‘Law in Peace Negotiations’ by Morten Bergsmo and Pablo Kalmanovitz, 2010

By Abby Zeith [1]

Law in Peace Negotiations[2] edited by Morten Bergsmo and Pablo Kalmanovitz, explores the complex relationship between justice, peace, law, truth, politics and conflict during the processes of transition. Irrespective of whether the readers herald from a purely legal or sociological background, the edited volume will be relevant to all scholars and practitioners interested in the role of law in transitional justice processes. The chapters include well-reasoned analyses of how criminal accountability mechanisms can affect peace negotiations (Ch. 3, 4, 10, 11); consideration of the roles that forgiveness, revenge, emotion and allocation of guilt play in the context of transition (Ch. 6, 8, 13); methods of assessing the effectiveness of intervention at the transition stage (Ch. 7); and how to incentivize fighters to lay down arms during peace negotiations (Ch. 5).

The anthology, which is published in open access format by Torkel Opsahl Academic EPublisher, comprises chapters that were first presented at the seminar "Peace and Accountability in Transitions from Armed Conflict" held in Bogotá on 15 and 16 June 2007. The seminar was co-organised by the Vice Presidency of Colombia, the National Commission for Reparation and Reconciliation of Colombia, Universidad del Rosario and the Peace Research Institute Oslo (PRIO).

In light of the location of the seminar, it is not surprising that the Colombian peace negotiation process, which took place between 2003 and 2005, is used as a reference point throughout the book. The book's coverage of the peace negotiation features chapters by Colombian nationals with first-hand exposure to many of the on-the-ground complexities of the peace process, and is highly relevant to ongoing peace talks in Colombia. Notwithstanding this focus on the Colombian transition, the book remains accessible to readers unfamiliar with the factual specifics of the conflict that has lasted for more than five decades. Pablo Kalmanovitz's introductory chapter offers readers a broad overview of the main aspects of the Colombian transitional legal framework, as well as the "political process behind the production of the legal framework that made peace negotiations possible in Colombia and, in particular, the sanction of the Justice and Peace Law in Congress in 2005" (p. 1). At the same time, Kalmanovitz offers readers his astute assessment of the overall process. Maria Paula Saffon and Rodrigo Uprimny also elaborate on the complexities of the Colombian conflict (Ch. 12, pp. 357-364) as a means of illustrating why one must adopt a "cautious and not naïve" (p. 398) approach to transitional justice in the midst of ongoing conflict. They argue that transitional justice "legal standards" do not necessarily have a normative effect that are actually prohibitive of political options for bringing about transition; rather, these processes can become a "rhetorical tool" used to hide impunity (p. 355).

Monika Nalepa's perceptive juxtaposition of the "credible commitments" problem experienced during the process of demobilizing paramilitaries and guerrilla groups in Colombia, with the "settling of accounts with the former communists" (p. 121) in East Central Europe (ECE) is worth careful consideration. Her empirical analysis and application of the ECE's "skeletons in the closet" model to the Colombian context is a compelling demonstration of how promises of amnesty may be made credible and fighters incentivized to lay down arms (p. 149). Francisco Gutiérrez (Ch. 6) also looks at the peace process involving the paramilitaries in Colombia and finds that "correct

public allocation and distribution of guilt" is a necessary condition to achieving a sustainable peace. Roger Petersen and Sarah Zukerman Daly (Ch. 8) and Antanas Mockus (Ch. 13) offer conceptual analyses of the theory and role of emotions in the context of the Colombian peace process. Mockus' chapter is of particular interest. He describes the five "constituting conditions" of forgiveness and explains how to secure a successful process of forgiveness for the violation of norms in countries where there is a marked difference between law, morality and culture (i.e. when there is a disparity between legal forgiveness and moral or cultural forgiveness).

The contributions in this book are by no means limited to the Colombian context. Jon Elster cites examples from a wide range of contexts including the Balkans, South Africa, Nuremburg, Argentina and Athens, in his discussion of the synergies and tensions that exist between the aims of justice, truth, and peace in the context of transition (Ch. 2). After providing the reader with a conceptual explanation of the "idea" and "value" of each of the three aims (pp. 28-29), Elster highlights the various ways in which pursuit of the aims of justice, truth and peace may have either a positive or negative effect on one, or both, of the other aims. An important aspect of Elster's paper is his proposition that "a durable peace requires *distributive* and not only *transitional* justice" (p. 37). He suggests that peace agreements, designed to resolve conflicts which can be attributed to distributive inequalities, should address the root causes of these conflicts. This chapter raises important questions relating to how deep a peace negotiation should delve into the institutional inequality, exploitation and poverty that existed long before the conflict itself, or whether such considerations are better left to those actors working in the spheres of development or politics.

