TRANSITIONAL JUSTICE IN ONGOING CONFLICT: COLOMBIA'S INTEGRATIVE APPROACH TO PEACE AND JUSTICE

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INTRODUCTION

It is clear that the peace should not be purchased at any price. But the illusion that it can be free is ridiculous.

– Francisco Gutiérrez Sanín, “¿Alternativas?” May 2012

We need [...] peace without impunity. I understand that in the balance between peace and justice, this balance needs some sacrifice on the part of justice, but we cannot accept impunity.

– Former Colombian President Álvaro Uribe Vélez,
interview with the author, November 2012

In September 2013, Colombian President Juan Manuel Santos told the United Nations General Assembly that those affected by the Colombian conflict are “entitled to justice, to the truth, to reparation, to non-repetition.” Interestingly, Santos echoed these rights—some of the core ideals of transitional justice—in

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² I am grateful to Professor Graeme Simpson for his guidance and feedback as I delved into this project. I also want to thank Elisabeth Wood, Francisco Gutiérrez Sanín, Ana Arjona, Roxane Cassehgari, and Juan Pablo Toro for sharing their expertise on the Colombian conflict.

a speech primarily intended to secure endorsement for his government's ongoing peace talks with the FARC-EP,³ Colombia's main insurgent group. The president acknowledged the difficulty of negotiating an end to a complex intrastate problem while simultaneously fulfilling the country's moral and legal obligations to investigate and prosecute the worst abusers of human rights and humanitarian law. Santos stated that Colombia's transitional justice strategy would prioritize the "maximum possible satisfaction" of victims' rights rather than aim—and fail—to investigate every violation committed during fifty years of armed conflict. The Colombian Executive views his country as pioneering the deployment of transitional justice tools in the midst of conflict and expects that this agenda will "enable" and "support" a transition toward peace.⁴

Indeed, Colombia's ongoing peace talks with the Marxist guerrillas were facilitated by a package of transitional justice instruments written into the Colombian constitution through the adoption of the Legal Framework for Peace (See Appendix 2) in July 2012. By creating the space for Santos' peacemaking efforts while also preventing impunity for conflict-related crimes and providing guarantees to victims,⁵ the Framework is an innovative effort to make transitional jurisprudence and conflict resolution complementary rather than competitive ventures.

The effort is not without its critics. This development departs from the original understanding of transitional justice as addressing past abuses rather than still-ongoing abuses.⁶ While some scholars and practitioners applaud this "era of complementarity"⁷ between transitional justice and peacemaking, others remain skeptical about the "overly-ambitious aim" of "justice-seeking in the absence of peace."⁸ In Colombia, former President Álvaro Uribe is among the loudest de-

³ See the Glossary in Appendix 1 for the expansion of this and every important acronym hereafter.

⁴ Juan Manuel Santos, "Statement by the President of the Republic of Colombia," Address before the General Assembly of the United Nations in its 68th Session, (New York: 24 September, 2013).

⁵ Felipe Gómez Isa, "Justice, Truth and Reparation in the Colombian Peace Process," *Norwegian Peacebuilding Resource Center* (2013), http://peacebuilding.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf.

⁶ Rosario Figari Layús, *The Role of Transitional Justice in the Midst of Ongoing Armed Conflict: The Case of Colombia*, (Potsdam, Germany: Universitätsverlag Potsdam, 2010), 31.

⁷ Graeme Simpson, "Transitional Justice and Peace Negotiations," International Center for Transitional Justice (discussion paper, 2008), 21.

⁸ Catalina Díaz, "Colombia's Bid for Justice and Peace," Building a Future on Peace and Justice," Workshop 5 at the Building a Future on Peace and Justice Conference, (Nuremberg, Germany:

tractors of the process, arguing that his country needs “peace without impunity.”⁹ While not the most credible objector, his words echo the concern that the simultaneous use of transitional justice and peacemaking heightens the tension between the demands of peace and those of justice.

There are reasons to remain optimistic about the Colombian experiment, however. Despite its imperfections, the framework that undergirds the ongoing Colombian negotiations places transitional justice at the heart of this peacemaking effort. The negotiation program itself novelly considers victims’ rights, however briefly and vaguely. In addition, the process incorporates Congress and constituents in the ratification and implementation of the peace agreement, including transitional justice measures emerging from the process. Any deal will also face the scrutiny of national, regional, and international courts. These facts suggest that both the Colombian government and the FARC must look beyond their narrow interests to broker a peace agreement that can minimally satisfy both local and global expectations of justice.

Through an investigation of transitional justice efforts in Colombia, I argue that the use of transitional justice instruments in ongoing conflict is not only possible, but that a wise use of such instruments can even facilitate bringing an end to conflict itself. This paper explores the potential complementarity of peacemaking and transitional justice instruments in the midst of ongoing conflict as well as the challenges that such an enterprise creates. I first discuss the opportunities and challenges presented by the rise in the use of transitional justice during ongoing conflict and the growing aspirational and operational overlaps between the transitional justice and peacemaking fields. I then contextualize the current transitional justice and conflict resolution architecture, tracking Colombia’s first steps—and missteps—in its controversial use of transitional justice. I go on to analyze the Legal Framework for Peace: the novel instrument that enabled the ongoing peace process by writing transitional justice instruments into the Constitution. Here, I also consider the development of the negotiations with the FARC in light of the embedment of transitional justice in Colombia’s conflict resolution labors. Finally, I analyze the opportunities and challenges faced

June 25-27, 2007), 7, citing Ruth Teitel, “Law and Politics of Contemporary Transitional Justice,” *Cornell International Law Journal* 38 (2005): 838-862.

⁹ Álvaro Uribe Vélez, interview with the author, Yale University Podcast Video, November 7, 2012.

by Colombia's complementary formula—and its implications for our understanding of the nature and purpose of transitional jurisprudence.

TRANSITIONAL JUSTICE AND PEACEMAKING: A GROWING OVERLAP

Causes and Origins

At the negotiating table, harmonizing the positions of parties engaged in intrastate conflict is a monumental undertaking. Even finding the lowest common denominator of the belligerents' interests that is preferable to warfare is no easy task.¹⁰ Moreover, in the wake of the rise of the "global accountability regime," such a lowest-common-denominator agreement may be insufficient to earn global legitimacy or even uncontested legality.¹¹ Under current international law and prevalent worldwide-responsibility norms, peace between warring parties can no longer be bartered at the cost of justice for the victims to the conflict.

Yet in the last few decades peacemaking itself has become more holistic, and most discourse surrounding conflict resolution now seeks long-term "sustainable peace." Increasingly, peacemaking aims to generate transformative processes in war-torn nations by attending to the roots of a conflict and by advancing democratic reforms and agendas of sociopolitical, ethnic, and—more rarely—economic inclusion. While punishing perpetrators of conflict-related violence still causes tension during peace processes, accountability has become a part of peacebuilders' policy objectives,¹² especially as the field becomes sensitized to the relationship between recurring violence and the perception of unaddressed injustices.¹³

Transitional justice refers to the judicial and non-judicial mechanisms im-

¹⁰ Although quantitative analyses regarding the success rate of civil war mediation efforts are fraught with problematic claims regarding, among others, the definitions of an intrastate conflict and a mediation success, a generous analysis of 438 diplomatic interventions in 68 conflicts between 1945 and 1999 concluded that only 38% of mediations achieved full or partial settlement, although around 57% resulted in at least a temporary ceasefire. See Patrick Regan, Richard W. Frank and Aysegul Aydin, "Diplomatic Interventions and Civil War: A New Dataset," *Journal of Peace Research* 46:1 (2009): 135-46.

¹¹ Par Engstrom, "Transitional Justice and Ongoing Conflict," in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram, et al. (London: Routledge, 2013), 41.

¹² Engstrom, "Transitional Justice and Ongoing Conflict," 46.

¹³ Simpson, "Transitional Justice and Peace Negotiations," 7; Richard Ponzio, *Democratic Peacebuilding: Aiding Afghanistan and other Fragile States* (Oxford: Oxford University Press, 2011).

plemented by different countries in the wake of conflict in order to overcome a violent past and redress the legacy of large-scale human rights violations. Just as the ambitions of conflict resolution have increased in the recent past, transitional justice has also evolved to share some of the goals and operational timelines of peacemaking. This is in part due to the intractability of contemporary conflict, which blurs the boundaries between war and peace. Transitional justice policies are used in situations where transition is uncertain, fragile, or even unapparent.¹⁴ The expanded legal architecture around human rights violations is another factor: an ever-more-ambitious international human rights agenda has labored to broaden the notion of threats to collective peace and security to include a concern for “human security.” The international human rights enterprise has succeeded, for example, recognizing the emerging principle of the “responsibility to protect,” and—most crucially for transitional justice as a field—in creating the International Criminal Court (ICC).¹⁵ The widespread ratification of the Rome Statute that established the ICC signals that accountability for genocide, war crimes, and crimes against humanity is no longer purely a matter of local prerogative. Finally, the emergence of a “victim-centered” approach to justice has also contributed to the evolving normative ambitions of transitional jurisprudence.

