Universität Potsdam

Rosario Figari Layús

The Role of Transitional Justice in the Midst of Ongoing Armed Conflicts

The Case of Colombia

Potsdamer Studien zu Staat, Recht und Politik | 5

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Glossary of Terms

ACR:	Office of the Presidential High Counselor for Reintegration (Alta Consejeria presidencial para la Reintegración)
AI:	Amnesty International
ARP:	Administrative Reparation Program (Programa de Reparación Administrativa)
AUC:	United Self Defence Forces of Colombia (Autodefensas Unidas de Colombia)
CCJ:	Colombian Commission of Jurists
CODA:	Committee for Weapon Decommissioning (Comité Operativo para la Dejación de Armas)
DDR:	Disarmament, demobilization and Reintegration.
ELN:	National Liberation Army (Ejército de Liberación Nacional)
FARC:	Colombia's Revolutionary Armed Forces (Fuerzas Armadas Revolucionarias de Colombia)
HRW:	Human Rights Watch
IDPs:	Internally displaced persons
IACHR:	Inter-American Commission on Human Rights
ICC:	International Criminal Court
ICTJ:	International Center for Transitional Justice
JPU:	Attorney general's Justice and Peace Unit (Unidad Nacional de Fiscalia para la Justicia y la Paz)
JPL:	Justice and Peace Law (Ley de Justicia y Paz)
LAWGEF:	Latin America Working Group Education Fund

NCRR:	National Commission for Reparation and Reconciliation (Comisión Nacional de Reparación y Reconciliación).
OAS:	Organization of American States (Organización de Estados Americanos)
PRVC:	Program for the Reincorporation to Civil Life (Programa para la Reincorporación a la Vida Civil)
NGO:	non-governmental organization
TJ:	Transitional Justice
UNHCHR:	United Nations High Commissioner for Human Rights
U.S.:	United States of America

1. Introduction

1.1. Research Question

This work will analyze the demobilization process of right-wing paramilitary groups and its legal framework as a political attempt to bring peace to Colombia. The question is whether this process can be considered a transitional process within a conflicted democracy. The demobilization process began when the United Self Defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC) agreed to participate in a government-sponsored demobilization process. These paramilitary groups were responsible for the vast majority of human rights violations for a period of over 30 years. The government designed a special legal framework that envisaged great leniency for paramilitaries who committed serious crimes and reparations for victims of paramilitary violence. More than 30,000 paramilitaries have demobilized under this process between January 2003 and August 2006. Law 975, also known as the “Justice and Peace Law”, and Decree 128 have served as the legal framework for the demobilization and prosecutions of paramilitaries. It has offered the prospect of reduced sentences to demobilized paramilitaries who committed crimes against humanity in exchange for full confessions of crimes, restitution for illegally obtained assets, the release of child soldiers, the release of kidnapped victims and has also provided reparations for victims of paramilitary violence. This study will not only consider the collective demobilizations, finished in August 2006, but also the implementation of trials and reparation policies which by 2010 were still running.

This paper analyzes the paramilitaries’ demobilization process in the concepts of transitional justice and conflicted democracies. One of the key elements to be addressed is the tension between securing a stable peace and providing an adequate response to the human rights violations perpetrated throughout the course of an internal conflict. In particular, a disarmament, demobilization

and reintegration process (DDR) requires a fine balance between the immunity guarantees offered to ex-combatants and the sought of accountability for their crimes. International law provides the legal framework defining the rights to justice, truth and reparations for victims and the corresponding obligations of the State, but the peace negotiations and conflicted political structures do not always allow for the fulfillment of those rights. In fact, Colombian and international human rights groups working as monitoring bodies have criticized the policies under concern.

The primary question of this study is: *Is it possible to describe the Colombian demobilization process of paramilitaries and its legal framework that envisage, inter alia, the judgment of perpetrators, reintegration and reparations initiatives as a transitional process in a conflicted democracy, and therefore as a transitional justice process?*

1.2. State of Research and Relevancy of the Topic

Social research on transitions, as well as within the field of transitional justice, has primarily focused on the implementation of transitional justice policies in the cases of well-known "Paradigmatic Transitions", i.e., from authoritarian regimes to liberal democracies. The assumption underpinning paradigmatic transitions is that the previous regime is illegitimate (O'Donnell and Schmitter 1995, Huntington 1991, Huyse 1995, Zalaquett 1995, Carothers 2002). This approach leaves unexplored the experiences of procedural democracies framed within the midst of an armed conflict and their transitional processes in becoming substantive democracies free of violence. These specific regimes, composed of the minimal requirements to be considered a formal democracy, are what Fionnuala Ní Aoláin and Colm Campbell have called "Conflicted Democracies" (2005). The study of transitional justice in transitions within conflicted democracies is new and has so far only been used for the case of Northern Ireland. In this context, the specificity of the "democratic," but also conflictive and violent nature of the Colombian regime, offers a good oppor-

tunity to deepen the understanding of the use, scope and goals of transitional justice measures in such transitional democratic scenarios.

Many observers have even questioned whether Colombia can be considered a case of transitional justice. Transitional justice measures are often taken up after the change of an authoritarian regime or at a post-conflict stage (Dudai 2007). However, the particularity of the Colombian case is that transitional justice policies were introduced while the conflict still raged (Laplante and Theidon 2007). That is why the Colombian case challenges the classic conception of the link between transitions and the role of transitional justice mechanisms. Thus, the aim of this paper is to analyze what kind of transition may be occurring in Colombia by focusing on the role that transitional justice mechanisms may play in political negotiations between the Colombian government and paramilitary groups. In particular, it seeks to address to what extent such processes contribute to or hinder the achievement of the balance between peacebuilding and accountability, and thus facilitate a real transitional process.

1.3. Structure of the Study and Method

To answer our question whether there was a transition in Colombia and what role the introduction of the transitional justice mechanisms played, this study will draw on different strands of research. In chapter 2, it will look at theoretical writings on the concept of transition, with special focus on the term of transition in conflicted democracies. In order to identify the characteristics of transition in conflicted democracies, we will take a look at the concept of paradigmatic transitions. This concept refers to government movements from authoritarian states to the more ideal type liberal democracies, the prototype upon which most transitional justice discourses are focused. Thereafter, we will look at the main theoretical approaches to transitional justice as well as its main instruments and its relation to transitions in conflicted democracies. Chapter 3 follows with a description and analysis of

the Colombian conflicted democracy, highlighting the central actors involved as well as the fundamental aspects which lead and shaped the negotiations between the paramilitaries and the Colombian government in 2002. In chapter 4, we turn to the examination of the data collected with regard to the implementation of the Colombian demobilization process for paramilitaries. We will also analyze the legal framework by evaluating advances in terms of justice, reparation, truth and guarantee of non-repetition as fundamental conditions to be addressed in order to come to terms with the legacy of the past and to thus enable a transition. Finally, it presents some overall conclusions about the particularities of the Colombian transitional justice project as a conflicted democracy and evaluates the perceived existence or the deficiency of a transition in Colombia and the possible uses of transitional justice mechanisms.

We analyze the Colombian demobilization process from a case study approach. A case study is a research strategy based on the in-depth empirical investigation of one or a small number of social, economic or political phenomena in order to explore the configuration of each case and to elucidate features of a larger class of similar phenomena by exploring, developing and evaluating theoretical explanations (Vennesson 2008: 226). Case studies are helpful to cope with complex social issues (Yin 1984: 14). It is important to note that conclusions drawn can be used as information contributing to not only the understanding of a specific case, but also of the whole field of research. The challenge of research is to uncover the specific meaning of findings, while at the same time extracting generalizable knowledge relevant for other cases (Vennesson 2008: 226) Specifically, we will follow what Pascal Vennesson calls an “Interpretative Case Study” approach, which entails the use of theoretical frameworks to provide an explanation of a particular case, which can or may not lead to an evaluation and refinement of the theories (2008: 227). As previously explained, we will thus use theoretical approach regarding the conceptualization of transitions and of transitional justice, which even though related are not exactly the same. Ad-

ditionally, by analyzing the concept of transition we will differentiate between paradigmatic transitions and transitions in conflicted democracies, providing us with a better theoretical tool to highlight a new phenomenon in the transitional justice field, i.e., the introduction of transitional justice mechanisms in violent but still democratic contexts. In the democratic context transitional justice instruments gain characteristics different from those in paradigmatic transitions from authoritarian regimes to liberal democracies.

The evaluation of the Colombian demobilization process is based on the review and analysis of different sources, including laws and decrees, official reports, and reports of intergovernmental and non-governmental human rights organizations, newspapers and magazines, and scientific literature on the subject. The data presented in this analysis was collected during two different field trips. The first trip to collect data and research and identify sources took place in Colombia between May and June 2009, during which we gathered official and unofficial reports and information from government and non-governmental institutions. We met with people from a cross-section of Colombian society, including human rights defenders, journalists and social and community activists; victims and witnesses of human rights abuses; and international bodies, such as the Office of the Organization of the American States (OAS), who have been monitoring the demobilization process in Colombia since 2004 and the International Center for Transitional Justice. We also held meetings with national government and state officials, including the High Counselor of Reintegration (ACR), the National Commission of Reparations and Reconciliation (NCRR), the Procurator General, judges participating in the judicial process and the Coordinator of the Human Rights Observatory of the Presidential Programme for Human Rights and International Humanitarian Law. The second trip consisted of participation in a Summer School on Transitional Justice at the University of Ulster in Northern Ireland in June 2009.

2. Theoretical Approaches to Transitions and Transitional Justice

In order to answer the major question of this work, whether it is possible to understand the Colombian demobilization process of paramilitaries and its legal framework as a transitional justice process, this chapter will review some theoretical approaches to the concept of transitions, referring to exceptional periods during or after which transitional justice processes take place. Thus, first it will explore the concept of a transition, differentiating between paradigmatic transitions and transitions in conflicted democracies. It will focus specifically on the concept of conflicted democracy, the political structure that this work considers to be characteristic of the Colombian regime, in order to understand what conditions are required to facilitate a transition and in order to identify the role of transitional justice in these processes. Subsequently, this chapter will analyze the theoretical approaches to transitional justice processes, its mechanisms, goals and its links to transitional processes.

2.1. Distinguishing between Transitions

One of the problems in analyzing transitions within scenarios of mass violence is that there remains a lack of consensus over what the criteria are for determining what a transition really means, i.e., when a transition starts and when it is over. In general terms, it is possible to assume that the concept of "transition" implicates a movement, or a certain degree of change in the power, actors and configurations of a political structure, which can then lead to changes in regime, economics, rule of law and implementation of justice policies (Ní Aoláin and Campbell 2005: 182). Thus, every transition seeks some kind of political reform (Posner and Vermeule 2003: 6). In other words, a transition implicates a break with a previous order. However, a relevant problem in the literature on transitions is that there is a theoretical gap

regarding the lack of a common clear criterion to define what kind of break can be considered a transitional process. Considering that there are different kinds of transitions with multiple goals, the meaning of break for one transition may differ from the break for another. While for some authors, transition means a mere change of regime, for others it is a longer and more fragmented process. (Naomi Roht-Arriaza 2005: 1)

Yet, a relevant underlying factor common to most transitions is the lack of legitimacy of a political regime. The assumption underpinning transitions is that "...the previous regime is, to a greater or lesser degree, illegitimate." (Ní Aoláin and Campbell 2005: 174).

Despite the wide range of transitions taking place in different contexts, it is possible to identify two dominant paradigms in the literature on transitional processes: paradigmatic transitions and transitions in conflicted democracies.

2.1.1. Paradigmatic Transitions and the Conflicted Democracy Model

Especially during the 1980s and 1990s, most of the studies about transitional processes have focused on a particular conception of transition that some authors have characterized as "classic" or "paradigmatic" (Carothers 2002: 5, 6, Ní Aoláin and Campbell 2005: 175), namely, the authoritarian state in transition to liberal democracy (O'Donnell and Schmitter 1995, Huntington 1991, Huyse 1995, Zalaquett 1995). It is a movement from a non-democratic and illegitimate to a democratic and legitimate government whose end goal ideal type is the liberal democracy model (Ní Aoláin and Campbell 2005: 183-85, Bhattarei 2007: 24, Carothers 2002: 6). In many of these transitional contexts, following the fall of authoritarian regimes, there is an increased concern for dealing with human rights violations and, in general, systematic abuses committed by the previous regime. This is linked to a general agreement on the need for major change in the institutions of the old state that was responsible for these vio-

lations. In the post dictatorship phase, according to Ní Aoláin and Campbell, this need is frequently expressed through institutional and constitutional "transformation" as well as through the implementation of transitional justice mechanisms such as prosecutions, truth commissions, vetting, etc. (Ní Aoláin and Campbell 2005: 181).

The change in the role of law is another fundamental condition for a transitional process. As Ní Aoláin and Campbell explain, "The pre-transition regime is likely to view law, in true undemocratic fashion, as a source of obligations for its citizens, rather than for itself. This view contrasts with the post-transition position that often aims to create a broad and clear distinction of the "rule of law" (2005: 184). Thus in the post-transition context, it is often argued that fundamental rights, namely civil, political, economic and social rights, which were often denied and violated in the previous authoritarian regime, must be recognized, respected and guaranteed by the state (Zalaquett 1995: 3, 4).

This transitional model envisages an ideal type of end goal which is the liberal democratic state (Carothers 2002: 6). The ideal type maintains several basic characteristics. It operates with the consent of the governed, which is a neccessary condition to be considered as legitimate. There are free and competitive elections, participatory mechanisms, and a division of governing powers into legislative, executive and judicial branches, which balance one another and prevent one branch from gaining more power than the others. Finally, the state enjoys what Max Weber describes as a monopoly on the legitimate use of force within its boundaries (Ní Aoláin and Campbell 2005: 184).

After the so-called third wave of democratizations in the 1990s[1] (Huntington 1991) and the gradual decrease of the amount of dictatorial regimes, the classical concept of a transition no longer

[1] The third wave of democratization began in 1974 in Portugal, and had three phases: Southern Europe during the 1970s, Latin America during the 1980s, and Eastern Europe beginning in 1989.

seemed to be an appropriate tool for explaining many of the current political processes that were taking place in the world. As a result, more recent studies on the concept of transition have focused their attention on those cases in which dictatorships are not the starting point of the transitional process.

In fact, as many scenarios attest,[2] authoritarian regimes are not the only type of governments with a legacy of serious and systematic human rights violations. A similar situation can be found in democratic states that have experienced prolonged political violence. These experiences have been described by Ní Aoláin and Campbell as "conflicted democracies" (2005). These authors use this term loosely to represent any state meeting the minimal requirements to be considered a formal procedural democracy. Likewise, Thomas Carothers also conceives these formal procedural democracies as a "grey zone" between the ideal type of a liberal democracy and a dictatorship (Carothers 2002: 9, 10). They can be described as having "some attributes of democratic political life, including at least limited political space for opposition parties and independent civil society, as well as regular elections and democratic constitutions. Yet they suffer from serious democratic deficits, often including poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state" (Carothers 2002: 9). Ní Aoláin and Campbell also stress that "a state that is 'democratic' according to this formula might fail to attract the consent of, or indeed repress, significant minorities and might fall well short if measured against tests of substantive democracy" (2005: 176). In this sense, authoritarian governments are not the only states suffering from weak institutional credibility and a lack of legitimacy. Conflicted democracies can also be considered illegitimate. This lack of legitimacy on the part of the state in conflicted democracies is another reason for it to

[2] For instance, the cases of Northern Ireland, Sri Lanka and Colombia.

develop transitional processes and discourses (Ní Aoláin and Campbell 2005: 174).

According to Ní Aoláin and Campbell, a "conflicted democracy" involves two elements. First, there must be a deep-seated and sharp division in the political body whether on ethnic, racial, religious, class, or ideological grounds. Second, this division must be so acute and the political circumstances such that the atmosphere could result in or threatens significant political violence. "Significant" indicates that the violence or threatened violence must have a certain intensity[3] (Ní Aoláin and Campbell 2005: 176). In conflicted democracies, therefore, there is a movement away from violent conflict to peace instead of a movement from an authoritarian regime to a democratic one. In this way, these authors define the concept of transition as a set of antinomies, so while in the paradigmatic transition the antinomy is "democratic vs. nondemocratic," in the conflicted democracy it is "war vs. peace" (Ní Aoláin and Campbell 2005: 182, 183). Ní Aoláin and Campbell conceive a transition in terms of a conflict transformation replacing violent confrontation with political contestation. A transition is thus the movement from a violent conflict to a non-violent conflict.

2.1.2. Transitions in Conflicted Democracies

We now turn to the question of what basic conditions must be met in order to facilitate a transitional process, in this case meaning a break with the previous regime and also a movement away from a conflicted democracy. As previously explained, there is no consensus so far in the literature on transitions to define what kind of break or conditions implicate a transitional process. Even though a break can have different forms and magnitudes according to different scenarios, this paper argues that the fundamental condition for a transition from a conflicted to a non-conflicted democracy is the achievement of the guarantee of non-repetition of

[3] Small scale disturbances are not included in this category.

the systematic violence which characterized the previous order. This implies the fulfillment of certain requisites, to which the implementation of transitional justice policies may contribute.

One of the requisites to enable a transition is the elimination of widespread organized violence. In this sense, there must be a change in the balance of powers, and one of the actors, not always but in most cases the state, must obtain the Weberian legitimate monopoly over the use of violence, which during conflict is distributed among different armed actors. In order to monopolize the use of force, two strategies have been identified. One of these strategies is to achieve a military victory over the enemy through the escalation of military force. The other strategy, for those cases in which the power relations of the involved actors are more or less symmetrical, consists of peace negotiations and agreements that embody a set of understandings between the protagonists of a conflict regarding how to resolve or at least manage the conflict (Münkler 2007: 28). Negotiations usually include the disarming and demobilization of armed actors. As we will see, both military and negotiated strategies are used simultaneously by the Colombian government

Additionally, a transitional process, aimed at the guarantee of the non-repetition of crimes, does not only rely on the recovery of the monopoly of violence but in the strengthening of democracy. The procedural role of the democratic regime must be strengthened and become substantial. A means by which to enable this process is the government's opening and recognition of institutional democratic spaces in order to promote the full realization of citizenship and human rights that during the armed conflict were systematically violated or were altogether absent. A transition to peace should ensure that the state is capable of guaranteeing its citizens the full and equal exercise of their rights.

