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Curing Violence: Prescriptions for Justice and Peace in Colombia

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CURING VIOLENCE: PRESCRIPTIONS FOR JUSTICE AND PEACE IN COLOMBIA

by

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A master's thesis submitted to the Graduate Faculty in Political Science in partial fulfillment of
the requirements for the degree of Master of Arts, The City University of New York

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Abstract

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As the administration of President Juan Manuel Santos sits across the negotiating table from the Fuerzas Armadas Revolucionarias de Colombia (FARC), justice as a conduit for peace has dominated discourse on remediating the legacy of more than 50 years of internal conflict. Justice, however, like the conflict itself, is contested in both meaning and substance. This thesis will approach the topic of justice from both a human rights and transitional justice perspective, arguing the need for systematically disentangling the concept in its international, domestic, and grassroots iterations. It will contend that transitional justice policy will more effectively be designed if its claims of causality are subject to continued and rigorous empirical testing. Approaching the development of transitional justice in Colombia from an historical perspective, this thesis will focus on three cycles of government intervention to end the conflict. This will highlight the limits of related policy to date and suggest its re-orienting towards local realities, both experiential and structural, as a promising and necessary move to achieving peace in the communities that will determine its ultimate success.

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Introduction

In the mid-1990s, the administration of Antanas Mockus, mayor of Bogota at the time, offered primarily symbolic and ritualistic “vaccines against violence” to a population suffering surges in instability from the myriad ways in which this “disease” was attacking the corpus of Colombian society. Two decades later, the country is still searching for its cure. As the administration of President Juan Manuel Santos sits across the negotiating table from the Fuerzas Armadas Revolucionarias de Colombia (FARC), justice as a conduit for peace has dominated discourse on remediating the legacy of more than 50 years of internal conflict. Justice, however, like the conflict itself, is contested in both meaning and substance. In order to comprehend justice as a possible prescription for peace, it must be unpacked, disaggregated into its constituent parts, revealing its dictates, its inconsistencies, and its value. Doing so requires embedding the Colombian conflict in an international environment of human rights and transitional justice norms, in a periodization of national domestic policies related to it, and in the grassroots reactions to life in the crosshairs of violence. This variegated approach attempts to systematically understand the contours of the concept in order to address the question harrowing current prospects for peace, *what is justice in Colombia?*

Approximating an answer requires an approach steeped in historical and current understandings and actualizations of the concept internationally, nationally, and at the grassroots. Doing so will challenge fundamental elements of justice: who it is meant to serve and who gets to decide. Internationally, ideals of justice have varied over time, in stride with the development of the international human rights movement since the end of World War II and the universality of norms, such as retributive justice, that it promotes. The criminal prosecution of human rights violators is just one measure in the “tool kit” of transitional justice (which also commonly

includes such mechanisms as truth and reconciliation commissions, lustration, and reparations policies), a field that evolved as a consequence of, and alongside, the human rights movement. What burgeoning human rights and transitional justice advocacy imparted to the international community was the assertion that impunity for grave violations of human rights cannot stand, both morally and in practice, if the resolution of conflict, understood equally as the end of violence and the reconciling of society, is to be achieved.

Fixed within this dynamic environment of evolving international norms, Colombian policy related to peace and justice has varied over time, in ways that have both clashed with and sought to incorporate changing international standards and practices. The favored policies of amnesty and political inclusion in exchange for the laying down of arms that characterized the earlier demobilization of guerrilla groups in the 1990s gave way to the demobilization of paramilitary forces in the first decade of the 2000s through a process that sought to balance victims rights to truth, justice, and reparations with the concession of benefits and reduced or alternative sentences for former combatants. Efforts in this direction aimed to secure both the peace and reconciliation promised by the enactment of transitional justice mechanisms in a country reckoning with the legacy of a decades long conflict, along with the reality of continuing violence.

In this atmosphere, the underwhelming success of the demobilization of paramilitary forces to achieve either end, along with the intense criticisms of current peace negotiations lead to critical questions concerning not only what justice is tasked with achieving, but also how justice may be more adequately imagined through its contextualization within the conflict it aims to ameliorate. Such questions problematize justice as a concept overburdened by its malleability, while nonetheless suggesting that this very malleability must be appealed to if it is to be effective

in achieving defined aims. Assessing the relationship between justice and peace, along with other abstracts or proxies, including reconciliation, truth, and non-repetition, requires fundamentally challenging the traditional claims of transitional justice and proffering the difficult contention that while human rights may be accepted as universal as a first step, the ways in which they are protected or their violation punished, may not be equally so.

Research evaluating the empirical effects of transitional justice mechanisms in varied conflict and post-conflict settings provide tempering evidence to the optimism and enthusiasm for their broad diffusion; nevertheless, through advancing an agenda that recognizes the community as a critical level of analysis, such research may offer the most fruitful opportunity to attune policies to the needs and desires of those that justice is meant to serve and where peace and reconciliation are meant to take root.¹ A principal goal of this paper is to further contribute to this strain of research as it engages with the community level and the richness of data available in studies of the micro-dynamics of conflict. To this end, this paper will assess Colombia's experience with initiatives intended to effect justice within a constellation of international norms and obligations, existent research as to the empirical outcomes of transitional justice mechanisms' use, and the varied realities of a complex and ongoing conflict. It will contend that both peace and justice are chimeric aims if policies are unresponsive to needs and desires at the grassroots.

The first section will provide an introduction to the conflict in Colombia, characterized by a multiplicity of armed actors, including various guerrilla groups, paramilitary forces, and state agents, and its confluence with other forms of violence and illegal activity, including drug-

¹ See, Anna Macdonald, 'From the Ground Up: What Does the Evidence Tell Us about Local Experiences of Transitional Justice?,' *Transitional Justice Review*, 1 No 3 (January 2015): 72—121; Rosalind Shaw and Lars Waldorf, and Pierre Hazan, editors, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010).

trafficking, common crime, and the rise of the new paramilitary. Wavering both geographically and temporally in intensity, the conflict has entrenched the different communities of the vast country unevenly across space and time. An historic overview of these complexities will distinguish five cycles of government initiatives aimed at ending the conflict. The first cycle corresponds to failed negotiations with the government and guerrilla groups in the mid-1980s. The second cycle encompasses the partially successful peace agreements and demobilization of smaller guerrilla groups in the early 1990s. The third cycle includes the failed negotiations with the FARC at the end of the 20th century. The fourth cycle commences soon thereafter with the partially successful demobilization of the paramilitaries. Discussion of these past cycles will serve to situate the fifth and current cycle of ongoing negotiations between the FARC and the government within a broader frame of factors and conditions that allow for perhaps only a more qualified attainment of justice and peace.

The second section will trace the development of international human rights' norms and discourse and the transitional justice field in order to understand the obligations and opportunities for justice contemplated by both. It will place significant emphasis on the developing research agenda that seeks to empirically test the claims of transitional justice advocates in order to assess their efficacy and strengthen understandings of peace and justice outcomes.² In a discussion of the development of transitional justice mechanisms from their implementation originally destined for post-authoritarian countries to their application in diverse

² See, Michael Ben-Josef Hirsch, Megan MacKenzie, and Mohamed Sesay, 'Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective,' *Cooperation and Conflict*, 43 No 3 (2012): 386—403; RS Ratner, Andrew Woolford, and Andrew C. Patterson, 'Obstacles and Momentum on the Path to Post-Genocide and Mass Atrocity Reparations: A Comparative Analysis, 1945-2010,' *International Journal of Comparative Sociology*, 55 No 3 (June 2014): 229—259; Elin Skaar, 'Reconciliation in a Transitional Justice Perspective,' *Transitional Justice Review*, 1 No 1 (2012): 54—103.

conflict and post-conflict settings, it is necessary to consider if and when these mechanisms may be effective across distinct experiences of violence and the structural factors that engender it.

Against this backdrop, the third section will discuss the design and implementation of national initiatives aimed at achieving peace and justice, focusing on the achievements and shortcomings of processes in Cycles 2 and 4. Detailing the agreements and institutions that governed the peace processes with smaller guerrilla groups in the 1990s and paramilitary forces in the early 2000s, this section will highlight the progressive incorporation of transitional justice mechanisms into Colombian policy and assess their contested compliance with international standards. Specific attention will be paid to the increasing role of victims rights, emphasis on truth-telling, and the linking of transitional justice mechanisms with official Disarmament, Demobilization, and Reintegration (DDR) programs, once solely imagined within the realm of security studies. Discussion of past initiatives will serve to contextualize the current negotiations, Cycle 5, and the agreements that have been reached thus far. Special emphasis will be given to analyzing the design and impact of the framework for the Comprehensive System of Truth, Justice, Reparation and Non-Repetition as outlined in the Agreement on Victims of the Conflict on both the understanding and practice of justice at the national level.

Conscious of international norms and national policies, the fourth section will evaluate the shortcomings of prior peace processes through a re-focusing of analysis on the community level. By turning to available research on the micro-dynamic of the conflict it is both possible and necessary to re-tailor policies related to peace and justice to the specific experiences of war at the grassroots. Such an exercise problematizes the concepts as imagined internationally and

nationally by placing actors and actions against the backdrop of wartime institutions and the prospects of reconciling communities in territories long neglected by the state.³

The fifth section will conclude with a summation of possible lessons to be learned from the Colombian experience with the implementation of justice policies for human rights and transitional justice practitioners, as well for the current and future design of domestic policy aimed at ending violence within the country. Formulaic attempts to resolve conflict through an equation of truth plus justice equals peace do not account for the complex environments in which these concepts must be operationalized. Advancing a research agenda focused on micro-dynamics and the empirics of transitional justice outcomes will fruitfully challenge the coherence of justice as a singular concept in a particular context and suggest locally rooted understandings as key to attaining a viable peace.