Transitional justice now aims to frame peacemaking efforts and delineate “the politics of transition within certain legal standards, particularly those regarding victims’ rights to truth, justice, and reparations.”¹⁶ Further, transitional justice has been increasingly recast as a means to bring about—or at least support—a transition in the first place. The ICC somewhat relies on the notion that its involvement during conflict deters future violence,¹⁷ even without clear

¹⁴ Engstrom, “Transitional Justice and Ongoing Conflict,” 43–44.

¹⁵ Engstrom, “Transitional Justice and Ongoing Conflict,” 44.

¹⁶ María Paula Saffon and Rodrigo Uprimny, “Uses and Abuses of Transitional Justice in Colombia,” Reprinted in *Law and Peace Negotiations*, ed. Morten Bergsmo and Pablo Kalmanovitz, *Forum for International Criminal and Humanitarian Law (FICHL) Publication Series 5* (2007; Reprinted in 2009): 217–245, https://www.fichl.org/fileadmin/fichl/documents/Pre-TOAEP/090325_FICHL_5_law_in_peace_negotiations_.pdf.

¹⁷ ICC Prosecutor Luis Moreno Ocampo has repeatedly argued that his office prevents and deters future violence, and has cited Cote d’Ivoire as evidence (see Luis Moreno Ocampo, “Building a Future on Peace and Justice,” Keynote Address at the Building a Future on Peace and Justice Conference, [Nuremberg, Germany: June 2007], 25–27). He also has more generally stated that the ICC seeks to “reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention

empirical evidence for such a consequentialist argument.¹⁸ Nevertheless, those who support transitional jurisprudence going beyond prosecutions and punishment have suggested creative and feasible ways in which transitional justice and peacemaking can work in productive tandem.

Opportunities and Advantages

To many, the potential for complementarity between peacemaking and transitional justice is paradoxical because of the traditional view that peace and justice are values at odds with each other in transitional periods. Under this view, achieving peace often comes at the cost of achieving justice, and vice versa. For example, peacemaking often involves extracting a negotiated settlement in exchange for more lenient sentences for the perpetrators of conflict-related violence. On the other hand, the implementation of retributive—or punishment-focused—justice is viewed as a crucial aspect of realizing the value of justice. As a consequence, decision-making in the transition from conflict to post-conflict is viewed as a compromise between the aims of peace and justice.¹⁹

And yet the “stakeholders” of peacebuilding and transitional justice—mediators, human rights advocates, and victims—share common goals in transitions from violent conflict.²⁰ Peacemakers must acknowledge that justice and accountability measures are crucial to a peace process’s sustainability, and transitional justice practitioners should recognize that ending the conflict is necessary to avoid ongoing and future violations.²¹ Each field’s success is interdependent. Exposure to “each others’ dilemmas, disciplines and opportunities” is essential to the integrity of a transition, and cooperation is feasible if practitioners understand that they operate “within a *peace-building and transitional justice continuum*” that resists re-

of future crimes” (Moreno Ocampo, “Transitional Justice in Ongoing Conflicts,” *International Journal of Transitional Justice* 1 (2007): 8-9, doi:10.1093/ijtj/ijm014). Practically speaking, the temporal jurisdiction of the ICC, which limits prosecutions to violations occurring after July 1, 2002, is a big part of why the court engages with ongoing conflict.

¹⁸ Oskar N. T. Thoms, James Ron and Roland Paris, “State-level Effects of Transitional Justice: What Do We Know,” *International Journal of Transitional Justice* (2010): 1-26; Oskar N. T. Thoms, James Ron and Roland Paris, “The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners,” *Centre for International Policy Studies Working Paper* (April, 2008).

¹⁹ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia,” 235.

²⁰ Simpson, “Transitional Justice and Peace Negotiations,” 7.

²¹ *Ibid.*, 3.

ducing transitional justice to criminal prosecutions and peacemaking to striking deals between warring parties.²²

Transitional justice tools beyond prosecution can help prevent patterns of abuse from repeating and hostilities from resurfacing. While criminal trials might deter future violence, individual punitive accountability does not primarily seek to buttress peace processes.²³ Therefore, satisfying the ambitions of both peace and justice also requires victims-oriented reparations programs. These approaches, already less of a threat to peace processes, can offer a “*peace dividend*” in the form of “civic trust,” an essential component of legitimate and sustainable peacemaking outcomes.²⁴

Moreover, pursuing ‘transformative’ rather than merely ‘restitutive’ transitional justice may be particularly appropriate under the auspices of peacemaking and in the context of a transition in the making. In other words, it might be worth pursuing transitional justice strategies that seek to improve upon the status quo prior to the conflict rather than to merely restore the country to such a state. This might be especially true in a transition from a “conflicted democracy”: A political system that meets the minimum formal requirements of procedural democracy, but faces such entrenched polarization and divisions that it is either subjected to, or perpetually threatened by, violent conflict.²⁵ Rosario Figari applies this concept to the Colombian state and Rodrigo Uprimny suggests a similar understanding when describing the country as a “dangerous democracy in danger.”²⁶ A conflicted democracy such as Colombia’s has the need to distance itself from a political legacy of long-standing exclusion—to the particular injury of the rural poor—and active violations of human rights and international humanitarian law. A break with such illegitimate order is at the heart of a conflict-

²² Ibid., 4.

²³ Ibid., 7.

²⁴ Ibid., 6.

²⁵ Colm Campbell and Fionnuala Ni Aolain, “The Paradox of Transition in Conflicted Democracies,” *Human Rights Quarterly* 27 (2005): 175.

²⁶ Figari Layús, *Transitional Justice*, 18-47; Rodrigo Uprimny Yepes, “Transitional Justice Without Transition? Possible Lessons From the Use and (Misuse) of Transitional Justice Discourse in Colombia,” Paper presented at the Building a Future on Peace and Justice Conference, (Nuremberg, Germany: June 25-27, 2007), http://www.peace-justice-conference.info/download/ws_5_-_expert_paper_-_uprimny.pdf.

ed democracy's transition to a state of peace and substantive liberal democracy.²⁷ Colombia's new transitional justice framework must prove itself more efficacious and politically transparent than the Uribe administration's agenda to demobilize the pro-systemic paramilitaries.

Transformative justice envisions a holistic approach to justice, comprising retributive, restorative, and socioeconomic elements.²⁸ Under this approach, transitional justice must coordinate with interventions that are often under the umbrella of peacebuilding or statebuilding such as psychosocial, development, and infrastructure rebuilding programs as well as reforms that widen political participation. Transformative justice aims to address the factors that spurred violence in the first place, rather than merely returning victims to the status quo prior to the armed confrontation.²⁹ Such an approach is arguably essential to achieving comprehensive justice and durable peace when state-perpetuated inequities and marginalization lie at the root of a conflict, as in the case of Colombia.³⁰

There are broader advantages to deploying transitional justice mechanisms in the framework of a peace process. Legal benchmarks on transitional justice can act as "virtuous restrictions" on a mediated process.³¹ Consensus on certain minimum, non-negotiable normative imperatives regarding the rights of victims—standards that are not merely rhetorically appealing, but also credibly and legally enforceable—diminishes the universe of possible outcomes and may channel discussions toward a space where agreement between opposing parties is more, not less, likely.³²

Finally, transitional justice discourse empowers victims as relevant political agents and elevates their rights in the list of priorities of a society emerging from conflict. Even though the victims' rights agenda appears to be especially vulner-

²⁷ Figari Layús, *Transitional Justice*, 24-5, 30.

²⁸ María Paula Saffon and Rodrigo Uprimny, *Plan Nacional de Desarrollo y Reparaciones. Propuesta de un programa nacional masivo de reparaciones administrativas para las víctimas de crímenes atroces en el marco del conflicto armado*, (Bogotá, Colombia: DeJusticia, 2007).

²⁹ Figari Layús, *Transitional Justice*, 29; Saffon and Uprimny, *Plan Nacional de Desarrollo y Reparaciones*.

³⁰ Saffon and Uprimny, *Plan Nacional de Desarrollo y Reparaciones*.

³¹ Nelson Camilo Sánchez and Rodrigo Uprimny, "Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures," in InterAmerican Institute of Human Rights, *Contribution of Truth, Justice, and Reparation Policies to Latin American Democracies* (San José: Inter-American Institute of Human Rights, 2011), 143.

³² Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia," 236.

able to manipulation during ongoing conflict, the Colombian experience surrounding Uribe's Justice and Peace Law shows how human rights advocates and victims' groups can at least partially re-appropriate the discourse of transitional justice to make non-trivial gains.³³ Indeed, victims' rights are now firmly at the center of the peace process between the Colombian government and the FARC, which hints at a positive transformation of the power dynamics between victims and perpetrators.

