Head of Police in greater Buenos Aires and commander of various clandestine detention centres. The judges Lorenzo, Rozanski, and Isaurralde convicted the 1929 born Miguel Osvaldo Etcheco-

latz for crimes of wilful homicide, illegal deprivation of liberty and the application of torture, and sentenced him to lifetime imprisonment in a public prison. The Argentine Penal Code does not include the instrument of 'genocide' in its penalty code as such. Therefore, the judgement concluded that these crimes shall be considered 'crimes against humanity' but included the important amendment "committed in the frame of the genocide that took place in the Republic of Argentina from 1976–1983" (Verdict 2006).

On a societal level, this judgement was remarkable. On September 20th, 2006, the daily newspaper *Clarín* (20.9.2006, Translation K.S.) wrote: "For the first time, a jury constitutes, that these crimes were committed 'in the frame of the genocide that was perpetrated in Argentina between 1976 and 1983. This means, that these crimes were part of a systematic plan of extermination'". In this sense, the meaning of the conviction is most important in its effects on the level of the group-consciousness and discussion produced.

In order to understand the sentence, it is necessary to look at the reasons given for the judgement, wherein the judges devote a large part of the text to the discussion of genocide. The arguments range from legal documents and former trials to social scientific and philosophical understandings of genocide. Rozanski starts with Resolution 96(I) of 1946, the first international draft document on the crime of genocide, which still included both 'political groups' and persecution for 'political motives' (UNGA 1946). Furthermore the judgement devotes two pages to the trials initiated in Spain by Baltasar Garzón, who at that time argued for the recognition of the Argentine state terror as genocide.

Rosanzki also recalls the reasons set out in the judgement of the trial against the nine Junta members read in December 1985 (Sentencia 1985), in which the system that was put in practice was legally accepted as substantially the same throughout the Argentine territory, and as being prolonged in time and enacted in a generalized form right from the very start (Sentencia 2006: 262). In the judgement he also makes use of other sources such as the CONADEP report (CONADEP 1984) and the 'trials for truth' to give credence to his main argument: the crimes committed in the context of the military regime all form part of a systematic and organised plan of extermination of a specific part of the Argentine society with the goal of reorganising the this society economically and socially. According to the judges, it

is an "ethical and juridical obligation to recognize that a genocide took place in Argentina" (Sentencia 2006: 256). They further insist that the legal recognition of that 'context' in the judgement as a truth "is of decisive importance for the construction of the collective memory" (ibid.).

After this first legal recognition of the Argentine state terror as genocide in 2006, Judge Rosanzki repeated this legal semantic a year later in the 'von Wernich' judgement (Sentencia 2007). In 2007, the Catholic priest Christian von Wernich was convicted for his complicity in the crime of torture, arbitrary arrest, and extra-judicial execution, again, as the judgement reads, "in the frame of a genocide". To bolster their conviction, this time the judges used the work of the Argentinean social scientists Daniel Feierstein and Mirta Mántaras. The argument concludes that the persecuted 'group' in question "did not in fact exist beforehand, but was constructed by the agents of repression themselves to include any individual who opposed the economic plan brought in by the military or was suspected of seeking to obstruct the aims of the government" (Sentencia 2007 cited in Soledad Catoggio 2010: 16). In this way, the anthropological theoretical notion of 'manufactured' or 'constructed' group identities as an alternative way of defining genocide entered the juridical process in Argentina.

5.3 Challenging international definitions

Juan Méndez, former political prisoner and victim of torture in Argentina from 1975 to 1977, and today President of the International Centre for Transitional Justice and UN Special Adviser to the Secretary-General on the Prevention of Genocide, commented on the La Plata judgements with enthusiasm: "The 'Etchecolatz' and 'von Wernich' judgements represent a good evolution. They were not found guilty of genocide but of crimes 'in the context of a genocide'. For the penalty this 'context' will not affect anything. But the judgements achieve recognition of the character of the repression in Argentina. To give it the name genocide, valid within the Argentine law although not for the international law, will amend a tendency, and one day, one will be able to use it" (Méndez in Pagina12, 4.11.2007, Translation K.S.).

As the UNCG definition provides recurring obstacles to the use and application of the convention, political discussion over the inclusion or exclusion of social and political groups, as well as the question of redefining

the term 'group' itself, persists on an international level. Due to the effects of Customary law, the current development in Argentina's juridical practice might therefore have an important impact on the discussion and applicability of the Convention on an international level in the near future.

By January 2011, eleven trials for crimes against humanity were in process in Argentina and seven more were announced to start in 2011, amongst them another mega-trial likely to influence the discourse on genocide once again. The trial, called 'Plan sistemático', which treats the illegal abduction and theft of children of the disappeared, had its opening session in March 2011. H.I.J.O.S. already announced on its website: "This systematic plan of appropriation of minors, which took place during the bloodiest dictatorship that Argentina had to endure, is one of the motives, even though not the only one, to confirm that in Argentina there had been a genocide" (Hijos-capital 2011c, Translation K.S.).

6. Conclusion

> "One gains power over the nightmare by calling it by its real name." (Buber 1958)

When looking at the transitional justice dynamics unfolding in Argentina today, one cannot but realize the strong interconnectedness of human rights movements, civil society's discourse, and the legal processes that take place. The intense struggle for justice by social and human rights movements in Argentina, such as the practice of *Escrache* performed by H.I.J.O.S., echoes in the current practices of state justice. The creativity displayed in this form of 'popular condemnation' helped to shatter a culture of impunity and pressed for a realisation of governmental responsibility.

The constant use of the word *genocida* helped shape the collective consciousness and is now repeated in the media and social sciences. Remembering the 70s is still contested within the Argentine society. However, talking about the last dictatorship as 'the Argentine Genocide' seems to have become internalised in the collective memory of most Argentine people, thereby rejecting any discourse of 'two demons' or 'civil war'.

