The legal framework for the peace process in Colombia and the precarious role of transitional justice

By *Niklas Eckhardt**

Abstract: Four years ago the Colombian government has entered into peace negotiations with the guerilla group FARC in order to terminate the armed conflict which has been raging in the country for more than fifty years. The most controversial issue has continuously been the incentives that the government would grant the guerilla group in the form of penal benefits in order to demobilize and reintegrate them into the Colombian society. As Colombia is a democracy based on the rule of law, these penal benefits seem to conflict with the legal standards provided for by the constitution. In order to meet this challenge, the Colombian parliament opted for a constitutional amendment, stipulating a particular framework for "instruments of transitional justice".

The first part of this article will focus on the adaption of the concept of transitional justice to the Colombian situation. Its application in Colombia demonstrates differences to paradigmatic cases of transitional justice. The concept obtains the function of a legal term which serves to justify deviations from legal standards. This entails adjustments of components and objectives of transitional justice and causes the risk of confusion or abuse of this term. In the second part, the legal concept of transitional justice, which has been established by the Colombian constitutional court, will be analyzed. As will be shown, it reveals a lack of structure and demonstrates legal deficits. An alternative model will be presented, which may serve to maintain the case law of the constitutional court and to avoid these defects. Based on this model, the scope of application of the legal framework regarding the inclusion of other actors in the peace agreement is evaluated as a critical factor.

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A. Introduction

The Colombian armed conflict is one of the longest ongoing domestic conflicts in the world and has been lasting more than fifty years now. It is of great complexity and intensity and reveals a chequered history. Various actors have participated in the conflict, namely different guerilla groups, paramilitary groups, state military forces, groups of drug dealers, as well as multiple other illegal groups. The control and use over land and its ownership has

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been the motor of the emergence and persistence of the conflict and as a consequence, civilians and in particular the rural population have been the principal victims of the conflict.[1]

In the last decades, several attempts have been undertaken by the Colombian government to promote the mitigation of the conflict, by military submission as well as via peace negotiations. It was a large military offensive from 2000 on against the guerilla group FARC (Fuerzas Armadas Revolucionarias de Colombia), supported by the US, which has helped weaken the FARC considerably and push the group back to the country's outer boarders; still, it could never be defeated completely and to date 5.765 members remain.[2] Peace agreements were successfully concluded with other guerilla groups in the early 1990s, which led to their demobilization; major parts of paramilitary groups demobilized in 2005 due to a special law permitting mitigation of punishments of the perpetrators. The current peace process with the FARC started in 2012, when the Colombian government and the guerilla group entered into peace negotiations, aiming at the termination of the armed conflict, the demobilization of the members of the FARC and their continuance as a political party. On 24 August 2016 a first peace agreement was concluded, encompassing also additional political arrangements on a land reform, political participation, the drug problem and reparations for the victims of the conflict. But the agreement was rejected by the Colombian people in a subsequent plebiscite. After some amendments to the agreement, the final peace agreement[3] was concluded on 24 November 2016 and, one week later, approved by the parliament.

Throughout the peace negotiations, one aspect has been in the center of the public debate that was probably also a determinant for the negative decision in the plebiscite: the punishment of the perpetrators of the armed conflict.[4] The constellation regarding this aspect entails challenges that seem to go beyond the legal instruments of an ordinary constitutional framework. The FARC, being party to the peace negotiations, could not be subdued by the state and state institutions were not able to bring the members of the FARC before the ordinary courts. As a consequence, particular incentives have to be granted by the government in order to convince the FARC to decide to end the armed conflict, to demobilize and to reintegrate into the Colombian society. Thus, ordinary and unmitigated punishment will not help and concessions with respect to the prosecution of the members of the FARC have to be made.

1 Cf. *Grupo de Memoria Histórica*, ¡Basta ya! – Colombia: Memorias de guerra y dignidad, Bogotá 2013, p. 20-21.

2 *El Espectador*, Farc reporta 5.765 miembros armados en Colombia, http://www.elespectador.com/noticias/paz/farc-reporta-5765-miembros-armados-colombia-articulo-657706 (last accessed on 13.10.2016).

3 See Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030.11-1480106030.2016nuevoacuerdofinal-1480106030.pdf (last accessed on: 18.12.2016).

4 *Semana*, Todo está acordado, N° 1791 from 28.08.2016, pp. 22-23.

But these factual and political necessities come into conflict with the legal standards provided by the Colombian constitution and international law. So, Colombia faces the challenge of observing the rule of law and the obligations granted by the constitution and international law on the one hand, and enabling extraordinary measures in order to facilitate the end of the armed conflict on the other hand. In this context, the Colombian legislative decided to legitimize an extraordinary process by the adoption of a transitional constitutional norm, the so called *Marco jurídico para la paz* ("legal framework for peace"). This constitutional norm and the corresponding jurisdiction of the Colombian constitutional court constitute a specific legal framework for the peace process in Colombia, with the term "transitional justice" in a central role. Being a worldwide precedent, this approach is of particular interest not only in regard to Colombia; lessons learned here can also be taken into account by other countries facing similar problems in the context of peace processes.

After a short presentation of the relevant norm, the circumstances of the application of transitional justice in Colombia will be elucidated in the first part and a legal assessment of the concrete concept will follow in the second part. The third part will deal with the scope of the legal framework, regarding the inclusion of further actors in the peace agreement.

B. The legal framework for peace

On 31 July 2012 the constitutional amendment "acto legislativo 01 de 2012" also known as *Marco jurídico para la paz* (in the following: MJPP) was promulgated, after having been adopted by both chambers of the Colombian parliament. It comprises the two transitional articles 66 and 67, stipulating special conditions for the peace process. The formative term of the law is "transitional justice". The particular provisions of the constitutional norms are defined as instruments of transitional justice, being stipulated in the title and explained in the beginning of the transitional article 66. Pursuant to this first paragraph, instruments of transitional justice are exceptional and aim at facilitating the end of the internal armed conflict and the achievement of a stable and long-term peace; guarantees of non-repetition and security for all Colombians shall be granted and the rights of the victims to truth, justice and reparation shall be guaranteed. The constitutional framework determines transitional justice as the superordinate concept for the subsequent sub-constitutional law that shall reflect the results of the peace agreement on this topic.

The main aspect of the transitional article 66 is related to criminal justice, as it permits various deviations from ordinary criminal prosecutions and criminal punishment. In particular, it allows extrajudicial sanctions, alternative sentences, cancelation of existing sentences, special modalities for the execution of sentences and the renunciation of prosecution. Furthermore, the article stipulates in paragraph 5 that any special penal treatment will be conditioned to the demobilization and the termination of the armed conflict and to contributions of the perpetrators to the rights of the victims to truth and reparation. Moreover, regulations on the scope of application, the creation of a truth commission, the possibility

of extrajudicial processes, conditions on the contributions of the perpetrators and political participation are provided for.

C. The particular function of transitional justice in Colombia

I. What is transitional justice?

The term transitional justice has its origin in international academic research and has been used since the mid-1990s.[5] Since then, publications on this topic in different disciplines have emerged continuously. In order to unify the different definitions and concepts of transitional justice, which have been established by several authors, the United Nations provided a definition of this term in a report from 2004. According to this definition, "'transitional justice' […] comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[6]

According to most of the authors in academic research and in compliance with this definition, the concept of transitional justice comprises four main pillars, which are estimated appropriate measures to come to terms with past crimes:[7] The promotion of justice, truth, reparation and guarantees of non-repetition. As pointed out in the UN-Report from 2004, this does not mean implementing one-size-fits-all formulas and of a rigid model, but rather analyzing the needs and capacities regarding the situation in the concerned country. Thus, these measures shall serve as guidelines and "experiences from other places should simply be used as a starting point for local debates and decisions".[8]

II. Development of the actual legal design for peace processes in Colombia

During Colombian history, various processes have taken place aiming at convincing members of armed groups to end the armed fight against state institutions and to reintegrate them into civil society. In this regard, between 1820 and 1995, 25 amnesties and 63 pardons

5 On the origin of the term see as broadly cited reference: *Neil Kritz* (ed.), Transitional justice. How emerging democracies reckon with former regimes, Washington 1995.