Risks and Challenges

Deploying transitional justice during ongoing conflict in general, and complementing transitional justice with peacemaking in particular, raises many challenges. Critics such as Ruti Teitel stress the risks of politicizing justice in the first place.³⁴ Other scholars argue that using transitional justice policies—which is “always a political decision” and a “political tool”—is particularly vulnerable to political manipulation during conflict.³⁵ Doing so presents security risks to victims and complicates state fragility and potentially compromised institutions. Therefore, transitional justice in this context can be easily misused to legitimize rather than combat impunity and to benefit local elite interests.³⁶ For these reasons, justice is a “field of contention” when implemented in the midst of conflict, and the various actors with distinct goals and views of the conflict must be recognized.³⁷

Combining conflict resolution and transitional justice approaches also brings about the increased complexity of any hybrid endeavor. Such an endeavor's success is predicated on its perceived legitimacy. Legitimacy, in turn, depends on the effective implementation of both the transitional justice *and* the peacemaking agendas. The failure of either endangers the viability of the other. For example, the Colombian attempt to use the same legal instrument to pursue

³³ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia.”

³⁴ Ruti Teitel, “Law and Politics of Contemporary Transitional Justice,” *Cornell International Law Journal* 38 (2005): 838-862.

³⁵ Figari Layús, *Transitional Justice*, 31, citing Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia.”

³⁶ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia”; Engstrom, “Transitional Justice and Ongoing Conflict,” 50, 53.

³⁷ Adriana Rincón Villegas, “Transitional Justice in Ongoing Conflicts: The Case of Colombia” (master's thesis, University of Georgia, 2015), 7.

accountability and the disarmament, demobilization, and reintegration (DDR) of paramilitary forces was impaired by the imperfect demobilization of the latter and the reorganization of many former combatants under new structures.³⁸ There, the miscarriage of the peacemaking arm of the initiative became a political and logistical obstacle to the achievement of transitional justice.

CIVIL WAR IN COLOMBIA: FIFTY YEARS OF VIOLENCE

A History of The Colombian Conflict

Colombia has suffered over five decades of an internal armed conflict that has claimed the lives, homes, and livelihoods of hundreds of thousands of its citizens—particularly in the rural countryside. The Colombian conflict is especially complex due to its protracted duration, multiplicity of actors, serious violations of human rights and humanitarian law, and the effect of the drug trade in criminalizing the civil strife.³⁹ The dynamics, actors, and scale of the conflict have changed throughout the years.

The conflict can be traced to a civil war waged from 1948 to 1958 known as *La Violencia*. After claiming over 200,000 lives, the conflict ended with a power-sharing agreement between liberal and conservative party leaders in Bogotá.⁴⁰ However, radical liberals rejected the coalition's legitimacy and allied with the Communist Party, which had been excluded from power. These dissidents took to the countryside. The FARC emerged in 1964 with roots in these peasant self-defense leagues.⁴¹ That same year, Colombian rebels trained in Communist Cuba founded the ELN, the other guerrilla group active today.⁴² A second generation of insurgent groups emerged in the 1970s, most of which demobilized between 1989

³⁸ Jemima García-Godos, "Colombia: Accountability and DDR in the Pursuit of Peace?" in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al. (New York: Routledge, 2013).

³⁹ Ana M. Arjona and Stathis Kalyvas, "Recruitment into Armed Groups in Colombia," in *Understanding Collective Political Violence*, ed. Yvan Guichaoua (Houndmills, Basingstoke: Palgrave Macmillan, 2012), 143-71.

⁴⁰ Marc Chernick, "Negotiating Peace amid Multiple Forms of Violence: The Protracted Search for a Settlement to the Armed Conflicts in Colombia," in *Comparative Peace Processes in Latin America*, ed. Cynthia Arnson (Washington, D.C.: Woodrow Wilson Center Press, 1999), 162.

⁴¹ Nazih Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, (Albany: State University of New York Press, 2002), 62-64.

⁴² Paul Wolf, "ELN and University Violence 1965-1973," <http://www.icdc.com/~paulwolf/colombia/universityviolence.htm#eln>.

and 1990.⁴³

The FARC's military capacities took off when Colombia emerged as a producer of illegal drugs, especially cocaine. In 1978, after a badly handled economic liberalization wrecked the subsistence farming lifestyle of the guerrillas' constituency, the FARC decided to accept—and tax—peasants' illegal coca plantations across its controlled territory.⁴⁴ Other insurgents would soon come to similar decisions. The new financial resources allowed the FARC and other guerrillas to finance better equipment, territorial expansion, and an immense increase in its number of fighters. Between 1982 and 1998, the FARC grew from 10,000 combatants to almost 17,000.⁴⁵

A new actor also spurred the hike in violence—the paramilitaries. In the early 1980s, drug lords and large landowners began to establish strong private armies to protect their economic interests.⁴⁶ Convinced that vigilante activity was an effective counterinsurgency strategy, the Colombian armed forces directly supported and trained these newly established paramilitary groups.⁴⁷ In 1997, these paramilitary groups came together under an umbrella organization, the United Self-Defense Forces of Colombia (AUC). The AUC quickly became the conflict's most violent actor, but the army and police failed to stop it.⁴⁸ Indeed, the Colombian state and the paramilitaries maintained a long, tacit alliance, with the AUC funding many politicians' campaigns or intervening with strong-arm tactics in so-called Colombian "parapolitics."⁴⁹

⁴³ García-Godos, "Colombia: Accountability and DDR in the Pursuit of Peace?" 221.

⁴⁴ Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, (Cambridge: Cambridge University Press, 2007), 293; Juan Guillermo Ferro Medina and Graciela Uribe Ramón, *El Orden de la Guerra, las FARC-EP: Entre la Organización y la Política* (Bogotá: Centro editorial Javeriano, CEJA, 2002).

⁴⁵ Christopher Thornton and Rainer Gude, "Towards Peace in Colombia: The Economic Obstacles to a Colombian Peace Process," *Peace & Conflict Review* 5:2 (2011): 5.

⁴⁶ UCDP Conflict Encyclopedia. "Colombia," Uppsala University Department of Peace and Conflict Research.

⁴⁷ Carlos Medina, *Autodefensas, Paramilitares y Narcotráfico en Colombia: Origen, Desarrollo y Consolidación*, (Bogotá: Editorial Documentos Periodísticos, 1990).

⁴⁸ Comisión Interamericana de Derechos Humanos (CIDH), "Violencia y la Violación del Derecho Internacional de los Derechos Humanos y el Derecho Internacional Humanitario," in *Colombia Country Report* 1999, Chapter 4, <http://www.cidh.org/countryrep/Colom99sp/capitulo-4e.htm>.

⁴⁹ Adriaan Alsema, "37 Colombian Congressmen, 5 Governors Convicted for Ties to Paramilitaries," *Colombia Reports*, (May 16, 2013); Sam Logan and Tatiana García,

But as it became clear that the paramilitaries did not limit their violence to the guerrillas, the Colombian government came under international pressure to outlaw paramilitary groups. When this proved unsuccessful, President Uribe brokered the demobilization of the AUC in 2003, in exchange for reduced prison time.⁵⁰ The left-wing guerrillas, catalogued as a “terrorist threat” by the Uribe administration, were left out of the peace process.⁵¹ The bulk of the AUC had demobilized by early 2006, and its former leadership was extradited to the United States in 2008.⁵² The legal instrument that enabled this demobilization was known as the Justice and Peace Law, which came into effect in 2005. While there is no explicit reference to transitional justice in the legal text, the state has since acknowledged it as a transitional justice instrument. Indeed, at the time, the government alluded to the “restorative justice paradigm” and justified the lenient sentences in the name of national reconciliation.⁵³

Demobilizing a large number of trained fighters, however, contributed to the rise of new criminal networks lacking centralized control—the so-called *bandas criminales*, or *bacrim*.⁵⁴ In 2011, the *bacrim* comprised 6,000 individuals operating on six fronts.⁵⁵ The *bacrim* adeptly filled in the authority vacuums in territories where the state presence was not consolidated swiftly enough after the military rollback of the FARC.⁵⁶ These groups have directly taken over illicit economies, especially drug trafficking and illegal mining, and carried out extortions, disappearances, and forced displacements. The Colombian police estimated that these successors to the AUC were responsible for 47% of the 15,400 murders per-

“Paramilitary Politics: A Colombian Reality,” *International Relations and Security Network* (2006), <http://www.isn.ethz.ch/isn/Digital-Library/Articles/Detail/?lng=en&id=108000>.

⁵⁰ Stephanie Hanson, “Colombia’s Right-Wing Paramilitaries and Splinter Groups,” *Council on Foreign Relations* (CFR), (11 January, 2008), <http://www.cfr.org/colombia/colombias-right-wing-paramilitaries-splinter-groups/p15239>.

⁵¹ Villegas, “Transitional Justice in Ongoing Conflicts: The Case of Colombia,” 4.

⁵² Sam Goffman, “Colombia: Paramilitaries Get Sweetheart Deal,” *NACLA Report on the Americas* 39:2 (2005): 50-1.

⁵³ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia,” 223-24.

⁵⁴ Comisión Nacional de Reparación y Reconciliación (CNRR), “Disidentes, Rearmados y Emergentes: ¿Bandas Criminales o Tercera Generación Paramilitar?” (2007).