The Longest Insurgency and Other Violences

To speak of the *current* conflict in Colombia is to recognize that after five decades of violence, conflict dynamics have re-shaped the phenomenon itself. Violence has unfolded amidst processes of state decentralization and the strengthening of the drug trade. Its narrative has ranged from ideological insurgency to drug war to fight against terrorism. It has permeated borders, the countryside, cities, and national and local institutions. Its impact has been so penetrating that questions have arisen as to whether Colombia itself suffers from a culture of violence.⁴ While consensus does not exist as to the precise origins of the conflict,⁵ an historical

³ See, Ana Arjona, 'Wartime Institutions: A Research Agenda,' *Journal of Conflict Resolution*, 58, No 8 (2014): 1360—1389.

⁴Peter Waldmann, 'Is There a Culture of Violence in Colombia?,' *International Journal of Conflict and Violence*, 1 No 1 (2007): 61—75.

⁵ There is a broad debate on just how far back in Colombian history it is necessary to go in order to understand the conflict as it has developed since the 1950s, as well as on the socio-economic, political, and opportunity structures that have fueled its continuation. This debate is perhaps most striking in the "Historical Commission's Report on the

approach is necessary to encompass the range of actors, acts, and structural factors that have contributed to the longest insurgency in Latin American history and the multiple forms of violence that have unfurled alongside and in confrontation with it.

Likewise, this historical approach will trace the government's reaction to such violence and the means with which they have sought to halt its continuance. Doing so produces a framework that distinguishes five cycles of government action to end the conflict. The fifth and current cycle represents a culmination of lessons learned, with an agenda that is explicit in its recognition that the end of conflict is not solely the laying down of arms. Peace, instead, must be based on the restoration of rights and justice in balance with the restrictions determined by a complex reality of ending violence in the midst of ongoing conflict.

Though the FARC was founded in 1964, the seeds of guerilla organizing had been planted in the preceding decades. Political exclusion, expressed both geographically through the marginalization of citizens outside of Bogota's dominating political force and theoretically through the suppression of leftist thought, had been the hallmark of Colombian politics since the Liberal and Conservative Parties established their dominance at independence in 1810. The 10-year period of political violence known as *La Violencia* (1948-1958) further entrenched this reductive political space through the formalization of the power-sharing pact, the National Front.⁶ Finding no room within the political establishment for progressive policies related to land reform and social justice, members of peasant militias that had fought under the banner of the Liberals soon after regrouped in alliance with the Communist Party (CP) to form what would

Conflict and its Victims," an over 800-page tome that developed from an agreement between the FARC and the government as a start to the building of an historical record of the conflict. Access to the document can be found at <https://www.mesadeconversaciones.com.co/comunicados/informe-comisio%CC%81n-histo%CC%81rica-del-conflicto-y-sus-vi%CC%81ctimas-la-habana-febrero-de-2015>. Accessed May 22, 2016.

⁶ Under this arrangement, the Conservative and Liberal Parties would alternate power every four years; the arrangement lasted from 1958 to 1974.

become the largest guerrilla insurgency in the country, the FARC. The violent state repression of Leftists, peasants, and peasant self-defense forces that followed its founding solidified future strongholds of FARC control. With assistance from the CP, displaced populations were relocated to the isolated areas of the Amazonian foothills and the less productive lands in the plains region.⁷ Absent an official path for political opposition, armed struggle became the means to challenge the state. In this context and in the decades that followed, numerous other insurgent groups taking up the banners of socialism and social justice were founded, including the National Liberation Army (ELN) in 1964, the People's Liberation Army (EPL) in 1967, the April 19th Movement (M-19) and the Autodefensa Obrera (ADO) in 1974, the Workers Revolutionary Party (PRT) in 1982, the Quintín Lame Armed Movement (Quintín Lame) in 1984, and the People's Revolutionary Army (ERP) in 1985.

The proliferation of armed insurgents in the early years of the conflict must be contextualized within both the domestic and international environments that, respectively, fueled and attempted to stem their growth. Following the success of the Cuban Revolution, United States policy in the Latin American region aimed at curbing the communist threat. To this end, the Kennedy Administration in 1961 initiated the Alliance for Progress (AFP), a 10-year, 20-million dollar social and economic development strategy meant to serve as a bulwark against the spread of communist insurgency through the elimination of the sources of economic disadvantage. Designed to address issues of joblessness, illiteracy, access to education, deficient infrastructure, and the unequal distribution of wealth, the AFP has been criticized for failing to achieve long-term success due to the short sightedness of its goals as distorted by Cold War politics and maneuvering. In this context, authoritarianism was confirmed as preferable to leftist

⁷ Ricardo Vargas Meza, 'The FARC, the war and the crisis of the state,' *NACLA Report on the Americas*, 31, Issue 5 (March-April 1998).

revolution, leading the U.S. to support the politically exclusive National Front in Colombia, along with right-wing regimes, such as the dictatorships in Brazil, Argentina, Chile, and Uruguay, well versed in the repressive practices that constituted the region's multiple dirty wars.

In his study of the role of humanitarian and development assistances' effects on citizen security, Samir Elhawary argues that the AFP in Colombia resulted in the prioritization of state security over that of its civilian population.⁸ While promoting such goals as agrarian reform in order to forestall communist sympathies amongst the economically marginalized, such efforts led to unintended results. Bolstered by economic aid, Colombia established Law 135 of 1961 to create the Colombian Institute of Agrarian Reform (INCORA), tasked with improving land titling, modernizing the agrarian economy, and supporting the peasantry and landless through greater land access. Such reform, however, was made difficult by the National Front coalition, which stymied any hopes of building the broad base of political support needed to undertake such projects. As a consequence, regional elites further strengthened their grip on power while efforts to expropriate land for more productive use were limited by the favorable terms conceded to large landholders. Despite the 350 million dollars allocated to Colombia between 1963 and 1969, development aid as a counter-insurgency strategy had failed. The inability of the AFP to fracture the structural grievances of the conflict had the consequence of pushing peasant migration towards the stateless peripheries of the agricultural frontier, setting the stage for guerrilla activity to flourish.

Though the conflict remained relatively low in intensity in the 1970s and into the early 1980s, in terms of both the geographical expansion of the various groups and the armed actions that they undertook, the growing number of insurgents steered the government towards

⁸ Samir Elhawary, 'Security for whom? Stabilisation and Civilian Protection in Colombia,' *Disasters*, 34 No S3 (October 2010): S388—S405.

increasingly oppressive policies to regain lost footing. The enactment of the controversial Security Statute of 1978 exemplified what has been referred to as the “difficult polarization of fear” that characterized this period in the country:

...on the one hand, there was the fear of the guerrilla’s actions, which gained greater military and territorial control in its armed struggle, and on the other hand, the fear of state repression, as the cases of arbitrary detentions, forced disappearances, and torture at the hands of state forces increased, with such actions being justified as the defense of internal security, there was a politic of enemies.⁹

In this environment of increasing insecurity, the administration of Belisario Betancur, elected in 1982, initiated what can be distinguished as a first cycle in the government’s approach to securing peace. In this cycle, the government suspended the Security Statute and conferred unconditional amnesty to political prisoners as a precursor to the state’s attempt at a negotiated settlement with the insurgent groups. In 1984, the government signed several ceasefire agreements with the FARC, M-19, EPL, and ADO. With these agreements in place, there was a moment in which the political door to the opposition was seemingly opened. The newly formed Patriotic Union (UP), a broad coalition of Leftist movements founded by the FARC and the CP, gained momentum; in the 1986 elections, 14 of its members were elected to the House and Senate, 18 were elected as representatives in departmental level assemblies, and 355 were elected as local councilman.¹⁰

Despite UP’s electoral successes, the peace process with the various guerrilla groups was plagued by multiple issues from the start, including the violation of ceasefire arrangements by both state forces and insurgent groups, the resignation of members of the Peace Commission in

⁹ Jenner Alonso Tobar Torres, ‘Violencia política y guerra sucia en Colombia. Memoria de una víctima del conflicto colombiano a propósito de las negociaciones de la Habana,’ *Revistas*, Pontificia Universidad Javeriana, 19, No. 38 (2015): 11. All translations by the author.

¹⁰ *Ibid.* 12.

response to the fledgling process, and the notable growth of paramilitary forces. In one of the most haunting instances of armed hostilities during this period, members of M-19 took control of the Palace of Justice in Bogotá in 1985, resulting in the death of at least 96 individuals, including nearly half of the Supreme Court, and the disappearance of 11 in the guerrilla takeover and military recovery of the site. At the same time, paramilitary forces, with origins in local self-defense groups fighting against the actions of guerrilla combatants, began to expand and intensify their actions, often overlapping and working in conjunction with state security forces. The combination of continued fighting and its hampering effect on the peace process, along with the growing threat to the guerrillas mounted by the paramilitaries were ultimately lethal to the process. By 1987, it had officially failed amidst an upsurge in violence that included the assassinations of roughly 3,000-4,000 members and supporters of the UP, carried out primarily by paramilitary forces, with the perceived collusion of the state.¹¹

In their study of the dynamics of the conflict between 1988-1990, Jorge Restrepo, Michael Spagat, and Juan Vargas identify 5 factors that account for the increase in violence during this period: 1) a rise in narcotrafficking and its accompanying criminality; 2) the failed peace process between the Belisario Betancurt administration and the guerrillas; 3) the systematic extermination of members of the FARC's political wing, the Patriotic Union; 4) the strengthening of paramilitary groups; and 5) a reduction in Soviet support as the Cold War came to a close, leading to increases in guerrilla kidnappings and extortion.¹² Likewise, Fabio Sánchez and María del Mar Palau identify the process of political, administrative, and fiscal

¹¹ Jim Rochlin, 'Plan Colombia and the Revolution in Military Affairs: the Demise of the FARC,' *Review of International Studies*, 37 (2011): 721.