Current court decisions are hence another step to support this view, as they recognise genocide as the 'frame' or 'context' for these crimes on a legal level. Furthermore, national Argentine juridical practices and the reasoning and arguments put forth by social scientists, judges, and lawyers in their allegations and judgements, might contribute to the discussion on and support for a revision of the restrictive legal definition of genocide as put forth in the Rome Statute and the UNCG in the near future.

As such, the innovative adoptions of cosmopolitan law in Argentina reflect a localisation of international legal instruments, as the Argentine justice system now makes use of but also challenges international conventions and definitions. Thereby, they offer possibilities for an emancipation from international organisations, which all too often act according to the political will of powerful countries. In that sense, the continuum of a model of truth and reconciliation to the framing of the Argentine state terror as genocide provides a remarkable example of legal subjectivity and shows the changing practices of 'local justice' in Latin America.

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2 This paper is based on my ongoing research and five and a half months of anthropological fieldwork in Buenos Aires and San Miguel de Tucumán (May/ June 2010, February to May 2011), in which I conducted 38 interviews, including semi-structured, biographic/narrative, and expert interviews with human rights activists, lawyers, judges, family members of accused perpetrators, survivors, current and former members of H.I.J.O.S., and Austrian-Jewish Holocaust child survivors. Participant observation was carried out at the Federal Criminal Courts of San Miguel de Tucumán, Comodoro Py 2002 and San Martín (Buenos Aires), as well as at reunions of H.I.J.O.S, the pronouncements of the judgements of four trials, and various protest and memorial marches. Furthermore, I made photographic and video documentation, engaged in local archival research, participated in numerous informal talks and undertook visits to four former clandestine detention centres.

3 Native or adoptive soil arranged like a nation, to which the human being feels tied by juridical, historical and affective ties (Dictionary of the Spanish Language; Real Academia Española).
4 El Nuremberg Argentino. Documentary by Miguel Rodríguez Arias and Carpo Cortés. Argentina 2004.
5 All names of interview partners are rendered anonymous, with the exception of D. Feierstein.

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Interview Sara (H.I.J.O.S. Tucumán), San Miguel de Tucumán, 3.3.2011.

Abstracts

The article analyses contemporary practices of transitional justice in the aftermath of Argentina's last military dictatorship and offers insights into the local articulations of international legal conventions. Focussing on the concept of genocide, the author presents two examples of her ongoing research. The first explores the non-institutional, symbolic jurisdiction entitled Escrache, a collective practice developed by H.I.J.O.S. to ostracize amnestied *genocidas* (perpetrators of genocide) in their own neighbourhoods. The second example presents the national trials reopened in 2005. Two recent judgements in which perpetrators were convicted for crimes

'committed in the frame of genocide' illustrate the innovative application and effective localization of cosmopolitan law. Taken together, the article examines the way in which social agents address the legacy of past violence and contribute to the symbolic inventory of collective memory and juridical practices.

In ihrem Artikel analysiert die Autorin die Bedeutung der zunehmenden Artikulation des letzten Staatsterrors als „Argentinischer Genozid". Anhand zweier Beispiele aktueller Praktiken von Übergangsgerichtsbarkeit wird aufgezeigt, wie internationale rechtliche Konventionen auf lokaler Ebene effektiv umgesetzt und internationale Normen und Definitionen herausgefordert werden. Das erste Beispiel beschreibt die nicht-institutionalisierte symbolische Rechtssprechung der *Escrache*, eine von der Organisation H.I.J.O.S. entwickelte kollektive Praxis, um straffreie *genocidas* (jene, die einen Genozid begangen haben) in ihrer eigenen Nachbarschaft zu ächten. Das zweite Beispiel beschäftigt sich mit den 2005 wieder aufgenommenen Prozessen, in welchen Richter den „Strafbestand des Genozids" in ihre Urteile inkorporieren. Der Artikel zeigt somit auf, wie soziale Akteure das Vermächtnis vergangener Gewalttaten aufgreifen und sowohl zur Entwicklung eines veränderten historischen Bewusstseins als auch zu einer neuen juristischen Praxis beitragen.

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Transitional Justice in Colombia: Does it Contribute to Reconciliation?

Transitional justice instruments are usually applied as part of an effort to reconstruct a country after the end of an armed conflict. The case of Colombia significantly changes this perspective. While the armed conflict was still going on, the paramilitary groups that had been responsible for most of the massacres and crimes against humanity were demobilized, which made transitional justice instruments necessary. This article puts these instruments in a larger conceptual framework that Daniel Philpott calls 'political reconciliation'. It includes and significantly goes beyond the concepts of truth, justice and reparation and points towards the need to holistically restore the relationships affected by the decades-long violence.

I will argue that the demobilization process, with its lack of legitimacy and efficiency, and the subsequent transitional justice scheme, with its focus on the perpetrators, did not meet the expectations of the communities with reference to a real transition. This would include a tangible change in everyday life regarding security, the performance of state institutions and economic welfare.

However, the recent initiative regarding a Victim's Law that includes the restitution of illegally acquired land, demonstrates that the current government under President Juan Manuel Santos has a broader understanding of the underlying causes of the conflict than his predecessor, Álvaro Uribe Velez, who focused exclusively on military security. Therefore, it is still not entirely clear whether the transitional justice scheme will eventually contribute to reconciliation or further harm it by deepening political, economic and social injustices.

As a first step I will briefly introduce the reader to the historical context of the Colombian conflict, with particular emphasis on the

various origins of the paramilitary groups. It shows that the Colombian state has a special responsibility in the healing of the sufferings caused by them, which is why in this article I will focus on the institutional response to the need to address the past. In the following section I will present the concept of 'political reconciliation' and characterize transitional justice as a potential instrument of its implementation. Then, I will return to Colombia and analyze the AUC's (*Autodefensas Unidas de Colombia*, termed paramilitaries) demobilization process and its transitional justice framework. Here, the so-called Justice and Peace Law and the discussion about a complementary Victim's law are of particular importance. The last chapter applies the conceptual framework to the Colombian case and examines whether Colombia is on the way to reconciliation according to this concept.