⁵⁵ Sally Palomino, “Las Bacrim tendrían unos seis mil hombres, en seis estructuras,” *La Semana* (January 18, 2011).

⁵⁶ Jeremy McDermott, “Colombia’s Criminal Bands Pose New Security Challenge,” *BBC News*, (April 25, 2011).

petrated in 2010.⁵⁷

In 2010, Juan Manuel Santos, Uribe's former defense minister, was elected president and adopted a new approach to the conflict. For the first time, the state acknowledged an "internal armed conflict" and applied the discourse of human rights and international humanitarian law.⁵⁸ In June 2011, Santos passed the Victims and Land Restitution Law, establishing a massive reparations program for over five million internally displaced Colombians.⁵⁹ In July 2012, his administration passed a constitutional reform dubbed the Legal Framework for Peace, which wrote exceptional transitional justice instruments into the Colombian Constitution. The ongoing peace process with the FARC was formally inaugurated only a few months later.

International Crimes and Legal Obligations

Fifty years of conflict led to the death of more than 200,000 Colombians, most of them civilians. Each party to the conflict has perpetrated crimes against humanity, human rights abuses, and violations of international humanitarian law. Kidnappings, torture, sexual and gender-based violence, enforced disappearances, child-soldier recruitment, extrajudicial killings, and large-scale massacres have been used strategically and wantonly throughout the conflict.⁶⁰ Roughly 12 percent of Colombians are victims of displacement, the second-largest percentage in the world.⁶¹ Further, the conflict has disproportionately affected Colombia's most marginalized groups: indigenous peoples, Afro-Colombians, and impoverished rural communities.

The Colombian state has certain international obligations to uphold in light of these crimes. As a monist country, Colombia recognizes the international human rights treaties it ratifies to be in the same category as the constitution.⁶² The state has ratified all major human rights treaties, including the Rome Stat-

⁵⁷ "Las bacrim cometen la mitad de los asesinatos en Colombia," *Infobae* (January 26, 2011).

⁵⁸ Villegas, "Transitional Justice in Ongoing Conflicts: The Case of Colombia," 4.

⁵⁹ United Nations High Commissioner for Refugees (UNHCR), "Colombia: 2015 UNHCR country operations profile," (2005) <http://www.unhcr.org/pages/49e492ad6.html>.

⁶⁰ International Crisis Group (ICG), *Transitional Justice and Colombia's Peace Talks*, Latin America Report N°49, (August 29, 2013), ii.

⁶¹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Fondo de Respuesta a Emergencias – Colombia," *Informe Segundo Trimestre* (2014), 1.

⁶² Colombian Constitution of 1991, Art. 93.

ute, which accepts the jurisdiction of the International Criminal Court (ICC) over crimes against humanity and genocide from 2002 onwards, and over crimes of war from 2009 onwards. Colombia is also party to the Inter-American Commission of Human Rights (IACHR), having agreed to be bound by the decisions of the Inter-American Court of Human Rights in 1985.⁶³

Further, the jurisprudence of the Colombian Constitutional Court is in line with the global accountability regime, adjudicating with reference not only to legally binding treaty law, but also soft law such as the Pinheiro Principles on Land Restitution; the UN Basic Principles and Guidelines (UNBPG) on the right to remedy and reparation for victims of gross violations of international human rights and humanitarian law; and the so-called Joinet/Orentlicher Principles against impunity.⁶⁴ This complex framework structures and restricts the state's maneuvers in its negotiations with the FARC. Extensive amnesties like those offered to guerrilla groups in 1990 and 1991 would not be feasible today.⁶⁵

TRANSITIONAL JUSTICE IN COLOMBIA

The Justice and Peace Law (Ley No. 975, 2005)

Colombia's first transitional justice instrument was passed in 2005 under the Uribe regime and is commonly known as the *Ley de Justicia y Paz*, or the Justice and Peace Law (JPL).⁶⁶ The JPL offered reduced sentences to demobilized combatants who had committed serious crimes on the condition that they would take on the responsibility of recompensing their victims. The instrument was conceived to incentivize the demobilization of the state-friendly paramilitaries. Around 4,800 former combatants—mostly paramilitaries—qualified for alternative sentences.⁶⁷

As a first attempt to use transitional justice in complementarity with peace-

⁶³ ICG, *Transitional Justice and Colombia's Peace Talks*, 6-7.

⁶⁴ The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity was formulated by UN expert Louis Joinet in 1997, and updated by Diane Orentlicher in 2005; Gustavo Gallón, "Human Rights in Crisis: The Case of Colombia Lecture at the School of International Relations of the University of Saint Andrews," (November 14, 2013), http://www.coljuristas.org/documentos/adicionales/speech_st_andrews_2013-11-14.pdf.

⁶⁵ ICG, *Transitional Justice and Colombia's Peace Talks*, 7; Sánchez and Uprimny, "Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures," 12-13.

⁶⁶ "Ley No. 975," Official Website of the Presidency of Colombia (July 25, 2005), <http://wsp.presidencia.gov.co/>.

⁶⁷ ICG, *Transitional Justice and Colombia's Peace Talks*, 4.

making, the JPL has a spotty record at best. The legitimacy of Uribe's initiative was questionable due to the links between the Colombian state and the paramilitaries. Some scholars expressed fear that if the initiative succeeded, the state's manipulative use of transitional justice discourse in the absence of a transition would, in effect, legitimize impunity to the benefit of the paramilitaries and certain political elites.⁶⁸ But the Colombian JPL experience also demonstrated how activists, international actors, and nongovernmental organizations could re-appropriate transitional justice discourse to obtain fairer legislation. Indeed, the advocacy of victim groups, the UN High Commissioner for Human Rights, the European Union, and others brought about the enormous procedural, if not ultimately substantive, gains for victims' rights when one compares the 2005 JPL against the government's first draft of the instrument.⁶⁹

Crucially, the JPL as it was passed in 2005 incorporated language regarding victims' rights to truth, justice, and reparations—a starting point that helped victims gain a central role in all future transitional justice and peacemaking discussions. Colombia's own Constitutional Court determined that paramilitary assets should be expropriated to fund the material reparations owed to victims. The Court also ensured that the authorities administering the JPL were subject to investigation so that prosecutors and victims could corroborate the narratives of the law's applicants. Finally, the JPL replaced the lenient “alternative” punishments it had originally envisioned with reduced prison sentences, lasting five to eight years.

Unfortunately, the instrument still had several failings. First, under the JPL victims could gain reparations only by judicial proceedings. Thus, victims had to report a crime against paramilitaries who the state had already identified as gross violators of human rights.⁷⁰ This was especially controversial in light of the close relationship between paramilitaries and the government. Further, the paramilitaries were not the only victimizers in the conflict; Colombians who suffered violence at the hands of the state or the guerrillas still had no way to see

⁶⁸ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia,” 229.

⁶⁹ Nicole Summers, “Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?” *Harvard Human Rights Journal* 25:1 (2012): 225.

⁷⁰ Because Uribe's government did not recognize the existence of an international armed conflict in Colombia, the national legislation from this period does not speak of violations of international humanitarian law, i.e. war crimes.

their rights vindicated. And even if victims reported a crime against a “state-approved” perpetrator—at great personal risk of paramilitary retaliation—they still needed to endure a time-consuming legal process in a time of conflict-induced institutional weakness. Only after a court had established culpability could victims seek restitution and damages. Because of these obstacles and risks, by 2008 the JPL had resulted in the compensation of a grand total of twenty-four victims.⁷¹

Further, the JPL did not condition leniency for ex-combatants on the *effective* restitution of their victims, despite speaking of a “general duty to repair.”⁷² The JPL only obligated its applicants to relinquish illicitly-gained assets to the state, and paramilitaries could easily hide these assets via third parties.⁷³ Consequently, Colombia’s victims’ reparation fund was dwarfed by the estimated reparations owed to victims of the AUC.

The success of combined transitional justice and peacemaking efforts depends on the success of both enterprises; the failure of one inevitably compromises the other. As a transitional justice tool, the JPL falls somewhere between an inadequate attempt to do justice and a blatant desecration of the justice itself. Additionally, the outcome of the JPL’s peacemaking goals is problematic at best: while the AUC umbrella organization was dissolved, the structures of power and control it exerted did not disappear. The armed groups that arose after the official demobilization of the AUC maintain similar influences, especially over local politics.⁷⁴ While so-called neo-paramilitaries like the post-AUC *bacrim* have not tried to remobilize officially, their camouflaged political influence, lasting illegal economies, and continuing violence highlight the shortcomings of the JPL when it comes to making peace.

Finally, a conflicted democracy such as Colombia may need not only “moral restoration”⁷⁵ but also truly transformative reforms that address the roots of the conflict, empower disenfranchised groups, and dismantle structures of economic

⁷¹ Diana Esther Guzmán et al., “Colombia,” *Las Víctimas y la Justicia Transicional: ¿Están Cumpliendo los Estados Latinoamericanos con los Estándares Internacionales?* (Washington, DC: Fundación para el Debido Proceso Legal, 2010), 109; Summers, “Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?” 224.