In these contexts, the strengthening of law and legal institutions plays a fundamental role in the transitional process to a more substantive democracy. In a transition from an authoritarian regime to a democratic one, the introduction of the rule of law and

the enforcement of civil and political rights is of great significance as a result of the absence of these rights due to the authoritarian character of the previous regime (Ní Aoláin and Campbell 2005: 188). By contrast, the formal democratic nature of conflicted democracies means that, in a greater or lesser degree, some minimal democratic standards already existed in the pre-transitional regime. However, the law and the legal system play a particularly complex and ambiguous role in conflicted democracies (in contrast to non-democratic societies), since the law may actually function as a political tool used to manage and ameliorate as well as to intensify the conflict (Ní Aoláin and Campbell 2005: 188). This can be clearly seen in the Colombian case, when whereas in the 1960s and 1990s the government promulgated decrees and laws allowing the creation of groups of armed civilians to carry out security and counterinsurgency operations in the 1980, in 1990 and from 2003 on legislation was created to demobilize and prosecute armed groups (Banco de Datos de Violencia Politica 2004: 12, García-Peña 2004: 2). This leads us to an examination of the relationship between law and legitimacy. Ní Aoláin and Campbell affirm that in contrast to the ideal type of liberal democracy in which law's legitimacy would be axiomatic, in a conflicted democracy, the law's complicity in human rights abuses (whether through the facilitation of abuse or in the law's failure to provide redress) may result in a wide segment of society (particularly in communities with victims of the violence) having little or no confidence in the law and legal institutions. This in turn may lead to a loss of legitimacy of the legal institutions on behalf of the state (Ni Aoláin and Campbell 2005: 187). However, this lack of legitimacy is not as deep as in authoritarian regimes. Citizens in conflicted democratic states have more, although deteriorated, confidence in their legal institutions and therefore may resort "…to law as a means by which to address the failure of the formally democratic…" regime (Ni Aoláin and Campbell 2005: 188). As this study will show, in the Colombian case, the judicial system acquires also a more relevant role than in paradigmatic transitions, where due to the dictatorial nature of the government,

the full and free functioning of these institutions is not possible. In conflicted democracies, in spite of this ambiguous role of the law, the judicial system still maintains a certain degree of legitimacy that allows it to function as a balance to executive and legislative powers, thus limiting abuse. However, the weak character of the democratic institutions must be strengthened in order for the state to progress from a formal and procedural democracy to a substantial democracy. In this sense, a transition requires that these ambiguities of the legal system, which weaken the democracy, are addressed and that the legitimacy of the law and legal institutions is built or rebuilt, particularly within those communities most affected by violence (Ní Aoláin and Campbell 2005: 187). The full exercise of citizenship rights, such as civil and political rights, is a means to prevent violence and the recurrence of crimes. Guaranteeing civil and political inclusion through democratic participation mechanisms is a means to substitute political contestation for violent confrontation (Ní Aoláin and Campbell 2005: 193-194).

It is important to consider that Ní Aoláin and Campbell developed this definition of “transition in conflicted democracies” in an attempt to analyze the case of Northern Ireland. In this sense, this paper will examine whether this notion is also appropriate to understanding the Colombian case; while both countries share some common features, there are some important differences. Thus, it may also be possible to make a distinction between different types of conflicted democracies with regard to the features of each specific democracy as well as those of the conflict, which would also influence the conditions required for a transition to take place in each case. Even though both Northern Ireland and Colombia could be characterized as conflicted democracies since this concept will allow us to highlight the formal democratic character of both cases, the Colombian conflicted democracy is much more severe in terms of magnitude and intensity when compared to the Northern Ireland conflict. In this sense, as Posner and Vermeule assert, every transitional context is different, and the requirements of transitional justice for one transition may differ

from the requirements for another (Posner and Vermeule 2003: 6). A transition in a conflicted democracy such as Colombia will require deeper transformations and added reforms to supplement those suggested by Ní Aoláin and Campbell for the Northern Ireland case in order to fully address the different circumstances or conditions that would enable a transitional process to occur within the Colombia case.

In conflicted contexts such as the Colombian case, a transition to peace should enable the state to guarantee its citizens the full and equal exercise of their rights as citizens, including civil and political rights, but also economic and social rights. Ní Aoláin and Campbell did not include an analysis of these rights in their Northern Ireland case study, perhaps because economic and social exclusion were not as central to the Northern Ireland example as they seem to be to the Colombian case, where high poverty rates, unemployment, basic social and economic needs, etc. are more serious issues. Thus, recognizing economic and social rights is a way of recognizing the potential powers of the citizens entitled to these rights, and in that sense, these rights can act as a means by which to restore equality in profoundly unequal social situations and to prevent the recurrence of systematic violence. Therefore, the reinforcement of economic, social and cultural rights, together with the protection of civil and political rights, would not only make possible the transition of a state from a procedural democracy to a substantial one, but also addresses and resolves instances of social exclusion that are often a root factor leading up to violent conflict.

In summary, the basic goal of a transitional process should be the guarantee of non-repetition of the widespread, systematic and repressive violence. In order to achieve this, basic requisites must take place: 1) widespread organized and armed violence must be eliminated, and in place of violent confrontation, legitimate space for political debate and contestation introduced. A condition for this is that the monopoly use of force should be obtained by one of the parties to the conflict through military victory or negotiated agreements; 2) the procedural character of the de-

mocratic regime must be developed to the point that it is substantial and respected. This step is fundamental to strengthening citizenship rights, the role and legitimacy of law and the legal system and to open democratic and inclusive spaces that in turn strengthen the political, social and economic rights of a state's citizens.

2.1.3. Different Transitional Developments

From a more critical perspective, Thomas Carothers analyzes a set of common assumptions underlying the concept of transition (2002). One of these assumptions is that all countries moving away from dictatorial rule or conflict seem to move consistently toward the liberal democracy model. Taking into account the countries that belong to the previously mentioned "third wave of democratization," Carothers observes that some of them have hardly democratized at all. Others have taken on a smattering of democratic features but show few signs of democratizing much further and are certainly not following any predictable democratization script (2002: 9). Priscila Hayner also argues that although in many cases a more democratic and less abusive government is established, the institutional or societal conditions that in the past had allowed the massive abuses, such as the structure of the armed forces, the judiciary, or the laws may remain unchanged (Hayner 2002: 11). Carothers stresses that in spite of including some democratic elements in the design of their new governments, many of these transitional countries should be recognized as alternatives to democracy, rather than on the path to instituting a liberal democratic state (Carothers 2002: 14). In this sense, the liberal democracy model should not be understood as the only possible endpoint to a transition; there are many other types of regimes that could result from a transitional process. In fact, the possibility of transitions moving from liberal democracies to dictatorial regimes must also be considered. Transitions can take different routes. In this sense, another assumption identified by Carothers (2002: 7) is that transitions toward democratization tend to unfold in a set sequence of stages consisting of opening,

break through, and consolidation. However, Carothers argues that there can be deviations from this sequence, such as the process of moving backward or stagnating as well as moving forward (2002: 15). As a matter of fact, when the above mentioned conditions that would seem to enable a transition do not occur, it is highly probable that the transition will fail. Not all transitional projects will succeed as expected - a transitional process can start and never achieve its transitional goals. Before moving on to examine how these considerations transpire in the Colombian context, some further generalized exploration of the concept of transitional justice is necessary.

2.2. Transitional Justice

The concept of transitional justice refers to a set of formal and informal measures which governments and societies implement in periods of political change, such as transformations from violent conflicts or authoritarian regimes to the pursuit of accountability and reparation for massive violence and human rights violations, and to the consolidation of a new non-conflicted democratic order (ICTJ nd, Teitel 2000). These measures can be both judicial and non-judicial, since often state and non-state actors are involved. The concept of transitional justice has a strong normative character with a basis in many human rights treaties and conventions.

Accountability is pursued by a variety of mechanisms or policies such as: implementing demobilization and reintegration programs, holding trials in domestic or international courts, and also granting amnesties and reduced sentences, vetting and purging wrongdoers from public or security posts, creating truth and inquiry commissions, providing reparation to victims, allowing public access to security files, building memorials and offering public apologies (Posner and Vermeule 2003: 5). In general terms, José Zalaquett identifies these mechanisms as the two main categories of transitional justice policies (1995: 5): The first group of mechanisms includes those aimed at repairing the damage in-

flicted such as the displacement of people and the dispossession of land (through, for example, the return of territory). The second group consists of measures to prevent the recurrence of abuses and achieve accountability through mechanisms such as trials and truth commissions (Bell, Campbell and Ni Aoláin 2004: 314).

2.2.1. Conceptualizations of the Role of Transitional Justice

The question that now arises has to do with the nature and role of transitional justice. As the concept of transitional justice implies, it is a kind of justice that is seen as different from ordinary justice. But in what way is it different? We will now take a brief look at the field and literature of transitional justice, in which it is possible to distinguish between four main conceptualizations regarding the role and nature of justice within transitional justice processes. A first conceptualization views transitional justice functions as (defective) ordinary justice, i.e., in no way different from the functions justice generally represents in any society, while at the same time recognizing that the situation of transition may require certain compromises that would otherwise be unacceptable (Posner and Vermeule 2003: 4, 7). This approach considers tradeoffs (such as truth as a tradeoff for amnesty, forgiveness for punishment, and prosecution of only the most serious offenders for the most serious of offences) as being the only way to implement some justice measures. According to Posner and Vermeule there should not be a distinctively 'transitional' theory of justice. They assert that analysts of transitional justice make an insufficient and stereotyped appreciation of ordinary law in which compensations and punishments are properly accountable, when in practice this is not always the case (2003: 3). There is always a certain degree of partiality at the time of providing sentences. In this sense, the difference between transitional and ordinary criminal justice would be a difference of degree.

A second approach considers transitional justice as liberalizing justice. In this case transitional justice is viewed as a necessary stage of a foundational project that lays the groundwork for a fu-

ture liberal democratic order where fundamental rights are fully guaranteed. In this conceptualization transitional justice is above all a future-oriented project. Ruti Teitel describes the nature of the rule of law in transition as extraordinary and constructivist justice (Teitel 2000: 27, Bell and O' Rourke 2007: 37). In contrast to the ordinary justice perspective in which transitional justice is described as having an ordinary function of law to provide stability, the liberalizing theory characterizes the role of transitional justice, especially regarding judicial amnesties or reduced sentences, as a necessary attenuation of some "rule of law requirements" in order to facilitate a transition to a liberal democratic future where a stricter notion of the rule of law would prevail (Bell and O'Rourke 2007: 37).

A third approach understands transitional justice mainly as restorative justice. It considers transitional justice as a tool to restore the status quo ante (Bell and O'Rourke 2007: 40). This perspective on transitional justice places the emphasis on mechanisms such as truth commissions as alternative forms of accountability and on goals such as national and personal reconciliation, rebuilding relationships and restoring community (Bell and O' Rourke 2007: 40).

Finally, transitional justice is also conceptualized as transformative justice. This implies a holistic conceptualization of justice which envisages retributive, restorative and socio-economical justice (Lambourne 2009, Fletcher, Weinstein and Rowen 2009, Uprimny and Saffon 2007a). According to this approach, justice initiatives should respond to and be coordinated with other types of deep reforms and interventions as, for example, rebuilding infrastructure, psycho-social programs, economic development, social integration, political reforms allowing political participation, etc., which address the underlying factors that contributed to the conflict in the first place (Fletcher, Weinstein and Rowen 2009: 209, Lambourne 2009: 30, Uprimny and Saffon 2007a: 5, 9, 10).

These four conceptualizations are not exclusive; as a matter of fact, each could be found within the same transitional justice

process. The preponderance of one of these approaches over another and each of their corresponding mechanisms will be influenced by the characteristics of each transition. As Posner and Vermeule indicate: “every transition is different, and the requirements of transitional justice for one transition may differ from the requirements for another” (2003: 6). Different transitions will have different implications regarding the measures adopted as well as the priority given to other transitional justice mechanisms.

2.2.2. The Link between Transitions in Conflicted Democracies and Transitional Justice

Now, the intended outcome of the above mentioned transitional justice instruments is contribute to achieve a successful break with a previous or still existing illegitimate, conflicted or dictatorial political order. The most significant condition required to make this transitional break with the past is the guarantee of non-repetition of the political circumstances and patterns of violence which led to the characterization of the previous order as “conflicted” or “dictatorial”. Thus, the implementation of policies seeking accountability through justice, truth and reparations are significant and fundamental in assuring the non-repetition of past patterns of violence. Without ensuring that wrongful acts will not occur again, changes will only have a short term and superficial impact rather than the desired transitional effect. Furthermore, by explicitly condemning past behaviors and by publicly addressing the systematic violence conducted by the old regime, in an effort to guarantee that similar events do not recur in the future, the government may gain legitimacy and as a result restore the faith of the society in the state (Teitel 2000, Hayner 2002, Ní Aoláin and Campbell 2005). In this sense, Rodrigo Uprimny and Paula Saffon stress that transitional justice mechanisms designed to establish a break with the past should have a transformative impact on the civil, political, social and economic rights which were previously deprived or absent. A situation like this is said to often contribute to the instigation of further conflict (2007a: 8). The construction of a more democratic and inclusive social order is a

fundamental condition to transform a conflict or dictatorial regime. If such conditions remain unmodified, sooner or later, the sustenance and consolidation of the new order will find itself at risk of a relapse to conflict (Uprinmy and Saffon 2007a: 8, 9). From this perspective, the link between transitional justice and transitions is very clear: Transitional justice mechanisms should serve as instruments by which to fulfill the previously identified conditions which have proven fundamental for ensuring that a transitional process can occur. Transitional justice policies entail governmental commitment and promises creating expectation in the society, especially in victims. Therefore, while successful implementation of transitional justice instruments can instill faith in the state, failing to fulfill this commitment can run the risk of strengthening the status quo and as a result reducing the government's legitimacy, preventing it from stabilizing the situation.

In analyzing the relationship between transitions and transitional justice, it is necessary to stress that these two processes are not automatically linked. A transition does not automatically include the implementation of transitional justice measures. There can be transitions without transitional justice. The introduction of transitional justice policies is always a political decision as well as a political tool (Uprimny and Saffon 2007b: 1, 14).

When applied in situations of conflicted democracy, the process of implementing transitional justice mechanisms acquires new characteristics in contrast to paradigmatic transitions. During a paradigmatic transition from an authoritarian regime to a democracy, transitional justice measures are implemented to deal with the legacy of past abuse only in the post-transitional stage, i.e., once the regime has already changed and a democracy has been established. In conflicted democracies, transitional justice initiatives take place in the midst of the conflict and serve as a means to transform the hostilities and enable the transition from war to peace to occur.

It is in these contexts that the implementation of the following most relevant transitional justice mechanisms should help to fulfill

the conditions required in order for a transitional process to take place: a guarantee of non-repetition of crimes committed during the conflict, the elimination of internal organized armed violence, the strengthening of democratic institutions by enforcing and guaranteeing citizens the full exercise of their civil, political, economic and social rights, and a rebuilding of the law's legitimacy.

Disarmament, demobilization and reintegration programs (DDR) aim at eliminating widespread organized violence that was previously committed by the demobilized groups; this is a prerequisite for a transitional process. DDR programs would serve to guarantee the non-repetition of crimes by the demobilized fighters. According to the definition of the United Nations Department of Peacekeeping Operations (UNDPKO), a demobilization process includes the disarmament and the reintegration of combatants. The UNDPKO defines disarmament as the putting down, collecting, control and disposal of the weapons relinquished by the fighters. Demobilization is the process by which the armed forces (government, opposition or factional forces) are disassembled and dissolved as part of a broader transformation within the society from war to peace (UNDPKO 1999: 15-17). A demobilization process can be an important procedure to implement in conflicted societies in transition, since the process aims first of all to reduce the level of violence carried out by the groups being demobilized and second, to acquire or recover the monopoly over the use of force to one actor, usually the state. A demobilization process can also utilize the distinction between individual and collective demobilization. In individual demobilization, fighters should disarm and lay down their weapons on their own. However, a collective demobilization captures the resolution of the whole armed group to demobilize, and as a result, the structure of the group must be completely dismantled (Laplante and Theidon 2007: 53). In order to guarantee that this will take place, collective demobilizations usually require agreements and advance negotiations between the different parties involved. The last step of the demobilization process is the reintegration phase, which normally provides former combatants access to assistance

programs in an effort to increase the likelihood of their economic and social reintegration into civil society. Reintegration programs could include cash assistance, or could provide vocational training and advice on legitimate income generating activities. An effective DDR process is based on the indivisibility and interdependence of all stages of the process: disarmament, demobilization and reintegration. An incomplete or ineffective reintegration of ex-combatants into civil society may lead to their own rearmament or may have no effect on armed criminal activities carried out by former soldiers who have no other means by which to earn a living (UNDPKO 1999: 15, 16). In this sense, the failure of a DDR process could lead to the recurrence of violence, which would place the entire process at risk.

Judicial prosecutions are a transitional justice tool utilized to provide justice to victims and to obtain accountability for crimes committed. The right to justice, present in many international legal documents,[4] appeals to the states to investigate, prosecute and sanction perpetrators of crimes against humanity. Criminal accountability, as an important response to mass violence, is reflected in international legal tools such as the international legal doctrine of universal jurisdiction and the Rome Statute of the International Criminal Court. However, pressing criminal charges against those who perpetrated atrocious crimes can also represent a difficult dilemma in a transitional process where there is tension between the demands for justice on the part of society and victims, on the one hand, and the interests of the armed groups, still with power to negotiate, on the other. Although solving this tension is crucial, there is no single or simple answer. As the ICTJ asserts, “there are different opinions supporting positions that range from a policy of forgive and forget to punishing each and every one of the human rights violators” (ICTJ 2009:

[4] See for instance the report of Diane Orentlicher (2005), *Independent Expert to Update the Set of Principles to Combat Impunity* E/CN/4/2005/102/Add. Principle 1 affirms the general obligations of states regarding taking effective action to combat impunity.