6 *Secretary-General*, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616 from 23.08.2004, p. 4.

7 The concept of transitional justice falls back on the same elements, Louis Joinet determined in his UN-Report from 1997 on the question of the impunity of perpetrators of human rights violations: *Louis Joinet*, UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1; updated in 2005 by Diane Orentlicher, UN Doc. E/CN.4/2005/102 from 18.02.2005.

8 *Secretary-General*, note 6, pp. 6-7.

were granted in Colombia.[9] In most of the cases, these privileges were conceded by the legal instrument of the political crime (*delito político*). A political crime can be defined as a violation of law, aiming at a change of the political order and based in political rather than personal reasons.[10] This legal term was used e.g. to end the thousand days' war in 1902, the demobilization of several guerilla groups in the 1950s or in the context of the actual armed conflict in the 1980s and 1991 in order to facilitate the demobilization of guerilla groups, such as EPL or M-19.[11] Thus, until recently, political crime served as the main legal concept to grant amnesties in order to facilitate the demobilization of armed actors in the Colombian conflict.

In 2003, the former government under President Álvaro Uribe entered into peace negotiations with paramilitary groups, where a change of the legal treatment took place. A first governmental proposal for the demobilization of armed actors, offering broad amnesties to the perpetrators and demanding little contributions for the victims, had to be rejected because of strong criticism of national and international actors and the progress made on requirements for punishment in international law.[12] The legal concept of the political crime, which was used to grant amnesties in the past, now seemed to be incompatible with the demands for punishment of the perpetrators of severe crimes; furthermore, altruistic motives, which are inherent in political crime, could hardly be attributed to the members of paramilitary groups.[13]

This meant that a new legal concept had to be established in Colombia in order to allow extraordinary treatments for demobilizing delinquents. At the same time, the international academic community was progressively conducting research on countries in transition to democracy under the concept of transitional justice, which seemed to promise what Colombia needed: justice and punishment for the perpetrators, truth and reparations for the victims and guarantees of non-repetition. Thus, in 2005, the law 975/05 – *Justicia y paz* ("Justice and peace") - was adopted and it incorporated these measures, stipulating a reduced range of punishment of five to eight years for the most severe crimes and providing requirements for the satisfaction of the demands by the victims for truth and reparation. According to the policy of legislation, a just balancing of justice and peace should be established with this law. In the aftermath, the Colombian constitutional court found several prescriptions of this

9 *Luz María Sánchez Duque*, Tendencias en la judicialización de las guerrillas entre 1990 y 2010 y perspectivas jurídicas frente a un proceso de paz, Bogotá 2011, p. 91, http://www.bdigital.unal.edu.co/8161/1/06697341.2011.pdf (last accessed on 13.10.2016).

10 Cf. *Torsten Stein*, Die Auslieferungsausnahme bei politischen Delikten, Berlin a. o. 1983, p. 49; *Fernando Velásquez V.*, ¿Delito político o delito común?, Estudios Constitucionales, Boletín N° 10 (2007), pp. 13-14. While the legal term of political crime disappeared from the jurisdictions of European states and the United States – except for its use as an exception to extradition –, this legal term continues to play an important role in the Latin American states and the political enemy experiences a broader legal recognition in these countries.

11 See *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.6.3.9., 6.3.10., 6.3.13.

12 *Grupo de Memoria Histórica*, note 1, p. 244.

13 Ibid., p. 244; *Corte Constitucional*, C-577/2014 from 06.08.2014, Chapter VII.6.3.

law to be unconstitutional and it based its decision on the concept of transitional justice. From then on, the term transitional justice was acknowledged as the guiding concept to challenge the peace process in Colombia and could be found in the center of the public and academic debate. Also at the international level, Colombia was classified as a case of transitional justice. As shown above, in 2012 the term was also included in the Colombian constitution.

Although the two instruments – political crime and transitional justice – are different in many aspects, one important characteristic continues in their application in Colombia. Both were applied in order to allow the demobilization of members of armed groups via mitigation of sentences and political participation. In this context, both terms have a particular legal function. They serve as the specific legal term in order to allow deviations from the usual legal standards against the background of the constitution and the validity of the rule of law.

III. The particularity of the Colombian application of transitional justice

The adoption of the term transitional justice in Colombia has been comprehensible in these circumstances: The term relates to the measures that have been claimed as necessary for the peace process in Colombia and it is a term which is acknowledged on an international level promising the successful coming to terms with past conflicts. Nevertheless, a thorough and systematic analysis of the appropriateness of the structures of transitional justice for the Colombian case has never been carried out. However, comparing the paradigmatic cases of transitional justice and the Colombian case, considerable differences can be identified and have to be pointed out.

In paradigmatic cases of transitional justice – e.g. Argentina, Chile or South Africa – a transition shall take place from an authoritarian regime to a democracy. In these cases, policymakers were confronted with a divided society and the legacy of large-scale human rights abuses of the former regime. Under the research field of transitional justice, appropriate measures were discussed, in order to dissociate from the former state system, to reconcile the society and ultimately establish a democratic state, based on the rule of law.[14] The four immediate instruments of justice, truth, reparation and guarantees of non-repetition are estimated appropriate in order to carry out this transition and lead to a functional democracy.[15] In contrast, in Colombia, a functional democratic state, based on the rule of law, already exists. The focal point of the current process is primarily the termination of the armed conflict and the facilitation of the demobilization of the members of the guerrilla group. While paradigmatic cases start from a status quo, where former state institutions shall be aban-

14 See *Fionnuala Ní Aoláin/Colm Campbell*, The paradox of transition in conflicted democracies, Human Rights Quarterly 27 (2005), p. 174.

15 The interactions and outcomes of the particular instruments are explained by *Pablo de Greiff*, Una concepción normativa de la justicia transicional, in: Alfredo Rangel Suárez (ed.), Justicia y paz – ¿Cuál es el precio que debemos pagar?, Bogotá 2009, pp. 17-30.

doned and aim at the achievement of democracy; transitional justice in Colombia is based in these structures of a democratic system. Thus, the area of application for transitional justice differs substantially in these cases.

These different circumstances entail also different consequences for the application of transitional justice. This regards the nature of the concept: While applied in the context of the paradigmatic cases, transitional justice represents a set of measures which are seen appropriate in order to lead a society to a prosperous future. On the contrary, in Colombia, it obtains the function of a legal term, which serves to allow deviances from legal standards. This entails also different aims, which are pursued in both contexts: Deviances of legal standards in order to facilitate the end of the armed conflict on the one hand, the achievement of a functional democracy, on the other hand. Thus, at this point, it may already be noted, that the application in Colombia represents at least an atypical case of transitional justice.

This atypical character may be better understood by looking at the starting point and the development that transitional justice has experienced in Colombia. Departing from paradigmatic cases, transitional justice in Colombia rather follows the tradition of the former use of the political crime, serving as a legal term to allow demobilizations of members of armed groups; but it is now complemented by the elements of justice, truth, reparation and guarantees of non-repetition – the ones, which have been developed under the international concept of transitional justice.