1. Historical context

Depending on whom you speak to, Colombia's internal armed conflict started either with its independence from Spain in 1819, in 1948 or in 1964. While several commentators look on the history of independent Colombia as a sequence of internal wars, others consider that the assassination of the popular politician Jorge Eliecer Gaitán in 1948 triggered the current conflict. Others, on the contrary, insist that it was caused by the emergence of the FARC (Revolutionary Armed Forces of Colombia) and ELN (National Liberation Army) groups in 1964.

In any case, it is a long lasting conflict with millions of dead, disappeared, displaced, tortured, kidnapped and mistreated human beings. Only a few families have been spared from the many forms of violence. The actors involved in the armed conflict are the state, the guerrilla groups, among which the FARC and the ELN are the most significant, and the paramilitary groups and drug-related mafias, though between the latter two the overlaps are profound.

A decade-long confrontation between the conservative and liberal parties found its climax in 1948, when Gaitán was killed. This constituted a major blow to his reform agenda that included important socio-economic issues, among which the unequal distribution of land has been the most

prominent. His assassination resulted in riots in Bogotá (called *Bogotazo*) and bloodshed in the rural areas. The security forces, supported by paramilitary groups, deliberately attacked opposition groups. Rural self-defence groups, linked to political programs, were set up and simultaneously defended peasant communities against armed attacks.

This was the context of the surge in guerilla activity that consisted in a mixture of self-defense, social misery and political grievances. While the FARC is more rurally based, the ELN, with its roots in the union movement and universities, could have attracted a more urban following; however, it has never achieved a significant military presence in the cities. For the sake of completeness I would like to mention that throughout history other guerrilla groups existed that are not described in detail here. The foundation of armed groups, their splintering into multiple groups and their dissolution is a characteristic feature of Colombia's history of conflict (UNDP 2003: 27ff).

In 1957, the bipartisan violence was formally terminated by a rigid division of power between the Liberals and the Conservatives. This pact, called the *Frente Nacional* (National Front), virtually excluded all other political actors, which made an opposition impossible. This, and the unresolved social questions, facilitated the territorial expansion of the guerrilla groups from the late 1960s onwards. They increasingly took control over entire regions, imposed taxes and levies on wealthy and administered the jurisdiction. In regions where the civil population was attacked or exaggeratedly high 'taxes' were levied, local self-defense groups and security firms came into existence. The former were usually organized by the local people themselves and defensive in nature, with the objective being to protect the communities; the latter were often financed by landowners. These well-armed groups of mercenaries also attacked the assumed social base of the guerrillas, the opposition, the union movement and other civil society actors.

Both types of armed actors were supported or at least tolerated by the military. Despite the fact that most of these emerged independently, the state bears responsibility for the violations of human rights due to its reluctance to prevent them. In any case, the state actively helped to undermine its own monopoly of force through arming them.

In 1968, Law 48 legalized private armed groups for self-defense. In 1987 President Virgilio Barco repealed the law, but President César Gaviria replaced it in 1994 with Decree 356 on the legal arming of security firms

that were meant to closely cooperate with the military (Ávila Martínez 2010: 113f). These firms came to the public's attention as *Convivir* and were the immediate precursors to the paramilitary groups.

In the 1980s the FARC gradually began to participate in the profitable cocaine business, particularly through control of the cultivation areas and the levying of 'taxes' on the plant. In this way, the guerrilla group came into competition with the big drug cartels of Medellín and Cali, which formed private armies to combat them. These violent actors and predecessors of the paramilitaries had completely different characteristics to those described above. Their objective was the elimination of competitors, the protection of the routes of transport and the areas of cultivation. From the start, their strong roots in the drug business made available enormous resources for the expansion of paramilitary forces and provided certain AUC leaders with significant wealth. These would eventually 'purchase' paramilitary units in order to exercise territorial control and become 'political actors', a position that has often resulted in legal privileges in the case of a demobilization process, privileges that are not attainable for 'normal' criminals (Medina 1990; Pardo 2007: 19ff).

In 1998 the FARC entered a peace process with the government under President Andrés Pastrana. Pastrana conceded territory the size of Switzerland, where the FARC enjoyed a safe haven for the negotiations. This process was characterized by a lack of strategy on the part of the government and a lack of will to seriously negotiate on the part of the FARC. On the contrary, the latter used the territory as an area of retreat for its troops, as a cultivation zone for coca and a shelter for the kidnapped. In the end this process completely failed and led people to the assumption that it was necessary to militarily defeat the guerrillas, given the apparent lack of interest in a negotiated solution – thus, the conditions for strong arm policies were set.

During that time, not only did the FARC bolster its military capacities, but the AUC, under the leadership of Carlos Castaño, did as well, by forging alliances against the peace process. These efforts, together with its anti-subversive and anti-communist propaganda, attracted significant support in several segments of the population that were not willing to tolerate any longer the weakness of the state (Garzón 2005: 79f). Consequently, in these years the AUC expanded its territorial and political control to most regions of the country. The cooptation of local politicians and even parties flour-

ished and explained why hitherto unknown political forces were immediately elected into Congress in 2002 (López Hernández 2010: 29ff; Romero 2007). The majority of them entered the coalition of president Uribe.

This anti-subversive wave swept Álvaro Uribe Velez to the presidency. As Governor of the Department of Antioquia, he had a record of supporting the above-mentioned *Convivir* groups (Romero 2003: 194). Despite being a rather unknown candidate, Uribe was elected president in the first round in 2002. In effect, his policy of 'democratic security' included a strong military component against the guerrillas, but also the instigation of the demobilization process of the AUC.