⁷² Díaz, “Colombia’s Bid for Justice and Peace,” *Building a Future on Peace and Justice*, 16.

⁷³ *Ibid.*, 17–18.

⁷⁴ “Los intereses electorales de las Bacrim,” *La Semana* (October 10, 2011).

⁷⁵ In the admittedly not unbiased words of Luciano Marín, aka Iván Márquez, one of the FARC’s representatives in Havana; “Farc llama a Gobierno a eliminar trabas jurídicas para la paz,” *El Espectador* (March 26, 2015).

and political oppression. This need is especially strong with accountability and demobilization schemes designed for state-friendly actors such as paramilitaries. Indeed, failure to discriminate between the transitional justice instruments required for anti-state actors and pro-system actors such as the Colombian paramilitaries can explain many of the JPL's shortcomings.⁷⁶ Disarming an anti-state actor constitutes a near total renunciation of power, but a state-friendly paramilitary group can relinquish its arms while retaining its power.⁷⁷ A successful transitional justice scheme must uphold non-repetition guarantees by preventing the perpetrators of crimes from maintaining the victim-victimizer power dynamic. With state-friendly actors, there must be conscientious institutional reform and vetting—initiatives that were, of course, unappealing to many of the powerful state actors behind the JPL.

Reform to the Justice and Peace Law (Ley No. 1592, 2012)

The JPL, which relied on a slow and weakened judiciary to vindicate victims, proved ineffective in its application. According to the official *Informe de Gestión* published by the public prosecutor's office, only fourteen out of the 4,800 eligible ex-combatants that applied for consideration under the JPL had received final sentences as of 2013.⁷⁸ The JPL experience was a lesson in the perils of overburdening a judiciary in the midst of conflict. In the context of the theoretical framework discussed above, the JPL's conception of transitional justice was too reliant on judiciary proceedings. It was neither holistic nor flexible enough to deliver on its justice and conflict resolution ambitions in the midst of ongoing conflict.

To remedy the situation, the Santos administration passed legislation in 2012 to redirect prosecutorial efforts to those “most responsible” for a set of serious and “representative” crimes. The verdicts obtained would then be applied to the ex-combatants in the JPL system subordinate to those “most responsible.”⁷⁹ This reform still focuses on individual accountability, but takes a prag-

⁷⁶ Saffon and Uprimny, “Uses and Abuses of Transitional Justice in Colombia.”

⁷⁷ Uprimny, “Transitional Justice Without Transition? Possible Lessons From the Use and (Misuse) of Transitional Justice Discourse in Colombia,” 4-5.

⁷⁸ “Informe de Gestión 2012-2013,” Fiscalía General de la Nación, (March 2013).

⁷⁹ “Ley No. 1592,” Official Website of the Presidency of Colombia (December 3, 2012), <http://wsp.presidencia.gov.co/>.

matic stance to what transitional justice can do in an ongoing conflict. It arguably also recognizes that a transition may require justice to act swiftly, even by selecting some cases for their symbolic impact.

Victims and Land Restitution Law (Ley No. 1448, 2011)

The JPL reparations mechanism also underwent revision. Already in 2008, the state had responded to international and domestic pressure and acknowledged its obligations to victims beyond the monetary compensation it could recoup from the AUC. Thus, it established a non-judicial, administrative process through which victims could apply for monetary compensation. The administration acted in “solidarity,” however, rejecting any responsibility for the atrocities committed throughout the conflict—despite growing evidence of state collusion with the AUC and of the military’s own hand in the violence.⁸⁰ Unfortunately, the parallel options of judicial or administrative remedy made the process even harder to navigate. In 2012, Santos eliminated this largely unsuccessful mass-reparations scheme, obligating victims eligible under the JPL to seek reparations under the “Victims and Land Restitution Law” (VL), passed in 2011.⁸¹

The VL is the first well-known transitional justice instrument in Colombia that revolves entirely around victims’ rights to reparations. It also represents a radical departure from previous legislation by endorsing transitional justice—and victims’ rights in particular—as a means to promote peace. In force since 2012, the VL is an ambitious piece of legislation that seeks to provide reparations to victims of crimes that occurred after 1985 and land restitution for events that took place after 1991. Following the soft law adopted by the General Assembly on the right to remedy, the VL uses the language of “integral reparations,”⁸² consist-

⁸⁰ A well-known example of the military’s abuses is the “false positives” scandal, which revealed the practice—spurred on by perverse incentives stemming from rewarding high body counts—of murdering civilians to pass off them off as “combat killings.” (See Adam Isacson, “Ending 50 Years of Conflict: The Challenges Ahead and the U.S. Role in Colombia,” *Washington Office on Latin America* (2014): 8, <http://www.wola.org/>).

⁸¹ “Ley No. 1448,” Official Website of the Presidency of Colombia (December 3, 2011), <http://wsp.presidencia.gov.co/>.

⁸² “Ley No. 1448,” Official Website of the Presidency of Colombia, Art. 21 cf. United Nations Commission on Human Rights, “United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (UNBPG), (2005), UN Doc E/CN.4/RES/2005/35, I.2.c.

ing of restitution, compensation, satisfaction, and guarantees of non-repetition.⁸³ The instrument also comprises other collective and individual measures seeking to strengthen the social norms eroded by the conflict, including symbolic reparation, the provision of social services, and the preservation of historical memory through oral accounts.

The VL crucially acknowledges the existence of an internal armed conflict, which introduces considerations of international humanitarian law and human rights law. The VL also shifts the responsibility for financial compensation to the state, thus recognizing that *all* victims of the conflict possess the aforementioned rights as well as special protections in judicial proceedings.⁸⁴ In short, the state is taking responsibility as a party to the violence—a far cry from the “principle of solidarity” upon which the state took on some of the burden of reparations under the JPL. In effect, the VL’s definition of victimhood is not perpetrator specific: those who suffered at the hands of the state’s armed forces can use the same mechanism as the victims of the AUC and the left-wing guerrillas to seek reparations.

The VL is also novel in that it pays special attention to the problem of conflict-related land displacement. This is significant for several reasons. First, as mentioned above, approximately 12 percent of Colombia’s population has suffered displacement. Second, land inequity and state neglect toward usurped and exploited peasant communities are among the very roots of civil strife in Colombia. In this sense, while the VL seeks restoration, it lays the groundwork for the transformative measures taken in the context of the peace negotiations with the FARC. Procedurally, the VL shifts legal presumptions regarding land ownership in favor of victims, and it establishes a well-crafted institution to oversee and adjudicate land restitution claims.

The VL is not without its limitations. The law’s lofty ambitions have led to some perhaps inevitable disappointment and claims of “unfulfilled promises” made to the 5.7 million victims of land displacement.⁸⁵ The VL also disqualifies former combatants of illegal armed groups and their relatives from benefiting from the legislation—failing to recognize that throughout the long conflict,

⁸³ “Ley No. 1448,” Official Website of the Presidency of Colombia, Art. 25 cf. UNBPG IX

⁸⁴ Sánchez and Uprimny, “Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures,” 134.

⁸⁵ ICG, *Transitional Justice and Colombia’s Peace Talks*, 37.

many Colombians have been both victims and victimizers.⁸⁶ Further, it is unclear whether victims of the *bacrim*, mostly remobilized paramilitaries, ought to fall under the category of “victims” of the armed conflict rather than merely victims of ordinary crime.⁸⁷

COLOMBIA’S CURRENT ROUTE TO PEACE AND JUSTICE

The Legal Framework for Peace (Acto Legislativo No. 1, 2012)

The Legal Framework for Peace (“Framework”) is a constitutional amendment adopted by Congress in July 2012 to facilitate negotiations with the FARC. A paradigmatic example of the growing crosspollination of the transitional justice and peacemaking fields, the Framework writes “exceptional” transitional justice instruments into the Colombian constitution with the “prevailing end of facilitating the end of the internal armed conflict and the attainment of stable and lasting peace.”⁸⁸ The theoretical underpinning of such ambition is that transitional justice may not only work in concert with conflict resolution mechanisms such as peace negotiations, but that transitional jurisprudence can create the space for peacemaking and support the road to lasting peace.

The Act maintains that these exceptional transitional justice instruments will bring “guarantees of non-repetition” and “shall ensure, *in as much as possible*, the rights of victims to truth, justice and reparation.” While this language aligns with the core principles of the international community’s body of policy and law regarding transitional justice, the qualifying clause stands out starkly. As President Santos argues in the speech cited in this essay’s epigraph, a state in the midst of conflict has competing duties and absolute positions might not serve the ultimate demands of either peace or justice.

The Framework also establishes “differentiated treatment” for the different armed groups that have been party to the conflict as well as for state actors. This provision recognizes that the distinct nature of the paramilitary and the left-wing guerrillas calls for different transitional justice approaches—a lesson learned the

⁸⁶ Summers, “Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?” 226.

⁸⁷ Sánchez and Uprimny, “Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures,” 134.