25). Those who defend the position of prosecuting all perpetrators argue that all democratic transition should judge the past, convicting those responsible for atrocious crimes in order to restore the dignity of victims. They also allege that "…it is only possible to make a break with the past and guarantee civic trust in society when a fair and effective criminal justice system is established that shows a democratic commitment against impunity for the atrocities perpetrated during conflict" (ICTJ 2009: 25). According to them, trials contribute to the rebuilding of communities with a history of mass violence through the following measures: 1) to discover and publicize the truth of past atrocities; 2) to punish perpetrators, thus preventing future human rights violations; 3) to respond to victims' needs; 4) to promote the rule of law in emerging democracies; and 5) to promote reconciliation (Fletcher and Weinstein 2002: 586).

However, not everyone supports this position. Those who oppose it believe that trials divide societies and create the mistaken image of a few guilty individuals and an *innocent* majority (Fletcher and Weinstein 2002: 580). This fails to acknowledge the collective nature of the violence that characterizes internal armed conflicts.

Developing a process of transitional justice to deal with a past of violence in a democratic society is no easy task. In this sense, the judicial system can play an important role in providing a transitional process with stability, credibility and thus, legitimacy. Well-functioning and independent courts should play an important role in consolidating the rule of law and democracy by balancing and limiting the powers of the executive and legislative branches. Courts serve the purpose of holding the political elites accountable for their actions by requiring public officials to publicly justify their policies, an act which should ensure adherence to human rights protections established in constitutions, conventions and laws (Gloppen, Gargarella and Skaar 2004: 1). In transitional cases, trials can also serve as an effective tool to demonstrate a break with the former order. Penal prosecutions of former perpetrators can be an effective resource to prevent future

abuses and strengthen the rule of law by emphasizing the non-discriminatory character of penal justice. As Ruth Stanley (2008: 103, 104) stresses, penal prosecutions make clear that, in comparison to the previous order, the state has no privileges when violating human rights. On the other hand, the dismissal of prosecutions and the granting of widespread impunity could produce the negative effect of portraying the state or armed actors as privileged or above the law, to the disdain and contempt of the victims.

Another classical transitional justice mechanism is the truth commission, which often refers to official but non-judicial temporary bodies set up to investigate and report on past human rights abuses (Hayner 2002: 5). The underlying principle of these bodies is the right to know the truth for victims, survivors and the society at large, as predicated by international law.[5] Priscilla Hayner distinguishes four main characteristics of truth commissions: 1) they have their focus on the past, 2) they investigate a pattern of abuses over a period of time, rather than a specific event, 3) they are a temporary body, disassembling with completion and submission of a final report, and 4) they are officially sanctioned, authorized, or empowered by the state. Along with public apologies, truth commissions can also provide some symbolic reparation to the victims since they offer the official acknowledgment of the previous state or non-state actors' crimes (2002: 26). Together, trials and commissions can serve as com-

[5] The "right to know the truth" is contained in several international documents. For instance, UN Security Council Document The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies in its chapter on "Facilitating truth telling"; and the Report of the Independent Expert to Update the Set of Principles to Combat Impunity E/ CN/4/2005/102/. Principle 2 states that *"every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes…*." The right to truth is also within the right to "seek, receive and impart information," which is guaranteed by article 19 of the Universal Declaration of Human Rights, among others.

plementary mechanisms for empowering victims. Rather than displacing or replacing justice in the courts, a commission may sometimes help contribute to accountability for perpetrators by passing their files on to the prosecuting authorities (Hayner 2002: 29).

Reparations is a general term that encompasses a variety of types of redress, including restitution, compensation, rehabilitation, satisfaction, and the guarantee of non-repetition. Restitution aims to re-establish, as much as possible, the situation that existed before the violation took place; compensation relates to any economically assessable damage resulting from the violations; rehabilitation includes legal, medical, psychological and other care; while satisfaction and guarantee of non-repetition relate to measures to acknowledge the violations and prevent their recurrence in the future. Usually, reparations programs include a combination of several types of redress (De Greiff 2008: 452, Hayner 2002: 171). International law[6] clearly establishes an obligation on the part of the state to provide reparations to victims of human rights violations.

Rodrigo Uprimny and Paula Saffon stress that the socioeconomic status of victims is an important factor in determining the nature of the reparations to be provided, and particularly for establishing whether the reparations should have a transformative potential rather than a mere restitutive effect (Uprimny and Saffon 2007b: 7). In societies with high levels of inequality like the Colombian case, where social exclusion and poverty are considered to be an essential causal factor of the conflict, victims of human rights violations usually belong to the poorest and most excluded sectors of society. This is why, from a holistic perspective, if the transitional justice policies aim to establish an effective transition, the

[6] See the UN Document of special rapporteur Prof. Theo Van Boven (2005). "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," UN Doc. E/CN.4/2005 L. 48.

reparation of the victims must not intend solely to return the victims to the situation in which they found themselves before they suffered, as the restorative conceptualization of transitional justice argues, but also to provide an opportunity for victims to improve their respective situations. The difference between integral and restitutive reparation measures is very important to understand in defining the scope and depth of the impact a transitional justice process. As Uprinmy and Saffon affirm, a restitutive reparation on its own, although important, would likely prove to be insufficient. Restitutive reparations only provide for the temporary stabilization of the situation of victims, without guaranteeing them the restitution of their rights as citizens. Therefore, it would not remove the victims from the condition of marginalization and social exclusion in which they were living previously. In this sense, public policies addressing basic problems such as housing, health and education may represent a good complement to reparation policies. (Uprinmy and Saffon 2007a: 7, 8).

Furthermore, as Pablo de Greiff asserts, reparations can be an instrument of social inclusion and restoration of trust between the citizens and the state in transitional contexts (De Greiff 2008: 46). De Greiff stresses that for victims, reparations constitute a manifestation of the seriousness of the state in its efforts to reestablish relations of equality and respect. In the absence of reparations, victims will always have reasons to suspect that "the new democratic order is one being constructed on their shoulders, ignoring their justified claims. By contrast if, even under conditions of scarcity, funds are allocated for former victims, a strong message is sent to them and others about their inclusion in the political community" (De Greiff 2008: 461- 464).

Other transitional justice mechanisms include the purges and lustrations that refer to the removal of persons from public employment based on their affiliation with the prior regime. This method introduces the public exposure of those collaborators who were not previously recognized as such within society and prohibits these individuals from serving in office. This mechanism was utilized in some Eastern European states, such as in Czechoslova-

kia, after 1989 (Schwartz 1994: 141, Posner and Vermeule 2003: 6). Finally, another strategy implemented by governments to provide victims the opportunity to learn about who has collaborated with prior regimes and how, is to ensure public access to review state security files (Hayner 2002: 13).

Having reviewed the theoretical background on transitions in conflicted democracies, and the role of transitional justice mechanisms in those contexts, we will follow by examining data collected on the implementation of transitional justice measures in Colombia, in an attempt to evaluate whether or not these measures provided the basis for a transitional process.

3. The Colombian Conflicted Democracy

To answer the question whether the demobilization's legal framework and its implementation can be understood as a transition in a conflicted democracy and therefore as a process of transitional justice, we will first consider the structure of Colombian society.

In spite of the armed conflict, there are quite a few formal democratic elements existent in Colombia, such as a system of competitive elections, an independent civil society, a minimal guarantee of political and civil rights, a quite independent judicial system, political control over the armed forces, and a democratic constitution. But the effectiveness of the democratic institutions has been vastly reduced by social, economic and political exclusion and by systematic political violence, which violated the fundamental human rights of a wide portion of the population. Thousands of civilians have been killed, and even more have been subjected to torture or were abducted by the security force, paramilitaries or guerrilla groups. Children were used as soldiers, and there was widespread sexual violence against women. To escape this violence between three and four million Colombians have fled their homes (AI 2008: 2), resulting in one of the world's greatest crises of internal displacement of people (The Internal Displacement Monitoring Centre 2009: 14). Thus, the Colombian political scenario includes the two elements of conflicted democracies: a formal democracy with sharp social cleavages on class or ideological grounds and considerable political violence. As a matter of fact, the Colombian conflict has been going on for more than 40 years and is one of the longest conflicts in the world (Pizarro Leóngomez 2006: 175, Otero Prada 2007: 35). In consequence, the numbers of victims and perpetrators are enormous. In the period between 1964 and 2003 the number of deaths reached over 120,075 (Otero Prada 2007: 44).

Now, as previously explained, in conflicted democracies a transition implies a movement away from the violent conflict to peace

but also from a procedural democracy to a substantive one. The means to enable this kind of transition are through military victory or negotiations. In Colombia transitional justice policies were implemented on the basis of the democratic regime, whereas the conflict continued. In order to understand what we call the "Colombian transitional project" we will take a brief look at the Colombian armed conflict.

3.1. Historical Background of the Conflict

Colombia's civil war began during the period known as "Era of the Violence" (*La Violencia)* (1948-1958), when the Conservative Party launched an aggressive offensive against supporters of the Liberal and Communist parties who were demanding land reform and socioeconomic and political change (Gonzalo Sánchez 2001: 340, Waldmann 1997: 33). These violent attacks prompted the rural population to begin organizing in "self-defense peasant forces" (Palacios 2001: 493). In spite of this great political opposition and a general strike, Liberals and Conservatives struck a power-sharing agreement to create the National Front in 1958, a governmental coalition which continued nearly 16 years (Silva Luján 2001: 384). Despite the National Front, the country was still not pacified due to the confrontations between the government and the peasant forces. Only through the employment of U.S. counter-insurgency tactics, including rural militias and civic-action programs, was it eventually possible to subdue the peasant forces (International Crisis Group 2002: 3, 4). By the time "the Era of the Violence" ended in 1958, 144,548 people were dead (Otero Prada 2007: 42).

This first sketch of the Colombian scenario shows that the conflict is quite complex and that more than two armed actors are involved: the government, the guerillas and the right-wing paramilitaries. While it is clear that the guerrilla groups fight against the government, the relation between paramilitaries and the Colombian state is understood by many scholars not as an autonomous

actor but as a state strategy (García-Peña 2004: 1, Banco de Datos de Violencia Politica 2004: 9).

During the 1960s, a proliferation of guerrilla movements occurred in Colombia and throughout Latin America, with programs of radical social change and political reform. (Laplante and Theidon 2007: 54) Today, only two of those groups are still active in Colombia. The *Colombia's Revolutionary Armed Forces* (FARC – Fuerzas Armadas Revolucionarias de Colombia), Colombia's oldest and largest guerrilla group, established itself in 1966. Today the FARC has between an estimated 10,000 and 17,000 members, including many women and children (Pecaut 2008: 23). The other main guerrilla group is the *National Liberation Army* (ELN – Ejército de Liberación Nacional). The ELN, formed in 1964, has its roots in the previous liberal peasant struggles, with an estimated of 3,000 combatants (International Crisis Groups 2007b: 2).

The FARC was founded in 1964 with the transformation of the former self-defense groups into peasant guerrilla forces under the auspices of the Communist Party (Palacios 2001: 493, 494). In contrast to the self-defense groups, the Communist guerrilla forces aimed at toppling the US-supported Colombian regime and implementing far-reaching socioeconomic reforms to establish a more egalitarian social system, in particular in the agrarian sector, against the domain of large landowners and for a fairer distribution of the land among the small peasants. (International Crisis Group 2002: 3). During the 60s and 70s the guerrillas created extensive strongholds in many rural areas where they effectively determined local government policies and had significant support of the local population. Since its foundation, the FARC has undergone profound changes. By the mid-1980s, it gained a high national profile by starting to recruit more broadly among urban students, intellectuals and workers, and concentrating on building a proficient force, acquiring more and better weaponry and continuing to expand operations across the country, and being capable of inflicting defeats on the army (International Crisis Group 2006: 2, 3). The relationship between civil population and

the guerrillas is ambiguous (Pecaut 2008: 35). The guerrillas need this support in order to go forward in its strategy as well as to build consensus and gain legitimacy. However, especially since the 90s extortion, kidnapping and drug trafficking became common practices in order to finance the organization. As a result, the guerillas have become responsible for serious breaches of international humanitarian law (AI 2005: 3).

On the other hand, in the logic of the Cold War, since the 60s the Colombian security forces have developed a counter-insurgency strategy which has primarily focused on undermining what they perceive to be the civilian population's support for the guerrilla. In this context paramilitary groups arose to protect the interests of the powerful elite against the guerrillas (Laplante and Theidon 2007: 54). The paramilitaries also became the preferred means to suppress social protest and opposition viewed through the prism of anticommunism (AI 2005:3). The armed forces, particularly military intelligence, played an active role in coordinating and setting up paramilitary structures. The instrumentalization of armed civilians as auxiliary private forces has been an integral part of this counterinsurgency strategy. The state's support of paramilitary structures has even been allowed a certain degree of legalization. Between 1965 and 1968, the government promulgated Decree 3398 and Law 48 which allowed the military to create groups of armed civilians to carry out joint counterinsurgency operations (Decree 3398 of 1965: Art. 4, Art. 5, Banco de Datos de Violencia Política 2004: 12, García-Peña 2004: 2). This shows how the law has played an ambiguous role in Colombia, an ambiguity that is a fundamental aspect of the Colombian regime as conflicted democracy.

The political counterinsurgency's use of paramilitaries explains the growth of paramilitary structures, especially where the state was absent. In this sense, the lack of territorial control on behalf of the state has been an important factor in the growth of all illegal armed groups (Rangel 2005: 8, Laplante and Theidon 2007: 54). According to Muñera Ruiz, paramilitary groups can be characterized as pro-systemic actors and not anti-systemic since

they were never considered as a political enemy by the Colombian state. They have never intended to overthrow the government or to defeat the army, but rather to support the political struggle against guerrilla groups (Muñera Ruiz 2006: 96, 97). However, the paramilitarism does not involve only a simply counter-insurgency strategy, but the promotion of an economic model based on the concentration of land and large-scale agricultural, oil, mining (gold, emeralds and diamonds) and infrastructure projects (Richani 2005: 114). Paramilitaries were often used as private security forces financed by rich landowners and economic elites who, with the justification of defending themselves from guerrilla attacks, wanted to forcibly remove peasants from land they later expropriated and economically exploited (Laplante and Theidon 2007: 54, 55). Furthermore, the collaboration between illegal armed groups, elites, multinational companies and drug traffickers is a key factor of the conflict (Richani 2005: 114, 115). Drug traffickers are also part of elite groups who laundered their profits through a variety of means, including through the purchase of land (AI 2005: 4). Drug trafficking, financing not only paramilitary groups but also guerrillas, has invariably helped the conflict to continue, though it is not the root cause of it. Local political elites have used paramilitaries to eliminate political opponents, such as rural, activist and community leaders. Paramilitaries have built their power on the back of widespread and systematic violence, including mass displacement of civilians and illegal expropriation of land, through which paramilitarism aims to launder their profits of drug-trafficking, and their alliance with state agents (Uprimny and Saffon 2007b: 5). Thus, the dismantling or legalization of such illegal business would be an important step to, at least, transform a key element of the conflict.

In 1997, Carlos Castaño, one of the most popular paramilitary chiefs, brought together eighteen paramilitary blocs to form the United Self Defence Forces of Colombia (AUC – Autodefensas Unidas de Colombia) as a national umbrella group of paramilitaries. The organization developed a highly regimented military

command structure, translating it into an increasingly military, economic and political power and control unit of national scope (Pardo Rueda 2007: 14, 29). By 2003, AUC-linked paramilitary groups were present in over 25 of the country's 32 departments, with an estimated number of between 12,000 and 15,000 members (Colombian Defense Ministery 2005: 13, AI 2005: 10). Indeed the paramilitary advance forced the FARC and ELN to withdraw from many areas they had dominated for decades. It meant that by the time of negotiation, paramilitary groups had high levels of power and control over many areas of the country.

3.2. The Two Strategies of the Colombian Transitional Project: the Combination of Military Escalation and Transitional Justice Policies

During the forty years of conflict, each president attempted some sort of military victory or, in the face of that impossibility, peace negotiations. Many governments attempted to negotiate demobilization processes with the guerrillas. It continually appeared to be the logical strategy, since the paramilitary forces were not perceived as a threat to the state. The two most important negotiations between the guerrilla and the Colombian government were fruitless. The first one took place in 1982 during the presidency of Belisario Betancur and the second between 1998 and 2002 with Andrés Pastrana's presidency (Heinz 1989: 251). The failure of Pastrana's peace process with the FARC in February 2002, together with the increase of international pressure especially from the U.S. after September 11, 2001, in the so called "war on terror,"[7] led to a shift in the governmental strategy to deal with all of the armed groups. The government designed two strategies to obtain a certain degree of pacification and to strengthen its legitimacy. These strategies form what we call the "Colombian transitional project."

[7] The FARC, the ELN and the AUC are all considered "terrorist" groups by the US government (Aviles 2006: 405).

Toward the guerrilla groups the government chose the intensification and escalation of the military strategy. In this context, the role played by the international community, and especially by the U.S., has also to a great extent shaped the dynamics of the conflict with the guerrilla insurgence. From 1998 the U.S. has strongly increased its participation in the Colombian conflict through the so-called "Plan Colombia," which envisages financial support to the military offensive against the guerrillas and drug trafficking (Palacios 2007: 13). Additionally, between 2001 and 2004 Colombian military spending increased by almost 33 % to strengthen and modernize the armed forces (Avilés 2006: 405). Another military offensive in southern Colombia, a guerrilla zone, which is also known as "Plan Patriota," involved nearly 17,500 troops between 2004 and 2006 (International Crisis Group 2009: 21). As a result there has been an escalation of the conflict with significant military defeats of the FARC (Pizarro Leóngomez 2006: 193). Nevertheless, the guerrillas are not defeated and drug trafficking has not been significantly reduced (Rangel 2005: 8). With regards to the paramilitaries, conversely, the administration of Alvaro Uribe (2002–2010) agreed for the first time to negotiations with these groups and appealed to the introduction of transitional justice instruments with the intention of demobilizing them as well as to giving reparations to their victims. The formal negotiations for demobilization started in 2002 and were, in theory, also open to the guerrilla groups but considering the parallel intensification of the military offensive, agreements were not an option for the insurgence.