Before elaborating on this process, it is of utmost importance to emphasize that paramilitarism has not only consisted of the armed groups, but also of a widespread and dense network of political, economic and criminal actors and interests. The interface between the legal and illegal spheres is of particular interest, for example when legal institutions were infiltrated by illegal groups and used for their ends. Consequently, the armed part of the paramilitaries served as an instrument to eliminate rivals, civil society actors, political opposition or peasants that resisted 'superior' interests. In addition, they took care of the protection of the drug business and the control of the acquired goods. After the demobilization of these groups, however, the illegal structures in the background remained intact. Due to its role in the creation of paramilitary groups, the state has a particular responsibility in dismantling them.

2. The demobilization of the armed paramilitaries

The main goal of Uribe's 'democractic security policy' was the strengthening of the state's authority throughout the country, a position that required the reinforcement of military and police action against illegal groups. From the start, the main enemy was the FARC. Simultaneously, Uribe started negotiations with the AUC about their demobilization (ICG 2003).

The negotiations with the AUC, named Ralito-process, after the area where they took place, suffered from a lack of transparency. On the one hand it became clear that the AUC had accumulated significant power that put them in a very strong negotiating position; on the other hand civil

society did not trust the president, because of his record. Therefore, it did not come as a surprise that the whole process, particularly the question of how to punish the most important paramilitary representatives, has been very controversial. From the beginning, the secrecy of the negotiations reduced the legitimacy of their results.

Based on the Agreement of Santa Fé de Ralito of July 15th 2003, in which the government and the AUC agreed on a demobilization process, the disarmament was implemented in the following years in public ceremonies (Pardo 2007: 53ff). The first was the demobilization of the *Bloque Cacique Nutibara*, a group in Medellín under the command of *Don Berna*. The city's reintegration effort has been considered an example for the engagement of local authorities. However, there was criticism referring to the almost exclusive focus attributed to the demobilized, while victims had been left aside for a long time.

The demobilization process raised strong doubts about its effectiveness. Civil society organizations have often criticized the fact that, before the ceremonies, the AUC had recruited poor youth to show up as paramilitaries, 'demobilize' and thus enjoy the payment, while the real paramilitaries kept their weapons and maintained themselves in illegality. According to these sources, the number of actual demobilized is far lower than the official figure of 31,000. The current debate about the so-called *bacrim* (*bandas criminales*, criminal gangs) seems to give some credit to these claims, given the fact that most of their members are former paramilitaries (Tobón García 2009).

3. 'Political reconciliation' as the conceptual framework …

This analysis of the nature of the paramilitaries, their demobilization and particularly the atrocities they committed, leaves Colombian society with a number of challenges: a state that is seriously undermined in its legitimacy by links with illegal actors and at least tacit support for crimes against humanity; a multitude of victims that lost relatives and property and still live in insecurity; a high number of ex-combatants who are stigmatized by society, potentially recruited by illegal groups and accustomed to violence; and the persistence of a flourishing drug-trade that offers enormous incentives to people to get involved in illegal activities.

These circumstances require a concept that is comprehensive enough to address them, but also sufficiently policy-oriented to offer strategies to improve the situation. This is why, in the following, I adopt Daniel Philpott's concept of 'political reconciliation' and apply it to the Colombian case. According to this author, reconciliation is a "concept of justice and of peacebuilding that envisions a holistic and integrated repair of the wounds that war and dictatorship leave behind" (Philpott 2010: 94).

Philpott puts the restoration of justice at the center of his concept. This includes a focus on relationships that transcends what he describes as 'liberal peace', which is usually the basis for transitional justice instruments. 'Liberal peace' consists in the idea that, after a conflict, the rule of law, democracy and civil liberties have to be reinstated. The best way to achieve this is to prosecute and punish the perpetrators, heal the victims and tell the truth about what happened. Philpott agrees that these goals are of utmost importance, but lack the relational aspects of apology, forgiveness and acknowledgement that are usually conditional upon the fulfillment of the former elements. The term 'holistic' refers to these additional elements that are usually absent.

The wounds caused by political injustices, which "are defined as the violation of human rights or the laws of war" (Philpott 2010: 102), sever relations of justice. Among them are: the violation of the person's dignity by diminishing a person's flourishing; the victim's ignorance of the source and circumstances of the injustice; the denial of the law, a denial which became manifest in human rights violations; the lack of acknowledgment of the victim's sufferings; the continuing victory of the perpetrator's injustice; and the psychological damage committed by the perpetrator. If not addressed adequately, these wounds result in further violence and injustices (Philpott 2010: 102ff).

Philpott identifies six "practices of an ethic of political reconciliation" (Philpott 2010: 106ff) that address those wounds and thus restore justice: the building of socially just institutions; acknowledgment; reparations; punishment; apology; and forgiveness. They are considered as interdependent and holistic and cause problems among each other that cannot be fully dealt with here.

(1) The first practice is based on the principles of 'liberal peace' and promotes the rule of law, a democratic political system and accountable institutions.

(2) The acknowledgment of injustice satisfies the need of the victims to know what happened and delegitimizes the past order. Truth Commissions are good examples of instruments that analyze what went wrong.

(3) Reparations may be material or symbolic; in any case they contribute to address the loss suffered by the victim and recognize the wounds.

(4) The punishment of the perpetrators is usually equated with retributive measures such as prison terms, without working on their relationships with the victims and the community. Restorative punishment includes the element of suffering for the perpetrator, but concentrates on his/her future rightful reintegration into society.

(5) An apology should directly address the injustice, show remorse and assume responsibility for it. It does not annul punishment.

(6) Forgiveness, finally, seems to be the most controversial element. Restorative forgiveness does not include forgetting the past or issuing amnesties for the perpetrators. Rather, on the contrary, it names and condemns the past evil and as a voluntary act may even relieve the victim of bitterness. Ideally, it would be accompanied by other elements such as punishment and apology.