¹² Jorge Restrepo, Michael Spagat, and Juan Vargas, 'The Dynamics of the Colombian Civil Conflict: A New Data Set,' *Homo Oeconomicus*, 21, No 2 (2004): 401.

decentralization taking place in Colombia at the time as the perfect storm for the growing presence of competing armed groups:

...on the one hand, local governments have less repressive capacity than the central government so local leaders are more susceptible to intimidation, and on the other, as more resources are transferred to local governments, the 'pot' available for plundering increases. Decentralization has been, therefore, an opportunity for the illegal groups to widen their political influences and enhance their sources of financing.¹³

The rise in drug-trafficking and related criminality in this period added another layer of complexity to the conflict. By 1987, it is estimated that Colombian drug cartels, principally the Medellín and Cali cartels, were selling more than \$20 billion of cocaine to North American and European market.¹⁴ Their by-any-means-necessary approach to growing what they viewed as a lucrative business, led to profound social and political impacts. These cartels were ruthless in silencing their critics, especially those who sought their extradition, and had a severe chilling effect on the media. Cartel violence was often aimed at high-level political figures, but likewise targeted laborers, peasants, guerrillas, social and political activists, state defense forces, and the military. In his study of the effects of the drug trade on democracy in the 1980s, Jonathan Hartlyn notes the especially traumatic effect it has on the judiciary, silencing attempts to combat impunity for related crimes through bribes, threats, and assassinations.¹⁵ Likewise, Hartlyn notes the profound linkages between drug-traffickers and other illegal armed groups, such as the FARC, finding a common enemy in the state as it seeks to destroy coca production. Important to note, however, is the competition that equally exists between the groups, as the FARC similarly

¹³ Fabio Sanchez and Maria del Mar Palau, 'Conflict, Decentralisation and Local Governance in Colombia, 1974-2004,' *Documento Cede 2006-20* (May 2006): 14.

¹⁴ Robert Filippone, 'The Medellín Cartel: Why We Can't Win the Drug War,' *Studied in Conflict and Terrorism*, 17 (1994): 323—344.

¹⁵ Jonathan Hartlyn, 'Drug Trafficking and Democracy in Colombia in the 1980s,' Working Paper No. 70, *Conference on Drug-Trafficking and Human Rights in Colombia* (Barcelona, 1993).

aims to to secure an independent position in the drug market. Drug-related violence in this period is thus a consequence of not only cartels seeking to maintain their drug empires, but likewise a result of their both collusive and competitive relationship with other illegal armed groups. Hartlyn emphasizes the de-stabilizing effects of drug-trade violence on state institutions and faith in the state itself. Colombia at the end of the 1980s was in crisis.

Beyond the impulse provided by the escalation in violence, peace negotiations were re-initiated at the end of the 1980s, ushering in the second cycle of government initiatives to secure peace. The talks were facilitated in part by the Virgilio Barco administration's proposed reform of the 1886 Constitution with the intent of opening up the political system to the opposition.¹⁶ Though not adopted, the proposed reform led the M-19 to organize as a political party in November 1989.¹⁷ Negotiations with the M-19 culminated in a peace agreement between the armed group and, signed on March 9, 1990. The successful negotiations with the M-19 spurred continued talks between the César Gaviria government and the PRT, EPL, Quintín Lame, Commando Ernesto Rojas (CER), Current Socialist Renewal (CRS), Popular Militias of Medellín (MPM), the Francisco Garnica Front (FFG), and the Armed Movement of Independent Commandos (MIR-COAR).¹⁸ By 1994, the government had signed agreements with each of the aforementioned groups, granting them legal political status, guaranteeing their political participation through the appointment of representatives to Congress, and offering them the benefit of participating in the National Constituent Assembly that would reform the Constitution in 1991, had they been in advanced stages of talks at the time.

¹⁶ Sergio Jaramillo, Yaneth Giha, and Paula Torres, 'Transitional Justice and DDR: The Case of Colombia,' *International Center for Transitional Justice* (June 2009): 1—57.

¹⁷ Joakim Kreutz, 'Colombia, 1978-Present,' in Karl R. DeRouen and Uk Heo, eds., *Civil Wars of the World: Major Conflicts since World War II, Volume 1* (ABC-CLIO, 2007): 286.

¹⁸ *Supra* n 16 at 47.

Despite the exit of these numerous guerrilla groups from the armed conflict and the accompanying dip in violence that immediately followed, the later years of the 1990s again saw an increase in intensity. Noted as the “upsurge period,” Restrepo, Spagat, and Vargas detail an increase in guerrilla, paramilitary, government, and civilian casualties after 1996.¹⁹ This period is characterized by what they view as the paramilitarization of the conflict. They find, “paramilitary attacks increase when there is a combination of infrequent government clashes and frequent guerrilla attacks. In other words, paramilitary activity substitutes for government activity.”²⁰ In 1997, the multiple paramilitary groups operating throughout the country were united under the umbrella organization, the United Self-Defense Forces of Colombia (AUC), notably the most indiscriminate actors in the murder of civilians and increasingly incorporated within the networks of drug-trafficking and associated with conflict atrocities. By 2002, they were operating in 28 of Colombia’s 32 departments.²¹ Similarly, by the late 1990s, some form of guerrilla presence was estimated in approximately three-fourths of all Colombian municipalities.²²

This peaking of violence in the late 1990s led into the third cycle of government negotiations. In his discussion of the Andrés Pastrana administration’s decision to resume efforts at a negotiated peace with the FARC in 1998, Juan Gabriel Tokatlian presents some sobering statistics of the conflict in this period: 10 deaths per day were attributed to political violence, approximately 10% of municipalities were wholly or partially destroyed by the guerrillas, 194 massacres were carried out in 1998 alone (perpetrated primarily by paramilitaries), approximately 9,407 individuals were kidnapped between 1996-1999 (including those carried

¹⁹ Supra n 12.

²⁰ Jorge A. Restrepo and Michael Spagat, ‘Colombia’s Tipping Point?’, *Survival: Global Politics and Strategy*, 47, No 2 (June 2005): 148.

²¹ Supra n 13 at 12.

²² Supra n 3 at 1365.

out by common criminals), and by the second half of the decade, roughly 300,000 Colombians left the country in addition to the more than 1 million that were internally displaced.²³ In this context, the government initiated talks after taking the extraordinary measure of ceding an area roughly the size of Switzerland in southern Colombia to the FARC. While meant to serve as a ceasefire zone, Caguán became the site from which the guerrillas were able to re-fortify themselves without state intervention at the same time as negotiations were failing bring any fruitful results.²⁴

While the negotiations failed to produce a political solution to the conflict, the Pastrana administration did succeed in securing the roughly \$1.3 billion U.S. aid package, known as Plan Colombia. Originally designed as a counter-narcotics effort, funding under the plan was directed primarily at counter-insurgency. Not officially launched until 2000, Plan Colombia led to the modernizing of the Colombian military and made possible a re-strategizing of the conflict. The experience in Caguán would catalyze support for the hardline policies of Álvaro Uribe, elected President in 2002, and conflict re-militarization. Under the policy known as Democratic Security, the Uribe administration sought to expand military and police presence to all areas of the country, along with the building up of networks of citizen informants, with the aim of recovering territory lost to the illegal armed groups and establishing an often-absent state in the most remote reaches of Colombia. These counterinsurgency efforts were bolstered by U.S. aid under Plan Colombia, which had reached over 4 and a half billion dollars by 2006.²⁵ U.S. support for anti-drug campaigns in a post 9/11 world helped shift the conflict towards rhetoric that envisaged the guerrillas as narco-terrorists, significantly altering the possibility of a

²³ Juan Gabriel Tokatlian, 'Una reflexión en torno a Colombia, 1999-2002 ¿negociación para la paz o proceso para la guerra?', *Foro Internacional*, 44, No. 4 (Oct-Dec, 2004): 636.

²⁴ *Supra* n 11.

²⁵ *Supra* n 11 at 726.

negotiated peace during Uribe's tenure. The renewed vigor of official state forces in the conflict had significant effects on conflict dynamics. Restrepo and Spagat identify a drop in guerrilla attacks during this time, as well as a decrease in civilian deaths (though injuries reached record levels, as did combatant deaths), while noting that the clashes between the government and guerrillas reached their highest point.²⁶ Likewise, a correlation between increased government intervention and fewer paramilitary attacks is noted during this period. Any gains in civilian security under Democratic Security, however, may be over-shadowed by the now notorious polemic of "false-positives" in which state forces are implicated in the murder of at least 3,000 innocent civilians, dressing their victims in guerrilla uniforms in order to boost the number of enemy combatants killed.²⁷

While the Uribe administration focused militarily on defeating the guerrillas, it turned to a negotiated solution with the paramilitary forces to bring an end to their indiscriminate killing of civilians, increasing involvement in the drug trade, and pervasive corruption of state institutions. AUC leader Vicente Castaño famously bragged that 35% of Congress were friends of the paramilitary,²⁸ helping to crystallize public opinion against the paramilitary forces that had once enjoyed both official and implicit support at various moments of the conflict. This fourth cycle, which led to the demobilization of more than 30,000 former paramilitaries beginning in 2003, was a significant factor in the decrease in civilian deaths during the Uribe administration. The peace process with the paramilitaries was the first in Colombia to require elements of truth-telling and victims reparations along with the possibility of alternative sentencing and benefits for former combatants. The success of the demobilization program must nevertheless be

²⁶ Jorge A. Restrepo, and Michael Spagat, 'Colombia's Tipping Point?,' *Survival: Global Politics and Strategy*, 47, No 2 (June 2005): 131—152.