Also, this demobilization is not the result of a military defeat of the paramilitariies by the state. In fact, it came at a time in which the paramilitary had strong possibilities to expand their control and activities. The AUC engaged in this negotiation and demobilization process at the peak of their military, economic, social and political power (Rangel 2005: 16). According to Rangel the reasons of the paramilitaries for engaging in this process were the following: 1) the evident fatigue among many of the leaders of paramilitary groups. Many of them are urban people, not used to

the difficulties, isolation and lack of conformability of the jungle. They have a sincere desire to return to their families and their local social environment; 2) the paramilitary leaders expected that President Uribe was going to weaken and defeat the guerrillas in a short period of time; 3) the paramilitaries thought that the legal and political conditions for their demobilization and reintegration were going to be similar to those that the state gave to the guerrilla groups that demobilized at the beginning of the 90s. The previous demobilization processes of guerrilla groups that had taken place had constituted a precedent of amnesties in which the demobilized groups had been offered the opportunity to reinsert in civil life without prosecutions.[8] The paramilitaries took part in the negotiations process with the firm belief that this was going to be the case in their demobilization as well (Rangel 2005: 17). However, the international climate and the international legal framework regulating the obligations of states in relation to the fulfillment of the enjoyment of human rights had changed. The demands for justice, truth and reparation now came from every front, inside and outside the country.

The decision of President Uribe to carry out dialogues with these groups had immense support from national and international public opinion (Rangel 2005: 16, 17). The negotiations included a series of agreements between the government and the AUC. Under the terms of these agreements the AUC agreed to demobilize all its combatants by the end of 2005, to stop fighting and to

[8] The first legislation for demobilization and reinsertion of insurgent groups, Law 35 of 1982, granted amnesties to rebel groups who demobilized without requiring them to hand their weapons over to the state (Palacios 2001: 502, Turriago and Bustamante 2003:5, 6). Law 77 of 1989 provided the basis for pardons granted to members of the "Movement of 19 April" (Movimiento 19 de Abril, M-19), Popular Army of Liberation (Ejercito Popular de Liberación- (EPL), Revolutionary Party of the Workpeople (Partido Revolucionario de los Trabajadores - PRT) and Armed Movement Quintín Lame (Movimiento Armado Quintín Lame -MAQL) in 1990-1991 (Turriago and Bustamante 2003: 32). Once pardoned, more than 4,000 ex-combatants were able to benefit from reforms which facilitated their participation in politics (Palacios 2001: 505, 507).

support government efforts to fight drug trafficking. In exchange, the government committed to design a special legal framework that envisaged pardons or reduced sentences for crimes. Demobilization began in 2003 and was essentially completed in August 2006, when 37 paramilitary blocks of the AUC with 31,671 individuals had been demobilized (Alta Consejeria presidencial para la Reintegración - ACR 2009).

The two strategies, military against guerrilla and negotiation with paramilitaries, composed what this paper considers, the “governmental transitional project” aimed at reducing the high rates of violence. While it is beyond the scope of this study to go deeper into the military strategy employed with the guerrilla groups, we will focus on the transitional justice policies implemented by the government to demobilize the AUC in order to see if they have been an appropriate instrument to facilitate a transition.

4. The Transitional Justice Policies: the Two Paths of Demobilizations

Now we will analyze how effective the transitional justice policies were in the demobilization process, according to the criterion of guarantee of non-repetition, which implies the elimination and prevention of paramilitary violence and the strengthening of democracy. Did they support the transition from a procedural to a substantive democracy by guaranteeing the rights to justice, truth, reparation and non-repetition? We will look at the legal framework which shaped the Colombian transitional justice instruments. We will assess the quality of governmental policies as well as the problems related to the structural conflicted situation that would not be under governmental control. The aspects to be evaluated are the following: the legislation regarding demobilizations, the process of demobilization and reintegration of paramilitaries, the judicial processes and the reparations policy of the victims of the armed violence.

The transitional justice mechanisms included a special legal framework which differed from the ordinary criminal law. This new legislation is basically composed of Law 782 from the year 2002, Decree 128 and 3360 from 2003, and Law 975 from 2005. These laws distinguish between two kinds of demobilized individuals, depending on the crimes they committed. Demobilized ex-combatants who had not been formally accused for crimes against humanity would receive pardons through Law 782 and Decree 128, whereas ex-paramilitaries who did have pending legal cases would have to undergo trials under Law 975. We will consider the two regulations separately. We begin with the legal framework for massive demobilizations under Law 782 and Decree 128 as well as the results of its implementation and analyze thereafter the implementation of demobilizations under Law 975, which includes prospects of reduced sentences for ex-combatants in exchange for demobilizing, full confessions, and

restitution of assets obtained illegally as reparations for victims of paramilitary violence.

4.1. The Massive Demobilizations under Law 782 and Decree 128

Before the negotiations of 2002, there existed previous legal instruments regulating demobilizations and reintegration into civil life from the 80s and 90s.[9] One of the most recent and significant was Law 418 of 1997. But this legislation was only accessible for members of guerrilla groups, considered to be the state's political enemy. The paramilitaries were not included. Consequently, an important change resulting from the negotiations between government and paramilitaries in 2002 was the modification of this law to provide the possibility of demobilization to members of paramilitary groups. In this way, the Uribe government passed the first brick of the legal framework, Law 782/2002, which regulated individual and collective demobilization[10] by both extending and amending Law 418 of 1997. Law 782 removed the legal requirement that peace negotiations could only be carried out with armed groups that had been granted political status, i.e., guerrilla groups, and allowed negotiations with *all armed groups* regardless if they are considered opposition to the state or not, guerrillas and paramilitaries alike (AI 2005: 20, 21). However, the strong rivalry between Uribe's administration and guerrilla groups, due to the increasing intensification of the military offensive of the government toward these groups, especially the FARC, and the strong links that these groups perceived between government and paramilitaries, did not offer an appropriate politi-

9 Regarding previous legislation for demobilizations in Colombia, see *supra* Note 7.

10 As explained previously, there are two kinds of demobilizations: individual and collective. Whereas in the individual demobilization the single fighters are the ones who leave the group by disarming and laying down their weapons, in the collective demobilisation the whole armed group as such, i.e., the structure of the group, decides to disarm and demobilize completely.

cal context of trust for negotiations or agreements for collective demobilizations. Consequently, there were only individual demobilizations of members of guerrilla groups during the Uribe administration[11] (Fundación Ideas para la Paz 2008: 2, Otero Prada 2008: 19).

Law 782/2002 was specified by Decree 128/2003, promulgated in January 2003. These two legal instruments regulated the demobilizations of 90 % of the paramilitaries under the Uribe government, either individually or collectively (AI 2008: 20). Decree 128 provided and regulated legal[12] (Art. 13), economic[13] (Art. 14) and educational benefits[14] (Art. 15) for demobilized combatants for two years in order to re-incorporate them into civil life. This legislation also granted pardons, in the form of cessation of investigations or prosecutions at every state of the criminal proceedings, to ex-members of illegal armed groups. In order to certify the demobilization, Decree 128 also set up an official "Committee for Weapon Decommissioning" (CODA - Comité para la Dejación de las Armas)[15], Law 128 and Decree 782 allowed amnesties and pardons to members of armed groups who had committed "political and related crimes," which means that it applied only to ex-combatants who decided to participate in individual or collective demobilization but who were being investigated or serving sentences for "minor crimes", such as the illegal possession of arms and membership in illegal armed groups. Once

11 Between 2002 and 2008, 11,010 members of the FARC and 2,295 of the ELN demobilized individually (Fundación Ideas para la Paz 2008: 2).

12 According to Article 13 of Decree 128, legal benefits included "pardons, conditional suspension of the execution of a sentence, a cessation of procedure, a resolution of preclusion of the investigation or a resolution of dismissal."

13 Including the provision of food, shelter, safety, and economic opportunities.

14 Access to educative and training programs.

15 The CODA had the function of verifying membership in illegal armed groups and of evaluating whether individuals and groups have a genuine desire to demobilize and provide identification papers to certify their status.

those persons had benefited from these pardons, they would not be judged again for the same crime. This could have been an important reason for many combatants to participate in the process. However, these benefits were not offered to all combatants. Decree 128 excluded all those from impunity "who are being processed or have been condemned for crimes which according to the Constitution, the law or international treaties signed and ratified by Colombia cannot receive such benefits (Art. 21). Such crimes are defined in Law 782 as "[…] atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, and murder committed outside combat" (Art. 50). In other words, as far as combatants were not under investigation, they had access to these legal benefits even though they may actually have participated in crimes against humanity. Indeed most paramilitary and guerrilla members are not formally under judicial investigation for crimes against humanity or for violations of international humanitarian law.

On November 21, 2003, the government promulgated Decree 3360, which regulated the collective demobilization. Through this decree the requirement for illegal combatants who wished to demobilize collectively as a group to be certified by the CODA as proof of membership of a group was eliminated. Article 1 of Decree 3360 stated that paramilitary membership of a demobilized individual was proved by a list produced by the leaders of the group.

Here it is important to address some deficiencies regarding the conception of this legal construct and, therefore, governmental management, which, as a result, constrained the demobilization process. This legislation failed to include some relevant conditions in order to guarantee an effective dismantling of the paramilitary structures as well as restitution measures and non-recurrence of their crimes. According to these instruments, ex-combatants were not required to reveal information about the group to which they belonged, paramilitary strategies, assets they expropriated from their victims, crimes in which they participated but had not yet been investigated, or to contribute to the

clarification of other serious crimes they might have witnessed. Neither were they required to provide any information about the fate of the disappeared or the hostages in the custody of their armed group. The only information an individual had to declare included their name, a fingerprint and dental records (AI 2005: 21). The resulting lack of information proved devastating to victims seeking answers and also prevented the government from designing more effective policies in order to properly dismantle these groups.

The fact that neither Law 782 nor Decree 128 considered carrying out investigations on the groups' members before certifying their demobilization status, implied a first step to impunity. Due to the lack of effective control mechanisms and investigations in these laws, many perpetrators of serious crimes were not prosecuted, and many ex-combatants, who actually committed serious crimes, would relapse or would not demobilize at all. This shortcoming of legal regulations confronted the victims with the constant threat of unpredictable encounters with their former aggressors. This threat was detrimental to the legitimacy of the process.

To assess the scope of the demobilization policy, it is useful to look at some of the official data. According to the Colombian government, the demobilization process of paramilitaries has been successful: “The AUC belong to the past”[16], said the High Commissioner for Peace (Alto Comisionado para la Paz), Luis Carlos Restrepo, in 2006 (El Tiempo 2006). According to the Office of the Presidential High Counselor for Reintegration (Alta Consejería presidencial para la Reintegracion - ACR), 31,671 persons were demobilized collectively between 2003 and 2006 from the AUC and other smaller illegal paramilitary organizations as a result of the negotiations that began in 2003 (see Table 1).

[16] This and all otherwise specified translations are made by the author.

Table 1: Number of Demobilized Paramilitaries between 2003 and 2006.

Year	Collective Demobilized
2003	1,035
2004	2,645
2005	10,417
2006	17,574
Total. 2000-2006	31,671

Source: Office of the Presidential High Counselor for Reintegration (ACR) and Otero Prada, Diego (2008), "Experiencias de investigación. Las cifras del conflicto colombiano". INDEPAZ, Bogotá.

A closer look at the dynamics of the demobilization process reveals some noteworthy critical points. Some of them are due to the legal framework and governmental implementation of the demobilization process and others to the economic and political situation of the country.

4.1.1. The Numbers of the Demobilization

The first issue to address is the discrepancy among the official numbers of the demobilization process. According to government figures, the number of paramilitaries demobilized is at least double the number of paramilitaries thought to be in existence in 2002 when the process began. According to the Defense Minis-

try, prior to the demobilization there were between 12,000 and 15,000 paramilitaries operating in Colombia (Defense Ministry 2005: 13). However, following the process, the government registered a total of 31,671 demobilized paramilitaries. In response, NGOs have criticized these numbers and argued that many of the participants involved in the demobilization ceremonies were "falsely demobilized" in an attempt to profit from the economic benefits of the demobilized (IACHR 2007: 4, AI 2005: 21, CCJ 2008a: 26, 27).

Here we need to distinguish between two underlying factors as the cause of this problem. The first is the difficult economic and social situation of the country. According to the UN Central Emergency Response Fund (CERF) **"**52.6% of the Colombian population lives under the poverty line and 17% in extreme poverty" (CERF 2008). Hence, people deprived of basic economic and social rights use any possible mechanism to improve their living conditions (CCJ 2008a: 26, 27). Even though this is a socioeconomic and not a legal problem, the government has to cope with these economic and social problems in order to facilitate a transition. The other factor giving rise to "false demobilizations" refers to the formulation of the legal framework. Decree 3360 of 2003, regulating collective demobilization, did not require individuals to provide conclusive evidence of their membership in a paramilitary group. Membership was merely proved by a list produced by the leaders of the different groups. The Inter-American Commission for Human Rights (IACHR) confirmed "…that there were no mechanisms for determining which persons really belonged to the unit, and were therefore entitled to social and economic benefits, nor for establishing consequences in case of fraud…"(IACHR 2007: 5). This mechanism allowed many non-paramilitaries to present themselves as demobilized paramilitaries and to get access to the economic benefits for demobilized paramilitaries. This practice enabled the government to present the inflated numbers to the international community as proof of its success (AI 2005: 21, 22).

Furthermore, while the government claimed that all paramilitaries had demobilized, international monitoring bodies and NGOs insisted that paramilitary groups remained active in Colombia (Calderon 2007: 1, 3). A report of the Institute of Studies for Development and Peace attested that by 2007 there were 9,000 armed paramilitaries that made up 76 groups operating in 25 departments of the country (Gonzalez Perafán 2007: 1). Likewise, the monitoring Mission of the Organization of American States has identified 22 new paramilitary structures composed of approximately three thousand members, with participation of previous AUC members (OAS 2007a: 6, CCJ 2008a: 27). These contradictions between the official and unofficial numbers, revealing the continuance of paramilitaries in spite of the large amount of demobilized combatants, are the result of three different underlying situations: 1) There was a partial demobilization, i.e., not all groups agreed to demobilize (CCJ 2008a: 18). Here the decreased effectiveness of the demobilization process lay in the organizational structure of paramilitary groups, which were not organized hierarchically and did not have a united or centralized mandate, but rather functioned as semi-autonomous cells or blocks of a nodal structure (Uprimny and Saffon 2007b: 5). This lead to a situation where although 37 regional paramilitary blocks decided to formally demobilize (OAS 2006: 15), other groups did not;[17]

2) A second problem was the desertion of the demobilization process. The official numbers of demobilized included many paramilitaries who actually took part in demobilization ceremonies but did not actually disarm, or who eventually abandoned the reintegration programs (CCJ 2008a: 27, 28). In this sense, the lack of control mechanisms reveals a governmental failure to ensure that combatants were effectively demobilized; 3) The third factor explaining the existence of these paramilitary groups, is the emergence or re-arming of new paramilitary structures, in many

[17] For instance, the Central Block Bolivar (Bloque Central Bolivar) and the Rural Self-defenses (Autodefensas Rurales) of the region of Casanare in the north of the country (CCJ 2008a: 18).

cases, with the assistance of former AUC members, both demobilized and active. This process of recruiting ex-combatants enabled the ex-AUCs to easily maintain control of their illicit economies (OAS 2007a: 6, CCJ 2008a: 27).[18]

As a matter of fact, the observable consequence of these problems is the continuity of political violence by paramilitary groups between 2002 and 2006 (and later). According to the NGO Colombian Commission of Jurists (CCJ), between July 2002 and June 2005 paramilitaries assassinated or forcibly disappeared 1,060 persons each year. This constitutes a significant reduction with regard to what occurred in the six preceding years (July 1996 to June 2002), during which the annual average was 1,781 victims (Table 2). However, in spite of the progress of ongoing negotiations with the government, paramilitary groups have continued to operate, and at least 3,000 persons have been killed between 2002 and 2007 (CCJ 2007: 9).

Table 2: Changes in the Modality of Violence Implemented by Paramilitary Groups.

Modality of violence	**July 1996 – June 2002**	**July 2002 – June 2006**
Annual average of deaths in massacres	886	227
Annual average of individual murders	895	833
Annual average of persons killed	1,781	1,060

Source: Data for chart is from Colombian Commission of Jurists, (2007: 9): "Colombia 2002-2006: Situation regarding human rights and humanitarian law."

[18] The OAS monitoring mission has observed that the groups that have organized after the demobilizations of the AUC, as well as the structures that did not demobilize, have recruited persons who were involved in the reintegration process (OAS 2007a: 6).

One of the most violent modes of killing employed by these groups is massacre, i.e., the collective murder of three or more persons at the same time (Otero Prada 2007: 219). It is one of the most common terror strategies used in Colombia.[19] The decrease in the number of massacres produced the impression that all political violence in Colombia was decreasing. As Table 2 shows, a large part of the deaths perpetrated by paramilitaries between July 1996 and June 2002 occurred in massacres. The annual average of deaths in massacres amounted to 886 persons. However, between July 2002 and June 2006 this average fell to 227 persons per year (CCJ 2007: 8). In contrast, the number of annual individual murders has remained stable and decreased slightly from 895 between July 1996 and June 2002 to 833 between July 2002 and June 2006.