These acts of restoration may produce additional benefits, such as the strengthened legitimacy of the political regime and trust among the community's members.

According to Philpott, reconciliation is both the process of restoring justice by applying these strategies and the resulting state of justice itself, which he equates with peace (Philpott 2010: 98). In a practical way, this means that reconciliation transcends by far the interpersonal level of victim/perpetrator and necessarily involves the state as an essential actor of reconciliation. The active participation of the parties beyond the legal and institutional activities of the state is intrinsic to this concept (Philpott 2010: 106).

Taking these elements together, political reconciliation is defined as a "concept of justice that involves the will to restore victims, perpetrators, members of the community, and states who have been involved in political injustices to a condition of right relationship in the political order [...] – a condition characterized [...] by the guarantee and recognition of basic rights. It comprises six practices that aim to restore persons and relationships with respect to the distinct wounds that political injustices have inflicted upon them. These restorations may in turn generate emotions and

judgments that bequeath upon the political order legitimacy, trust, and national loyalty, forms of social capital that in turn promote the stability of just institutions, economic growth, peace among states, and other social goods" (Philpott 2010: 105).

I would add two essential methodological considerations that refer to the six practices. On the one hand, it is necessary to design their implementation using a maximum of communication. Victims and affected communities need to feel that they are not passive receivers of an apology or an acknowledgment, but rather participate in its design and timing. On the other hand, it is important to stress that reconciliation is a multi-level process; the practices must be adapted to meet the specific expectations, language and needs of each of the levels.

4. … and 'transitional justice' as its implementation

'Transitional justice' consequently refers to the actual instruments applied in a given historical context. In this case it deals with the question of how the demobilized AUC have to atone for their acts, how a victim's rights to truth, reparation and justice are fulfilled, and how society as a whole is transformed in order to prevent a repetition of the atrocities. In hindsight these instruments will be judged according to their contribution to reconciliation.

The UN Secretary General Kofi Annan, in his 2004 report *The rule of law and transitional justice in conflict and post-conflict societies* (Annan 2004), defined transitional justice as follows: "Transitional Justice comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."

Transitional justice is not only about analyzing and addressing past crimes and atrocities. It is of utmost importance that the main focus remains on the present and the future. In compliance with the conceptual framework of 'political reconciliation' as described above, it is clear that the

goal is the transformation of a society that perpetuates violence into one that does not need it to resolve its conflicts.

Moreover, I consider transitional justice as both top-down and bottom-up processes that are inter-related but respond to different priorities. While the former are the result of political processes, international pressures, conditionalities and international standards, the latter are frequently in line with local needs and initiatives. Since transitional justice is often seen as the area of international lawyers, who defend international norms of human rights and jurisdiction, the non-legal and local ways to confront the past and to construct a future often receive insufficient attention. However, they are at least as important for reconciliation as the judicial measures (McEvoy/McGregor 2008: 1ff).

5. The Justice and Peace Law (Ley Justicia y Paz)

The instruments of transitional justice have usually been applied to transitions from authoritarian to democratic political systems. Colombia, however, must undertake a transition from armed conflict to peace. In such a situation it is not easy to define 'transition', due to the lack of a well-defined transitional moment. This results in debates about the legitimacy of special transitional justice procedures to deal with those who committed atrocities. Those who refuse to speak of a transition, point to the lack of a real change in everyday life, particularly in the rural areas. In addition, there are suspicions about the maintenance of the political, economic and social structures of the paramilitaries. In the end, there are too few changes to speak of a transition according to these voices (Diaz 2008: 195ff).

For those who consider that there is a transition, these mechanisms are justified in order to prevent the occurrence of future victims. The whole demobilization process of the paramilitaries has the goal of taking out huge numbers of fighters and thus reducing the risk of further civilian victims. They also assert that the current transitional justice instruments constitute a major improvement, in comparison to previous efforts that resulted in amnesties, such as the demobilization of the M-19 guerrilla group in the 1990s.

The last argument, however, is not convincing, given the fact that the demobilization of the M-19 was part of a political process that resulted

in the Constitution of 1991, whereas the demobilization of the paramilitaries simply consisted in negotiating legal privileges for the fighters. Additionally, international standards have changed significantly compared to 1991. Considering the ad-hoc tribunals for Yugoslavia and Rwanda and the establishment of the International Criminal Court (ICC), the tolerance for amnesties has diminished (Robertson 1999). The 'international script' of transitional justice insists on accountability for atrocities, such as those committed by the paramilitaries (Cavallaro/Albuja 2008: 124f).

For quite some time the legal framework for this demobilization was unclear. In August 2003, the then Peace Commissioner, Luis Carlos Restrepo, launched a proposal for a *Ley de Alternatividad Penal* (Law for Alternative Criminal Prosecution) that did not envisage prison terms for crimes against humanity or for the involvement in the drug business. This original project could not be implemented due to massive national and international protest (Pardo 2007: 60ff).

Only in June 2005 did Congress pass Law 975/2005, also called the Justice and Peace Law,that was intended to serve as a basis for the collective and individual demobilization of armed groups. According to this law, those who committed crimes against humanity and war crimes have to face a special procedure that concedes reduced prison terms in exchange for the whole truth about the candidate's acts, as well as reparation for the victims. The stipulated five to eight years for massacres, mutilations and the like seemed too mild to many detractors of the law; the government, on the contrary, defended it as being an internationally relevant example (Pizarro/Valencia 2009: 25).

Around 3,000 of the 31,000 demobilized paramilitaries applied for special treatment under the law, because they had committed especially severe crimes. The remaining paramilitaries had to undergo a simple administrative procedure before returning to civil life. Since then these ten percent of the demobilized have participated in proceedings that start with the so-called *versiones libres* (voluntary declarations) about their involvement in illegal activities. Provided that they provide the whole truth and are willing to make reparations to their victims, they receive reduced prison terms.