Vice versa, the concept of transitional justice under the international understanding had to be adapted to the Colombian circumstances.[16] The instruments of transitional justice, which in paradigmatic cases are seen as recommendations for policy makers, obtained a legal status in order to justify deviations from legal standards. To this end, the Colombian constitutional court developed a particular case law under the term of transitional justice and the term was subsequently also explicitly adopted in legal texts. Also the objectives of transitional justice required an adjustment: Due to the Colombian context, the termination of the armed conflict and the achievement of peace were consequently determined as the objectives of transitional justice in the legal texts.[17] Nevertheless, the explanatory memorandum for the MJPP,[18] the constitutional court,[19] and academic research[20] adhered to the traditional objects of transitional justice and stated that its actual objects - the strengthening of the rule of law or democracy – would also be part of the Colombian processes. Finally,

16 See also *Delphine Lecombe*, A conflicted peace: Epistemic struggles around the definition of transitional justice in Colombia, in: Amanda Lyons (ed.), Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience, Bogotá 2010, p. 178.

17 For the MJPP see Art. 1 paragraph 1, for Justicia y paz see Art. 1 Ley 975/2005.

18 *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* Ponencia para segundo debate en Senado en segunda vuelta from 11.06.2012, Chapter 1.

19 *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.6.1.1.

20 See e. g. *Rodrigo Uprimny/Luz María Sánchez Duque/Nelson Camila Sánchez León*, Justicia para la paz – Crímenes atroces, derechos a la justicia y paz negociada, Bogotá 2014, p. 14.

the determination of the guarantees of non-repetition raised difficulties for the Colombian case. In general, measures like institutional reforms, measures necessary to ensure respecting the rule of law and to foster and sustain a culture of respect for human rights are encompassed by this term.[21] But as these measures were not considerably envisaged in the legislative procedure and scarcely discussed by the constitutional court, imprecise determinations, references on the right of truth and reparation or the termination of the conflict or merely references to international publications were the result of this constellation.[22]

It is remarkable that these differences and adjustments have seldom been analyzed or even pointed out. The constitutional court and the explanatory memorandum for the MJPP continuously refer to international experiences in order to justify a diverging constellation and thus suggest the existence of a uniform concept.[23] These differences of the Colombian constellation have also often been ignored in academic research.[24] Yet, the lack of differentiation does not concern only terminological aspects, but seems to have impact also on the application of the particular provisions. The encompassment of different situations under a single term causes the risk of justifying particular measures in Colombia by referring to aspects that are only inherent in the international understanding of transitional justice. Furthermore, a structured understanding is being prevented and thus causes (or allows) inconsistencies, as will be demonstrated in the next chapter.[25]

D. The concept of transitional justice as a legal term in Colombia

I. Concept

The establishment of transitional justice as a legal term in Colombia has been primarily promoted by the constitutional court. After its foundation in 1991, the demobilization pro-

21 *Diane Orentlicher*, UN Doc. E/CN.4/2005/102/Add.1, Principle 35 ff.; *Secretary-General*, Guidance Note from March 2010, p. 9.

22 See e. g. *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* note 18, Chapter 1; *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.7.2.4. Lecombe states, that the application of transitional justice in the Colombian case would make the implementation of guarantees of non-repetition impossible. She also mentions further problems in the adaptation of transitional justice in Colombia, see *Lecombe*, note 16, pp. 174-175.

23 See *Corte Constitucional*, C-370/2006 from 18.05.2006; C-771/2011 from 13.10.2011; C-579/2013 from 28.08.2013; *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* note 18.

24 See e. g. *Rodrigo Uprimny*, Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano, in: Centro de Estudios de Derecho, Justicia y Sociedad (ed.), ¿Justicia transicional sin transición? – Verdad, justicia y reparación para Colombia, Bogotá 2006, pp. 17-44; from the international perspective see *Kai Ambos*, El marco jurídico de la justicia de transición, in: Kai Ambos/Ezequiel Malarino/Gisela Elsner (eds.), Justicia de transición – Informes de América Latina, Alemania, Italia y España, Montevideo 2009, pp. 23-129, in particular p. 27.

25 Another interesting aspect regards the question whether it is correct to determine the Colombian case as a situation of transitional justice. For the sake of brevity, this aspect cannot be dealt with in this publication.

cess from 2005 was the first realized peace process that was executed under the validity of the constitutional court. In the course of this process, the law *Justicia y paz* was adopted, allowing an exceptional regulation on deviations from the ordinary framework for punishment for the members of armed groups in return for contributions for the rights of the victims. Brought before the constitutional court, the court found some provisions unconstitutional, holding that requirements for the satisfaction of the rights of the victims would be insufficient.[26] As for the law regarding a particular situation and including specific provisions, which diverge from the usual legal standards, the constitutional court felt constrained to develop a particular concept in order to review the provisions appropriately and to comply with the underlying constellation. In this context, the constitutional court established its concept of transitional justice; first in the decision C-370/2006 and affirming these rulings in the decision C-771/2011 concerning law 1424 from 2010.[27]

The court explained that in order to achieve peace and the demobilization of the members of armed groups, the legislative opted for a reform of the criminal procedure with penal benefits and impacts on the rights of the victims.[28] This factual and legal constellation would implicate a tension between the constitutional rights justice and peace and entail that these rights could not be granted absolutely, but require certain restrictions.[29] Thus, the right to justice, peace and additionally the rights of the victim would have to be harmonized.[30] The adequate method to resolve a collision of constitutional rights or values would be the method of balancing (*ponderación*), which would also have to be applied in this case.[31] With regard to this balancing, the rights of peace and justice would be the opposing values; additionally, the rights of truth, reparation and non-repetition would have be included in this balancing.[32] Since these elements would be interconnected, the balancing would have to be carried out from an integral perspective.[33]

The court determines this method of balancing as the appropriate one for situations of transitional justice.[34] Furthermore, the court clarifies that transitional justice would be exceptional and would differ from the ordinary legal framework.[35] Against this background

26 *Corte Constitucional*, C-370/2006 from 18.05.2006.

27 Although, the constitutional court did not denominate the concept clearly as transitional justice in the decision C-370/2006, it catched up with this denomination explicitly in the decision C-771/2011, see *Corte Constitucional*, C-771/2011 from 13.10.2011, Chapter VI.4. (p. 35 and 48). In the aftermath, also law 418/1997 and law 782/2002 were declared as laws of transitional justice, ibid; *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* note 18, Chapter 3.a.

28 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.3.

29 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.5.

30 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.5.

31 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.4. f.

32 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.3.

33 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.15.

34 *Corte Constitucional*, C-771/2011 from 13.10.2011, Chapter VI.4.

35 *Corte Constitucional*, C-771/2011 from 13.10.2011, Chapter VI.4.

and in consideration of these rights in conflict, the legislative would have a broad scope to find an appropriate solution; the court then would have to check whether the regulation in question was appropriate and proportional.[36] The legal term transitional justice was established with these decisions in Colombia and has since been acknowledged by courts, politicians, academic research and the media. In addition, the legislative incorporated the term in legal text in law 1424 from 2010, law 1448 from 2011 and in the MJPP.

II. Criticism

Despite its broad acceptance, a closer study of the concept offers grounds for criticism and reveals legal problems. Objections to this concept can be raised against the balancing of justice and peace, on the one hand, and the inclusion of the rights of the victims in this balancing, on the other hand.

1. Justice and peace

a) Concerns regarding their relationship to each other

In its presentation of the method of balancing, the constitutional court remains mostly on an abstract level and refrains from determining the affected elements precisely, their relationship to each other and their role in the underlying situation. Though, these aspects are crucial for the judicial decision-making and pose several questions.