²⁷ Human Rights Watch, 'Colombia: Top Brass Linked to Extrajudicial Executions,' June 24, 2015.

²⁸ Taran Volckhausen, '45 Colombian Congress Members Convicted over Paramilitary Ties since 2006,' *Colombia Reports*, December 10, 2013.

qualified by what has been observed as the re-constitution of former paramilitaries into the violent and pervasive criminal groups known as the BACRIM,²⁹ along with the insufficiency of reparatory measures.

Current conflict statistics estimate the total number of people killed at over 218,000, 80% of which are civilians, the number of people displaced at more than 5.7 million, and the number of people disappeared at a minimum of 25,000.³⁰ It is in this atmosphere of multiple violences and perpetrators, that Colombia is tasked with the challenge of administering justice. The failures and limited successes of past cycles have proffered a number of lessons for guiding the current negotiations towards the achievement of peace. While Cycle 1 initiated a period of optimism and the opening of the political process, the growing threat of the paramilitary and drug-trafficking criminality ultimately doomed the success of a negotiated settlement. This period highlights the critical need to view the conflict within the broader environment of violence and insecurity. This point is reiterated again in Cycle 2. Although negotiated settlements were reached with various guerrillas groups, a tribute to the efficacy of political inclusivity, the failure to comprehensively approach the dismantling of the paramilitaries left the FARC resistant to participation in talks that were viewed as a threat to their safety. The devastating failure of negotiations with the FARC in Cycle 3 highlights the significant enmity and disillusionment that can follow such processes and the political tenability of negotiating with the insurgent group. Concessions in this cycle, along with their unsuccessful outcome, continue to haunt current processes that engage the

²⁹ The BACRIM have been described as both the successors of the paramilitary forces, as well as the third wave of narco-traffickers. They are involved in numerous criminal activities, including illegal mining, trafficking in humans, contraband, and drugs, as well as extortion, homicide, etc. Several studies have brought attention to the ease with which demobilized paramilitaries have been absorbed into the criminal networks in such major cities as Medellín, for examples see: Ralph Rozema, 'Urban DDR-Processes: Paramilitaries and Criminal Networks in Medellín, Colombia,' *Journal of Latin American Studies*, 40, No 3 (August 2008): 423—452; and, Kimberly Theidon, 'Transitional Subjects: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia,' *The International Journal of Transitional Justice*, 1 (2007): 66—90.

³⁰Lisa Haugaard, 'The Human Cost of the Colombian Conflict,' Latin American Working Group.

FARC as anything but enemies. Cycle 4, while boasting the demobilization of tens of thousands of former paramilitaries, must be scrutinized for its failure to address the systems of violence operating within the country that permit a re-constitution of conflict actors into newly threatening groups. Likewise, the limited success of restorative measures suggests a need for both increased reparations and the institutional capacity to carry them out.

The Santos' administration has approached the current negotiations with the FARC, Cycle 5, as the critical moment for securing peace in Colombia. In doing so, the concessions made have, on paper, been elaborated as a complex process of peace, justice, and social change. In August 2012, the government and the FARC entered into the "General Agreement for the End of Conflict and the Construction of a Stable and Lasting Peace".³¹ The ongoing negotiations have revolved around the agreed upon 6-point agenda, encompassing: 1) agrarian reform; 2) political participation; 3) the end of the conflict; 4) the problem of illicit drugs; 5) victims; and 6) implementation, verification, and legalization. To date, draft agreements on a solution to illegal drugs, agrarian reform, political participation, and victims have been announced.³² The agreement on victims, made public on December 15, 2015, and the joint communiqué on transitional justice measures, announced on September 23, 2015, have been the greatest sources of contention, rhetorically dividing the country into two camps: friends and enemies of peace, with both proponents and opponents of the process claiming the banner of defending the elusive goal and hurling insult across the aisle.³³

³¹Mesa de conversaciones, 'Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera,' (August 2012).

³² Draft agreements and joint communiqués are available on the official site for the negotiations, Mesa de conversaciones (<https://www.mesadeconversaciones.com.co>). Accessed May 22, 2016.

³³ Accusations of one or the other have been made across party lines and between government organizations. The government maintains that dissention from the agreements only hurts possibilities for peace, while those opposed maintain that it is their very criticism of the agreements that serve to bolster a more just peace in the future. For examples, see: Iván Duque Márquez, '¿Enemigos de la paz?' Opinion, *El País* (November 24, 2015); 'Ni la Procuraduría, ni el procurador pueden ser enemigos de la paz,' *El Universal* (October 19, 2015); and, Maria

The provision of alternative sentences, along with judicial proceedings that require elements of truth telling are complemented by measures to address the drug trade and paramilitary violence. Do the terms so far agreed upon provide justice for Colombia and the millions of victims in its conflict? Can they provide the groundwork for a stable and lasting peace? The following section will consider these questions through the lens of the international norms related to human rights and transitional justice. Tracing the development of these international standards and new avenues of research related to the implementation of transitional justice mechanisms may be helpful as a first step in determining whose voice should echo loudest in calls for justice in Colombia.

International Antidotes

Colombian policy related to human rights and transitional justice has increasingly sought the inclusion of restorative measures while, likewise, seeking compliance with international norms that place obligations, at least discursively, to provide punishment adequate to the crimes committed. The difficulties of addressing human rights abuses is exacerbated in a long-running, multi-party conflict, such as Colombia's, that puts to the test the adaptability of human rights and transitional justice mechanisms' implementation in a context that seeks a balance of justice in the name of peace. Aware that the world is watching, the government's chief negotiator, Humberto de la Calle, recently remarked on both the will and capacity of Colombia to undertake a genuine process of transitional justice.³⁴ Whether this process is able to achieve the dual goals of justice and peace is inextricably linked to the international environment and its ability to legitimize state

Clara Ospina, 'Los verdaderos enemigos de la paz,' Opinion, *El Colombiano* (October 14, 2015).

³⁴Humberto de la Calle, as quoted in, 'No habrá venganza ni cacería de brujas, pero tampoco impunidad': De la Calle,' *El País* (December 15, 2015). The wording of having both the will and capacity is almost certainly intentioned as a bulwark against the possibility of future ICC proceedings that may go forward if Colombia does not show itself to have either under the principle of complementarity.

interventions and perceptions to them. A principal contention is, thus, that scrutiny of Colombia's transitional justice policy from the international community matters, by way of the hampering effects of negative discourse surrounding policies and the diversion of funding that may follow such recommendations.

Spanning more than 50 years, the conflict in Colombia has long been enmeshed within the dynamic international system and the changing normative framework that has adjusted to the ascendancy of the human rights movement. To understand the legal and moral claims to which the Colombian state is subject, it is necessary to analyze the development of human rights norms and transitional justice mechanisms in order to assess what justice is demanded of Colombia in the way of international obligations. This section will argue that though there is a significant body of law surrounding human rights and the laws of war, whose violation by all parties to the conflict is without question, there exists ambiguity as to the legal imperative to provide recourse for such abuses by way of a specific mechanism. In this way, the dominant discourse of the international human rights movement that seeks to compel states to enact retributive measures based on international law is challenged as factually tenuous. As such, it will be contended that a more flexible approach to transitional justice should guide policy that seeks to engender sustainable peace, based on continued empirical research as to a given mechanism's effectiveness in providing for the desired outcome.

The modern international human rights movement, originating in a post-WWII world reeling from the devastating loss of human life and rights abuses, grew up around the signing of the UN Declaration of Human Rights in 1948 and subsequent core treaties. This encompasses the principal international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on

Economic, Social, and Cultural Rights (1966), the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1989), and international humanitarian law as enshrined in the 1949 Geneva Conventions and Additional Protocols. Likewise, the establishment of international instruments, such as the American Convention on Human Rights, overseen by the Organization of American States, and the Rome Statute, establishing the International Criminal Court, provide additional guidance as to the rights of individuals under international law and states' obligations to ensure they are satisfied.

Despite its troubling human rights record, Colombia, a party to all aforementioned treaties and conventions, has made strides to incorporate the legal framework of international human rights law into its domestic structures. As dictated in the reformed Constitution of 1991, all such treaties maintain constitutional supremacy under domestic law. In fact, the Covenant on Economic, Social, and Cultural Rights and the Covenant on Civil and Political Rights were critical influences in the re-drafting of the Constitution.³⁵ Similarly, Christof Heyns and Frans Viljoen note the Colombian Constitution Court's zealous referencing of international treaties, with specific reference to the Covenant on Civil and Political Rights made in 129 cases between 1992 and 1998.³⁶ The development of these international human rights bodies and instruments, along with the movement that supported their growth and influence, have succeeded in altering human rights discourse from its focus on states rights and sovereignty to that of human-centric individual rights. Likewise, the elaboration of states' obligations to provide truth, justice, reparations, and guarantees of non-repetition in international human rights law has

³⁵ Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level,' *Human Rights Quarterly*, 23, No 3 (August 2001): 483—535.

³⁶ *Ibid.* 502.

afforded much needed protections to victimized and marginalized populations. The question arises, however, as to the appropriate measure to provide recourse when international human rights are violated. In the case of Colombia contending with human rights abuses must be placed within the framework of transitional justice policy. As such, interpretations of justice are contextualized within the broader debate concerning the clash between the retributive discourse promoted by the international human rights movement and the exceptional circumstances of conflict and transitional settings that require greater flexibility.