Furthermore, the law enumerates the rights of the victims to truth and reparation. While the former should be guaranteed by the paramilitaries' declarations, the victims may choose different ways to get reparation.

Whereas, such reparation is part of the procedure under the Justice and Peace law, the *Fondo para la Reparación de las Víctimas* (Fund for the Reparation of the Victims) was established for cases in which the perpetrator could not be identified. Finally, President Uribe issued a decree that opened to victims the possibility to get administrative reparation without having to wait for the results of the protracted legal procedure.

In addition to its material and individual aspects, the law also characterizes reparation as symbolic and collective. Thus, groups or communities that were particularly harmed by violence can have reparations made to them as a collective actor. This is of special relevance in the case of the left-wing party *Unión Patriótica* (Patriotic Union), which was exterminated by the paramilitaries.

There was an intense debate about the law that found its institutional manifestation in the confrontation between the President and the Supreme and Constitutional Courts. Both Courts annulled several articles of the law and thus guaranteed a better implementation of the rights of the victims to truth, justice and reparation. Among other considerations, the time that paramilitaries had spent at the negotiation site in Ralito could no longer be deducted from the prescribed prison term; the demobilized now had to disclose the whole truth or risk losing their legal privileges even after the verdict, and they were obliged to make reparations with the totality of their assets and not only with those illegally acquired. This judgment caused very negative reactions, both from the President and the paramilitary commanders (García Villegas et al. 2010: 324ff).

The fact that the law in its last version constitutes, at least on paper, not only a constructive contribution to the demobilization of the paramilitaries, but also to the implementation of the victims' rights, owes not so much to governmental initiative, but to the courageous decisions of the Courts and the protests of civil society actors and international organizations that gave a valuable practical example of the so-called 'boomerang effect' (Keck/Sikking 1998).

5.1 Impact of the Justice and Peace Law

Article 50 of the law provided for the establishment of a *Comisión Nacional de Reparación y Reconciliación* (CNRR, National Reparation and Reconciliation Commission) under the Vice-President. The Commission

consists of representatives of the Government, the Public Prosecutor, the Ombudsperson and civil society. Their tasks include observation of the demobilization effort, promotion of reconciliation, elaboration of individual and collective measures for reparation, and historical analysis of crimes. The Commission utilizes local offices in several regions of the country and consequently is able to get in direct contact with many victims.

The Commission has attained public recognition for its analysis of the massacres of *Trujillo, Salado, Bojayá* and *La Rochela,* on which exhaustive reports were published. Politically, however, it seems that the main planning and decisions on transitional justice-measures take place outside the Commission. Examples of this are the debates on the first version of the Victims Law in 2009 and also on the before-mentioned administrative reparation, a one-time payment for the victims of violence. In light of the very slow advance of procedures under the Justice and Peace Law, President Uribe issued Decree 1290 in April 2008, thereby creating the opportunity for victims to receive money according to the degree of their victimization. As an example, a victim or his/her relative can receive 40 months' minimum wages, i.e. around 8,000 euros, in the case of assassination, disappearance or kidnapping.

A direct consequence of this law was the extradition of important paramilitary leaders to the US. Notorious commanders such as Macaco, Mancuso, Jorge 40 and Don Berna were surprisingly extradited in April 2008. According to the government, they violated the stipulations of the Justice and Peace Law by committing criminal acts from prison. This extradition caused intense debates, due to the concern that they would no longer contribute to the disclosure of truth. According to these critics, the government removed them just at the moment when they were about to reveal their links to the political and economic elite of the country. In contrast, it was claimed that in the US they would be indicted only for drug-related crimes, but not for crimes against humanity.

This argument is not convincing, because these commanders will spend significantly more time in prison than they were supposed to under the Justice and Peace framework. Furthermore, several of them only began to remember their past in the US, while in Colombia they had suffered from amnesia.

Not linked to the law, but still in relation to the efforts to come to terms with the past, there is another aspect that is worth mentioning: the

parapolítica, the disclosure of the political supporters of paramilitarism. Academics such as Claudia López and politicians like Gustavo Petro rendered outstanding service to the analysis of electoral manipulations in exchange for the political support of paramilitary leaders. One member of Congress after another was either detained or subjected to resulting criminal investigations. The overwhelming majority belonged to parties of the governmental coalition, such as the Conservative Party, the party *La U, Alas Equipo Colombia, Convergencia Ciudadana* and *Cambio Radical*. In addition, there were scandals involving the secret service *DAS*, the former director of which, Jorge Noguera, was seemingly involved in the assassination of trade unionists and members of the opposition in the Atlantic departments. These examples back the hypothesis that state institutions were systematically infiltrated and transformed in favour of illegal interests (López Hernández 2010; Romero 2007).

6. The debate on a Victim's Law

In September 2010 President Santos introduced a new law project on victim's rights and the restitution of illegally acquired land – termed 'Victim's Law'. The difference to the first, failed version in 2008 is that the government actively supports this new proposal. It was designed to complement the Justice and Peace Law that formally included the victim's rights, but concreted only the procedures with regard to the demobilized. In December 2010 it passed the Chamber and in May 2011 the Senate; on June 10th the law was signed by the President in an official ceremony with the participation of UN-Secretary General Ban Ki-moon.

The main elements of the law refer to the rights of the victims of the armed conflict to reparation, justice and truth. Under President Uribe the term 'armed conflict' was suppressed, because he considered the armed actors as terrorists, thus stripping the conflict of its political meaning. This is a major advance, because the recognition of the existence of a conflict is the basis for a future peace process. Furthermore, the law considers victims of all the armed actors, including the military, which is a milestone in comparison to past debates.

