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## **Beyond Transitional Justice**

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**CHRISTIAN WLASCHÜTZ**

**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.

## **I. 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-defense 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 ‘democratic 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 15<sup>th</sup> 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.

(i) 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 10<sup>th</sup> 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 10<sup>th</sup>) 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.

## References

- Annan, Kofi (2004): The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, S/2004/616. New York: United Nations.
- Ávila Martínez, Ariel Fernando (2010): Injerencia política de los Grupos Armados Ilegales. In: López Hernández, Claudia (ed.): ... y refundaron la patria. De cómo mafiosos y políticos reconfiguraron el Estado colombiano. Bogotá: Corporación Nuevo Arco Iris, 79-214.
- Cavallaro, James L./Albuja, Sebastián (2008): The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond. In: McEvoy, Kieran/

- McGregor, Lorna (eds.): *Transitional Justice from Below. Grassroots Activism and the Struggle for Change*. Portland: Hart Publishing, 121-142.
- Díaz, Catalina (2008): *Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia*; In: McEvoy, Kieran/McGregor, Lorna (eds.): *Transitional Justice from Below. Grassroots Activism and the Struggle for Change*. Portland: Hart Publishing, 189-216.
- García Villegas, Mauricio/Revelo, Javier/Uprimny, Rodrigo (2010): *Impacto constitucional e institucional*. In: López Hernández, Claudia (ed.): *... y refundaron la patria. De cómo mafiosos y políticos reconfiguraron el Estado colombiano*. Bogotá: Corporación Nuevo Arco Iris, 317-330.
- Garzón, Juan Carlos (2005): *La complejidad paramilitar: una aproximación estratégica*; In: Rangel Suárez, Alfredo (ed., 2005): *El Poder paramilitar*. Bogotá: Editorial Planeta Colombiana, 47-136.
- Greiff, Pablo de (2008): *The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted*. In: Gibney, Mark/Howard-Hassmann, Rhoda E./Coicaud, Jean-Marc/Steiner, Niklaus (eds.): *The Age of Apology. Facing Up to the Past*. Philadelphia: University of Pennsylvania Press, 120-136.
- ICG – International Crisis Group (2003): *Colombia: President's Uribe Democratic Security Policy*. <http://www.crisisgroup.org/en/regions/latin-america-caribbean/andes/colombia/006-president-uribes-democratic-security-policy.aspx>, 28.5.2011.
- Keck, Margaret E./Sikking, Kathryn (1998): *Activists without Borders. Advocacy Networks in International Politics*. Ithaca/London: Cornell University Press.
- López Hernández, Claudia (ed., 2010): *... y refundaron la patria. De cómo mafiosos y políticos reconfiguraron el Estado colombiano*. Bogotá: Corporación Nuevo Arco Iris.
- Lozano, Pilar (2011): *Colombia lanza un plan para proteger la devolución de tierras*. In: *El País*, 31.3.2011.
- McEvoy, Kieran/McGregor, Lorna (eds., 2008): *Transitional Justice from Below. Grassroots Activism and the Struggle for Change*. Portland: Hart Publishing.
- Medina, Carlos (1990): *Autodefensas, Paramilitares y narcotráfico en Colombia: Origen, desarrollo y consolidación. El caso de 'Puerto Boxacá'*. Bogotá: Editorial Documentos Periodísticos.
- Pardo, Rafael (2007): *Fin del Paramilitarismo. ¿Es posible su desmonte?* Bogotá: Ediciones B.
- Paredes, César (2011): *Diez Puntos Claves de la Ley de Víctimas*. In: *Semana*, 26.5.2011.
- Philpott, Daniel (2010): *Reconciliation. A Catholic Ethic for Peacebuilding in the Political Order*. In: Schreiter, Robert J./Appleby, R. Scott/Powers, Gerard F. (eds.): *Peacebuilding. Catholic Theology, Ethics, and Praxis*. New York: Orbis Books, 92-124.
- Pizarro, Eduardo/Valencia, León (2009): *Ley de Justicia y Paz*. Bogotá: Editorial Norma.

- Robertson, Geoffrey (1999): *Crimes Against Humanity. The Struggle for Global Justice*. London: Penguin.
- Romero, Mauricio (2003): *Paramilitares y Autodefensas. 1982–2003*. Bogotá: Editorial Planeta.
- Romero, Mauricio (ed., 2007): *Parapolítica. La ruta de la expansión paramilitar y los acuerdos políticos*. Bogotá: Corporación Nuevo Arco Iris.
- Tobón García, Alonso (2009): ¿Criminales o enemigos? In: *Semana*, 14.8.2009.
- UNDP (2003): *El Conflicto: Callejón con Salida*. Bogotá: UNDP.
- Wlaschütz, Christian (2008): *Reconciliación en medio del conflicto. Estudio de Caso: Monterrey*. Bogotá: IOM.
- Wlaschütz, Christian/Ardila, Leonardo/Paez, José Antonio (2009): *Reconciliación en Barrancabermeja. Diagnóstico y Recomendaciones*. Bogotá: GTZ.

## 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 fort-dauernden 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.

Christian Wlaschütz  
Edificio La Tora #701  
Barrancabermeja/Colombia  
Christian.wlaschuetz@gmx.at