In his discussion of international law in the resolution of conflict in Colombia, Jose E. Arvelo identifies three positions that dominated discussion of transitional justice policy during Cycle 4 and that apply equally to the current polemic surrounding providing justice and accountability in Cycle 5.³⁷ The first approach, classified as peace-forgiveness, stresses blanket amnesties as a precursor to ensuring peace, as opposed to the vengefulness illegal armed groups associated with retributive measures. The second approach, denoted as peace-justice balancing, endorses truth and reparations alongside alternative sentences for illegal armed actors in order to both provide for redress to victims and ensure perpetrators' continued participation in the process. The third approach, termed strict justice, requires the centrality of victims and a rigid view of justice for human rights violations as retributive in nature. While international human rights law is clear in its provision of victims' rights to truth, justice, reparations, guarantees of non-repetition, these varying approaches are representative of the interpretive conflicts that exist in the design of transitional justice policy. In Colombia, the debate concerning (non)compliance with international law has centered on issues of accountability and whether amnesties and alternative sentences satisfy these four international obligations.

³⁷ Jose E. Arvelo, 'International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process,' *Georgetown Journal of International Law* (January 2006): 1—67.

In a further elaboration of these obligations, Arvelo finds international law does not specify the prioritization of specific mechanisms. While the blanket amnesties advocated for under a peace-forgiveness approach would violate such treaties as the American Convention on Human Rights as interpreted by the Inter-American Court of Human Rights, a review of additional treaty law complicates calls for a strict justice approach. He specifies:

In sum, international law does not command a particular punitive result in Colombia's efforts to achieve a peaceful resolution of its conflict with powerful armed non-state actors. This fact may explain UNHCHR (Colombia) Director Fruhling's qualified demands for Colombian compliance with purported international "principles and norms" as opposed to hard-and-fast international laws. (252) Thus, the force of the "strict justice" case for strict retribution derives mostly from the morality and legitimacy of proportionate accountability for international crimes, not from developed international law. While "strict justice" proponents may see this as a weakness of the legal order to be remedied, the result is nevertheless more attuned to international law's twin aims of peaceful resolution of disputes on the one hand and protection of innocent war victims on the other.³⁸

Yet, the strict approach continues to dominate criticisms of Colombian transitional justice policy as it has favored a balance of peace and justice. International human rights NGOs, including Human Rights Watch and Amnesty International, persist in their condemnation of past and current cycles of negotiations with illegal armed actors that allow for alternative sentencing and amnesties for political crimes alongside restorative measures. Thus, the absence of a legal imperative does not prohibit a discourse of international human rights that seeks to institutionalize criminal justice as the mechanism required to ensure states' compliance with human rights obligations. The chasm between existent legal obligations and the discourse that reigns within the international human rights movement and influences its policy recommendations requires deeper discussion of the normative development of international

³⁸ Ibid. 26.

criminal accountability for human rights violations and its interaction with additional transitional justice mechanisms.

Kathryn Sikkink's well-documented study of the rise of the justice norm, one significant achievement of the mobilization for human rights, contends that

...there has been a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm. The term [the justice cascade] captures how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake.³⁹

The momentum of this specific norm is emblematic of the dynamism of the human rights movement. For decades, she argues, impunity and state accountability models succeeded ahead of calls for individual criminal accountability, yet, in line with the human rights movement, justice is defined by this very legal accountability for crimes.⁴⁰ Indeed, establishing an international legal framework around human rights has been identified as the 'central collective project' of the movement for more than a half-century.⁴¹

The 'cascade' of the justice norm and specification of international laws related to human rights were hard fought victories of the movement. To understand such developments, Martha Finnemore and Kathryn Sikkink propose a three-phase model of a norm 'life cycle.'⁴² The first stage, norm emergence, requires the work of norm entrepreneurs in getting the ball rolling, while the second, norm cascade, hinges on the socialization of states, norm entrepreneurs, and international organizations to affect the behavior of non-compliers until the moment of

³⁹ Kathryn Sikkink, *The Justice Cascade* (W.W. Norton & Company, Inc., 2011): p. 5.

⁴⁰ Criticisms of the stringency of the human rights movement and its clinging to criminal justice as without par in the addressing of abuses will be discussed later on; however, it is necessary to highlight this aspect of human rights advocacy early on, especially as it relates to Colombia and its use of restorative justice in balance with retributive justice.

⁴¹ Beth A. Simmons, *Mobilizing for Human Rights* (Cambridge University Press, 2009).

⁴² Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' *International Organization*, 52 No. 4 (Autumn, 1998): 887—971.

internalization, the third stage, by which norm compliance becomes the dominant behavior. Margaret Keck and Kathryn Sikkink further elaborate the interactive development of human rights through their conceptualization of the ‘boomerang effect’⁴³, which they define as the strategy by which domestic groups bypass the state in order to form alliances with international allies that can then bring pressure back to bear on a norm violating government.

The fluidity of progress implied by the terminology of cascading justice belies, however, the irregular development of transitional justice more broadly in fits and starts. In her genealogical approach, Ruti G. Teitel delineates three phases of transitional justice, which respond to the specific political limitations on the perceived possibilities for imagining justice in a particular context.⁴⁴ The first phase occurred post-World War II with the Allied victors carrying out justice at the Nuremberg Trials. Teitel notes the post-WWI failure of German domestic trials and collective sanctions against the country to deter another war as key factors in the turn towards international law and its applicability to individuals as the appropriate response in extraordinary transitional circumstances.

In Phase II, post-Cold War transitional justice, the political transitions occurring in South America’s Southern Cone, Eastern Europe, and Central America ushered in a return to domestic trials and the novel creation of hybrid courts as the appropriate venues to enact justice in an international environment accommodating itself to the end of bipolarity and a new wave of democratization. It is in this second phase that Teitel notes the emergence of multiple conceptions of justice. While international law serves as a complement to domestic law and the latter is further bolstered as legitimate through the conception that the norm of criminal justice may contribute to nation-building, the limiting political conditions of transitional moments

⁴³ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Cornell University Press, 1998): 12.

⁴⁴ Ruti G Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Journal*, 16 No 69 (2003): 69—94.

themselves open up the possibility of seeking amnesty to secure peace in precarious environments. She notes:

Phase II moved beyond retributive justice as historically understood. The transitional dilemmas at stake in Phase II were framed in terms more comprehensive than simply confronting or holding accountable the predecessor regime, and included questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation, that had previously been treated as largely external to the transitional justice project⁴⁵

The restorative model that dominates this phase compromises the justice norm, as conceived by Sikkink, in favor of approaches that prioritize truth over criminal justice. Altering the metric of transitional justice's intended outcome—effect on rule of law versus effect on nation-building efforts, comprising peace and reconciliation—increased the mechanisms available to countries in transition. Importantly, Teitel draws the distinction between the application of retributive justice in the first phase as intended to perform justice and justice as a secondary aim in the use of truth commissions primarily intended to secure peace in the second phase. While truth-commissions, like trials, were motivated by the goal of deterrence, it was similarly aspired that they would contribute to dialogue between victims and perpetrators and the establishment of an historical record in a nod to preservative justice. Nevertheless, by her logic, the limited use of criminal prosecution, in favor of alternative mechanisms, solidified an antagonistic relationship between the goals of justice on the one hand and peace on the other.

The third phase is characterized as steady-state transitional justice, in which the use of transitional justice mechanisms are extended to situations beyond the exceptional settings of post-conflict environments, as well as normalized as a consequence of this very expansion and the conventionalization of transitional justice discourse. For Teitel, current developments in transitional justice are exemplified by the establishment of the International Criminal Court

⁴⁵ Ibid. 77.

(ICC) and the attendant return of Phase I international law as arbiter in situations of both peace and war. Lamenting the conflation of human rights law and the law of war, she notes the limited ability to critique an expanded discourse of transitional justice that cloaks itself in humanitarian terms in order to justify increased political discretion, politicization, irregularity in procedures, and unambiguous deviation from extant law in the application of justice.⁴⁶

In a critique of Teitel's genealogical approach, Paige Arthur suggests that weaving the history of transitional justice requires resisting the attribution of ideas related to the field to past periods in which those ideas may not in fact have been held.⁴⁷ Beginning the transitional justice narrative with a first phase following WWII obscures the profound significance of "transition" as recalling a specific phenomenon at the moment transitional justice is actively being conceived. For Arthur, the transitions from dictatorship to democracy that began in the 1980s lent legitimacy to certain mechanisms while limiting others given the tense environments in which these countries sought to balance peace and justice. In this way, compromise under exceptional situations is definitional to transitional justice itself. The victors' justice enacted at Nuremberg was not tenable in a new environment in which stability considerations weighed heavily on newly established regimes. While both scholars rightly understand transitional justice as responsive to limiting political conditions, Arthur's historical placement of transitional justice as a concept emerging under the specific conditions of transitions from dictatorship to democracy is a reminder of what mechanisms were meant to effect and how they are contextually bound. She proposes, thus, that transitional justice as originally conceived cannot be understood apart from its relation to democratic aims and challenges whether the legitimacy of the mechanisms that

⁴⁶ Ibid. at 92.

⁴⁷ Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly*, 31 (2009): 328.

came to dominate the field would maintain under transitions of a different type.⁴⁸ Legitimacy, she reminds, restricts the imagination in transitional situations.

In Teitel's words, nonetheless, transitional justice became diffused throughout the world as "secularized religion without law."⁴⁹ And it is here at this moment of normalization and universalism that transitional justice must be questioned; what are the legitimate mechanisms available to countries in transition? The works of Teitel, Arthur, Finnemore, and Sikkink offer important insight and overlap, yet diverge at specific moments or are incomplete in capturing current international norms and dynamics that would seek to obligate the structuring of transitional justice policies in diverse contexts.