Another important aspect is the topic of land restitution. For many analysts, land is one of the root causes of the conflict. In recent years,

the displacement of peasants by armed actors reached dimensions that equated to a 'land counter-reform', meaning a further concentration of land. The access and use of land would certainly ease the situation of the approximately four million displaced people and contribute to a development of the rural sector based on economic opportunities for the small peasant. The victims who have lost their land since 1991 will be considered for restitution. Further measures of reparation may be attributed to victims after 1985, which is an advance when compared to the version agreed upon in the Chamber.

There is another factor that facilitates the reparation of the victims, which is the reversal of the burden of proof in favor of the victims. Thus, it is the owner of a specific property who, in case of a dispute, has to prove that he/she acquired it legally. Moreover, certain symbolic measures have been considered, such as the National Day of Victims (December 10th) and several initiatives to document what happened such as a Center and a Museum of Memory (Paredes 2011). The assassinations of leaders that claim their lands, however, emphasize the need for an efficient program to protect peasants who actually return to their lands (Lozano 2011). This is a topic of enormous importance for the implementation of the law.

There seems to be a major downside to the law, however. The state does not assume responsibility for the victimization of the victims. It considers itself as a subsidiary actor in the reparation effort, meaning that these measures should not be seen as an admission of responsibility. It is still too early to assess the impact of this refusal to accept the state's responsibility, but if there is no expression of regret or apology by the President, the psychological benefit of the law will certainly be reduced.

7. Does transitional justice in Colombia contribute to reconciliation?

In order to assess the above discussed instruments of transitional justice in Colombia as regards their impact on reconciliation, I am revisiting the 'practices' that Philpott proposed for the restoration of justice.

It is probably too early to comment on the aspect of 'building socially just institutions'. There are certainly institutional efforts in the judiciary

system to implement the Justice and Peace Law. If properly implemented, the new Victim's Law must lead to institutional transformations in the several agencies that consider land-related issues. In Colombia it seems that norms themselves have not been the main problem, but rather their implementation. To change the public perception that laws are more than ink on paper, the implementation of the Victim's Law should be carefully designed and from the beginning be based on a participatory process. Only then can people's 'civic trust' in norms and their institutions be re-established and the resentment caused by the frequent disappointment of legitimate normative expectations, such as being protected by the State, alleviated (Greiff 2008).

Most efforts are undertaken with regard to reparations. Both the Justice and Peace Law and the Victim's Law consider significant measures of reparations, both material and symbolic. Furthermore, the Victim's Law leaves space for additional Presidential decrees to promote special groups, such as the indigenous, at a later stage.

The trickiest element is probably that of acknowledgment. Up to now, the state has not declared its (co-)responsibility for actions or omissions that seriously damaged its citizens. The Victim's Law at least recognizes the existence of an 'armed conflict'. The aforementioned *parapolítica* demonstrated that there was a systematic cooperation between state agents and paramilitary groups. Notwithstanding this, they were never condemned as state failures by the government, but only as individual crimes. This certainly undermines the relation between the state and its citizens. On the other hand, the fact that the armed conflict is still ongoing does not encourage such manifestations of responsibility.

Since there is no formal acknowledgment of the state's role in violence, there is no apology and therefore no possible forgiveness on the national level. On a local level, however, there may be more opportunities for constructive relations between the state and its citizens, as I realized when coordinating a project with the objective of promoting reconciliation in the city of Barrancabermeja. One of the results was a survey on the essential social disruptions in the city that must be addressed in order to (re)generate basic trust between the citizens and the institutions. There was complete consensus on this between public authorities and civil society. Another conclusion was that it was not appropriate, at that time, to publicly foster

the personal perpetrator-victim relation; the crimes were too recent and the wounds too fresh (Wlaschütz et al. 2009).

This reflects the very legitimate insistence of the victims to determine the moment when they deem forgiveness or even contact with the perpetrators appropriate. However, this and other surveys also show that there is an enormous desire of citizens to have accountable state institutions that generate positive services, such as health or education (Wlaschütz 2008).

The punishment of the perpetrators is most visible with regard to politicians who were involved with paramilitaries and are now detained. The paramilitary leaders who were extradited to the US also face decade-long prison terms. Through the process of Justice and Peace, several other leaders may be condemned to prison; the majority of the paramilitaries, however, have long returned to civil life or slid back into illegality. In general, those who decided to integrate into civil life feel stigmatized by society, which in itself is an additional form of punishment. The fact that they received certain privileges such as payments and professional training, while their victims had to wait a long time for recognition, increased their isolation. With the exception of indigenous communities that, through their rituals, managed to reintegrate 'their' demobilized excombatants, I am not aware of communitarian ways of addressing these criminal actions. As a result, punishment is highly concentrated on the state and focuses almost exclusively on retributive forms. The attempts by government programs to engage the demobilized with the rest of the population through productive projects usually do not address what happened in the past.

8. Conclusion

After this analysis of the impact of the transitional justice instruments on Philpott's 'practices' designed to promote reconciliation, the preliminary balance must be mixed. The most challenging endeavor will be the transformation of a political and economic system that throughout decades has perpetuated violence. In this regard, Colombia presents an interesting case study for a country, where people usually know what happened and who was involved. There are also judicial prosecutions of high-ranking members of the system; what is still lacking, though, is a systemic approach to eradi-

cating the roots of violence. It is not enough to condemn certain individuals or demobilize certain armed groups, if the structures behind remain the same. Therefore, 'truth' or lack of analysis is not the main problem, but, rather, the lack of consequent action.

The new Victim's Law may make a significant contribution in this regard. If efficiently implemented, it would ease the sufferings of many victims and address one main systemic deficiency, i.e. the distribution of land. It remains to be seen how the simultaneous developments of land-restitution and the increased use of land for agro-industrial projects work out. There are real fears that the restitution of land will go hand in hand with the pressure to sell this land to agro-industrial companies, especially given the boom of agro-fuels and other energy-related projects.