First, peace appears to be a rather undetermined element in the method of balancing. The constitutional court illustrates the legal foundation of peace: It is stipulated as a national objective in the preamble and in Art. 2 Constitución Política (CP); Art. 22 CP defines peace as a right and a duty and Art. 95 Nr. 6 CP determines a duty to achieve and maintain the peace. Additionally, the constitutional court emphasizes the importance of peace by characterizing the constitution as a treaty of peace and illustrating its relevance on the international level.[37] The court explains further that peace can be characterized as a collective right, as a human right of the third generation, as a subjective right and a fundamental right. Despite the different legal facets of peace mentioned, the court refrains from clarifying which aspect would be concerned in the particular situation, but concludes merely that peace would have a multifaceted character.[38]

This vagueness raises questions with respect to the relationship between peace and justice. As the method of balancing requires a collision of rights, the determination of a specific collision between justice and peace must be possible. Statements concerning the right of justice cannot help along in this respect, as the court provides again just a general overview

36 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.14.

37 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.4.1.2., VI.4.1.

38 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.4.1.7.

of the different aspects of justice and its international acknowledgement.[39] The Colombian constitution offers basically two functions of peace: its function as a national objective and its function as a right. National objectives represent fundamental aims, are guidelines and directives for state activities and obligate state authorities to align their actions towards these objectives.[40] They are little appropriate as a benchmark for judicial review as they are not functionally orientated towards a (negative) delimitation, but towards a (positive) orientation of state activities.[41] As national objectives do not have a limited legal content and can at most be used as criteria of interpretation,[42] they are not appropriate for the method of balancing. The peace as a right, stipulated in Art. 22 CP, can be considered for the method of balancing, but still lacks further determination of its content. Also, the stipulation as a constitutional right seems to be unique in Colombia and a further determination in academic research remains controversial and not compelling.[43]

Besides its legal foundation, doubts can be cast, to which extent a collision of peace and justice and thereby a balancing of these rights may be possible: Determined as a collective right, the question arises how such a right can enter into collision with other rights that concern rather a concrete character. Additionally, the explanations of the constitutional court seem to describe a relationship of subordination – where justice seems to be a prerequisite for peace – rather than a relationship of equal ranking. The court states e.g., that in order to achieve peace, amendments in the penal procedure have been carried out with impacts and restrictions to justice;[44] that administration of justice does not oppose necessarily to peace but can contribute to peace and is a prerequisite for peace.[45]

Further explanations to these questions have been delivered neither by the constitutional court nor by academic research on the Colombian case. Due to the singularity of peace as a constitutional right, experiences of other countries in this respect are also missing. However, research has been conducted on the relationship between peace and human rights from the perspective of United Nations peacekeeping missions. Whereas different approaches can be found, the concept of *Henninger* can be consulted for the Colombian case, as he qualifies peace and human rights as legal principles that have an imperative of optimiza-

39 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.4.3.

40 *Alfred Katz,* Staatsrecht: Grundkurs im Öffentlichen Recht, 18. edition, Heidelberg a. o. 2010, p. 69.

41 *Karl-Peter Sommermann,* Staatsziele und Staatszielbestimmungen, Tübingen 1997, p. 396.

42 *Sommermann,* note 41, p. 386.

43 See *Luis Restrepo R.*, La paz: Derecho síntesis, Politeia 16 (1995), pp. 60-68; *Hernán Olano García*, Constitución Política de Colombia, 8. edition, Bogotá 2011; *Jorge Pérez Villa*, Compendio de Derecho Constitucional –Tomo II, Bogotá 1999, pp. 114-115.

44 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.3.; VI.5.5.

45 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.10.

tion.[46] A collision between peace and human rights would imply a collision of these principles and would have to be dissolved by the method of balancing.[47] He discusses peace as a right in its collective dimension and estimates the balancing with other rights, such as human rights, as feasible.[48] His statements on the relationship of peace and human rights are suitable to be transferred to the relationship of peace and justice in Colombia.

Thus, the concept of balancing between justice and peace can be estimated as principally feasible. However, further concerns on the consideration of the right to peace are also raised by *Henninger*: As a general and rather imprecise term, it is usually easy to argue on the basis of the right to peace; but it entails the risk that peace may be instrumentalized in order to devaluate fundamental rights or principles of the rule of law.[49] Accordingly, a precise content of peace as a right also remains unclear for Art. 22 CP.

b) Concerns regarding the underlying situation

Albeit its principal feasibility, further doubts remain regarding the application of the method of balancing of justice and peace under another aspect: A closer examination of the decisions of the constitutional court reveals, that the exposition of the method has been carried out without a presentation of or a subsumption to the underlying situation. The court illustrates the method and the rights in an abstract manner, but fails to explain which elements and functions of these rights are affected, and refrains from describing clearly the actual constellation for the balancing and the interrelation of the rights.

However, a determination of the underlying situation is necessary in order to carry out a legal evaluation properly. In the decision regarding the law *Justicia y paz*, where the concept of transitional justice has been developed for the first time, the constitutional court indicated the constellation in just a short remark: It stated that, in order to achieve peace, a reform of the penal procedure is being carried out, which has an impact on the right to justice. Penal benefits and specific forms of criminal procedure shall be granted to those, who decide to demobilize, leave illegal armed groups and reintegrate into the civil society. Herein would consist the conflict between peace and justice.[50] The court later explained: In order to achieve peace, restrictions on justice can be necessary, because otherwise, due to the factual and legal situation of those who have participated in the conflict, the peace would be an unachievable objective.[51] The crucial element of the constellation, which the court only adumbrates, has been pointed out explicitly by Colombian professor *Uprimny* before, also

46 *Hartmut Henninger*, Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts – Das Handeln der Vereinten Nationen in der Konfliktnachsorge aus der Perspektive einer völkerrechtlichen Prinzipienlehre, Tübingen 2013, pp. 163-166.

47 Ibid., p. 172.

48 Ibid., pp. 361-372.

49 Ibid., p. 339.

50 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.3.

51 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.5.

by referring to the tension between justice and peace: In the context of war, no armed actor is willing to accept a peace agreement that does not contain any incentives for them.[52]

Hence, the actual constellation with respect to justice and peace seems to be the following: in order to convince actors of armed groups to demobilize and terminate the armed conflict, penal benefits have to be granted. This means that two contradictory interests can be determined: On the one hand, the state demand for punishment without restrictions, on the other hand, the demand of armed actors for penal benefits in order to consent to their demobilization.

Based on this constellation, the constitutional court connected the demand for punishment without restrictions with the right to justice and the demand for penal benefits in order to facilitate the demobilization with peace. While a connection of the demand for unrestricted punishment with justice seems to be unproblematic, the connection of peace with penal benefits aiming to lead to a demobilization raises considerable concerns. To begin with, the process contains several subsequent steps: first the adoption of penal benefits, then the decision of the armed actors to demobilize and finally the achievement of (partial) peace. But the provisions in question, upon which a judicial decision has to be found, are related only to the first step, the legal requirements of the process, in particular the penal benefits. The factual impacts can be separated from this aspect. Nevertheless, the constitutional court refers by choosing peace to the last step in order to define the first one.

Against this approach, it may be argued, that the scope of constitutional rights comprises a rather specific, susceptible content and cannot be extended to factual impacts. Furthermore, peace seems inappropriate in this respect, as it remains an abstract element, which does not impose concrete measures. Relevant state action can only be executed on the previous level via measures that aim to lead to peace. But, in this regard, policy makers have manifold political options for measures that they estimate as appropriate for achieving peace. While in the past, amnesties were granted in order to achieve peace, in principle, punishment is utilized in order to maintain a system of law and order, which shall guarantee peace. Thus, even opposite measures can be considered as leading to peace.[53] Finally, the achievement of peace depends on the decisions of the armed actors and other factual circumstances that cannot be encompassed by a legal norm. Thereby, the connection to peace encompasses rather an expectation than a legal value, being capable of dispositions.

In the light of the foregoing, the legal values in collision seem to be different. The conflict of interests concerns just the state's claim for punishment and thus only the element of justice: On the one side stands the demand of the state to impose an appropriate penalty and on the other side the demand of the armed actors for a penal benefit in order to consent in their demobilization. Superordinated is the peace, serving as the objective of the process.