Whereas Teitel identifies the Nuremberg Trials as exemplifying the heyday of criminal accountability⁵⁰ and international legal responses to rights abuses, this moment is, for Sikkink, a blip in the history of the justice cascade, establishing a precedent, but otherwise moving undertow as the international conventions that followed WWII prioritized state responsibility while extending immunity to individuals.⁵¹ Interestingly, as Sikkink identifies the justice norm as gaining momentum in a post-Cold War world, Teitel emphasizes the supplanting of justice for mechanisms seeking peace. The differences are substantial when considering why such a misalignment occurs. While Teitel's narrative focuses primarily on the international conditions driving the development of transitional justice, activism on behalf of human rights and the justice norm is at the center of the justice cascade and the principal force motivating Finnemore and Sikkink's norm life-cycle. What Teitel identifies as moving away from legal accountability

⁴⁸ Transitions to democracy can be set in contrast to transitions to socialism, which may favor distributive justice, eschewed in the post Cold War context, but as a particularly salient point for countries, such as Colombia, in which the transition may require overcoming the structural conditions that led to conflict.

⁴⁹ *Supra* n 44 at 82.

⁵⁰ *Ibid.* 74.

⁵¹ *Supra* n 38.

through the devolution of control over transitional justice from the state to civil society, Sikkink recognizes as the pivotal moment for norm entrepreneurs to push forward the justice norm and create a critical mass of advocacy and support on behalf of the norm. While Sikkink mentions the concurrent rise of alternative mechanisms, such as truth-commissions, she does not, in contrast to Teitel, suggest that their implementation amounts to sacrificing justice in the name of truth for peace.

The divergent narratives lead to a muddled concept of transitional justice and how it is to be understood as governing transitions today. The creation of the ICC in 1998 and the entering into force of the Rome Statute four years later represent for Sikkink the convergence of the precedent set by the Nuremberg Trials and the use of domestic and foreign trials to hold individuals criminally accountable for abuses.⁵² Equally, Teitel recognizes the ICC as epitomizing a third phase of transitional justice and a return to the first phase prioritization of international legal responses.⁵³ Yet, the normalization of transitional justice in Teitel's terminology, or the internalization of the justice norm, if using that of Finnemore and Sikkink do not lend themselves to a critical assessment of the contemporary balance of transitional justice mechanisms. Indeed, while Teitel's genealogical approach makes mention of the application of transitional justice mechanisms in diverse environments, including transitions to peace, it does not account for how the field and the mechanisms it touts may be responsive to these new contexts. Likewise, Sikkink's mention of the criticisms mounted against the court does not alter what seems to be the infinitely forward moving momentum of the justice cascade throughout its life cycle or propose how it may be understood alongside alternative mechanisms.

⁵² Ibid. at 97.

⁵³ Supra n 44 at 90.

If in theory the predominance of individual criminal responsibility is accepted, its place at the top must be problematized by its results in practice. Apart from questioning the application of transitional justice in contexts outside of transitions to democracy⁵⁴, Arthur challenges the empirics behind transitional justice claims. Recent research has responded to the empirical gap through quantitative and qualitative analyses of case studies that seek to elucidate the causal mechanisms at work in transitional justice policies and the intended outcomes pursued by the same.

Prescient of the criticism facing criminal prosecution based on its results in transitional societies, Sikkink dedicates a chapter of *The Justice Cascade* to the effects of human rights prosecutions in Latin America and another to their global effects.⁵⁵ Using data from Latin America, she finds no evidence to suggest that prosecutions affect democracy in either a positive or negative way, though she notes that the region used trials extensively and there have been few democratic reversals, a weak argument of correlation and not a strong indication of causation. Similarly she suggests it is difficult to contend that prosecutions engender greater conflict, given the diminishing number of sustained conflicts in the region,⁵⁶ and notes the positive effects of prosecutions on establishing rule of law. She finds that prosecutions do have a positive effect on a country's human rights record, further specifying that while countries with greater experience with democracy are more likely to hold trials, this experience does not account for improvements

⁵⁴ Of significance is the contention made by historical justice practitioners that transitional justice is determinedly narrow and fails to take a long-term view of a transition, focusing on prosecutions and reparations instead of the necessary elements of social restructuring. *Supra* n 47 at 362.

⁵⁵ Her definition of prosecution is expanded to include all elements of the process, such as indictment, extradition, trial, etc, and does not necessarily exclude prosecutions that did not end in a conviction. While she departs from the assumption that each phase of the prosecutorial process has an effect, such a definition may further complicate the isolation of what leads to satisfactory retributive justice from the perspective of victims, though this is not her aim.

⁵⁶ Colombia is, of course, an outlier here. It is important to note that she refers to conflict in the sense of armed conflict and not necessarily as non-reconciliation.

in human rights. She likewise finds that countries that had both prosecutions and a truth commission showed greater improvement in human rights than countries with just prosecutions.

Turning to the global effects of prosecutions, Sikkink similarly finds that they do help to improve human rights conditions, especially when persistent and frequent. Similar to the effects seen in Latin America, prosecutions along with the presence of a truth commission improves human rights conditions more than prosecutions alone. She finds that prosecutions in countries transitioning from civil war are not more prone to lead to a worsening in human rights.

Interestingly, her data show an impact across borders, as repression decreases in a transitional country if four or more of its neighbors have prosecution activity even if that country does not.

The positive effects Sikkink finds for prosecutions on improving a country's human rights records are contrasted in part by the general results of Andrew G. Reiter, Leigh A. Payne, and Tricia D. Olsen's study on the impact of transitional justice mechanisms in 161 countries from 1970-2007.⁵⁷ They find that trials⁵⁸ do not have a statistically significant effect on human rights and democracy on their own, but when trials are coupled with amnesties, or combined with amnesties and truth commissions, improvements can be seen in both areas. Similarly, they find that amnesties alone do not have a statistically significant effect and the use of truth commissions by themselves negatively affect human rights and democracy. Their results lead them to suggest an holistic approach to transitional justice, which they demonstrate does, in the long run, have a positive effect on democracy and human rights, through its incorporation of multiple mechanisms that balance accountability with forgiveness for crimes deemed less grave. Likewise, they signal a need to carefully parse out the characteristics of truth commissions that may have a positive or negative impact on human rights and democracy and suggest the

⁵⁷ Andrew G. Reiter, Leigh A. Payne, and Tricia D. Olsen, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace 2010).

⁵⁸ Trials here differ from Sikkink's definition and are limited to those cases that led to verdicts.

sequencing of mechanisms, such as amnesties followed by trials, that may allow for the greater success of transitional justice overall.

While the previous studies focus on the end goals of democracy, human rights, and rule of law, Elin Skaar addresses the glaring lack of research on the relationship between transitional justice mechanisms and reconciliation, the empirics of which are complicated not only by conceptual multiplicity, but also the limited timeframes available in which to gauge outcomes.⁵⁹ Engaging with the concept of reconciliation requires first questioning the way in which it is understood; according to Skaar, this can range from the political, moral, and religious and can be imagined as a goal, a process, or both. It can occur at the macro and micro level. Her general findings suggest that empirical research to date is inconclusive on the relationship between transitional justice mechanisms and their intended outcomes. Regarding trials, she states that simply not enough time has passed in most cases to make a judgment on their effects. And, significantly, she notes the difficulty of tracing the mechanisms by which trials might affect reconciliation given their primary use for different aims. As such, research tends to draw conclusions on the reconciliatory effects of trials as ancillary to such goals as reduced repression and positive effects on democracy.

Turning to alternative mechanisms, Skaar finds equally inconclusive evidence to support claims of their fostering reconciliation. In looking at the evidence of amnesties' possible contribution, she finds that there have been limited single case studies on their effects and that parsing out the effects of amnesties is complex, given the difficulty of attributing outcomes to an amnesty and not local processes that emerge in response to the amnesty itself and a perceived lack of official state response to violence. In discussing truth commissions, she notes, similarly to trials, that studies do not determine reconciliation as the specific end goal, thus leaving

⁵⁹ Skaar, *supra* n 2.

improvements (or regressions) in human rights or democracy as correlates of reconciliation and summarizes the contradictory findings of studies that fail to lead to a determinate answer on if truth commissions positively or negatively affect either. She attributes the limited empirical evidence to three principal factors, including a too-short timeframe in which to assess outcomes given their recent employment, a reliance on anecdotal evidence and moral convictions, and a reliance on the reception of a commission's report as a marker of its success or failure, leaving such studies short-sighted and unable to capture any possible long-term dynamics of reconciliation.

The results of these studies are sobering for human rights and transitional justice advocates that have been criticized for their faith-based, rather than fact-based, championing of the value of transitional justice mechanisms in societies trying to redress past injustices. While such empirical studies do not provide a definitive answer on what mechanisms are right or wrong in a given context, they do suggest the need for practitioners, advocates, and academics to more sincerely examine the intentions and effects of transitional justice policies. As a first step, there is a striking need for greater conceptual and causal clarity. As Skaar notes,

In the transitional justice literature, concepts such as truth, justice and reconciliation, in addition to carrying a multiplicity of meaning, are often treated simultaneously as independent variables and dependent variables⁶⁰

Disentangling the concepts is a difficult, but necessary task, if policies are to be designed to specific ends and, likewise, if the impact of mechanisms are to be understood. Similarly, it is necessary to recognize that these mechanisms do not necessarily operate uniformly at the international, national, and local levels and their impacts must be valued in both the short and long terms.

⁶⁰ Supra n 2 at 101.

Calls for a comprehensive framework for understanding key conceptual relationships between and outcomes of transitional justice mechanisms in turn highlight the need to re-examine the relationship between human rights and transitional justice and the demands they make upon countries in transition. In a criticism of contemporary human rights advocacy, César Rodríguez-Garavito identifies what he observes as five problems within the human rights movement.⁶¹ The first relates to the verticality and rigidity of both human rights discourse and the movement itself. The second is its tendency towards over-legalization, which he perceives as exclusionary in part due to the technical barriers it raises to access, utilization, and participation. The third criticizes the movement's work to adopt legal frameworks as an end in and of itself and as such failing to register the impact for better or worse that they engender. The fourth notes the glaring disparity between the Global North and the Global South in terms of access to and decisions about funding and the disproportionate power relations that result. Lastly, he calls into question the failure of the movement to empirically assess the impacts of the norms that it promotes.