In general terms, there was a real reduction of violent acts committed by paramilitaries during the period of negotiations (2002-2006). But this reduction implied mainly one form specifically - the massacres. Massacres generated significantly more international attention than selective individual murders. Indeed, most of the sentences of the Inter-American Human Rights Court against the Colombian state refer to massacres´ cases committed by state agents in collaboration with paramilitary groups. In spite of the reduction of the number of massacres, violence executed by the paramilitaries in the form of individual murders goes on. This situation reflects the failure of the agreement between the paramilitaries and the government, an agreement which implied the compromise on behalf of the paramilitaries to uphold a ceasefire, since many of the murders continued to occur in areas where paramilitaries were thought to be effectively demobilized (CCJ 2008a: 79, IACHR 2007: 21).

Therefore, in spite of the considerable demobilizations, these violent practices continued. Thus, in its most important dimension,

[19] There are 4,499 of massacres registered between 1964 and 2007 (Otero Prada 2008: 219).

the non repetition of paramilitary violence, the transitional process was hardly successful.

4.1.2. Neo-paramilitaries or Criminal Groups?

In this context, the state's incapacity to guarantee the non-repetition of crimes put the legitimacy of the process seriously at risk. Therefore, in order to show that there was a real break with the past, the government attributed this violence not to paramilitary forces but to the rise of new ordinary criminal groups. These armed organizations, known as the Black Eagles (Aguilas Negras) and New Generation (Nueva Generación) among others, are officially described as criminal gangs with no connections to former paramilitaries. NGOs, by contrast, consider these groups a hybrid of both, combining their criminal activities with the practices of their paramilitary predecessors (International Crisis Group 2007a: 2, 3, CCJ 2008b: 2). The Office of the United Nations´ High Commissioner for Human Rights (UNHCHR) attested that the ranks of these groups include many demobilized and non-demobilized former members of paramilitary organizations who were recruited voluntarily or forcibly. Especially middle-ranking members of the former AUCs are said to play commanding roles within these groups (UNHCHR 2009: 13).

According to the government, a main distinction between these groups, also known as "neo-paramilitaries," and the AUC is that they do not champion counterinsurgent ideologies as the AUC did. Indeed, many of these groups are engaged in common criminal activities, mainly in drug trafficking and other activities related to organized crime. However, some of these groups do indeed operate as the former paramilitary organizations did. According to the UNHCHR these groups do have military structures, as well as the capacity to have territorial control, and do act with a political and ideological orientation, similar, if not equal, to the

former AUC[20] (UNHCHR 2009: 13). Furthermore, the AUC activities included not only political goals but also ordinary delinquency acts. In this sense, the distinction between old and new groups becomes even vaguer. Now, regardless of their characterization, the violence generated by these neo-paramilitary groups cannot be considered as a mere common crime issue. Their crimes, committed in the context of the armed conflict, produce an alarming level of violence against the civilian population, especially political opponents. Indeed, attacks on the civil population engaged in political activities, usual victims of paramilitaries, continue to be a major challenge to the rule of law. Since the demobilization process formally ended in August 2006, there has been a significant number of threats against and killings of human rights defenders and trade unionists attributed to neo-paramilitaries (IACHR 2007: 21, International Crisis Group 2007a: 26). For instance, according to Amnesty International, at least 46 trade union members and 12 human rights defenders were killed by neo-paramilitary groups in 2008 (AI 2009: 113).

4.1.3. The Economic and Political Structures of the Paramilitaries

Another important strength of many paramilitary organizations that the demobilization process failed to address was their economic and political structures, which seem to remain intact throughout the process. As we have seen, as a result of their modus operandi, paramilitaries were able to build strong economic and political structures, obtaining financing power and resources through drug trafficking and from acquiring a strong concentration of land (Duncan 2006). In many cases, these resources provided the paramilitaries with favorable political posi-

[20] These groups have been located particularly in the regions of Guaviare, Meta and Vichada, as the self-styled “Anti-terrorist Revolutionary Army of Colombia” (ERPAC), and in the region of Nariño, with the so-called “New Generation Peasant Self-Defense Forces” (AC-NG) (UNOHCHR 2008b:13).

tions, especially at the local level. In this sense, according to Uprimny and Saffon, “peace and the guarantee of non-recurrence of atrocities cannot be assured merely by a demobilization process … .” Indeed, if their economic political structures are not addressed by the process, it “… might allow for power structures to remain intact, and even to become stronger in virtue of a legalization process” (2007b: 5).

4.1.4. The Reintegration Policy

A fundamental element of the demobilization process was the creation of a program for the reintegration of ex-combatants called Program for the Reincorporation to Civil Life (Programa para la Reincorporación a la Vida Civil - PRVC), which was carried out by the official High Commissioner for Peace (Alto Comisionado para la Paz) and offered demobilized combatants psychosocial attention and basic services such as accommodation, health, education and technical training to obtain employment and start productive projects,[21] as well as a monthly economic salary (Alta Consejeria presidencial para la Reintegración nd). Reintegration in the civil society depends mainly on access to education and work. However, problems related to the effectiveness of the reintegration program were reported. According to the monitoring report of the OAS, until June 2006, the PRVC attended to 19,752 of the 31,671 persons demobilized, by which the program covered only about 65% of the demobilized population (OAS 2006: 9, 10). In general terms, the main problems of the reintegration programs were the high level of desertion, especially from educational and labor programs. The IACHR indicated that “The problems associated with reintegrating thousands of demobilized persons into civilian life have been reflected in the low coverage of education, the high dropout rate in formal education, and the abandonment of programs that offer immediate remuneration, such as those for civic auxiliaries or manual eradica-

[21] These productive projects consist of placements in agricultural, farming, construction industry and commercial sectors.

tors" (IACHR 2007: 24). As a result, the proportion of demobilized persons with links to jobs is low: only 4,402 of the approximately 31,671 persons who have been demobilized collectively or individually (IACHR 2007: 25). According to the OAS, there was an overbearing of governmental institutions that were not prepared to assist such a large volume of people (OAS 2006: 9, 10, 11). As a result, inadequacies in coverage in education, psychosocial attention and social security prevailed at both the local and national level. In response to these problems, the government created a specific institution to address inefficiencies, the Office of the Presidential High Counselor for Reintegration (Alta Consejeria presidencial para la Reintegración - ACR) in September 2006 to design, implement and evaluate the state policies of social and economic reintegration of both the individually and collectively demobilized persons (ACR 2009: 1). However, reintegration problems remained. The new reintegration programs privileged education over employment. Whereas through the ACR, a major institutional effort in the areas of education and health coverage has been implemented and is achieving positive results, this has not been the case in the employment field. The generation of employment for demobilized persons has faced some critical problems. According to the OAS, ex-combatants experience immense difficulties in obtaining a job in different regions of the country (OAS 2009: 2). Here again, we have to differentiate between problems directly linked to governmental performance deficiencies in managing the program from the difficulties regarding the social and economic context, preceding and also framing this process. Regarding the first issue, the lack of governmental policies to facilitate employment possibilities to ex-combatants is a serious problem, which in many cases ended with the abandonment of the reintegration programs (IACHR 2007: 24). As for the social and economic context difficulties, the social stigmatization of ex-combatants, as well as the already existing high levels of unemployment in certain regions, make reinsertion initiatives even more difficult (Laplante and Theidon 2007: 69). This difficult social context often leads to a relapse on the

part of ex-combatants as they must rely on previously effective means of survival, including performing illegal activities (OAS 2009: 3). Here we have to consider that many paramilitaries and guerrilla's members as well entered to these forces as a way of earning a living and not necessarily because of ideological conviction. In this sense, the introduction of public policies to strengthen social and economic rights would be an important condition to prevent the recurrence of violence.

Additionally, international organizations have stressed that some initiatives of the reintegration process provoked what they called the "recycling of paramilitary groups" through programs that incorporated them into the public security forces (CCJ 2008a: 30, AI 2009: 112). Contrary to the goals of demobilization and reincorporation of combatants, which aim to "achieve the full reincorporation of the demobilized population in the civil life" (Decree 128, 2003), part of the government's policy of reintegration included the incorporation of demobilized combatants into the activities of the security forces in the militaries as well as in the police force. For example, some ex-combatants have been employed as police officers patrolling the highways or as civic guards. As a matter of fact, of the 1,527 demobilized fighters who were provided with a formal and stable occupation in August 2006, 1,105 (which corresponds to 72.3 %) of which were jobs linked to vigilance or security (CCJ 2008a: 32). For example, with regard to the National Police, in October 2007, 888 demobilized persons were employed as police officers guarding the highways or as road guards (CCJ 2008a: 31). Inclusion of the demobilized in typical activities of the public and security forces was encouraged by the government since it offered an extension of the economic benefits for those taking part in the above mentioned activities.

The reintegration of ex-paramilitaries, possible perpetrators of human rights abuses in the security forces,[22] can strongly reduce trust of society in public institutions. In this sense, these kinds of policies represent the opposite of what Ni Aoláin and Campbell suggested as means to enable a transitional process to a substantial democracy. As explained in the theory chapter, in the conflicted democracy the governmental institutional complicity in human rights abuses (whether through the facilitation of abuse, or in its failure to provide redress) may result in a wide portion of the society, especially those communities who were victims of the violence, having little confidence in law and in legal institutions, which then results in a general loss of legal legitimacy (Ni Aoláin and Campbell 2005: 187). In this sense, an important outcome of a transitional process should be the strengthening of legitimacy of democratic institutions, which will be possible only if these become a legitimate means to prevent the recurrence of crimes.

Furthermore, these initiatives violate the basic principle of disarmament, demobilization and reintegration processes, which claim that demobilized combatants must be totally removed from armed structures in order to close the possibility of relapse and recurrence of crimes (ASK - Arbeitsgruppe Schweiz-Kolumbien 2005). This is why human rights organizations characterize the government process as a “recycling” of gunmen and the legalization of paramilitaries (AI 2005: 41). Far from supporting a reincorporation process into civil life, these practices reinforce teachings, practices and behaviors derived from belonging to the armed groups, thereby maintaining instead of breaking the links between the state security forces and the paramilitaries (CCJ 2008a: 30). On the contrary, an effective policy, aimed at reintegrating former paramilitaries into civil life, should include programs that take into consideration the capacities and social

[22] We describe them as possible perpetrators since, as previously explained, there were no investigations which proved that they did not participate in human rights violations.

background of demobilized combatants, providing assurances for education and psychosocial assistance that would allow them to redesign their lives.

Murders of paramilitaries have become another recurring problem preventing some local reintegration initiatives from being completely effective. As Table 3 shows, there was a notable increase of killings of paramilitaries during the period of negotiations (2002-2006) in comparison to previous years. Nevertheless, it is noteworthy that this increase in paramilitary killings is especially high in 2007 (Otero Prada 2008: 20). This can be attributed to the fact that even though the negotiations were over by that time, the judicial process was just starting, and paramilitary confessions in trials were providing information which revealed not only murders and disappearances cases, but also the link to governmental as well as still existing paramilitary structures. This information could have been considered inconvenient for these groups. In this sense, the killing of paramilitaries and their families have become intimidation strategies to hinder confessions.

Table 3: Paramilitaries killed between 1995 and 2007 (outside of combat)

Year	Paramilitaries Killed
1995	4
1996	5
1997	10
1998	34
1999	40
2000	90
2001	120
2002	187
2003	346
2004	558
2005	322
2006	198
2007	636
Total 2000-2007	2.457

Otero Prada, Diego (2008: 20), "Experiencias de investigacion. Las cifras del conflicto colombiano." INDEPAZ, Bogotá.

In general terms, the murders of paramilitaries imply a serious security problem resulting mainly from two problems. The first

one is the incomplete disarmament and demobilization of paramilitary groups. Security problems for ex-combatants are usually the result of a failed or incomplete demobilization process since often the threats come from other combatants of the former belonging armed group (UNDPKO 1999: 36). This highlights the importance of collective demobilization, which should imply the complete dismantling of the paramilitary groups in order to guarantee the non-repetition of crimes, a condition essential for a durable peace. The second problem is the lack of governmental security measures or programs to protect demobilized combatants. The security of participants is an important aspect of a DDR process that should be guaranteed by governments. The possibility that DDR participants who have been disarmed may have concerns regarding their own security, could prevent other combatants from demobilizing, thus putting the demobilization process at risk.

In summary, there are two important factors hindering an effective demobilization. On the one hand, the dismantling of the economic structures of the paramilitaries should play a key role in the process. The maintenance and reproduction of illegal economic activities, such as the drug trafficking and the exploitation of lands through expropriation and forced displacements, require parallel illegal forms of coercion, as in the case of the paramilitaries, that guarantee their continuance. Consequently, while these commercial circuits are still operating, the use of illegal parallel coercion forms that enable them will go on. The absence of policies, not only to control the demobilization, but also to truly dismount the paramilitaries, that is to say, its economic structure linked to the expropriation of lands and to the drug trafficking, is what supports the continuation of paramilitaries, in the form of the old paramilitaries or rearming. In this sense, it is possible to describe the demobilization process with a high degree of superficiality, which reduces its impact and scope in the long term.

At the same time, the continuance of the political use of non-official armed groups to combat political opposition and insurgence reveals the governmental incapacity to open and guaran-

tee democratic spaces for debates and negotiation with critical sectors of the society. The intensification of the armed conflict against the insurgency and the lack of political will to dialogue with them is a fundamental obstacle to start negotiations, strengthen democracy and carry out a transition.

4.2. The Second Path of Demobilization: The Justice and Peace Trials

The gap created by Law 782 and Decree 128, by not addressing serious crimes, attracted international scrutiny and required the government to create an additional law for the DDR process to deal with members alleged to have committed human rights abuses (Laplante and Theidon 2007: 75). This was Law 975, better known as the "Justice and Peace Law" (Ley de Justicia y Paz - JPL). The ordinary criminal procedure did not appear to be a convenient tool at the negotiating table. The AUC leaders were not interested in subjecting themselves to criminal proceedings in exchange for demobilizing, especially when they held big economic and political power and there had been no military defeat. Consequently, a special legal framework was designed, structured on two formal objectives: to facilitate the peace processes and to guarantee the victims' rights to truth, justice and reparation (Laplante and Theidon 2007: 76, 77). As the previous legislation for demobilization, the JPL was formulated not only with the intention to be applied to paramilitaries but also to guerrillas. However, since the armed conflict between Uribe's government and guerrilla groups intensified, there were no appropriate conditions for negotiations between them.

The enactment of the JPL on July 25, 2005 was preceded by turbulent national and international deliberations. Between 2003 and 2004 the Uribe administration submitted drafts of a bill on alternative criminal sentencing to Congress, where there were intense critical debates (Laplante and Theidon 2007: 76-78). Both the Colombian and the international community rejected this bill for blatantly ignoring victims' rights and disproportionately fa-

voring paramilitary groups (UNHCHR 2003, Ambos 2004: 4-6, ICTJ 2009: 26). The drafting process received great interest from the national government, intergovernmental agencies, local political elites, NGOs and civil society looking for a balance between peace and justice.

At the beginning of the negotiations the paramilitaries were powerful enough to achieve a draft which was highly beneficial to their concerns (Rangel 2005: 16). They were supported by the sympathy of the political and economic elites. Finally, however, they could not muster sufficient political weight. The international community, especially NGOs and victims organizations, lobbied the Colombian government and provided input to the congressional debates, significantly shaping the final outcome (Diaz 2007: 14, 15). Essential for the process was also the prospects of a possible intervention of the International Criminal Court (ICC). In 2005 the ICC's prosecutor, Luis Moreno Ocampo, sent an official communication to the Colombian government inquiring about official response to the perpetration of international crimes and warning that if the government failed to provide accountability for the crimes and justice to victims, the court could intervene since the Rome Statute came into force for Colombia in November 2002. The threat of possible intervention played a significant role in the drafting of the law as well as in the paramilitaries' acceptance of stricter law, as an ICC sentence would certainly be unfavorable. At the same time, another element that influenced paramilitaries to accept the JPL was the attempt to avoid extraditions to the U.S. on charges of drug trafficking, which would also imply harder sentences (Laplante and Theidon 2007: 90). All these discrepancies are the result of one of the most difficult dilemmas in a transitional justice process arising from the tension between the demands for justice on the part of society and victims, on the one hand, and the interests, in this case, of the paramilitary groups still having the power to impose some aspects of the peace negotiations, on the other.

Here, it is also possible to see how the existence of some democratic aspects, such as an active civil society or the, at least

formal, compromise to accept international human rights norms shaped the formulation of the JPL. The intervention of actors such as the civil society, the international community and the legislative power would have not been possible in an authoritarian regime. These developments regarding the formulation of the law show how different actors acquire, in a conflicted democracy like the Colombian one, a more relevant role than in paradigmatic transitions where due to the dictatorial nature of the government the intervention would not be so strong.

Finally the JPL was passed in July 2005,[23] establishing the legal framework for the prosecutions of those demobilized combatants who had not benefited from the Law 782 and Decree 128. In other words, it applied to demobilized combatants who have participated in gross human rights violations and were for that reason facing criminal charges and therefore not eligible for amnesties. That is the case especially with most paramilitary leaders.

4.2.1. The Transitional Justice Principles of the Justice and Peace Law

The JPL content explicitly connected demobilization with the principles of Transitional Justice. Indeed, the language in the law was very clear. For example Article 4 established that the process of national reconciliation "should always promote the right of victims to truth, justice and reparation" as well as "respect the right to due process and judicial guarantees of the prosecuted". Similarly, according to Article 1 of the JPL, the aim of the peace and justice process was to support reintegration of demobilized

[23] The final title of the law is: "Law by which it is dictated the dispositions for the reincorporation of members of illegal organized armed groups that contribute in an effective manner to the consecution of national peace and other dispositions for humanitarian accords" (Ley 975 de 2005 por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios.).

members of illegal armed groups in the society and ensure that the victims receive access to truth (Art. 7),[24] justice (Art. 6)[25] and reparation (Art. 8).[26]

Article 11 established the eligibility requirements for demobilization. These requirements were: 1) to provide information or collaborate in the dismantling of the group to which they belonged by confessing all their crimes, 2) to cease all illegal activity, 3) to return all assets obtained as a result of illegal activities to provide reparation to the victim. Once an ex-combatant met these conditions, he or she could be granted an alternative sentence (Art. 29), which means a considerable reduction of the sentence they would have received under ordinary circumstances according to the rules of the Criminal Code. In this case, an alternative sentence consisted of deprivation/privation of liberty for a term of at least five years and not greater than eight years, to be set based on the gravity of the crimes and his or her effective collaboration in their clarification.