52 *Uprimny*, note 24, p. 20.

53 Cf. *Till Zimmermann*, "Deals" mit Diktatoren? – Zur politischen Verhandelbarkeit völkerrechtlicher Strafansprüche, Zeitschrift für Internationale Strafrechtsdogmatik 3 (2013), p. 113.

2. The method of balancing including the rights of victims

Beyond the relationship of justice and peace, the method of balancing, including the rights of victims, raises further legal (dogmatic) problems. The constitutional court established the model of balancing justice and peace, including the right to truth, reparation and non-repetition.[54] But this arrangement differs considerably from the usual application of the method of balancing. The understanding of the method of balancing coincides with the concept used in German constitutional law.[55] Basically, it is when two constitutional rights come into collision that the method of balancing is applied, in order to establish harmonization.[56] Constitutional norms stipulating principles represent optimizing commands that aim to be realized to the highest degree, which is effectively and legally possible. In this regard, balancing expresses what optimization relative to the possibilities means.[57]

But differing from the usual application of this concept, the Colombian constitutional court applies the method of balancing not just on two, but on more than five different rights and explains that the balancing would have to be carried out holistically via an integral perspective, because all rights would be interrelated.[58] This application raises several concerns. It remains doubtful how in such a holistic approach an accurate and punctual compromise between all the different rights might be found. Additionally, the court did not clarify the structures and causal interrelations between the rights. A structured balancing, based on transparent and comprehensible criteria does not seem possible under this arrangement.

Furthermore, the method of balancing applies basically only to rights of defense which serve to protect liberties against state action (status negativus) and not for rights claiming positive action of the state (status positivus).[59] But the rights of victims mentioned above cannot be considered rights of defense. They express claims against the state regarding the punishment of perpetrators (justice), the disclosure of the crimes (truth), the compensation of the victims (reparation) and the realization of institutional changes (non-repetition). Eventual conflicts of these rights with status positivus are of political-practical nature and not of logical nature, which are required for the application of the method of balancing.

54 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.7.

55 The Colombian constitutional court also refers to a publication by the German Professor Alexy, in order to explain the concept, see *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter 8.3.1.

56 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.4.

57 See *Robert Alexy*, Constitutional Rights, Balancing and Rationality, Ratio Juris 16 (2003), p. 136.

58 *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.5.6.3.; VI.5.15.

59 *Stefan Huster*, Rechte und Ziele. Zur Dogmatik des allgemeinen Gleichheitsgrundsatzes, Berlin 1993, p. 116; *Gertrude Lübbe-Wolff*, Die Grundrechte als Eingriffsabwehrrechte, Baden-Baden 1988, pp. 17-19; *Martin Borowski*, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, Tübingen 2006, p. 616.

III. Alternative model

In spite of these deficits, the constitutional court declared several provisions on basis of this method of balancing unconstitutional. So, the apparent necessity to take decisions on the one hand, the legal (dogmatic) deficits of the current model and the lack of comprehensible structures for decision making on the other hand make the development of an alternative model necessary, which might allow to administer justice based on clear and transparent structures.

For this purpose, a reconsideration of the underlying constellation allows to identify two causal relationships. First, the conflicting interests described above, regarding the state's claim for punishment, which the constitutional court qualified as the balancing of justice and peace. Second, the causal relationship determined by the rights of victims and demobilization: The state demands from the members of illegal groups a contribution for the rights of the victims, namely the disclosure of their knowledge on past crimes and contributions for the reparation of the victims as well as their demobilization and the collaboration with the prosecution authorities. This second causal relationship is characterized by the particularity that the state formulates demands for actions that differ from protected positions, which are guaranteed by state law. If armed actors consent to these claims, they resign from the presumption of innocence and the right to defend themselves (Art. 29 paragraph 4 CP), the right not to incriminate oneself (Art. 33 CP), the right to silence and the right to defense (Art. 8° Ley 906/2004), the right not to collaborate against their own interest to their conviction (*nemo tenetur se ipsum accusare*) and they would contribute to reparation without a legal title. Thus, these contributions of armed actors represent a concession to the state.

Now, when the two causal relationships are being related to each other, it can be ascertained that the two parties – the state and the armed actors – consent to making concessions to each other. Basically, it represents an exchange relationship, in which each party departs from its legally protected position by making concessions to the other party. On the one hand, the state departs from its claim for punishment without restrictions by granting penal benefits to the armed actors; on the other hand, the armed actors renounce their right to refuse to give evidence and not to contribute to their own conviction by offering voluntary contributions to truth and reparation for the victims and consent in their demobilization and the termination of the conflict. Essentially, the constellation represents a relationship of *do ut des*.

This model seems preferable to the method of balancing due to the role of the state in this situation: The law regarding a demobilization process is generally preceded by negotiations over the disposition of armed actors to collaborate, which will later be reflected in the provisions. Thus, the situation is characterized by the fact that the state could not act from a position of sovereignty, which would be a requirement for the application of the method of balancing. The attempt, to trace such a constellation through the perspective of a sovereign state cannot match the requirements of the situation, because on the one hand, it seems

problematic to determine a precise penalty range in such a situation based on merely legal criteria;[60] on the other hand, a unilateral, sovereign solution - however appropriate and just it might be - is useless if the armed actors are not willing to comply with the process, namely to demobilize and contribute to the rights of the victims. Therefore, the constellation cannot be reflected by a construction within state structures; the assumption of an independent party as a counterpart to the state seems more convincing.

The deficits of the model of balancing become also apparent by the explanations of the constitutional court in the decision C-579/2013 concerning the MJPP. With this law, the court is faced with different gradations of prosecution and punishment, upon which the mentioned method hardly matches. The court declares the model of balancing as applicable,[61] but feels constrained to extend the method by inserting other values like consequences and objectives into the balancing of rights.[62] This approach lacks dogmatic fundament and departs from an assessment based on legal criteria. In the decision, the court provides statements on experiences with former laws or simple explanations that hardly represent a legal assessment.[63]

The construction of such an exchange relationship between the state and individuals is furthermore not alien to legal systems. The process of mutual concessions is established in criminal procedures: Explicit agreements are known as "deals" and are also common in Colombia;[64] contributions of the accused like confessions, victim-offender mediation or compensations of victims usually lead to a reduction of punishment; particular instruments like leniency programs – in Colombia known as "principio de oportunidad" – are also executed. Furthermore, authorization rules for agreements between the state and individuals are common in administrative law. While in Colombia, the framework for such agreements is stipulated in 113 articles in law 80 from 1993, in Germany, there are two abstract norms, §§ 55, 56 of the administrative procedural law (VwVfG). Allowing the conclusion of agreements between the state and individuals, § 56 VwVfG stipulates a judicial control of appropriateness between both performances. Compared to the case law of the Colombian constitutional court, found in decision C-370/2006, where the court demanded an enhancement of the contributions of the perpetrators for the victims, this norm could serve as a role model for valuation criteria for the court. So, the standard of valuation would be to prove whether the stipulated contributions of the perpetrators are appropriate in return to the penal benefits, granted by the state.

With this model, the elements considered by the Constitutional Court remain the same. But now the peace - lacking a precise content and being systematically problematic as a

60 Rodolfo *Arango,* La ponderación y la Ley de Justicia y paz, in: Eduardo Montealegre Lynett (ed.), La ponderacion en el derecho, Bogotá 2008, p. 190.

61 *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.4.5.; III.8.3.1.

62 *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.8.3.1.

63 See *Corte Constitucional*, C-579/2013 from 28.08.2013, Chapter III.8.3.2.

64 See e. g. *Semana*, La parábola de Tapia, N° 1661 from 03.03.2014, p. 42.

right – is removed from the specific legal assessment and subordinated as an objective of the process. Subject to the assessment are only the elements that are actually affected. Thus, the balancing of several rights is structured into two causal relationships, upon which the court may continue with its legal appraisal and judge on the appropriateness of the concessions. This model can also help to evaluate other aspects, as shall be shown in the following chapter.