These criticisms are central to the need to distinguish the transitional justice field from human rights and assess how transitional justice can and should be responsive to such commentary. In her genealogy, Teitel notes that the transitional justice field incorporated the rhetoric of human rights in the second phase, although integrated within a restorative approach sensitive to the limiting political conditions of the time.⁶² The peace versus justice debate that mars the distinction between transitional justice and human rights rests upon the conceptual bounds of each term and their relation. Does the use of alternative mechanisms truly sacrifice justice in the name of peace, or is peace more intimately and integrally related to justice than an

⁶¹ César Rodríguez-Garavito, 'The Future of Human Rights: From Gatekeeping to Symbiosis,' *Sur International Journal on Human Rights*, 11 No 20 (June/December 2014): 498—509.

⁶² *Supra* n 44 at 81.

inflexible human rights movement may allow? Indeed, as Arthur eloquently states in opposition to the just desert theory of punishment:

It may be argued, however, that what made the field of transitional justice distinct from human rights was its addition of causal beliefs about facilitating a transition to the principled beliefs of human rights actors...about right and wrong. Resolving that tension by placing decisions about justice squarely in the sphere of international law might, on that definition, effectively announce the dissolution of transitional justice itself.⁶³

Her statement is an important reminder of the exceptional circumstances under which transitional justice mechanisms are put into practice. While the justice cascade has seemingly brought a tide of retributive justice, calculations must still be made. Even the ICC, heralded as an enforcer of human rights and a site of individual criminal accountability, is conscious of this particular role as mediator in transitional situations.

Illustrative of this point is the Court's activity in Colombia and the scrutiny it places upon the country as a signatory of the Rome Statute. Though Colombia ratified the Rome Statute in 2002, it exempted itself from the Court's war crimes jurisdiction until 2009. The ICC has been credited as heavily influencing transitional justice policy in Colombia. Indeed, the International Center for Transitional Justice (ICTJ) has noted the stated exception as driven by concern over its interference in future negotiations with the AUC, while likewise heralding the Court's affect on public discourse that now generally accepts amnesty and pardons as incompliant with international law.⁶⁴ For years the Prosecutor's Office has maintained an open preliminary investigation into grave violations of human rights and crimes against humanity occurring after 2002 and war crimes after 2009. In comments made regarding this investigation, James Stewart, the Deputy Prosecutor of the ICC, noted the Prosecutor's interest in the case is limited to the use

⁶³ Supra n 47 at 363.

⁶⁴ International Center for Transitional Justice, 'Colombia: Impact of the Rome Statute and the International Criminal Court, *The Rome Statute Review Conference*, (June 2010, Kampala).

of criminal prosecution as a tool of transitional justice.⁶⁵ The critical question relates to whether domestic proceedings within Colombia satisfy its international obligations, thus proscribing further ICC proceedings under the principal of complementarity.

The Deputy Prosecutor makes clear the Court's concerns regarding the possibility of suspended, reduced, or alternative sentences and their compliance with the law, as well as amnesties for crimes under the court's jurisdiction. Nevertheless, the Prosecutor, Fatou Bensouda, released a statement that is cautiously optimistic of the peace process and agreements made to date. Significantly, she makes mention of the possibility of her using her discretion in not pursuing a case if it falls within the interests of justice, in consideration of victims' interests and the gravity of the crime:

Today, I have learned of the latest developments in Havana where the Government of Colombia and the FARC-EP have jointly taken a significant step towards ending the decades-long armed conflict in the country. Any genuine and practical initiative that achieves this laudable goal, while paying homage to justice as a critical pillar of sustainable peace, is of course welcomed by my Office. Our hope is that the agreement reached by the parties on the creation of a *Special Jurisdiction for Peace* in Colombia does just that. I note with optimism that the agreement excludes the granting of any amnesty for war crimes and crimes against humanity, and is designed, amongst others, to end impunity for the most serious crimes.⁶⁶

Her statement makes several critical points. The first recognizes the constraints of negotiating within a context of ongoing conflict by praising practicality in the design of initiatives. Secondly, she makes an explicit link between justice and peace as dependent and not antagonistic. Thirdly, she confirms the prioritization of international law in relation to specific crimes included in international conventions.

⁶⁵ James Stewart, "Transitional Justice in Colombia and the Role of the International Criminal Court," Deputy Prosecutor of the ICC, Keynote Speech (Bogota, May 13, 2015).

⁶⁶ Office of the Prosecutor, International Criminal Court, 'Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia,' (September 24, 2015).

Nonetheless, criticism within Colombia and in the human rights community persists. One of the most vocal opponents of Agreement on the Victims of the Conflict, Colombia's Inspector General Alejandro Ordóñez, lamented the document as an example of grave impunity. In his estimation, the draft agreement fails to ensure sentences that are proportional to the crimes committed nor do they require jail time; as such, the concerns of the ICC may manifest in the moving forward of an investigation into the country's failure to provide justice by international standards.⁶⁷ The concerns expressed by Ordóñez have been echoed by international NGOs, such as Human Rights Watch (HRW) and Amnesty International (AI), which are closely monitoring developments in the country. In its report "Colombia: Dealing Away Justice," Human Rights Watch concludes that though amnesty is off the table for crimes against humanity and serious war crimes, the alternative sentences fall well short of meaningful punishment that might offer justice to the abusers' victims.⁶⁸ HRW's Americas Director, Jose Miguel Vivanco, expresses skepticism that the agreement as currently devised could ultimately pass the careful scrutiny of the Prosecutor.

Returning to Rodríguez-Garavito's criticisms of the human right's movement, it is clear that a strict view of justice as retributive in transitional situations is, as Arthur warns, anathema to transitional justice itself. While the Prosecutor issues strong support for international law and standards relating to specific crimes, she, likewise, takes the perspective that transitions require flexibility in the face of political limitations. Approaching transitional justice in this way allows for the development of policies that may be more fully responsive to the complexities of countries in transition. Addressing the four additional criticisms, their application to transitional justice is equally significant. Admitting alternative mechanisms under the rubric of justice allows

⁶⁷ El País.com. 'Acuerdo anunciado en Cuba es a favor de los victimarios con sanciones groseras: Ordoñez,' (December 17, 2015).

⁶⁸ Human Rights Watch, 'Colombia: Dealing Away Justice' (September 28, 2015).

for the incorporation of marginalized viewpoints that might otherwise be lost to hegemonic legal frameworks; likewise, testing the results of each mechanism supports the idea of justice as a concept in practice and not empty rhetoric irrelevant to reality. Noting the disparity between the Global North and the Global South is critical to understanding how policies may be misguided and is first step in recognizing that a singular concept of justice is only discursively, not legally, defensible. While international human rights law provides an extensive framework to protect victims' rights to truth, justice, reparations, and non-repetition, the prevailing mechanism to ensure the satisfaction of these rights is not specified. As such, the discourse on human rights that purports a legal obligation of states to hold rights abusers criminally accountable through a strict approach to justice may inhibit rather than contribute to attaining the goal of peace. Retributive justice must instead be considered alongside additional transitional justice mechanisms and policy designed according to the empirical benefits derived from their implementation. While calling for a fact-based approach to transitional justice does not currently provide conclusive answers as to best practices, continuing to rely on faith based assumptions as to mechanisms' competency in transitional settings only serves to obscure causal relationships in transitional justice policy.

This section has sought to address a number of concerns beginning with the opportunities for justice allowed for by both human rights and transitional justice. While the tension between both fields is clear, it is principally a matter of method, rather than ideals that differentiate the course of action that either promotes in the pursuance of justice. The historical overview of the development of transitional justice is meant as a guide to the development of justice as a concept itself, from its retributive beginnings to its expansion to incorporate restorative ideas, along with its grappling with individual vs. collective implications and the sidelining of historical and

distributive aspects. Evaluating whether or not an agreement may lay the groundwork for a stable and lasting peace requires demarcating clear conceptual and causal relationships that may only be possible through continued and rigorous empirical research. While this section has not provided definitive answers on what justice is in Colombia, it should serve as a backdrop to an analysis of current negotiations that seek to determine the same. Through the lens of transitional justice, it is possible to trace Colombia's development of policies in step with the field in order to assess the country's progress towards achieving the ultimate aim of peace, as well as identify the critical disconnects between national initiatives and the lived realities of conflict that may inhibit its ultimate attainment.

The Domestic Course of Action

Though conflict has been a constant in Colombia since the mid 20th century, the state's response to violence has wavered as a consequence of changing international tides, as well as domestic pressures and circumstances. The duration of the conflict allows the unique opportunity to periodize state policy in one country over the long term in order to isolate how transitional justice has been manipulated into a particular form at a specific moment and why such policies may take the shape they do. In doing so, this section will further elucidate international dynamics related to human rights and justice as they have played out in the Colombian context, as well as the limiting domestic political conditions under which transitional justice policies have been forged.

Cycles 3, 4, and 5 will be focused on, though the divisions between them must be considered fluid, as the experience of transitional justice in one period deeply impacts the future of transitional justice policy in another. Cycle 3 corresponds to the peace processes that occurred

in the early 1990s with smaller guerrilla groups, Cycle 4 to the demobilization of the AUC in the early 2000s, and Cycle 5 to the current government negotiations with the FARC. Tracing the development of transitional justice policy in Colombia, however, requires first problematizing the concept of transition—*transition to what?*—and how the absence or identification of a clear transitional moment may impact policy prescriptions in the context of ongoing conflict.