⁸⁸ “Acto Legislativo No. 1,” Official Website of the Presidency of Colombia (July 31, 2012), <http://wsp.presidencia.gov.co/>.

⁸⁹ All subsequent quotations are taken from the original text (see Appendix 2). All translations are my own.

hard way through the JPL experience. The Act states that the guerrillas, unlike the paramilitary, can be considered “political offenders” and that they therefore may qualify for benefits in the context of peace negotiations, except in the cases of crimes against humanity, war crimes, or genocide.

The core principles of the Framework are “prioritization” and “selection,” recognizing from the JPL experience that attempting to prosecute every violation is unfeasible. The Act assigns to the attorney general the task of determining the prioritization criteria—that is, on what grounds will some types of crimes most warrant prosecution.⁹⁰ Congress has the responsibility to craft a statutory law—pre-examined by the Constitutional Court and embraced by a qualified majority—to determine the “selection criteria that will allow efforts to be focused on the criminal investigation of those most responsible for all offences that acquire the connotation of crimes against humanity, genocide, or war crimes committed in a systematic manner” (Art. 67). In the words of Sánchez and Uprimny, Congress is tasked with the challenge of preventing the Framework from becoming either a “blank check” or a straightjacket for the peace negotiations.⁹¹

These vague and undefined prioritization and selection criteria are of concern to analysts who believe they should have been complemented with a commitment to “necessity” and “proportionality.”⁹² Put more plainly, case selection should only be considered when doing so is indispensable to secure peace. Further, proportionality to the gravity of the crime in question should be maintained.⁹³

Critics have raised other concerns. The Framework specifies that these transitional justice tools may also apply to individual demobilizations—an application that does not seem appropriate for an instrument that compromises on prosecutions under the justification that this is necessary to achieve peace. While

⁹⁰ Felipe Gómez Isa, “Justice, Truth and Reparation in the Colombian Peace Process,” 2.

⁹¹ Nelson Camilo Sánchez and Rodrigo Uprimny Yepes, “El Marco Jurídico Para La Paz: ¿Cheque En Blanco O Camisa De Fuerza Para Las Negociaciones De Paz?” in *Justicia Para La Paz: Crímenes Atroces, Derecho a La Justicia Y Paz Negociada*, ed. Rodrigo Uprimny Yepes, Luz María Sánchez Duque and Nelson Camilo Sánchez León (Bogotá, Colombia: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2014), 184.

⁹² Sánchez and Uprimny, “El Marco Jurídico Para La Paz,”.

⁹³ Gómez Isa, “Justice, Truth and Reparation in the Colombian Peace Process,” 2; Sánchez and Uprimny, “Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures.”

individuals who want to demobilize on their own should be offered benefits for collaborating with the judicial system and furthering the cause of peace, it does not make sense to apply exceptional transitional justice to individuals—at least not under the logic of this Framework. An individual who has perpetrated crimes and demobilizes on her own is not going to bring about peace in a level that is proportional to the sacrifice of accountability. Further, if this provision applies to state agents, it may open the door to self-amnesty for gross violations of international law.

Granted, state agents are still included among those susceptible to international standards of accountability, truth, and reparations. This alone can be considered a triumph considering the state's prior denials of any wrongdoing, particularly with respect to the armed forces. Yet as argued by Sánchez and Uprimny, applying transitional justice mechanisms to the military misunderstands the purpose of such extraordinary tools.⁹⁴ Transitional jurisprudence in the context of accountability is premised on the understanding that an armed party may receive penal benefits or leniency because that party recognizes its role in a phase of widespread violence and seeks to be reintegrated into society. The Colombian military, however, continues to deny any institutional responsibility over human rights violations. For example, it describes the actions of the soldiers involved in the “false positives” scandal as “bad apples.” Further, even if the Colombian military admitted to prior wrongdoings, the Framework requires no non-repetition guarantees of the armed forces: there is no mention of vetting or security sector reform for the armed forces.

The Havana Peace Talks

Negotiations between the Santos administration and the FARC were formally inaugurated in Oslo and are being held in Havana. So far, they have survived a contested presidential election, a series of military confrontations, and even the FARC's kidnapping of a high-ranking army general. Over the past three years of negotiations, the parties have achieved landmark agreements on an extensive array of issues. They have recently accelerated the pace of the negotiations, setting March as a deadline to sign a final peace agreement.⁹⁵ Colombia entered the talks

⁹⁴ Sánchez and Uprimny, “El Marco Jurídico Para La Paz.”

⁹⁵ “Everyone Throwing Their Support Behind Colombia's Peace Process,” *Telesur* (January 22, 2016), <http://www.telesurtv.net/english/news/Everyone-Throwing-Their-Support-Behind-Colombias-Peace-Process-20160122-0020.html>.

with a broad mediation agenda. It aimed to settle on institutional and social reforms as well as on the demobilization, disarmament, and reintegration (DDR) of FARC combatants to civilian life.⁹⁶ The parties have thus far reached partial agreements on land reform, political participation for ex-combatants, the end to the illegal drugs trade, and victim's rights. The current discussions have dealt with the logistics of the demobilization of the FARC. A final negotiated settlement will be ratified by direct citizen participation, expected to occur in May or June of this year.⁹⁷ Colombia is also keenly aware that any agreement with the armed group will need to withstand the scrutiny of the Inter-American Court of Human Rights and the International Criminal Court.

These negotiations have been facilitated by a transitional justice framework that emphasizes its peacemaking goals. In turn, they have incorporated elements usually identified with the aims of transitional justice, such as a victims-sensitive approach to the conflict, provisions for reparations to victims of human rights violations, and language on the right to truth. The land reform and political participation agenda items can also be understood in the context of a transformative approach to transitional justice and peacemaking. Even in 2013, the High Commissioner for Human Rights recognized this opportunity, encouraging the parties to “maximize societal transformation and address historic inequalities, preventing repetition and a return to armed groups through the promotion of mass long-term employment benefiting and empowering those communities most affected by the conflict.”⁹⁸

The agreements reached so far may enable Colombia to substantially fulfill the preconditions for transition from conflicted democracy to integral, liberal democracy. Both peacemaking and justice have been deployed with a holistic

⁹⁶ It should be noted that the FARC has rejected the term “disarmament” arguing that the term does not apply, as it has not been defeated militarily. The peace process has chosen the language of *dejación de armas* (“leaving weapons behind”) to refer to the FARC’s voluntary disarmament and disbandment as a guerrilla group. This careful word choice follows that of the Northern Ireland peace process, which spoke of decommissioning rather than disarming combatants.

⁹⁷ Rose Lander, “Colombia will Vote on FARC Peace Deal in May or June: Santos,” *Colombia Reports* (November 12, 2015), <http://colombiareports.com/how-should-colombia-ratify-the-peace-deal/>

⁹⁸ United Nations High Commissioner for Human Rights. “Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia,” (2013), UN Doc A/HRC/22/17/Add.3, 18.

and pragmatic eye: justice has not been reduced merely to criminal prosecutions, and the parties have recognized that addressing the marginalization and inequalities that lie at the root of the conflict is a crucial step toward both peace and justice. At the same time, the conflict resolution agenda has not been restricted to convincing the FARC to lay down its arms today—the mediation in Havana seeks to create sustainable peace by reforming some social, political, and economic foundations.

The land reform issue is particularly good news for Colombia. After all, inequities in socioeconomic power and political participation spurred the Colombian conflict and legitimized the Marxist guerrillas in the countryside; the plight of the rural poor was a motor for recruitment. A state cannot guarantee non-repetition—or, if not repetition, then the recurrence of violence in another form—if it leaves some of the key motivators of the conflict intact. In the land reform issue, there is an opportunity for real transformative justice.

In terms of punitive justice for crimes committed throughout the Colombian war, the parties have agreed to establish a Special Peace Jurisdiction—including special tribunals featuring international judges—to prosecute and judge conflict-related crimes committed by the FARC, state forces, and non-combatants. While purely political crimes, such as FARC membership, will be eligible for pardons, the special tribunals will handle war crimes and crimes against humanity. Those who acknowledge their crimes early will be eligible for sentences of five to eight years of restricted freedom while involved in activities such as demining the areas in which their crimes were committed. Those who admit their crimes belatedly shall pay with five to eight years of prison time. Finally, actors who do not admit responsibility and are found guilty, will be sentenced to up to twenty years in prison.⁹⁹

These special tribunals will also determine reparations to victims.¹⁰⁰ While many questions remain regarding this complex punitive justice formula, the preliminary blueprint aims to be practicable both in terms of being a formula the parties can agree upon and one that will not overwhelm the judiciary. At the same

⁹⁹ Natalio Cosoy, “En qué consiste el pacto entre las FARC y el gobierno de Colombia que los deja a un paso de la paz,” *BBC*. (September 24, 2015), http://www.bbc.com/mundo/noticias/2015/09/150923_colombia_farc_santos_acuerdo_paz_la_habana_ao.

¹⁰⁰ “9 Unanswered Questions About Colombia’s Victims and Justice Accord,” *Washington Office on Latin America*, (2015), <http://colombiapace.org/2015/12/23/9-unanswered-questions-about-colombias-victims-and-justice-accord/>.

time, the scheme attempts to take some form of punitive action against the worst of crimes committed in the last fifty years of violent conflict.