E. Inclusion of other actors in the MJPP

The main reason for the creation of a particular legal framework in Colombia had been the incipient peace negotiations with the FARC. However, it is expected that also other actors, namely state officials and individual people who supported the armed groups without having been involved directly in the conflict, like politicians, judges, businessmen and civilians will benefit from the particular framework as well. The possibility of the inclusion of state officials is stipulated explicitly in the MJPP and the inclusion of other individuals has been discussed thoroughly since 2015. It has been supported by a vast majority, namely the government, the general state prosecutor, the FARC, lawyers and human rights organizations.[65] Differing votes, which criticized this extensive inclusion have been few.[66] Finally, the inclusion of these actors is also provided in the peace agreement from 24 November 2016.[67]

Often it has been argued that all actors should be included in the peace process and in the MJPP in order to terminate and cope with the conflict comprehensively. But, as the legal framework has been created primarily for the necessities of an agreement with the FARC, it bears the risk that other actors could obtain legal benefits without any justification.[68] The legitimacy of the extensive inclusion of actors has scarcely been discussed from a legal perspective in Colombia. But also on an international level, research on the adequate scope of peace agreements can hardly be found. This may be due to the particularity of the Colombian conflict, which is characterized by the participation of a multitude of different actors and a high complexity and thus differs from other inner-state conflicts, which often comprise just two hostile groups.

65 *León Valencia*, De qué hablamos cuando hablamos de justicia transicional, in: Semana; N° 1712 from 22.02.2015, p. 50; see *Hernando Gómez Buendía*, ¿Justicia para todos? ¿Impunidad para todos?, 01.03.2015, http://www.razonpublica.com/index.php/conflicto-drogas-y-paz-temas-30/8292-%C2%BFjusticia-para-todos-%C2%BFimpunidad-para-todos.html (last accessed on 13.10.2016). Other votes in *El Tiempo*, Gremios y sectores sociales también destacan propuesta de Gaviria from 16.02.2015, http://www.eltiempo.com/politica/proceso-de-paz/propuesta-de-cesar-gaviria-sobre-justicia-transicional/15258689 (last accessed on 13.10.2016). The demand of the FARC: *Semana*, ¿Castigo sin cárcel?, N° 1713 from 01.03.2015, pp. 34-36.

66 *Gómez Buendía*, note 65; *Juanita León*, La zanahoria que ofrece Gaviria a detractores de la Habana, La silla vacía from 16.02.2015, http://lasillavacia.com/historia/la-zanahoria-que-ofrece-gavir ia-detractores-de-la-habana-49583 (last accessd on 13.10.2016).

67 See pp. 148-150 of the final peace agreement, note 3.

68 See also *Gómez Buendía*, note 65.

Legal restrictions for the scope of the framework and the possibility to include other actors cannot be deduced by national law. The MJPP stipulates the possibility of the inclusion of state actors and does not establish limits for those actors, who have been involved in the conflict indirectly. Being already a constitutional norm, there do not exist other national legal limits for political discretion in this regard. But limits exist in international law: Colombia has ratified various conventions, stipulating an explicit obligation to prosecute;[69] the Inter-American Court of Human Rights has so far been rigid in declaring amnesties invalid and adumbrated an exception only in a concurring opinion of a judge;[70] the International Criminal Court stipulates the formal obligation to punish severe crimes.[71] Therefore, international law stipulates the obligation to prosecute and punish severe crimes and permits deviations only in exceptional cases.[72] The question on the admissibility of exceptions from the obligation to prosecute must have relevance not only for the question "whether" such exceptions may be possible, but also to the one towards "whom" such an exception may be possible. Thus, a justification of exceptions from the obligation to prosecute and punish severe crimes does have a legal relevance with regard to international law.

The justification for the inclusion of these other groups focused mainly – apart from merely political aspects – on three legal arguments: transitional justice, justness and equality, and procedural aspects. These arguments shall be revised more closely in the following sub-chapters.

I. Argument of transitional justice

In most cases, the inclusion of other actors is being justified by the advantages of transitional justice and its instruments. It is argued, that the objectives of transitional justice and its particular measures justice, truth, reparations and guarantees of non-repetition, should be achieved also with regard to other actors and their victims.[73] But it can be ascertained that the references to transitional justice are mostly carried out by enumerating the general ad-

69 United Nations Convention against Torture, International Convention for the prosecution of all persons from enforced disappearance, Inter-American Convention to prevent and punish torture, Inter-American Convention on forced disappearance of persons, Convención de Belém do Pará.

70 See in particular *Velásquez-Rodríguez* vs. *Honduras* from 29.07.1988; *Barrios Altos* vs. *Peru* from 14.03.2001 or *Gelman* vs. *Uruguay* from 24.02.2011. The judge García-Sayán adumbrated the possibility to concede exceptions in his concurrent opinion in the case of Masacres de El Mozote y lugares aledaños vs. El Salvador from 25.10.2012.

71 See Art. 17 of the Rome Statute. Exceptions might be justified under Art. 53.

72 For a more detailed discussion see *William A. Schabas*, Kein Frieden ohne Gerechtigkeit? – Die Rolle der internationalen Strafjustiz, Hamburg 2013; *Uprimny/Sánchez Duque/Sánchez León,* note 20; *Kai Ambos,* Straflosigkeit von Menschenrechtsverletzungen – Zur "impunidad" in südamerikanischen Ländern aus völkerstrafrechtlicher Sicht, Freiburg 1997.

73 See the explanatory memorándum: *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega*, note 18, Chapter 5.a.; *César Gaviria Trujillo*, 'Justicia transicional para todos' pide César Gaviria, in: El Tiempo from 25.02.2015, http://www.eltiempo.com/politica/justicia/expresidente-gaviria-habla-de-la-justicia-transicional-/15249538 (last accessed on 13.10.2016).

vantages of the characteristics and instruments of transitional justice without further remarks on the concrete application of such measures.

Yet, it seems easy to argue with transitional justice, as it is an internationally acknowledged term, which promises the successful coming to terms with past conflict and embraces the different experiences and approaches of several countries and thus allows to argue in an imprecise way. However, this abstract use also entails the risk of its abuse and the alleged justification of effectively unjustified measures. International authors have already mentioned that the term serves for easily garnering consensus and that it would consist of ethical mottos which could hardly be invalidated;[74] discussions would shift from legal to moral categories and would still have effects on legal or political decisions;[75] some argue that it could even serve to prevent the goals of transitional justice.[76] These risks have also been experienced in the Colombian case.[77]

As an example for such an argumentation in the Colombian discussion that bears the risk of abuse can be mentioned the following method:[78] The term transitional justice and the law MJPP serve as a framework for the particular instruments. By evoking the necessity to apply transitional justice, the application of all particular instruments is being triggered. So, e. g. in order to justify the inclusion of other actors in the MJPP by referring to the necessity to reveal the truth for their victims, the application of penal benefits will also be triggered. This enables granting penal benefits by referring only to transitional justice or to the rights of the victims, but not to the measures actually in question.[79]

In order to address these risks, a more precise and structured understanding of transitional justice for Colombia seems necessary. For this purpose, the model of exchange relationship illustrated above, again, can help, as it reflects and structures the main elements of the most important Colombian laws that are considered as laws of transitional justice. Furthermore, another crucial aspect of transitional justice has to be considered, namely its exceptional character. In general, the application of transitional justice relates to specific circumstances, such as conflicts, post-conflicts or severe human rights violations and does not concern the ordinary application of the rule of law. This differentiation also characterizes the particularity of the Colombian case, where it is applied within the ordinary structures of the rule of law. As a consequence, a differentiation is necessary between transitional jus-

74 *Lecombe*, note 16, p. 168.