The JPL also created institutions to carry out its implementation. The most important of them are: 1) the National Attorney General's Unit for Justice and Peace (Unidad Nacional de Fiscalía para la Justicia y la Paz), responsible for conducting investigations and preparing indictments before the courts in the cases of those demobilized under the JPL (Art. 33), 2) the General Ombudsman for Justice and Peace, responsible for guaranteeing the victims' rights and due process of law for perpetrators (Art. 34), 3) the National Commission on Reparation and Reconciliation - NCRR (Comisión Nacional de Reparación y Reconciliación),

[24] Art. 7 established the right to truth. This means that the whole society and in particular the victims had the fundamental right to know the full truth about the crimes committed, in this case, by paramilitaries.

[25] Art. 6 regulated the right to justice (access to justice), according to which the state had the duty to carry out an efficient investigation leading to the identification of responsible of serious crimes.

[26] Art. 8 regulated the victims' right to reparation, which includes the actions taken for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

mandated to develop strategies for protecting victims' rights to reparations and fostering reconciliation (Art. 50), 4) the Regional Commissions for the Restitution of Assets, which, under the coordination of the NCRR, is responsible for facilitating procedures related to claims to property and unlawful occupation or possession of assets (Art. 52), 5) the Fund for the Reparation of Victims, which was to be made up of all the assets or resources provided by demobilized illegal armed groups, resources from the national budget, and donations in cash and in kind, both national and foreign (Art. 54), and 6) the Superior Judicial District Courts for Justice and Peace Matters (Tribunales Superiores de Distrito judicial en material de justicia y Paz), which include eight legal chambers in the Districts of Barranquilla and Bogotá to prosecute the demobilized under the JPL (Art. 32).

The Colombian government alleged that the JPL had the intention of balancing the demands for justice and peace through trying to establish equilibrium between the political necessity to achieve a peace negotiation with the paramilitaries and the national and international legal obligations for the protection of the rights of the victims to justice, truth, reparation and non-repetition. However, even if the law refers to the language of transitional justice, the mechanisms provided in it made it void of guarantees for an effective application.

Indeed, once approved, the JPL generated another serious controversy, receiving criticism from national and international bodies.[27] The discomfort among Colombian civil society was also clear, and it even prompted the creation of a national victims movement (Movimiento Nacional de Víctimas de Crímenes de Estado - MOVICE). Central to these criticisms was also the concern that the demobilization process was ineffective and that paramilitaries would continue to threaten the civil population, murder, traffic drugs and displace people from their lands due to the

[27] For instance, the ICC prosecutor, the UN High Commissioner for Human Rights, the EU, the Inter-American Commission for Human Rights and human rights organizations.

law's inadequacy in dealing with these problems. According to the Latin America Working Group Education Fund, demand for more rigorous justice measures stemmed not just from an abstract or ideal notion of justice, but from the fear that the violence would inexorably persist (LAWGEF 2008: 5). Consequently, there were ten national lawsuits presented by human rights organizations before the Colombian Constitutional Court (Gustavo Gallón Giraldo y otros v. Colombia Const. 2006). All these national and international claims were consolidated by the constitutional court in the *Gallón Giraldo* case on July 13, 2006, where the Court considered all the constitutional challenges to the law. In its ruling, the Court reviewed the JPL within the framework of Colombia's legal system and international obligations, seeking a balance between the rights of peace and justice (Laplante and Theidon 2007: 81). As result, the Constitutional Court ruled through sentence 370/06 that the law was constitutional, but laid out important guidelines related to its application. In general terms, the court established and modified the following aspects of the JPL: 1) The alternative sentences from five to eight years were acceptable, but it extended the time that prosecutors had to investigate crimes committed by ex-combatants seeking the law's benefits, which according to the law were just 60 days; 2) The court also defined greater incentives for truth by establishing that legal benefits would be withdrawn if it were later determined that a paramilitary had lied during their confessions, a situation unforeseen by the law; 3) It contended that paramilitaries would be responsible for paying victims' reparations not only from their illegally acquired assets, as it was originally established in the JPL, but from all of their assets, regardless of whether they were acquired legally; 4) Finally, the sentence expanded victims' rights by demanding major access for victims' participation in the judicial proceedings (Colombian Constitutional Court 2006, ICTJ 2009: 32, 33). However, while the Constitutional Court ruling was welcomed by human rights groups within and outside of Colombia for its potential to improve the law's application, the executive

branch did not agree to fully implement the court's decision (LAWGEF 2008: 5).

These controversies around the JPL highlight again the ambiguous character of conflicted democracies. The importance and influence of the Colombian judicial system, an essential component of a democracy, played a relevant role in the regulation of the transitional justice mechanisms by trying to put some limits on the executive power, a necessary condition to strengthen the rule of law. In the same way, the fact that civil society referred to the Constitutional Court as a means of influencing the formulation and application of the JPL denotes the fact that, even though restricted because civil society organizations act often under threats and killings, there are some democratic spaces which enable the possibility of political contestation through the judicial system, which in authoritarian regimes would have not been possible. In this sense, the Colombian civil society and the judicial system played a fundamental role in limiting the scope of the state's prerogatives in peace negotiations and JPL's formulation in the Colombian conflicted democracy (in contrast to non-democratic societies). As we have previously mentioned the legitimacy of the law in conflicted democracies is a complex issue. In contrast to the ideal type of liberal democracy in which law's legitimacy would be axiomatic, in a conflicted democracy, the law's complicity in human rights abuses (whether through the facilitation of abuse or in the law's failure to provide redress) may lead to the situation that a wide segment of society has little or no confidence in the legal institutions (Aoláin and Campbell 2005: 187). However, this lack of legitimacy is not as deep as in authoritarian regimes. As our case study shows, citizens in conflicted democracies show to have more, although deteriorated, confidence in their legal institutions and therefore resort to law as a legitimate means by which to address the failure of the formally democratic regime (Aoláin and Campbell 2005: 188).

The Colombian case also highlights the increasing importance of the international consensus over the binding legal nature of some of the transitional justice principles. Thus, Colombia's govern-

ment had to embed its DDR process in these international transitional justice principles if it pretended to be taken seriously before the international community in advancing a transitional process toward a more peaceful democracy. The approval or criticism of the international community regarding human rights standards have become strong factors in legitimacy.

Nevertheless, a crucial problem in this case is that if the existence of these democratic institutions and instances from civil society, the judicial system and the international community are not enforced by an effective governmental response that takes their demands and recommendations seriously, the democratic quality of the regime acquires a rhetoric and formal character. In this sense, in order for the official acknowledgment of the importance of transitional justice principles to become more than a formal discourse, there must be an effective implementation that gives the process direction towards the fulfillment of these principles.

Therefore, we will now take a look at the implementation of the Justice and Peace Law to observe if it fulfills the central principles of transitional justice: truth, justice and reparation as basis of the guarantee of non-repetition, necessary conditions for enabling a transitional process.

4.2.2. Implementation of the Justice and Peace Law

In order to benefit from JPL, ex-combatants had to be in a list of candidates. The demobilized individuals had to state in writing their interest in being included and swear under oath their commitment to abide by the conditions established under the JPL. The decision as to who was included in the list was the responsibility of the governmental office of the High Commissioner for Peace, who later on would submit the list to the Ministry of Interior and Justice, which had the final say on the universe of possible beneficiaries. Following, the list was sent to the Office of the Attorney General (ICTJ 2009: 29). According to Articles 10 and 11 of the JPL, the inclusion of a person in the government's list

did not mean that he or she complied with the requirements established for its application, and therefore, it did not guarantee that the benefits would be granted, what is finally decided between the judicial units (Law 975 2005: Art. 10, 11). However, there were serious legal and practical challenges concerning this list and the problem of determining who was eligible for JPL benefits (ICTJ 2009: 30) As the ICTJ explains, the design of the JPL as its enforcement was discretionary since the government was the filter with the faculty to decide who was a candidate or not. If the government did not include an individual in a list submitted to the Office of the Attorney General, this person would not be a candidate for access to the benefit of the JPL (ICTJ 2009: 30).

Once candidates were accepted by the Attorney General, they had to deliver a full confession of their crimes called “Free Versions” (Versiones Libres). Paralleling this, the Attorney General carried out investigations regarding their crimes (Law 975 2005: Art. 16). Depending on the results of investigations and declaration of victims, judges finally decide what kind of sentence they give to ex-combatants, between five and eight years. The judge determines the final length of the alternative sentence based on two criteria: the seriousness of the crimes committed and the degree of cooperation on the part of the demobilized person regarding the investigation of those crimes (Law 975 2005: Art. 29). In the case that the demobilized individual fails to meet these requisites, the ordinary sentence, which may be up to thirty years in prison, would automatically apply (ICTJ 2009: 31, 32).

Now in practice, the trials of paramilitaries started in December 2006 and are still going on. But the magnitude and complexity of the crimes involved are slowing the JPL process, which increasingly suffers from a lack of legitimacy (International Crisis Group 2008: 1). Of the original 31,671 demobilized paramilitaries, just over 10% applied to be judged under the Justice and Peace Law jurisdiction and will probably receive reduced sentences, which means that until June 2009 there are 3,712 candidates (Attorney General 2009: 1). Considering the large amount of crimes attrib-

uted to paramilitaries, it strengthens the hypothesis that perpetrators of serious crimes have achieved impunity by demobilizing under Decree 128.

Regarding effective sentences, there has been just one so far (of an ex-member of the AUC) under JPL in March 2009,[28] annulled by the Supreme Court in August 2009 for considering it to be in contradiction with transitional justice principles of rights of victims to justice, truth and reparation (Semana 2009). Thus, the intervention and supervision of the Colombian Supreme Court again highlights the importance of the judicial system as a key element in the process. In this sense, there is a tension between different institutions inside the state through which there is an attempt to adjust the judicial process to transitional justice standards and principles. Regarding the other 3,712 cases waiting for sentences, by July 2009 there have been no major advances. According to the Attorney General's Justice and Peace Unit (JPU), more than 1,100 of those as of July 1, 2008 had decided not to continue in the JPL process when they realized no charges were pending against them. Of the 3,712 in the process, approximately 320 have been delivering confessions, but none have been convicted (International Crisis Group 2008: 7).

4.2.3. The Role of Victims in the Judicial Process

State policies related to victims' rights play an important role in the strengthening of democracy and the state's legitimacy, since these policies demonstrate the state's willingness to guarantee the human rights. Thus, transitional justice mechanisms should be a means to enable integration, recognition and protection to victims. Furthermore, by assuring the participation of victims in the transitional justice judicial process, the state provides legitimacy to the entire process. Therefore, the participation of victims

[28] The judgment was against Wilson Salazar, alias "The parrot," member of the AUCs. Under JPL conditions he received a five years sentence instead of the 38 years he would have had according to the ordinary criminal code (Corporacion Nuevo Arco Iris 2009).

in the judicial process against paramilitaries would reinforce their rights to know as well as to provide information about past crimes. The empowerment of these actors is an important factor in changing the asymmetrical balance of forces between themselves and the perpetrators. However, the participation of victims in the Justice and Peace Process is limited by fear, lack of available information, restricted participation mechanisms and overburdened institutional capacities.

One detriment to the Justice and Peace process is due to the fact that victims rarely receive notification in time to take part in judicial proceedings, which are held in only a few locations of the country – Bogotá, Medellin and Barranquilla (International Crisis Group 2008: 25). When they do, many do not have enough economic resources to travel to the judicial audiences, and the government does not provide any financial support for victims in order to enable them to participate in the process.

Furthermore, the governmental institutions tasked with implementation of the Justice and Peace Law - the Attorney General's Unit for Justice and Peace, the Ombudsman, the Superior Judicial District Courts for Justice and Peace Matters - find themselves attempting to operate beyond their existing capacities and experience great difficulties in moving the judicial process forward. These institutions are responsible not only for monitoring demobilization and providing assistance to victims, but also for recovering ill-gotten assets that can be used to make reparations payments to victims. The burden of implementing the JPL was placed on the Attorney General's JPU, which seems to be overwhelmed by the task of prosecuting 3,712 ex-paramilitaries (International Crisis Group 2008: 2). Despite registering an increase of 350% of its staff during 2008, the JPU has not been able to satisfactorily advance cases under the Law (UNHCHR 2009: 14). At the same time, the massive register of victims of paramilitary violence making accusations in the judicial process has exceeded the governmental capacity; in this case, of the Ombudsman's office, which was not prepared to attend to such a large volume of the population. According to the magazine *Semana*, a

senator from the pro-Uribe "La U" party, Armando Benedetti, revealed in April 2008 that only 8,634 of the more than 125,000 victims who had registered had actually participated in the Justice and Peace hearings, and only 10,716 had received legal counsel from the Ombudsman's office (Semana 2008). According to the OAS and the ICTJ, there has been scarce and inadequate legal representation provided to victims. Although the Ombudsman has gradually increased the number of public defenders available, the number of persons who still have not met with a legal defender remains very high. Through August 2008, 23,463 victims received legal representation nationally. On average, every official is responsible for 300 victims, which makes adequate representation difficult and providing a suitable legal defense challenging (OAS 2009: 11, ICTJ 2009: 38).

These problems are also compounded by the continuance of the paramilitary violence, which, according to international organizations, has shown to be a fundamental obstacle to full JPL implementation and the promotion of victims' rights (LAWGEF 2008: 7, Crisis Group 2008: 25, OAS 2009: 2). Many victims testifying in the trials have been threatened or even killed. Victims' lack of security threatens their participation in the judicial process because of the fear of retaliation or revenge. Especially threatened are those victims who make claims for the restitution of their lands. In many cases, due to these threats, victims are forced to leave the country (El Tiempo 2007a). For instance, at least 15 victims who testified in the trials of the Justice and Peace process have been killed as of September 2007, while another 200 people were threatened (El Tiempo 2007b). Victims' groups have warned the government that they lacked protection.[29] Yet, little was done until the Constitutional Court ordered the government in June 2007 to implement a plan for witness protection, which

[29] For instance, the National Movement of Victims of State Crimes stated that "no guarantees exist for the victims" in October 2006, after learning about the existence of an "extermination list" with 26 participating victims' names on it (LAWGEF 2008: 7).

the Ministries of the Interior and Justice finished in September 2007. Here again we see the judicial system intervening in order to improve the application of the transitional justice policies. However, the threats and attacks continued, especially by the new paramilitary Black Eagles, preventing victims from talking in trials (LAWGEF 2008: 7). The fact that most of the victims who were threatened or attacked were the ones demanding the restitutions of their properties, together with the big reticence of paramilitary to return those lands, shows that the economic dismantling of the paramilitary structures is one of the most sensitive and difficult aspects of this process.

4.2.4. The Right to Truth

The official framework does not offer many mechanisms to guarantee the right of victims to truth. A notable and serious limitation is the lack of any kind of truth commission in this process. Truth commissions can cover a whole range of needs that cannot be satisfied or addressed through prosecutions. Hayner remarks that a fundamental difference between trials and truth commissions is the nature and extent of their attention to victims and their right to truth. During a trial, victims testify only to back up the specific claims of a case. Their statements comprise to the facts which already constitute the crime charged. Truth Commissions, on the contrary, investigate a pattern of abuses over a period of time, rather than a specific event (Hayner 2002: 28). Furthermore, commissions are designed to focus primarily on victims. For instance, the process of holding public hearings, and publishing a report that describes a broad array of their experience of suffering, provides victims with a public voice which may also have a catharsis effect for some of them (Hayner 2002: 28, 29). Truth commissions can also provide some symbolic reparation to the victims since they offer the official acknowledgment of the previous state or non-state actors' crimes (Hayner 2002: 26). Therefore, the lack of a truth commission in the Colombian process so far has serious consequences for the victims and for the society at large.

Regarding most of the ex-combatants demobilized under Decree 128, the Inter-American Commission for Human Rights (IACHR) stressed that some 90% of the 31,671 "offered no significant information on illegal acts or crimes committed by the paramilitary units to which they belonged" (IACHR 2007: 9). The vast majority of the paramilitaries, therefore, simply demobilized without confessing abuses, providing information on their group's structure, drug trafficking, money laundering or other criminal activities. According to the Inter-American Commission on Human Rights (IACHR), the prosecutors who handled this were given no special training and used a poorly designed questionnaire to elicit specifics regarding the commission of crimes (IACHR 2007: 7).

The second chance to obtain truth is through the declarations made by the paramilitaries who, having committed serious crimes, seek the benefits of the law in order to receive a reduced penalty. As previously mentioned, these declarations are voluntary depositions called *"versiones libres"* regarding their participation in crimes. During the phase of voluntary depositions, a number of events have been brought to light, which have allowed the Attorney General's Office to initiate or reopen investigations of cases previously unknown. These cases include for example put en evidence relations between senior public officials and paramilitary groups (UNHCHR 2009: 15). According to the OAS the voluntary depositions have also revealed the truth about a vast number of crimes such as massacres, tortures, forced disappearances, sexual abuses, murders of civil and political persons in cooperation with public security forces, among others. Also, due to these confessions increased the number found of exhumed graves and bodies[30] (Attorney General's Unit for Justice and Peace 2008). This situation shows some advances in the pursuit of truth (OAS 2009:12).

[30] The Attorney General has received information, mainly from demobilized fighters, about more than 4,000 graves, and the NCRR estimates there could be up to 10,000 buried bodies (International Crisis Group 2008: 10).