Unlike Elster, who raises instances where "justice and peace have been at odds" (p. 34), Florence Hartmann uses her considerable experience at the International Criminal Tribunal for the Former Yugoslavia (ICTY), to dispute the common assumption that "justice is a hindrance to political action, or an impediment to peace" (Ch. 10). Hartman uses the Balkan wars as a framework for discussion because the ICTY was the first international criminal tribunal established prior to a peace agreement. Hartman accepts that justice may, in some cases, "be a cause of instability in the fragile post-war stages" (p.306) and argues that the best way to resolve the dichotomy between the "constraints of law and constraints of peace" is to combine them (p. 306). For Hartmann, "when impunity is no longer a key to peace, then justice will start to operate as a deterrent to crimes and war" (p. 307). This is a creative

argument. However, I would be interested in exploring the extent to which Hartmann's proposition comports with general criminal theories of deterrence in the context of mass atrocities and systemic human rights violations. In the same vein as Hartmann's chapter, Marieke Wierda writes about the ways in which legal norms can actually assist, rather than hinder, mediators negotiating peace agreements in ongoing conflicts (Ch. 9) and, in doing so, draws upon her breadth of experience with transitional justice programs in Afghanistan and Uganda.

For those readers with a particular interest in the role of international law and "justice" in the transitional context, Claus Kreβ and Leena Grover provide a summary of the legal developments related to the State's duty under international law to prosecute perpetrators of genocide, crimes against humanity, and war crimes committed during non-international armed conflict. The two authors consider whether this duty leaves any discretion to transitioning societies to invoke alternatives to prosecution, such as community-based justice, blanket or conditional amnesties, or reduced sentences. The chapter by Kreβ and Grover is interesting reading, although it is important to bear in mind that *Law in Peace Negotiations* was published in 2010: since then, the obligation to prosecute or extradite (*aut dedare aut judicare)* has received attention within the International Law Commission,[3] the International Court of Justice,[4] and the United Nations General Assembly.[5] Moreover, there have been developments at the UN on the closely-linked fields of "immunity from jurisdiction"[6] and "universal jurisdiction"[7] that should be considered.

David Cohen discusses in detail the strengths and weaknesses of the hybrid tribunals of Sierra Leone, East Timor and Cambodia in light of the two aims which led to their creation, that is, to reduce the expense and length of trials before ad hoc international criminal tribunals and to better address goals related to transitional justice (p. 85). Cohen suggests that these hybrid tribunals are merely a "series of unintended experiments by the international community to find a workable formula for addressing the need for accountability in transitional situations" (p. 86). He suggests that the underlying problem with the tribunals is a failure of "accountability and effective oversight". To Cohen, effectiveness is dependent on effective leadership, management, recruitment, political will and a clear mandate (p. 120).

Carsten Stahn does a superb job at challenging commonly-held assumptions about the "arrest and surrender" provisions of the Rome Statute of the Inter-

national Criminal Court. He advances a well-supported argument that this "cooperative regime" plays an integral role in "shaping peace processes and approaches towards justice in situations of transition from conflict to peace" (p. 309).

Moving away from justice in transition, Ana Arjona advances a compelling thesis in her chapter concerning war and the legitimacy of post-war interventions. Using her micro-level data on the Colombian transition, Arjona argues that one must consider the effects in local contexts before it is possible to identify the conditions under which a given intervention will be justified and most effective (p. 200). To Arjona, treating the country as the "unquestioned unit of analysis" ignores the important fact that new and highly varied social orders can emerge at local levels. Arjona does a commendable job of demonstrating why understanding the specific features of, and differences between, local communities is essential to assessing how the consequences of war affect the behaviour of civilians and the organization of local society in a post-conflict period (p. 238).

A welcome addition to the volume would have been a deeper exploration of the six points on the Colombian peace talks agenda decided upon prior to the commencement of peace negotiations in 2012, particularly those points on which a resolution has not yet been reached (i.e reparations for victims, the disarmament, demobilization and reintegration of rebel fighters, and the implementation of the final peace agreement). Nonetheless, *Law in Peace Negotiations* provides readers with a well-rounded sample of academic scholarship that showcases the manifold ways in which justice, peace, law, truth, politics and forgiveness interact during transition processes.

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[2] Morten Bergsmo and Pablo Kalmanovitz (eds) *Law in Peace Negotiations*. Second edition, Oslo: Torkel Opsahl Academic EPublisher and Peace Research Institute, 2010. p. 442. ISBN: 978-82-93081-08-1. (Book can be accessed here: http://www.fichl.org/fileadmin/fichl/documents/FICHL_5_Second_Edition_web.pdf)

[3] See the 2014 Report of the United Nations International Law Commission (Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10 (A/69/10), pp. 139-165.

[4] See Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports 2012.

[5] See, e.g., General Assembly resolution 67/1 of 24 September 2012 entitled "Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels", para. 22.

[6] See also the work of the Sixth Committee in the United Nations on the scope and application of the principle of universal jurisdiction at http://www.un.org/en/ga/sixth/68/UnivJur.shtml.

[7] See also the work of the United Nations International Law Commission on the topic on the immunity of State officials from foreign criminal jurisdiction at http://legal.un.org/ilc/guide/4_2.htm.

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