75 *Ruti Teitel*, Transitional Justice Genealogy, Harvard Human Rights Journal 16 (2003), pp. 81-85.

76 *Pierre Hazan*, Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice, International Review of the Red Cross 88 (2006), pp. 46-47; See presentation at *Felipe Gómez Isa,* in: Lyons, note 16, pp. 150-151.

77 *Rodrigo Uprimny/María Paula Saffon*, Usos y abusos de la justicia transicional en Colombia, Anuario de Derechos Humanos (2008), pp. 165-192.

78 See as examples for this argumentation *Gaviria Trujillo*, note 73. See also the interventions (Kap. I.3.) for the decision C-579/2013 and the explenatory memorandum *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega*, note 18, Chapter 5.b.

79 Similarly also the criticism regarding the inclusion of other actors: *Gómez Buendía*, note 65.

tice, which is applied only with regard to the conflict, and the usual laws, which are applied in general. This exceptional character of transitional justice is also stipulated in the first instance of Art. 1 of the MJPP and is emphasized by Art. 2, which stipulates its temporary nature. Prior to this law, its exceptional character has also been determined by the constitutional court.[80] This exceptional character also has legal effects, as transitional justice cannot be a discretional alternative to the ordinary laws, but requires a plausible justification. In this regard, the constitutional court also applies a restrictive interpretation of norms that stipulate exceptions.[81] Thus, if exceptions from the ordinary procedure require a justification, the abovementioned questions arise: to which extent and in particular regarding whom these exceptions are justified.[82]

Based on the exceptional character of transitional justice and the model of exchange relationship, the inclusion of other actors in the MJPP can be examined. The concession of the state can be identified without any difficulties. Through the inclusion of certain actors in the MJPP, the criterion of selection applies, which implies different categories of penal benefits. In contrast, the concessions of the opposite party raise several questions. The requirements for these concessions are stipulated in the MJPP: On the one hand, it stipulates concessions regarding the termination of the armed conflict, such as disarmament, the liberation of recruited children (Art. 1 paragraph 5), the demobilization and the omission of further crimes (Art. 1 paragraph 1 and 2); on the other hand, it stipulates contributions for the rights of the victims, such as the recognition of responsibility as well as contributions for the elucidation of truth and reparation of the victims (Art. 1 paragraph 5).

In order to check whether the inclusion of different actors is justified, the applicability of these concessions to the actors have to be proven. The first part of concessions relates to factual acts that directly contribute to the end of the armed conflict. Hence, these acts require the immediate participation in the armed conflict. This is the fact for the paramilitaries – being the principal actor of the former law *Justicia y paz* –, for the FARC – being party of the current peace agreement – and it may be the case for the ELN (Ejército de Liberación Nacional) – being in current peace negotiations with the government –. But it is more doubtful with regard to the other actors: Although the military has participated directly in the armed conflict, the institution shall be maintained and an abolishment is not at issue. As far as structures within the military might be responsible for serious crimes, only

80 *Corte Constitucional*, C-771/2011 from 13.10.2011, Chapter VI.4.

81 This interpretation has been carried out in various decisions, see: *ARKHAIOS*, La interpretación restrictiva de las normas que consagran excepciones, 2012, http://www.arkhaios.com/?p=3026 (08.12.2015). It seems to be valid also in international law, see: *Heintschel von Heinegg*, in: *Ipsen* (ed.), Völkerrecht, 6. edition, 2014, pp. 407-409, m.n. 19. More critical on this interpretation: *Karl Larenz/Claus-Wilhelm Canaris*, Methodenlehre der Rechtswissenschaft, 3. edition, Berlin a. o. 1995, p. 176.

82 A closer revision of the justification for an exception from the rule of law seems also necessary due to the experiences and the particularities regarding the application of law in Latin America, see *Peter Waldmann,* Der anomische Staat – Über Recht, öffentliche Sicherheit und Alltag in Lateinamerika, Opladen 2002.

lustration comes into question rather than abolishment or demobilization. Furthermore, disarmament does not seem suitable for these actors, as the state already wields power over the weapons that are deliberately handed over to the soldiers. Thus, these concessions demanded cannot be fulfilled by the military. This becomes even more evident for those other individual actors that have not participated directly in the conflict.

With respect to the second aspect, the contributions towards the rights of the victims, these can be made by every perpetrator, irrespective of which group they belong to. But two reasons indicate that mere contributions to the rights of victims do not justify the inclusion in the MJPP. First, because this does not meet the requirements of transitional justice, which is determined as an exception to the ordinary procedure and thus requires a particular justification that goes beyond the normal prerequisites. But the satisfaction of the rights of the victims to justice, truth and reparation is not uncommon in ordinary procedures; the constitutional court has actually confirmed its validity also with regard to the normal procedure.[83] Second, the role of these actors in the peace process does not correspond to a constellation that transitional justice requires: The necessity to enter peace negotiations with the FARC has been due to the fact that the claim of a constitutional democracy to enforce law and order was not possible. So, the FARC "earned" its role in the peace negotiations, because of the power deficit of the state against this group. This position justifies their role in the model of exchange relationship and, thus, the deviation from the ordinary legal system. In contrast, the military or the indirectly involved actors can be subdued by the state and there is no necessity to negotiate and deviate from the ordinary law. Furthermore, the exchange relationship requires the previous consent to make concessions and the determination of their performance. But the negotiating party of the peace process has just been and is only reasonable for the guerilla groups and not the military or indirectly involved persons. Hence, the argument of transitional justice does not justify the inclusion of the other actors.

II. Argument of justness and equality

Furthermore, it is argued, that it would be unfair and it would violate the principle of equality if some actors were punished severely, while others only received mild sentences.[84] While these arguments may be politically comprehensible, they do not seem convincing from a legal perspective. At first, it has to be admitted, that the objection of justness cannot be disclaimed. According to the rule of law and from an abstract perspective, it would be fair and equitable to judge everybody upon the same criteria for punishment without exceptional penal benefits, as it is stipulated in the penal law. But, according to the political decision, this particular treatment is the price that the society has to pay in order to allow to put

83 See *Corte Constitucional*, C-228/2002 from 03.04.2002; see also the presentation in *Corte Constitucional*, C-370/2006 from 18.05.2006, Chapter VI.4.9.2.-4.9.11.9.

84 *Gaviria Trujillo*, note 73; *Semana*, 35 años, N° 1696 from 02.11.2014, pp. 24-27.

an end to the armed conflict. However, this unjust treatment does not entail to transfer its legal standards to other actors pursuant to the principle of equality. On the one hand, it would be difficult to justify an appropriate delimitation for the inclusion. While some claim an equal treatment between guerilla and military, others claim equality with the former law *Justicia y paz* or a more lenient treatment for actors that have not been involved directly;[85] furthermore, it could be questioned why the involvement in the armed conflict deserves a privilege with regard to perpetrators that committed ordinary crimes. The existence of a democracy based on the rule of law rather requires that exceptions from the ordinary system should have to be made as narrow as possible and only when they are necessary. On the other hand, it seems reasonable to interpret the principle of equality, stipulated in Art. 13 CP, similar to German case law on the principle of equality, whereupon there prevails no equality in unjustness.[86] This means, that the legal framework for an agreement with the guerilla, being evaluated as unjust, cannot be applied to other actors, by referring on the principle of equality.

III. Procedural aspects

Finally, procedural aspects are stressed in order to legitimate transitional justice and the inclusion of the controversial actors in the MJPP.[87] In this regard, lessons learned from the former process *Justicia y paz* are often mentioned, where processes had been carried out individually and courts were overburdened with the high amount of cases.[88] Henceforth, investigations should be carried out from a systematic perspective in order to reveal macro criminal structures and a "global truth".[89] The general decision to implement special procedures in order to deal with the large number of perpetrators seems convincing and the general appropriateness is also acknowledged by the international community.[90] However, the assertion, that the necessity for particular processes also justifies the inclusion of other actors in the MJPP, must be revised.