However, a significant obstacle for the judicial process and especially to the fulfillment of the right to truth was the sudden extradition in 2008 of paramilitary leaders who were being tried under the JPL. An important condition of the negotiations between paramilitaries and the government was the promise of non-extradition to the U.S. because of drug trafficking. However, in a surprising move the Colombian government extradited fourteen of the most important former AUCs commanders in May 2008 (Human Rights Watch-HRW 2008b: 66). Even though the extradition could result in much longer jail terms for these leaders, the U.S. charges are solely on drug trafficking, so that the U.S. judicial process will not include human rights crimes (HRW 2008b. 12, International Crisis Group 2008: 1). The Colombian government justified this decision by arguing that the reason for the extradition was that the paramilitary leaders did not comply with the conditions of the Justice and Peace law[31] (El Tiempo 2008, LAWGEF 2008: 9). However, this decision threw the Justice and Peace process into confusion. Judges and prosecutors were caught unaware by a decision made at the very highest level. Critics have charged that the extradition of the paramilitary leaders deprived both victims and judicial authorities, especially the Attorney General, of one of their main sources of information (HRW 2008b: 82). According to the Attorney General there was no proof that these paramilitary leaders had committed offenses during the judicial process, and therefore, there was no reason to extradite them (El Espectador 2009). In any case, the argument that the main commanders had not fulfilled the agreed requirements would have justified excluding them from the benefits of the Justice and Peace Law but not necessarily their extradition (International Crisis group 2008: 3).

Human rights groups were greatly concerned that this controversial move would even further halt the progress that had been made in the Justice and Peace hearings, in which important information regarding connections between paramilitaries and poli-

[31] To confess the truth and stop committing crimes (El Tiempo 2008).

ticians were coming out to light. These cases were being investigated by the Supreme Court (HRW 2008b: 12). Taking into account that the non-extraditions were one of the conditions of paramilitaries to accept negotiations, the fact that they were finally extradited reveals a break in the relations between paramilitaries and the government. According to different sources the extraditions would have been the retaliation of the government, a reaction to the declaration of paramilitary chiefs linking and involving important government's officials with paramilitaries (HRW 2008b: 13). According to the organization Human Rights Watch the extradition came three weeks after Colombian prosecutors ordered the arrest of President Álvaro Uribe's cousin and other politicians for allegedly conspiring with paramilitaries. He is one of more than 50 congressmen from the president's ruling coalition to come under investigation in the last two years for alleged links to paramilitaries as part of what is known as the "parapolitical scandal": "Just as local prosecutors were beginning to unravel the web of paramilitary ties to prominent politicians, the government has shipped the men with the most information out of the country" (HRW 2008a).

The "parapolitical scandal" emerged by a combination of factors: the Supreme Court and journalist's investigations, some Justice and Peace hearings of paramilitaries and the discovery of a computer owned by paramilitary boss Jorge 40, containing evidence linking members of Congress, governors and mayors to local paramilitary networks. It also contained evidence alleging that the head of the state intelligence agency, Jorge Noguera, had handed over to paramilitaries lists of union leaders and others to be killed (LAWGEF 2008: 27). Around 70 members of Congress were still under investigation in 2009 for alleged links to paramilitary groups. Most of the legislators implicated in the scandal were members of the president Uribe's government coalition (HRW 2008b: 13). While cases against some legislators were dropped, others were found guilty by the Supreme Court and sentenced to terms of imprisonment. Tensions increased between the government and the Supreme Court over the scandal,

with the former claiming the Supreme Court was politically motivated and the latter accusing the government of seeking to undermine the investigations. This public conflict was so disturbing to the justices, in part, because public condemnations by high-level government officials of journalists, human rights groups or members of the judiciary are often followed by death threats from paramilitary groups (LAWGEF 2008: 29). This threatening situation lead the Inter-American Commission on Human Rights to ask the Colombian government in December 2008 to take precautionary measures on behalf of the Supreme Court judge co-coordinating the investigation on "parapolitics", Iván Velasquez, regarding the judge's security (HRW 2008b: 14, AI 2009: 113). Here we can see another paradox of transitional justice in a conflicted democracy. On the one hand, the investigations of the Colombian Supreme Court into paramilitaries' influence in the political system represent a good means to strengthen democracy by reducing the power of these links between paramilitaries and politicians. On the other hand, the persistence of threats and intimidations to the members of the Supreme Court could be a serious factor undermining the progress of these investigations and the rule of law. Regardless of these judicial investigations, it is relevant to stress that the demobilization legal framework did not include any mechanism such as purges and lustrations to remove persons from public employment linked to paramilitary forces.

4.2.5. Reparations

The government and the institutions involved in the JPL process created great expectations regarding reparations for the victims of paramilitary violence (ICTJ 2009: 41). Indeed, formally, the JPL includes the five internationally recognized forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition. However, little has been done regarding the legal and effective application of these principles. In practice, reparations policies have not started so far, since reparations procedures depend on the prosecution of the perpetrator

or of the paramilitary bloque to which he/she belonged (ICTJ 2009: 41).

In general terms, the reparation policy translates, clearly, into the creation of the previously mentioned NCRR, which does not directly repair but rather serves as a consulting, assisting and monitoring body to guarantee victims' rights and promote reconciliation (Law 975 2005: Art. 51). The NCRR has gained some recognition for providing direct help through its regional offices, but it has had a limited reach. By March 2008, for instance, it reported giving in-depth training to only 88 of more than 2,400 victims and victim-assistance organizations in its database (International Crisis Group 2008: 5).

In Colombia, according to the United Nations High Commissioner for Refugees, there are around three million forcedly internally displaced people (IDPs) (UNHCR 2009). Monitoring organizations attest that more than 75% of all IDPs abandoned their land as a result of pressure and killings from illegal armed groups (International Crisis Group 2008: 11, Consultoria para los Derechos Humanos y el Desplazamiento - Codhes 2008: 27). Therefore, one of the most meaningful and difficult reparations in the Colombian context is the restitution of assets and stolen land to victims. As a matter of fact, paramilitaries had to disclose illegally obtained assets, including lands, as a condition for their demobilization under JLP. These assets were supposed to be channeled into the National Reparations Fund *(*Fondo para la Reparación de las Víctimas), administered by the NCRR, which had be made up of all the assets or resources provided by demobilized of illegal armed groups. In this sense, the process of reparation of victims depends to a large extent on the properties and funds the authorities are able to collect from the assets legally or illegally obtained by the perpetrators (ICTJ 2009: 41). This arrangement presents several practical difficulties. The first of these includes not being able to anticipate the total amount of money available for reparations. This amount will depend on the asset forfeitures and surrenders required of the demobilized persons within the JPL process, meaning that recovering such assets is subject to

slow legal proceedings. Furthermore, even though paramilitaries obtained through violence, extortion and drug trafficking enormous wealth, not the least of which is most of the 5 to 6 million hectares of land stolen from Colombia's nearly 3 million IDPs, the amount of returned assets is extremely scarce (LAWGEF 2008: 13). [32]

Furthermore, to obtain economic reparation, victims have to know exactly who perpetrated the crime and provide proof of what was stolen, including the land title. These requirements can complicate the reparation process for IDPs. Aproximately 11% of IDPs do not know which armed group attacked them (Codhes 2008: 27). At the same time, the lack of land titles and accurate records of property, especially in the case of many poor farmers and indigenous populations who work the land for decades without proper title, has made it difficult for victims to bring restitution claims (International Crisis Group 2008:11).

Some aspects of reparations, as contemplated in the current process, have undergone important changes over time. These changes have benefited the victims. The Colombian Constitutional Court played an important role in this regard. For example, the Court decided explicitly that the payment of economic reparations pertained to the members of armed groups who had been tried, and not to the national budget, whose resources could only be used for reparations residually (Constitutional Court Judgment 370 2006). In addition, the Court established a type of joint and multiple liabilities among members of the same illegal group. If the assets of the person directly responsible for a crime, in a given legal proceedings, would not suffice for the payment of reparations, any member of the same armed group should be liable for them. This rule applies in the case where the harm suf-

[32] According to LAWGEF by April 2008 the following assets have been turned over to the National Reparations Fund: 21 rural properties covering 5,439 hectares; 7 urban lots; clothing; 4,666 head of cattle and horses; 8 vehicles; 2 helicopters; 739 million pesos; and 70 pairs of shoes (LAWGEF 2008: 13).

fered by the victim resulted from an act perpetrated by all members of the armed group (ICTJ 2009: 43).

Recognizing that the paramilitary-funded reparations policy was at a standstill, the government passed Decree 1290 in April 2008, creating the Administrative Reparation Program (ARP), which started receiving applications on August 15, 2008 and seeks to accelerate the process by providing state-funded economic assistance to victims. It means that the funding would come primarily from the government's budget and international donations rather than through the paramilitaries' ill-gotten gains. The administrative mechanism needs neither the intervention of a judge, nor to take part in a judicial process, but is a complement of the judicial reparation. It considers only monetary reparations ranging from 10 and 40 minimum wages. Only two months after the beginning of this program, more than 126,000 requests of victims have been registered (OAS 2009: 12). However, as of May 2009 it had not been implemented.

In this context, the strengthening of economic and social rights as a state policy does not seem to be the central aspect of the reparation polices to be employed in Colombia. Even though the ARP has not been implemented in Colombia yet, its conception shows to have a restitutive character more than a transformative one. Restitutive reparations only contribute to the temporary stabilization of the situation of victims, without guaranteeing them the restitution of their rights as citizens living (Uprinmy and Saffon 2007a: 7).

The current tendency of great slowness in reparations measures can have serious consequences for the legitimacy and credibility of the whole process. Reparation policies entail governmental commitments which create expectation in the society, especially among victims. As previously explained, reparations can be an instrument of restoration of trust between the state and the citizens. However, the appeal to these mechanisms without effective implementation, in contrast, may reduce the government's legitimacy. As Pablo de Greiff explains, reparations constitute a

manifestation of the seriousness of the state in its efforts to reestablish relations of equality and respect. In the absence of reparations, victims will always have reasons to believe that their claims are being ignored and they are being excluded from the political community (De Greiff 2008: 464). However, the topicality of this process makes difficult to do a more precise evaluation of how reparations policies will develop in the future.

In this sense, it is important to stress that the implementation of justice and reparations policies entails long processes that certainly last for several years. In this sense, it remains open to see whether the current tendency of great slowness, lack of institutional capacity and resources, restricted participation of victims, security problems for victims and for perpetrators, etc. will hold true in the long term.

5. Conclusion

We have analyzed the legal framework and the current measures implemented for the demobilization of paramilitaries in Colombia. We wanted to find out whether this demobilization can be understood as a transition in a conflicted democracy and therefore as a process of transitional justice. The conclusion we have arrived at reads: Even though Colombia can be described as a conflicted democracy and transitional justice mechanisms have been utilized, the demobilization process of paramilitaries has not resulted in a transitional process from war to peace. A transition would have implied the fulfillment of certain conditions which so far have not been realized.

The democratic character of the political regime allowed the introduction of transitional justice measures, yet important deficiencies in its governmental formulation, its implementation as well as socioeconomic problems hindered the full success of the process. First, political violence and the internal armed conflict between security forces, paramilitaries and guerrilla groups continue and oppose the transition to peace. The demobilization policy was ill conceived by the Uribe's government, as the negotiations have not included all armed actors. The armed conflict with guerrilla groups, and particularly with the FARC, has continued and even intensified in the last years. As previously explained, the political options to end an armed conflict must include either peace negotiations with the other involved armed actors, or their military defeat. The Uribe administration originally promoted the Justice and Peace Law (JPL) as an integral part of its pacification strategy, but in practice focused on fighting the insurgency. In this context, a peace agreement with this guerrilla group does not seem like a realistic possibility in the short term (Uprimny and Safon 2007b: 9). In fact, as we have seen, parallel to the demobilization process of paramilitaries, the Uribe administration put emphasis on reinforcing the military aspect of its security policy, by fighting the FARC through the so-called Plan Colombia and

the Plan Patriota. However, so far, the guerrilla groups have not been defeated. In this case the lack of political will to open negotiations with guerrilla groups can be seen as a fundamental obstacle to achieve pacification. The simultaneous use of both strategies, military escalation of violence and negotiations, is risky because the failure of any of them can oppose a successful transition.

Regardless of the lack of an agreement with the guerrilla groups, it would still be possible to ask if the negotiations with the paramilitaries have lead, at least, to a partial transition, including the dismantling of these groups and the cease of paramilitary violence guaranteeing the non-repetition of their crimes. However, as our study has shown, neither has been the case. According to the reports of international organizations, there is strong evidence that paramilitary structures are clearly and strongly remaining after demobilization. They are killing civilians, displacing people and committing other crimes, sometimes with the support or acquiescence of the security forces (OAS 2009, UNHCHR 2009, AI 2005, HRW 2008). There is no guarantee of non-repetition of paramilitary violence. This means that there was no transformation of the conflict in terms of a movement from a violent conflict to a nonviolent one. In this sense, the demobilization process failed to address essential aspects of dismantling paramilitarism such as its links to state security forces, to drug trafficking and to the political and economic elite. The process suffered from a lack of serious investigations, which would have uncovered and exposed, politicians, business companies and other sectors of civil society, who finance and support paramilitary activities. In fact, except for the so called “Parapolitical Scandal”, mentioned above, the links between paramilitary forces and economic, political and state institutions as well as security forces have not been addressed by the process.

The movement from a procedural to a substantive democracy with civil, political, economic and social rights has not been far reaching, as this study has shown. In conflicted democracies the existence of certain democratic mechanisms does not completely

forbid, as in dictatorships the exercise of civil and political rights. However, the full enjoyment of these rights is far from being guaranteed by the Colombian state. To strengthen democracy, the limited attention attributed to the victims in the judicial process under JPL needs to be addressed, as do the persistence of threats and murders of those who are considered opposition, i.e., politicians, trade unionist, human rights defenders, journalists, the indigenous population and others.

Measures to advance justice and reparations to victims have hardly been effectively implemented so far. Only 3,712 of the 31,671 demobilized ex-paramilitaries have been accused of crimes against humanity and are waiting to be judged under JPL. And there has been only one legal sentence which indeed has later been annulated by the Supreme Court. Moreover, even though the government had established two mechanisms to compensate victims for harms they have suffered, no reparations have been paid nor has stolen property been restituted. In general terms, the legitimacy of the process is at risk by serious operational and financial bottlenecks in the judicial process and in assistance and reparations to victims.

However, in spite of these problems and of the absence of a transition, the implemented transitional justice mechanisms have brought some positive results. There has been a real but also slow progress on the right to truth. Information about mass graves and about connections between politicians and paramilitaries has been important outcomes. Moreover, numerous paramilitaries have actually demobilized.

It is important to stress that trials and reparation policies in Colombia will certainly last for several more years. It remains open to see whether the current tendency of great slowness, lack of institutional capacity and resources, restricted participation of victims, security problems for victims and for perpetrators, etc. will hold true in the long term.

The Colombian case shows that when applied in a conflicted democracy, the process of implementing transitional justice

mechanisms acquires new peculiar characteristics in contrast to paradigmatic transitions. Transitional justice mechanisms could be applied during the conflict because of the democratic character of the political system. They could not have been implemented in pre-transitional regimes of paradigmatic transitions, where justice and reparation measures are taken after the fall of the dictatorial regime. Furthermore, due to the existence of some democratic guarantees, other actors such as the civil society, the international community and the judicial system could to a certain degree influence and control the transitional justice mechanisms. In conflicted democracies, the judiciary can still have an important role in strengthening rule of law by controlling and limiting the executive and legislative power. In the Colombian case the Constitutional Court as well as the Supreme Court of Justice played a relevant role by trying to put some limits to the executive power. The Constitutional Court restricted and modified the formulation and implementation of the Justice and Peace Law and tried to adjust it to international human rights standards, the Supreme Court investigated links between paramilitaries and congressmen and annulled the only sentence of the Justice and Peace Law process. Both courts acted as control instances, fundamental in a democracy.

The Colombian case also shows the importance of the national and international civil society. In comparison to paradigmatic transitions where the civil society was much harder oppressed, in conflicted democracies, civil society, even though still limited, has more influence on the transitional process.

In general terms, the Colombian case provides evidence of two phenomena. First, transitional processes can fail. As Carothers indicated (2002, 15), transitions can also go backward, stagnate and fail. Thus, it is possible to conclude that the Colombian case provides us with a good example of a transitional project which so far did not achieve the expected goal, i.e. a transition to peace. In this sense, the way in which transitional justice mechanisms are legally designed and implemented is fundamental to enable a transitional process. In the Colombian case, the demo-

bilization process as well as its legal framework did not address essential aspects of the conflict. The policy of, parallel to the demobilization process, intensifying the military escalation of the conflict with the guerrilla groups instead of trying to negotiate with them constituted another risk factor hindering a real peace process.

Finally, the Colombian case highlights that the implementation of transitional justice does not always entail a transition (Uprimny and Saffon 2006: 14). The processes of transitions and transitional justice are not inseparable. As there are transitions without transitional justice, the implementation of transitional justice mechanisms does not per se include a transition. However an inappropriate use of such mechanisms could be more prejudicial than beneficial. Transitional justice laws and reparation programs entail governmental commitments which create expectation in the society, especially among victims. If these expectations are frustrated, the legitimacy of the government and of the transitional justice mechanisms is threatened. This may limit the possibility that other governments use them again in the future. Therefore, while successful implementation of transitional justice instruments can increase the faith in the state, the appeal to these mechanisms without effective implementation, in contrast, may reduce the government's legitimacy, preventing it from stabilizing the country's situation and revictimizing victims.