Ultimately, I am convinced that all these instruments would gain significant legitimacy, if they are implemented using a form of participatory methodology. It is virtually impossible to prescribe reconciliation from above; people want to be recognized as citizens and taken seriously as agents of their future. The elaboration of the Victim's Law included several efforts to outreach to the affected communities by organizing gatherings to collect information and recommendations from the people.

This wish to be directly addressed is also why a public acknowledgment of, or even apology by the President for the state's failure to protect its citizens would have an enormously positive impact on the state's credibility, which is the most important pre-condition for a real transition towards a peaceful and just society.

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Abstracts

Colombia offers a valuable contribution to transitional justice research due to its attempt to implement post-conflict-instruments in the middle of an ongoing armed conflict. Ideally, these instruments would be able to become tools for peace and reconciliation. The author introduces the concept of 'political reconciliation' in order to test its impact in this regard. The implementation of the concept in the case of Colombia shows that the state has made small steps in the direction of reconciliation, but that its legitimacy is still not established. The demobilization of the paramilitary units turned out to be non-transparent and ineffective, and its legal framework did not address the needs of the victims. However, the current victim's law offers interesting perspectives with regard to the necessary structural transformations. It still remains to be seen however, whether it will turn out to be more than another good law on paper.

Kolumbien unternimmt den für die „Transitional Justice"-Forschung hochinteressanten Versuch, Post-Konflikt-Instrumente inmitten des fortdauernden bewaffneten Konflikts anzuwenden. Im Idealfall könnten diese zu Werkzeugen für eine Friedens- und Versöhnungspolitik werden. Um diese Möglichkeit zu prüfen, stellt der Autor das Konzept der „politischen Versöhnung" vor. Dessen Anwendung auf Kolumbien zeigt, dass der Staat kleine Schritte in Richtung Versöhnung leistet, aber vor allem beim Aspekt

der Legitimität Schwächen aufweist. Die Demobilisierung der paramilitärischen Einheiten gestaltete sich nicht nur intransparent, sondern auch höchst ineffizient, der gesetzliche Rahmen ging nicht auf die Bedürfnisse der Opfer ein. Allerdings bietet das aktuelle Opfergesetz interessante Perspektiven in Richtung der notwendigen strukturellen Veränderungen. Es bleibt offen, ob es mehr ist als ein weiteres wohlklingendes Gesetz.

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Rita Schäfer: Frauen und Kriege in Afrika. Ein Beitrag zur Gender-Forschung. *Frankfurt/M.: Brandes&Apsel 2008, 520 Seiten, 39,90 Euro [www.frauen-und-kriege-afrika.de].*

The outsider's view on wars and conflicts focusses predominantly on the male protagonists (soldiers, rebels, politicians). In particular, the representation of wars in the international media often does not reach beyond this perspective, in the process leaving aside an anonymous mass of civilians. As a result, one can quickly forget the fact that different groups of people are subject to different experiences before, during and after violent conflicts. German ethnologist Rita Schäfer's book *Frauen und Kriege in Afrika* (Women and Wars in Africa) contributes to throwing light on this frequently neglected subject by focussing on gender relations in the context of postcolonial (civil) wars and conflicts in Africa. Following a short introduction, there are 15 country studies, which are divided into four subgroups: Southern Africa, Western Africa, Central and Eastern Africa, as well as the Horn of Africa.

All country studies follow a similar structure and can be read independently of each other. Schäfer begins with an introduction on the (colonial) history of each country, which makes the book worthwhile as well for non-experts in recent African history. What follows are sometimes rather detailed, sometimes more general analyses of the developments before, during and after the conflicts, where she emphasizes a gender perspective, while not forgetting to exhibit political, historical and other relevant processes driving the conflicts, such as power relations between the old and the young.

The role model of women underwent a significant change during colonial times and afterwards during the specific circumstances of (civil) wars. The situation, however, was not the same for men and women of different classes, ethnic groups or different ages. Many young women actively engaged with conflict groups, which promoted, at least verbally and on the lower social levels, an egalitarian relationship between men and women (examples would be EPLF in Eritrea and FRELIMO in Mozambique). After the conflicts, disillu-

sion was a common experience for these women because their hopes for the continuity of the new gender relations were disappointed. The strategy of postponing the struggle for women's rights in favour of the fight for independence turned out to be problematic, as many women who took part in the fighting were accused of 'immoral behavior' and of being 'impure' (p. 469) and there was a societal drive for a return to 'traditional' lifestyles.

While the title of the book explicitly addresses the role of women in Africa's wars, Schäfer also delivers deep insights into the changing concepts of masculinity. She examines violence-based pictures of masculinity which were introduced during colonial times and transformed older forms of masculine identities based on lives as peasants or farmers. The book helps the reader to gain insight into the long-term effects of feelings of powerlessness engendered by colonial and postcolonial despotic rule. From this point of view, it becomes possible to grasp the reason for seemingly inhuman cruelties like mass rape and intentional infection with HIV, which are widely understood as "excessive individual and collective proofs of power" (p. 511), and which were used as ways of compensating for male disorientation and loss of power in other areas.

For the post-war period, Schäfer describes the challenges of rebuilding peace in conflict-torn societies in a very unpretentious style that also makes the book interesting for people working in the field. Her account of UN peacekeeping missions is particularly enlightening. In the concluding section, Schäfer outlines some connecting elements between the various country studies, one of which is the insufficient consideration of gender relations during the attempts at peace-building.

Her book deals impressively with a wide array of other topics and is accompanied by a detailed literature overview on her supplementary website. For integrating the relational concept of gender into research about African (civil) wars and deepening our understanding of the roots of these conflicts and why it is so hard to solve them, *Frauen und Kriege in Afrika* stands out as an important contribution to peace and conflict research.

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2/07	Perspectives on Development Studies / Entwicklungsforschung
3/07	Paulo Freire heute / Popular Education
4/07	Entwicklungspolitik und Sicherheitsinteressen / Development Cooperation and Security Politics
1/08	Medien und Entwicklung / Media and Development
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