Much still needs to be overcome. Security risks arise with demobilization in the midst of an ongoing conflict. These risks are particularly sensitive given the result of the FARC's last attempt to demobilize an arm of its cadres. In 1985, about 10% of the FARC demobilized and joined the *Unión Patriótica* (UP), trading guns for politics.¹⁰¹ The 1986 elections yielded surprisingly positive results for the UP, which elected fourteen congressmen and senators as well as a number of local councilmen. In response, paramilitaries, drug lords, and rogue military operatives waged a dirty war against the party. In only five years, 3,000 UP members, including several presidential candidates, had been murdered.¹⁰² One factor potentially lessening security risks, however, is the possibility of another armed actor dropping out of the conflict: ELN too is close to joining its own negotiation process with the Santos administration.

Further, the *bacrim* and neo-paramilitary structures continue to be a problem—so much so that the FARC insisted on including their existence on its negotiation agenda with the government. This is a sensitive subject given the lasting network of neo-paramilitary actors and the state. Indeed, the High Commissioner for Human Rights all but encouraged the government to undergo a vetting and institutional reform process, noting in the 2013 Annual Report that the administration must uncover armed groups' "political and economic origins and their links to State agents" and that Colombia must "strengthen the State's internal control mechanisms."¹⁰³ Putting such a process in place is a critical step toward a truly transformative transitional justice and peacemaking endeavor. The Colombian transition may well depend on the state's ability to identify and dismantle these networks and to divest itself from its unsavory past as a tacit oppressor.

THE ROAD AHEAD: CONCLUSIONS AND IMPLICATIONS

Hence, the purpose is not to sacrifice justice to achieve peace, but how to achieve peace with maximum justice.

¹⁰¹ Guáqueta, "Political and Economic Dimensions of the Colombian Conflict," 3.

¹⁰² Chernick, "Negotiating Peace amid Multiple Forms of Violence," 159-95.

¹⁰³ United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17/Add.3, 18.

– Colombian President Juan Manuel Santos, UN General Assembly, September 2013

International justice, national justice, search for the truth, peace negotiations can and must work together; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution.

– ICC Prosecutor Luis Moreno Ocampo, Building a Future on Peace and Justice, June 2007

This paper has explored the increasing overlaps between the transitional justice and conflict resolution fields. A state in conflict often finds itself weighing the needs for peace and justice against each other as it attempts to honor its many international and domestic commitments. Yet a holistic understanding of both enterprises reveals that peace and justice need not be mutually exclusive ideals. As Kofi Annan said in his Keynote Address in the recent ICTJ conference on transitional justice in Colombia, “justice is not an impediment to peace; it is an essential partner.”

The judicial instruments reviewed in this paper show Colombia’s growing embrace of this complementary approach to peacemaking and transitional justice. While the JPL and VL are examples of transitional justice instruments deployed during ongoing conflict, the Legal Framework for Peace is a tool that aims to facilitate an end to the conflict through a transitional justice instrument. Negotiating a final agreement with the FARC will involve striking a difficult equilibrium between the imperatives of full accountability and the desire to transition to a post-conflict scenario. An accord that forges sustainable peace in Colombia cannot neglect the human rights abuses committed by all sides of the conflict. Such an outcome would enrage victims and their advocates. It would generate mistrust among a public already wary of the guerrillas’ commitment to peace and the legitimacy of state institutions. These suspicions could intensify the conflict, especially since those who oppose peace with the FARC would use this discontent to discredit the current administration. This would also disrupt the reintegration of ex-combatants, which could in turn cause the group to rearm or splinter. And additional mistrust in the government and the rule of law could worsen the already serious levels of criminal violence. While it is much debated whether transitional justice in fact facilitates peace and deters future violence, a peace process resulting in grave *injustice* would surely not only fail to bring lasting peace, but could even

become a new source of violence.

Colombia has traveled a conflicted, tumultuous path in its complementary use of transitional justice and peacemaking efforts. Inevitably, the path will continue: the previous administration has already introduced the discourse of transitional justice—whether aptly or not—during the demobilization of the paramilitaries. Further, the international, regional, and national legal and normative obligations that Colombia faces today demand that any peace process address the satisfaction of victims' rights and the prosecution of the worst offenders of human rights and international humanitarian law.

Anything short of this result risks the demands of both peace and justice. A lax political deal could prompt the International Criminal Court, the Inter-American Court of Human Rights, or Colombia's own judiciary to intervene and reject the agreement. Even the threat of such scrutiny could instigate renewed violence. Since the FARC will want to rely on the fact that any agreement be honored, the silver lining is that both parties understand the need for a negotiated outcome to satisfy minimal commitments to justice—even if this requires some sacrifices. Further, the government needs its constituents' support both to ratify a peace treaty and to reintegrate the FARC into civilian life. A DDR scheme often clashes with victims' restitution programs and a country's general post-conflict development goals. Since the escalated violence and the guerrilla's drug-trafficking operations have eroded the group's legitimacy, a peace deal with the FARC must convince a skeptical Colombian public that the rebels are committed to abiding by the rule of law.

Finally, the outcome of the peace process and success of the transitional justice framework will test the legitimacy of the Colombian state, especially following the "parapolitical" and "false positives" scandals of the Uribe regime. The Santos administration must rebrand a governmental structure widely perceived as repressive, neglectful, and corrupt. A successful peace process and a victim-centered transitional process will advance this aim, but guarantees of non-repetition might also require a vetting and institutional reform of the government's most compromised structures. Rural development measures and guarantees of political reintegration are positive indicators that the parties are using the transitional process as an opportunity for "transformative" justice that will not merely seek to restore the pre-conflict status quo. Rather, measures such as land reform and opening the political arena address the crucial socioeconomic and political

oppression at the root of Colombia's fifty years of armed struggle.

In conclusion, there are serious obstacles to simultaneously deploying transitional justice and conflict resolution agendas. A complementary approach requires a holistic understanding of both fields as well as recognition of the relationship between justice and sustainable peace. Developing and implementing transitional justice while armed violence is ongoing is not unlike "repair[ing] the boat at high seas, amidst high winds and furious waves."¹⁰⁴ A pragmatic, victims-oriented transitional justice architecture that ambitions to improve upon rather than restore the status quo may very well buttress a transition toward peace. There are no guarantees: transitional justice instruments, even when carefully deployed, cannot assure a transition. Nevertheless, Colombia's strong institutions, judicial tradition, and prior experiences with transitional justice agendas offer the country a robust chance to pioneer the complementary use of transitional justice and peacemaking.

¹⁰⁴ Villegas, "Transitional Justice in Ongoing Conflicts: The Case of Colombia," 7, quoting Eduardo Pizarro, "Reparando el bote en altamar," in *Ley de Justicia y Paz* (Bogotá, Colombia: Norma, 2009).

APPENDIX 1: LIST OF ACRONYMS

AUC: *Autodefensas Unidas de Colombia* (United Self-Defense Forces of Colombia) is an umbrella organization of far-right paramilitary groups in Colombia, each intending to protect their local political, economic and social interests by fighting left-wing insurgent groups in their regions. While the AUC was officially demobilized in 2006, some local successors remain.

Bacrim: *Bandas criminales emergentes*, criminal bands.

CNRR: *Comisión Nacional de Reparación y Reconciliación* was created under the 2005 Justice and Peace Law. The Commission, which operated for eight years, was tasked with publishing a report on the causes of the Colombia internal conflict and the emergence of armed groups.

DDR: Disarmament, Demobilization, and Reintegration.

FARC, or FARC-EP: *Las Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo* (Revolutionary Armed Forces of Colombia - Army of the People) is Colombia's main left-wing insurgent group. A Marxist-Leninist revolutionary guerrilla, the FARC opposes Colombia's central government advocating agrarianism and anti-imperialism, and has been involved in the ongoing armed conflict since the group's foundation in 1964.

ELN: The *Ejército de Liberación Nacional* (National Liberation Army) is Colombia's less known remaining left-wing guerrilla. The ELN's Communist political platform is a combination of Marxism and Liberation Theology. Also established in 1964, the ELN as an organization is an outgrowth of university unrest, founded by Colombian rebels trained in Communist Cuba, and later by a series of Catholic priests, advocates of Liberation Theology.

ICC: The *International Criminal Court*, which sits in the Hague in the Netherlands, is an international tribunal with jurisdiction over the international crimes of genocide, crimes against humanity, and war crimes. Its jurisdiction is governed by the Rome Statute. Colombia, which has ratified the Rome Statute, accepts

the jurisdiction of the ICC over crimes against humanity and genocide from 2002 onwards and over crimes of war from 2009 onwards.

JPL: *Ley de Justicia y Paz* (Justice and Peace Law) was Colombia's first transitional justice instrument, passed in 2005 under the Uribe regime.