6. Summary in German

Die vorliegende Arbeit beschäftigt sich mit dem kolumbianischen Demobilisierungsprozess der paramilitärischen Gruppen und der Implementierung von *Transitional Justice*-Mechanismen zwischen 2002 und 2008 als einem politischen Versuch, Frieden in Kolumbien durchzusetzen. Die zentralen Fragen lauten: *Stellt die Demobilisierung der Paramilitärs und der rechtliche Rahmen einen Transition-Prozess von einer Konflikt- zu einer Friedens-Demokratie dar? Zählt dieser Übergang als Transitional Justice-Prozess?*

Die sozialwissenschaftliche Forschung zu Übergangsprozessen sowie zu *Transitional Justice*-Prozessen, hat sich in erster Linie auf die Implementierung von *Transitional Justice*-Mechanismen im Rahmen von „paradigmatischen Übergängen" konzentriert, d. h. von autoritären und gewaltsamen Regimen zu liberalen Demokratien. Hierbei ist der Übergang als der Wandel von nicht-demokratischen und rechtswidrigen zu demokratischen und legitimen Regierungen zu verstehen (O'Donnell and Schmitter 1995, Huntington 1991, Huyse 1995, Zalaquett 1995, Ní Aoláin and Campbell 2005, Bhattarei 2007, Carothers 2002). Dennoch zeigen viele Fälle, dass autoritäre Regime nicht die einzige Art von Regierungen sind, die systematisch Menschenrechte verletzen. Unerforscht sind weitestgehend demokratische Staaten, in welchen trotz demokratischer Strukturen anhaltende politische Gewalt herrscht. Diese Regierungsform wird von Fionnuala Ní Aoláin und Colm Campbell (2005) als „Konfliktive Demokratien" (Conflicted Democracies) charakterisiert.

Voraussetzungen für den Übergang von Konflikt- zu Friedens-Demokratien sind: dass der Staat das legitime Monopol zur Ausübung von Gewalt hat, die Garantie der Nicht-Wiederholung der vorausgegangenen Verbrechen und die Stärkung der demokratischen Bürgerrechte. In diesem Zusammenhang sind *Transitional Justice*-Instrumente, wie u. a. Strafverfolgungen und Amnestie, Wahrheits- und Versöhnungskommissionen, Wiedergutmachun-

gen und Demobilisierungsprozesse zu sehen, die im Rahmen von Übergangsprozessen eingesetzt werden. Sie verfolgen das Ziel, die Vergangenheit eines gewaltsamen Konfliktes oder Regimes aufzuarbeiten, um so den Übergang zu einer nachhaltig friedlichen demokratischen Gesellschaftsordnung zu ermöglichen. Einerseits wird mit Hilfe von *Transitional Justice*-Instrumenten versucht, Gerechtigkeit und Entschädigung für die Opfer herzustellen. Andererseits sollen die angeklagten Täter mit Hilfe von Amnestie und Wiedereingliederungsprogrammen in die Gesellschaft reintegriert werden. So steht die Anwendung dieser Instrumente einem Dilemma zwischen Frieden und Gerechtigkeit, Verantwortlichkeit und Straflosigkeit, Strafe und Vergeben gegenüber. Eine Balance zwischen den verschiedenen Akteuren und Interessen muss gefunden werden.

In Kolumbien herrscht seit mehr als 40 Jahren ein bewaffneter Konflikt. Es ist der längste bewaffnete Konflikt in der westlichen Welt. An diesem Konflikt sind der Staat, die rechtsgerichteten Paramilitärs und linksgerichtete Guerillagruppen beteiligt. Bis heute hat der Staat in weiten Teilen des Landes de facto kein Gewaltmonopol über einige Gebiete, die stattdessen von der Guerilla oder den Paramilitärs beherrscht werden. Als Folge wurden tausende Bauernfamilien von ihrem Land vertrieben. Kolumbien steht mit drei Millionen Binnenvertriebenen nach dem Sudan weltweit an zweiter Stelle. Neben Bauern sind auch andere Gruppen Opfer des Konflikts, vor allem Afro-Kolumbianer, Frauen, Gewerkschaftsfunktionäre, Menschenrechtsverteidiger und Journalisten.

Trotz des bewaffneten Konfliktes gilt Kolumbien offiziell als Demokratie. Formelle demokratische Elemente wie freie Wahlen, eine unabhängige Zivilgesellschaft, zumindest eine minimale Garantie politischer und bürgerlicher Rechte, ein formell unabhängiges Justizsystem, politische Kontrolle über die Streitkräfte und nicht zuletzt eine demokratische Verfassung sind vorhanden. Doch die Wirksamkeit der demokratischen Institutionen ist durch die soziale, wirtschaftliche und politische Exklusion einiger Bevölkerungsgruppen und durch die anhaltende politische Gewalt,

die die Menschenrechte eines breiten Teils der Bevölkerung einschränken, reduziert.

Aufgrund der hohen Gewaltrate wird die Legitimität des kolumbianischen Staates mittlerweile auch auf internationaler Ebene in Frage gestellt. Um die Legitimität wiederzuerlangen, versuchte die Regierung von Präsident Alvaro Uribe mit Hilfe einer auf zwei Säulen basierenden Strategie, das Gewaltmonopol im ganzen Land wiederherzustellen. Diese Strategie beinhaltet zum einen eine Ausweitung der militärischen Bekämpfung der Guerilla durch den Staat und zum anderen die gleichzeitige Demobilisierung und Wiedereingliederung der Paramilitärs in die Gesellschaft. Diese Doppelstrategie wird im Rahmen dieser Arbeit als „Übergangssprojekt" bezeichnet, wobei die Arbeit sich auf die zweite Säule konzentriert.

Der Demobilisierungsprozess begann, als der Dachverband der paramilitärischen Gruppen – AUC (Vereinigte Selbstverteidigungskräfte Kolumbiens, Autodefensas Unidas de Colombia) – bereit war, an einem mit der kolumbianischen Regierung ausgehandelten und von ihr unterstützten Demobilizierungsprozess teilzunehmen. Diese paramilitarischen Gruppen sind für die überwiegende Zahl von Menschenrechtsverletzungen seit mehr als 30 Jahren verantwortlich. Die Verhandlungen für einen Demobilisierungsprozess der paramilitärischen Kräfte begannen unter der Regierung Alvaro Uribe im August 2002. Im Dezember 2002 erklärten die AUC einen einseitigen Waffenstillstand. Am 15. Juli 2003 unterzeichneten die Regierung und die AUC das Abkommen von Santa Fe de Ralito I, mit welchem sich die AUC zur kompletten Demobilisierung verpflichteten.

Der Demobilisierungsprozess wird durch einen sondergesetzlichen Rahmen geregelt: durch das Gesetz 782, das Dekret 128 und das Gesetz 975. Insbesondere das Gesetz 975 aus dem Jahr 2005, auch bekannt als das „Gesetz für Gerechtigkeit und Frieden" (Ley de Justicia y Paz), bietet Strafmilderung für angeklagte Mitglieder illegaler Gruppen, die Verbrechen gegen die Menschlichkeit und Mord begangen haben. Um diese Strafmilde-

rung in Anspruch nehmen zu können, sind die angeklagten Exkombattanten im Gegenzug aufgefordert, Informationen über ihre ehemalige Gruppe zu erteilen und illegal angeeignete Güter auszuhändigen. Um den Demobilisierungsprozess im Einklang mit *Transitional Justice*-Prinzipien umzusetzen, wurden eine Vielzahl von Institutionen eingerichtet: acht Sondergerichtskammern, eine Sondereinheit der Staatsanwaltschaft (Unidad Nacional de Fiscalia para la Justicia y la Paz), ein staatlicher Fonds für Entschädigung (Fondo de Reparación) und eine Nationale Kommission für Wiedergutmachung und Versöhnung (Comisión Nacional de Reparación und Reconciliación).

Diese Arbeit hat die Umsetzung des Demobilisierungsprozesses, die gerichtlichen Prozesse und die Wiedergutmachungspolitik evaluiert. Als Ergebnis kann festgehalten werden, dass der Demobilisierungsprozess der paramilitärischen Gruppen bislang keinen Übergang von Krieg zu Frieden zum Ergebnis hat. Ein Übergang hätte die Erfüllung der oben erwähnten Bedingungen – Ausübung des legitimen Gewaltmonopols durch den Staat, Garantie der Nicht-Wiederholung von Gewaltverbrechen und die Stärkung von Bürgerrechten – einbezogen.

Dies ist bislang nicht geschehen. Der demokratische Charakter des politischen Regimes erlaubte zwar die Einführung von *Transitional Justice*-Instrumenten. Jedoch haben einerseits fehlerhafte politische Entscheidungen der Regierung sowie andererseits soziale und wirtschaftliche Probleme den vollen Erfolg des Übergangsprozesses behindert. Die politische Gewalt und der interne bewaffnete Konflikt zwischen Sicherheitskräften, Paramilitärs und Guerillagruppen dauern an und wirken dem Übergang zum Frieden entgegen. Das Konzept der Demobilisierungspolitik der Regierung Uribe schließt nicht alle bewaffneten Akteure in die Verhandlungen ein. Der Mangel an politischem Willen, Verhandlungen mit der Guerilla zu führen, ist ein grundsätzliches Hindernis dafür, Frieden zu schaffen. Der bewaffnete Konflikt mit den Guerillagruppen, insbesondere mit der FARC, hat sich sogar in den letzten Jahren verstärkt. Durch den so genannten Plan „Colombia und Plan Patriota“ hat sich die Regierung Uribe stark auf die

Intensivierung der militärischen Bekämpfung der aufständischen Gruppen konzentriert. Vor diesem Hintergrund sind Friedensverhandlungen mit dieser Guerillagruppe kurzfristig nicht realistisch. Die gleichzeitige militärische Eskalation mit einer Gruppe (der Guerilla) und Verhandlungen mit der anderen (Paramilitärs) ist riskant, weil das Scheitern jeder der Teilstrategien einen erfolgreichen Übergang gefährden kann.

Lässt man die fehlende Vereinbarung mit den Guerillagruppen einmal beiseite, muss dennoch die Frage gestellt werden, ob die Verhandlungen mit den paramilitärischen Gruppen zumindest zu einem partiellen Übergang geführt haben, nämlich der Auflösung dieser Gruppen und ein Ende der paramilitärischen Gewalt sowie die Nicht-Wiederholung ihrer Verbrechen. Wie diese Studie jedoch zeigt, ist dies nicht der Fall.

Nach Berichten internationaler Organisationen liegen Beweise dafür vor, dass paramilitärische Strukturen auch nach der Demobilisierung in großem Umfang weiterbestehen. Paramilitärs töten Zivilisten, vertreiben Menschen und begehen weitere Verbrechen – in einigen Fällen mit der Unterstützung oder Duldung kolumbianischer Sicherheitskräfte (OAS 2009, UNHCHR 2008, AI 2005, HRW 2005). Die Nicht-Wiederholung paramilitärischer Gewalt ist daher nicht garantiert. Eine Transformation von einem gewaltsam ausgetragenen Konflikt hin zu einem mit gewaltfreien Mitteln ausgetragenen Konflikt hat also nicht stattgefunden.

Darüber hinaus bestehen weiterhin Verbindungen des Paramilitarismus zu Mitgliedern der staatlichen Sicherheitskräfte, zur politischen und wirtschaftlichen Elite sowie zum Drogenhandel. Der Demobilisierungsprozess wurde bisher zu wenig von ernsthaften Ermittlungen begleitet. Diese hätten unweigerlich aufgedeckt, dass PolitikerInnen, Wirtschaftsunternehmen und weitere Sektoren der Zivilgesellschaft paramilitärische Aktivitäten finanziert und unterstützt haben. Mit Ausnahme des sogenannten Parapolitik-Skandals wurde die Durchdringung der wirtschaftlichen, politischen und staatlichen Institutionen sowie der Sicherheitskräfte

durch den Paramilitarismus im Zuge des Demobilisierungsprozesses nicht thematisiert.

Des Weiteren zeigt diese Arbeit, dass eine Veränderung von einer formalen hin zu einer substantiellen Demokratie, in der die zivilen, politischen, wirtschaftlichen und sozialen Rechte der Bevölkerung garantiert sind, nicht sehr weit gediehen ist. In Konfliktiven Demokratien ist es – im Gegensatz zu Diktaturen – aufgrund der Existenz von bestimmten politischen Mechanismen der Bevölkerung nicht völlig unmöglich, ihre bürgerlichen und politischen Rechte auszuüben. Dennoch ist der kolumbianische Staat weit davon entfernt, die volle Ausübung dieser Rechte zu garantieren. Um die Demokratie in Kolumbien zu stärken, muss die begrenzte Unterstützung der Opfer bei der juristischen Aufarbeitung im Rahmen des „Gesetzes für Gerechtigkeit und Frieden" verbessert werden. Außerdem muss effektiv gegen die anhaltenden Drohungen und Morde, gegen diejenigen vorgegangen werden, die von der Regierung als Oppositionelle wahrgenommen werden, darunter fallen insbesondere PolitikerInnen, GewerkschafterInnen, MenschenrechtsverteidigerInnen, JournalistInnen, indigene Bevölkerung.

Bislang wurden keinerlei wirklich effektive Maßnahmen zur Verbesserung von Gerechtigkeit und Wiedergutmachung für die Opfer umgesetzt. Lediglich 3.712 der 31.671 demobilisierten Paramilitärs wurden im Rahmen des Gesetzes für Gerechtigkeit und Frieden wegen Verbrechen gegen die Menschlichkeit angeklagt und warten auf ihren Prozess. Bis heute gab es nur ein einziges Urteil, das jedoch mittlerweile wieder aufgehoben wurde. Obwohl die Regierung zwei Mechanismen zur Entschädigung von Opfern eingerichtet hat, gab es bisher weder Reparationszahlungen noch wurde gestohlenes Eigentum zurückgegeben. Die Legitimation des Prozesses ist aufgrund von schwerwiegenden operationalen und finanziellen Engpässen im juristischen Prozess und bei der Entschädigung der Opfer gefährdet.

Trotz dieser Probleme und des Fehlens eines Übergangs haben die angewandten *Transitional Justice*-Mechanismen auch einige

positive Ergebnisse hervorgebracht. Es hat einen echten, wenngleich sehr langsamen Fortschritt beim Recht auf Wahrheit gegeben. Informationen zur Lokalisierung von Massengräbern sowie über Verbindungen zwischen Politikern und Paramilitärs sind wichtige Resultate. Darüber hinaus gibt es zahlreiche Paramilitärs, die ihre Waffen abgegeben haben.

Es ist wichtig zu betonen, dass sich die Gerichtsverfahren und die Entschädigungsmaßnahmen in Kolumbien sicher noch über Jahre hinziehen werden. Es bleibt abzuwarten, ob die derzeitige Tendenz zu ausgeprägter Langsamkeit, fehlenden institutionellen Kapazitäten und Ressourcen, mangelnder Beteiligung der Opfer, Sicherheitsproblemen für Opfer und Täter usw. langfristig anhält.

Der Fall Kolumbien zeigt zwei Phänomene auf. Erstens: dass ein Übergangsprozess scheitern kann. Wie Carothers feststellt (2002, 15), können Übergangsprozesse sich rückwärts entwickeln, stagnieren und scheitern. Wir können schlussfolgern, dass der Fall Kolumbien ein klares Beispiel für ein Übergangsprojekt ist, welches das erwartete Ziel, nämlich den Übergang zum Frieden, nicht erreicht hat. Die juristische Konzipierung und Umsetzung der *Transitional Justice*-Mechanismen ist eine fundamentale Grundlage dafür, dass ein Übergangsprozess möglich wird. In Kolumbien haben sowohl der Demobilisierungsprozess als auch dessen rechtlicher Rahmen grundlegende Aspekte des Konfliktes unberücksichtigt gelassen. Parallel zum Demobilisierungsprozess wurde der Konflikt mit der Guerilla militärisch eskaliert, statt Verhandlungen mit ihr anzustreben. Dies stellte ein zusätzliches Risiko dar, das den Friedensprozess behindert hat.

Darüber hinaus macht das Beispiel Kolumbien deutlich, dass die Anwendung von *Transitional Justice* nicht immer einen Übergang (Uprimny and Saffon 2006: 14) mit sich bringt. *Transitional Justice* und Übergang sind nicht notwendigerweise unzertrennlich miteinander verbunden. So wie es Übergangsprozesse ohne *Transitional Justice* gibt, so beinhaltet die Anwendung von *Transitional Justice*-Mechanismen nicht per se einen Übergang. Es bleibt die Frage, ob *Transitional Justice*-Instrumente in Kontexten

angewendet werden können und sollen, in denen keine Transition stattfindet, und wenn ja, welche Reichweite sie dann haben können. Eine unangemessene Anwendung solcher Mechanismen könnte mehr Schaden als Nutzen bringen. Gesetze von *Transitional Justice*, der damit verbundene Sprachgebrauch und Entschädigungsprogramme beinhalten Verpflichtungen seitens der Regierung, die in der Gesellschaft, insbesondere bei den Opfern, Erwartungen wecken. Wenn diese Erwartungen enttäuscht werden, dann gefährdet dies die Legitimität der Regierung und der *Transitional Justice*. Dadurch wird die Möglichkeit anderer Regierungen, diese künftig anzuwenden, begrenzt. Während die erfolgreiche Umsetzung von *Transitional Justice*-Instrumenten das Vertrauen in den Staat stärken kann, so schränkt umgekehrt die Anwendung dieser Instrumente ohne effektive Umsetzung die Legitimität der Regierung ein, was sie wiederum dabei behindert, die Situation im Land zu stabilisieren.

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The demobilization process began when in 2002 the United Self Defence Forces of Colombia (AUC) agreed to participate in a government-sponsored demobilization process. Paramilitary groups are responsible for the vast majority of human rights violations in Colombia. The Colombian government designed a special legal framework that envisaged great leniency for paramilitaries who committed serious crimes and reparations for victims of paramilitary violence. More than 30,000 paramilitaries demobilized under this process between 2003 and 2006. Law 975, also known as the "Justice and Peace Law", and Decree 128 have served as the legal framework for the demobilization and prosecutions of paramilitaries. It has offered the prospect of reduced sentences to demobilized paramilitaries who committed crimes against humanity in exchange for full confessions of crimes, restitution for illegally obtained assets, the release of child soldiers, the release of kidnapped victims and has also provided reparations for victims of paramilitary violence.

The Colombian demobilization process presents an atypical case of transitional justice. Transitional justice measures are often taken up after the change of an authoritarian regime or at a post-conflict stage. However, the particularity of the Colombian case is that transitional justice policies were implemented while the conflict still raged.

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