For this purpose, first of all, the relationship between the procedural aspect and transitional justice has to be clarified. Mostly both aspects are mentioned jointly or the procedural aspect is determined as an element of transitional justice. The MJPP even describes in

85 Ibid.

86 BVerfG, Beschluss v. 17.01.1979 - 1 BvL 25/77, BVerfGE 50, 142, Rn. 55.

87 *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* note 18, Chapter 5.a.; *Rodrigo Uprimny*, ¿Justicia transicional integral? 21.02.2015, http://www.elespectador.com/opinion/justicia-transicional-integral-columna-545436 (last accessed on: 13.10.2016).

88 *Barreras/Andrade/Londoño/Cristo/Avellaneda/Vega,* note 18, Chapter 3. b. i., ii., 5. a., c.

89 *Iván Orozco Abad*, El proceso judicial de Justicia y paz como teatro de la memoria oficial, in: Myriam Loaiza Ríos (ed.), Seminario internacional "Desafíos para la reparación integral a las víctimas del conflicto armado interno en Colombia" – Memorias, Bogotá 2012, p. 362; *Ambos*, note 24, p. 48.

90 See e. g. *Secretary-General*, note 6.

Art. 1 paragraph 4 the procedural approaches of selection and prioritization as being inherent of transitional justice. But again, the extensive and imprecise use of the term transitional justice has to be countered and its comprehension as an exchange relationship shall be maintained. By mixing penal benefits as a part of the Colombian transitional justice and procedural aspects, the risk of its abuse arises once again. Sometimes penal benefits have been justified by evoking the problem of court congestion. But the procedural problem of exorbitant amounts of perpetrators is a problem of quantity and not a problem of quality regarding their criminal responsibility. Therefore, the logical answer to this aspect of quantity cannot be found in the category of criminal responsibility, but in more effective procedures. Penal benefits can only be justified by the model of exchange relationship, as demonstrated above. Also amnesties, the most extreme form of penal benefits, only apparently contribute to the problem of court congestion, since the aim of prosecution is to establish justice and not to get rid of the procedures. Unless amnesties are justified by the model of exchange relationship; their implementation means renunciation rather than settlement of prosecution. Although it has to be noted that in peace processes penal benefits often go along with procedural aspects. But their combination concerns only two sides of a coin with no causal interconnection. Thus, procedural aspects have to be evaluated separately from the structure of transitional justice.

The main argument for the necessity of particular procedures alludes to the congestion of justice and the necessity for a systematic and efficient approach for the investigation in order to disclose the criminal structures and all the circumstances of the crimes. This argumentation seems reasonable, but again, lacks differentiation. First, the congestion of justice is a problem that nearly every country is confronted with.[91] This is also the case for Colombia, where the congestion of justice is even determined as the main obstacle between the existence of laws and the lack of its practical implementation.[92] Thus, congestion is not a particular problem of the peace process, but a general problem for the Colombian justice;[93] efforts to improve this situation are desirable in general. But being a general problem, the question arises why those actors deserve a privileged treatment and a deviation from procedural standards, only because a connection to the termination of the armed conflict is assigned. As it has been shown above, a direct contribution to the termination of the conflict does not actually exist. Thus, these reasons apply just as well in general and a preferable treatment for these actors cannot be justified.

91 *Kai Ambos*, Introducción y resumen comparativo, in: *GIZ-ProFis* (Eds.), Selección y priorización como estrategia de persecución en los casos de crímenes internacionales – Un estudio comparado, Bogotá 2011, p. 9.

92 *Proyecto FortalEsDer-GIZ*, Proyecto FortalEsDer 2004-2013. Logros prometedores, fruto del trabajo conjunto Bogotá 2013, p. 2.

93 With regard to criminal justice, in 2015 there were more than 10.000 procedures pending and more than 42.000 persons were in remand without a previous process, *Semana*, ¿Dónde está la autoridad?, N° 1715 from 15.03.2015, pp. 26-30.

Furthermore, it may be asked, if such a particular procedure with a systematic approach is even reasonable for these actors. The necessity for particular procedures has always been justified by the ineptitude of individual prosecutions and the necessity for a collective approach in order to disclose macro structures and a collective truth. So, this argumentation presupposes a certain collective element with regard to the perpetrators. This collective element coincides with the instruments of the MJPP, which stipulates abstract and general penal benefits, the creation of a truth commission and the demobilization; thus, collective approaches that shall guarantee, that systematic structures shall be disclosed and that the entire group will end the armed conflict and reintegrate into the society. But with regard to the military and the indirectly involved persons, such a collective element can hardly be identified. It is hardly possible to get hold of the indirectly involved persons like businessmen, politicians, judges or the civil population in a collective manner, as the crimes that have been committed do not concern entire groups, but only individuals of these groups. Also it would not do justice to the military if the entire institution would be accused as a whole. As a matter of fact, a prior recognition of systematic structures is even denied by the military and it is asserted that the crimes committed would have been excesses of independent individuals.[94] Moreover, a truth commission is simply inappropriate for crimes of individual responsibility; a demobilization is not suitable for these actors. However, the ordinary procedure provides the necessary legal instruments for individual prosecution. The leniency programs (principio de oportunidad) allow to offer incentives for the broad disclosure of the criminal structures and to determine the responsibility of individuals. Precisely the threat of the ordinary high fine may be the decisive factor to contribute with broad disclosure. Experiences demonstrate that this form of prosecution of militaries has been successful in Colombia.[95] Also with respect to a historic reappraisal, several successful projects have been initiated, independently from the procedure of prosecution.[96] Thus, the inclusion of other actors that have not been party of the peace negotiations cannot be legally justified.

F. Conclusion

The application of the term transitional justice in Colombia causes several problems. As the situation in Colombia differs considerably from the one in paradigmatic cases of transitional justice, the undifferentiated use of the term entails the risk of confusion or abuse. Approaches like the final peace agreement between the government and the FARC from November 2016, where the term has not been used at all are thus to be welcomed; but its validity on the constitutional level remains. The justification of the constitutional court for

94 See *Uprimny/Sánchez Duque/Sánchez León*, note 20, pp. 27, 150. This assertion is being doubted, see *Human Rights Watch*, El rol de los altos mandos en falsos positivos, Estados Unidos de América 2015.

95 See *Human Rights Watch*, Falsos ibid.; *Semana*, El batallón de la muerte, N° 1727 from 07.06.2015, pp. 42-43.

96 See e. g. the publications of the Centro Nacional de Memoria Histórica.

deviations from constitutional standards demonstrates legal (dogmatic) deficits and lacks a clear structure. An alternative model allows to obtain a more structured consideration of the situation and reveal deficits of the argumentation, also with regard to the scope of the peace agreement and the inclusion of other actors. The reference to the general existence of the constitutional order and the respect for it seems crucial in this respect. Finally, it should be remarked, that the lack of differentiation and the risk of confusion between the different conceptions of transitional justice seems to be continued also by actors of important international institutions.[97] This risk should be countered either by a weakening of the normative function of the term or by a delimitation of the scope for its implementation.

97 See the concurring opinion of the judge García-Sayán of the Inter-American court for Human rights in *Masacres de El Mozote y lugares aledaños* vs. *El Salvador* from 25.10.2012, Para. 27-38; see also the letter from the ICC's chief prosecutor Fatou Bensouda to the president of the Colombian constitutional court from 26.07.2013, Ref. 2013/025/FB/JCCD-evdu, http://www.derechos.org/nizkor/colombia/doc/cpicol7.html (last accessed on 13.10.2016).