M-19 - *Movimiento 19 de Abril* (April 19th Movement) was a Colombian guerilla movement. It was the second largest guerilla group in Columbia by mid-1985, but was demobilized in the late 1980s. After its demobilization, it formed the political party M-19 Democratic Alliance, or AD/M-19.

VL: The *Victims and Land Restitution Law* is Colombia's first well-known transitional justice instrument in Colombia that revolves entirely around victims' rights to reparation. It has been in force since 2012.

APPENDIX 2: THE LEGAL FRAMEWORK FOR PEACE

determinar criterios de selección que permitan centrar los esfuerzos en la investigación penal de los máximos responsables de todos los delitos que adquieran la connotación de crímenes de lesa humanidad, genocidio, o crímenes de guerra cometidos de manera sistemática; establecer los casos, requisitos y condiciones en los que procedería la suspensión de la ejecución de la pena; establecer los casos en los que proceda la aplicación de sanciones extra-judiciales, de penas alternativas, o de modalidades especiales de ejecución y cumplimiento de la pena; y autorizar la renuncia condicionada a la persecución judicial penal de todos los casos no seleccionados. La Ley estatutaria tendrá en cuenta la gravedad y representatividad de los casos para determinar los criterios de selección.

En cualquier caso, el tratamiento penal especial mediante la aplicación de instrumentos constitucionales como los anteriores estará sujeto al cumplimiento de condiciones tales como la dejación de las armas, el reconocimiento de responsabilidad, la contribución al esclarecimiento de la verdad y a la reparación integral de las víctimas, la liberación de los secuestrados, y la desvinculación de los menores de edad reclutados ilícitamente que se encuentren en poder de los grupos armados al margen de la ley.

Parágrafo 1º. En los casos de la aplicación de instrumentos de justicia transicional a grupos armados al margen de la ley que hayan participado en las hostilidades, ésta se limitará a quienes se desmovilicen colectivamente en el marco de un acuerdo de paz o a quienes se desmovilicen de manera individual de conformidad con los procedimientos establecidos y con la autorización del Gobierno Nacional.

Parágrafo 2º. En ningún caso se podrán aplicar instrumentos de justicia transicional a grupos armados al margen de la ley que no hayan sido parte en el conflicto armado interno, ni a cualquier miembro de un grupo armado que una vez desmovilizado siga delinquiriendo.

ARTÍCULO 2º. Transitorio. Una vez el gobierno nacional presente al Congreso de la República el primer proyecto de Ley que autorice la aplicación de los instrumentos penales establecidos en el inciso 4 del artículo 1 del presente Acto Legislativo, el Congreso tendrá cuatro (4) años para proferir todas las leyes que regulen esta materia.

ARTÍCULO 3º. La Constitución Política tendrá un nuevo artículo transitorio que será el 67, así:

Artículo Transitorio 67°. Una Ley estatutaria regulará cuáles serán los delitos considerados conexos al delito político para efectos de la posibilidad de participar en política. No podrán ser considerados conexos al delito político los delitos que adquieran la connotación de crímenes de lesa humanidad y genocidio cometidos de manera sistemática, y en consecuencia no podrán participar en política ni ser elegidos quienes hayan sido condenados y seleccionados por estos delitos.

ARTÍCULO 4°. El presente Acto Legislativo rige a partir de su promulgación.

EL PRESIDENTE DEL HONORABLE SENADO DE LA REPÚBLICA

JUAN MANUEL CORZO ROMAN

EL SECRETARIO GENERAL DEL HONORABLE SENADO DE LA REPUBLICA

EMILIO RAMON OTERO DAJUD

EL PRESIDENTE DE LA HONORABLE CAMARA DE REPRESENTANTES

SIMON GAVIRIA MUÑOZ

EL SECRETARIO GENERAL DE LA HONORABLE CAMARA DE REPRESENTANTES

JESUS ALFONSO RODRIGUEZ CAMARGO

APPENDIX 3: EXCERPTS FROM THE NEGOTIATION AGENDA¹⁰⁵*General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace*

The delegates of the Government of the Republic of Colombia (National Government) and the Revolutionary Armed Forces of Colombia-People's Army (FARC-EP):

As a result of the Exploratory Meeting held in Havana, Cuba, between 23 February 2012 and 26 August 2012, that counted on the participation of the Government of the Republic of Cuba and the Government of Norway as guarantors, and on the support of the Government of the Bolivarian Republic of Venezuela as facilitator of logistics and companion:

With the mutual decision to put an end to the conflict as an essential condition for the construction of stable and lasting peace;

Attending the clamor of the people for peace, and recognizing that:

- construction of peace is a matter for society as a whole that requires the participation of all, without distinction, including other guerrilla forces that we invite to join this effort;
- respect of human rights within the entire national territory is a purpose of the State that should be promoted;
- economic development with social justice and in harmony with the environment is a guarantee for peace and progress;
- social development with equity and well-being that includes big majorities allows growing as a country;
- a Colombia in peace will play an active and sovereign role in peace as well as regional and worldwide development;
- it is important to broaden democracy as a condition to build solid foundations for peace.

¹⁰⁵ Excerpts taken from the International Crisis Group's adaptation of the translation available at <http://colombiareports.com/colombia-news/fact-sheets/25784-agreement-colombiagovernment-and-rebel-group-farc.html>. (ICG 2012, 34).

With the government's and FARC-EP's full intention to come to an agreement, and the invitation to the entire Colombian society, as well as to the organisations of regional integration and the international community to accompany this process;

WE HAVE AGREED:

1. To initiate direct and uninterrupted talks about the points of the agenda established here that are aimed at reaching a Final Agreement for the termination of the conflict that will contribute to the construction of stable and lasting peace.
2. To establish a Table of Talks that will be opened publicly in Oslo, Norway, within the first two weeks of October 2012 and whose main seat will be Havana, Cuba. Meetings can take place in other countries.
3. To guarantee the effectiveness of the process and conclude the work on the points of the agenda expeditiously and in the shortest time possible, in order to fulfill the expectations of society for a prompt agreement. In any case, the duration will be subject to periodic evaluations of progress.
4. To develop the talks with the support of the governments of Cuba and Norway as guarantors and the governments of Venezuela and Chile as accompaniers. In accordance with the needs of the process and subject to common agreement, others may be invited.
5. The following agenda:

1. Integrated agricultural development policy

Integrated agricultural development is crucial to boost regional integration and the equitable social and economic development of the country.

1. Access and use of land. Wastelands/unproductive land. Formalisation of property. Agricultural frontier and protection of reservation zones.
2. Development programs with territorial focus.
3. Infrastructure and land improvement.
4. Social development: health, education, housing, eradication of poverty.
5. Stimulus for agricultural production and for solidarity economy and cooper-

atives. Technical assistance. Subsidies. Credit. Generation of income. Marketing. Formalisation of employment.

6. Food security system.

2. Political participation

1. Rights and guarantees for exercising political opposition in general and for the new movements that emerge after signature of the Final Agreement. Media access.
2. Democratic mechanisms for citizen participation, including direct participation, on different levels and on diverse issues.
3. Effective measures to promote greater participation of all sectors in national, regional and local politics, including the most vulnerable population, under conditions of equality and with security guarantees.

3. End of the conflict

Comprehensive and simultaneous process that implies:

1. Bilateral and definitive ceasefire and end of hostilities.
2. Handover of weapons. Reintegration of FARC-EP into civilian life, economically, socially and politically, in accordance with their interests.
3. The National Government will coordinate revising the situation of persons detained, charged or convicted for belonging to or collaborating with FARC-EP.
4. In parallel, the National Government will intensify the combat to finish off criminal organisations and their support networks, including the fight against corruption and impunity, in particular against any organisation responsible for homicides and massacres or that targets human rights defenders, social movements or political movements.
5. The National Government will revise and make the reforms and institutional adjustments necessary to address the challenges of constructing peace.
6. Security guarantees.
7. Under the provisions of Point 5 (Victims) of this agreement, the phenomenon of paramilitarism, among others, will be clarified. The signing of the Final Agreement initiates this process, which must be carried out within a reasonable

period of time agreed by the parties.

4. Solution to the problem of illicit drugs

1. Illicit-crop substitution programs. Integral development plans with participation of communities in the design, execution and evaluation of substitution programs and environmental recovery of the areas affected by these crops.
2. Consumption prevention and public health programs.
3. Solution to the phenomenon of narcotics production and commercialization.

5. Victims

Compensating the victims is at the heart of the agreement between the National Government and FARC-EP. In this respect, the following will be addressed:

1. Human rights of the victims.
2. Truth.

6. Implementation, verification and ratification

The signing of the Final Agreement initiates the implementation of all of the agreed points.

1. Mechanisms of implementation and verification:
 - System of implementation, giving special importance to the regions.
 - Verification and follow-up commissions.
 - Mechanisms to settle differences.

These mechanisms will have the capacity and power of execution and will be composed of representatives of the parties and society, depending on the case.

2. International accompaniment.
3. Schedule.
4. Budget.

5. Tools for dissemination and communication.
6. Mechanism for ratification of the agreements.

Signed on 26 August 2012, in Havana, Cuba.