As Teitel explains, the current and third phase of transitional justice is characterized by its normalization and expansion, or what she terms ‘transitional justice all the time’.⁶⁹ Yet, what she identifies as a contemporary state of exception in the field is in essence the enduring challenge of transitional justice in Colombia. In each cycle in which transitional justice mechanisms have been enacted to address a conflict that has spanned all phases of Teitel’s genealogy, there has never been a clear political transition. This is particularly salient when considering Arthur’s contention that too often the lens of transitional justice is used to assess mechanisms that may not have been contemplated under the transitional justice rubric at the time of their enactment. This section is conscious of such a critique and confesses that while each cycle is analyzed for the implementation of transitional justice mechanisms as currently understood, they might, more precisely, have been considered within broader policies related to national politics, peace, and security.

This point will later make clear the significance of Colombia’s approach to the termination of the conflict, its view of the conflict itself, and consequently, what could be seen as transitional justice delayed. Arthur eloquently approaches this issue in her analysis of the expansion of transitional justice to situations that include transitions to peace and the possible need to reconfigure both normative aims (democracy and justice) and the mechanisms that may be more adept at addressing the challenges facing post-conflict situations:

⁶⁹ Supra n 44 at 89.

Justice claims in such contexts are much more likely to revolve around reintegration of ex-combatants, ethnic cleansing, war crimes, internal displacement, property restitution, power sharing, wealth-sharing, and claims for self-determination. The measures of prosecutions, truth-telling, reparations, and reform of an abusive state apparatus should not be assumed to map neatly onto these very different practical problems—if it all.⁷⁰

Indeed, all such issues enumerated above have come into play in Colombia. The challenge to the field of transitional justice is to adapt to such environments in a way that empirically addresses outcomes and adjusts recommendations accordingly, if the field is in fact translatable to such differently complex contexts.

In addition to questions concerning justice in times of transition to peace, the case of Colombia further complicates an assessment of transitional justice mechanisms given that no such transition has occurred. As such, mechanisms designed for implementation in contexts in which a political transition has already taken place are, instead, being initiated in a country seeking a prospective transition to peace in an environment of ongoing conflict. Jemima García-Godos and Knut Andreas O. Lid specify the exceptional nature of the Colombian case and the particular frustrations of justice caused by the continuation of violence.⁷¹ They note that in this context, transitional justice policy has evolved in piece-meal fashion, contemplating various armed groups at distinct moments and through distinct terms, while likewise, and controversially, linking justice measures and victims rights with those traditionally enacted under the umbrella of peace and security with a focus on combatants. The complexity of the environments in which transitional justice mechanisms are expected to operate are of principal importance in turning to the three cycles contemplated in this section.

⁷⁰ *Supra* n 47 at 331.

⁷¹ Jemima García-Godos and Knut Andreas O. Lid, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia,' 42, No 3 (August 2010): 487—516.

Cycle 3: Early Demobilization of Guerrillas in the 1990s

Looking at the third cycle of transitional justice beginning in the 1990s, two policies stand out as the principal mechanisms used by the government to address the conflict situation: amnesty and pardon. These mechanisms, combined with an opening of the political establishment, characterize this period as one not principally focused on justice, but instead, on achieving partial peace. Both the political and legal benefits conferred to demobilized soldiers through the reform of the Constitution and instituted DDR program served to make peace more attractive than war for a number of ex-combatants and their armed groups.

In their work on the 1991 National Constituent Assembly to reform the Constitution (ANC), David Rampf and Diana Chavarro outline the exceptional state of affairs that led President Barco to utilize martial law to first introduce a referendum on a possible ANC.⁷² While the Barco administration's proposed reform of the Constitution in 1989 failed in Congress, it did lead the M-19 to reorganize as a political party and paved the way for continued negotiations with multiple guerrilla groups. Political participation as an incentive to laying down arms was key in the early demobilization of guerrilla combatants. Indeed, through the proposal of such reforms, the government effectively addressed the principal concern of the ideologically motivated groups that took up arms to challenge the traditionally exclusive political system. Likewise, support for such reforms was echoed throughout various sectors within the country. With the growth of a broad coalition of support, President Gaviria adopted the referendum by presidential decree in 1990, obviating the Congressional approval that had served as an obstacle under President Barco.

⁷² David Rampf and Diana Chavarro, 'The 1991 Colombian National Constituent Assembly: Turning Exclusion into Inclusion, or a Vain Endeavour?', Berghof Foundation, IPS Paper 1 (2014).

With the M-19 entering the legal political process and intensifying calls from movements, most especially student organizations, to rewrite a Constitution seemingly incapable of addressing Colombia's multi-faceted conflict, institutional reform became the leading means through which to achieve peace. According to Sergio Jaramillo, Yaneth Giha, and Paul Torres, all nine peace agreements signed between 1989 and 1994 contemplated political benefits for former guerrillas, including participation in the ANC, government support and guarantees for their legal political movements, and the appointment of two of the movements' members to Congress.⁷³ In the end, the ANC included 23 members of former guerrilla groups, or members of guerrilla groups in advanced stages of negotiations, including 19 from the Democratic Alliance of the M-19 (the political party of the former guerrilla group), 2 from EPL, 1 from PRT and 1 from MAQL.⁷⁴ The pardons and amnesties for political crimes as contemplated in Transitorial Article 30 of the new Constitution were intentioned to restore these guerrilla groups to legality. Jaramillo, Giha, and Torres characterize this period as one of forgiving and forgetting; while certain individuals faced criminal proceedings for non-political crimes, including kidnappings and homicides not related to the conflict, the legal benefits potentially applied to all demobilized combatants accused of crimes committed prior to the new Constitution.⁷⁵

Transitional justice policy was thus molded to contribute to the larger project of opening the political system and addressing the exclusionary institutions that had for decades permitted, if not fueled, the ongoing conflict. Rampf and Chavarro suggest, nonetheless, that the 1991

⁷³ Supra n 16 at 11.

⁷⁴ Donald T. Fox, Gustavo Gallon-Giraldo, and Anne Stetson, 'Lessons of the Colombian Constitutional Reform of 1991: Toward the Securing of Peace and Reconciliation?', in *Framing the State in Times of Transition* (USIP 2010): 473.

⁷⁵ Combatants enjoyed multiple benefits during this process. First and foremost, they (and their crimes) were given political recognition as a primary requirement for amnesty and pardon. Former illegal groups were incorporated within the political system, affording them both legal and political protections, while, likewise, allowing them to enjoy legal benefits under the DDR program. The legal and the political overlap in this instance, though it is necessary to draw the distinction as later the later process in Cycle 4 will provide legal, though not political benefits to demobilized AUC combatants.

Constitution has achieved only limited success in its intentions. While providing for political inclusivity and the use of new participatory tools (including plebiscites, referendums, recalls of officials, etc), elites threatened by the new system doubled down on their support of paramilitary groups to protect their grip on power; meanwhile, the two largest guerrilla groups, the FARC and the ELN, did not participate in the ANC or drafting of the new Constitution. These factors have greatly restricted the practice of democracy as imagined by the ANC and the new Constitution's contribution to peace.⁷⁶

In an additional criticism, Jaramillo, Giha, and Torres maintain that the measures adopted in the 1990s continue to represent an open wound within the country. By favoring peace over justice, the Colombian government largely ignored long-term commitments to rebuilding communities and providing adequate redress to victims. In their overview of the reparations program undertaken in the 1990s, Jaramillo, Giha, and Torres note the weakness of the collective reparations program, targeted specifically at infrastructure projects with little input from or involvement with the victims such projects were meant to assist. Likewise, they criticize the absence of an individual or administrative reparations program to provide compensation for the victims of the various demobilized groups. While the incorporation of former armed groups into the political system signified a long-overdue opening of the traditionally exclusionary system and the perceived dip in violence during the period 1992-1995⁷⁷ suggests the positive effects of the demobilizations, at least in the short-term, truth, justice, and reparations are, to current standards of transitional justice, startlingly absent or incomplete.

⁷⁶ Rampf and Chavarro discuss the unintended consequences of the new Constitution in turning political participation into a dangerous act, both by decentralizing control, thus creating new spaces for violent capture, but also by creating what were seen as imminent threats to long-held power, turning activists and civil society leaders into the targets of elites and their paramilitary allies. *Supra* n 72 at 16.

⁷⁷ *Supra* n 12 at 409.

The use of amnesties and pardons in order to ensure greater political stability while ignoring the needs of victims speaks volumes as to the government's approach to the conflict at the time. Firstly, it recognizes the political nature of these guerrilla groups at the same time that the exclusion of other armed actors, including the paramilitaries and drug traffickers, are seemingly cast apart in a conflict of another sort. Such an approach leads to a strategy of eliminating one spoiler at a time in an effort to secure peace gradually. A transition and possible reconciliation that considered the interests of victims was not yet contemplated. Peace in Colombia in the 1990s was not yet subject to the terms of transitional justice. While constitutional reform, the granting of legal and political benefits, and the use of amnesties and pardons were intentioned to alleviate conflict dynamics, justice was not an identifiable cause of peace.

In the years leading up to the demobilization of AUC forces, violence along with victim counts surged while protections for victims of the conflict remained insufficient from a human rights standpoint. Indeed, in her overview of laws related to victims rights and protections at the end of the 1990s and early 2000s, Nicole Summers highlights that while Law 387 of 1997 declared the responsibility of the state to care for displaced persons, it did not declare the state responsible for establishing protective mechanisms, nor declare a principle of victims' rights to be free from displacement.⁷⁸ Likewise, it did not provide for reparations. As Jaramillo, Giha, and Torres contend, the five minimal components of a reparations program, as established by international law—rehabilitation, compensation, restitution, satisfaction, and guarantees of non-repetition—were entirely absent during this period.⁷⁹

⁷⁸ Nicole Summers, 'Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict,' *Harvard Human Rights Journal*, 25 No 1 (Spring 2012): 223.

⁷⁹ *Supra* n 16 at 40.

Cycle 4: Demobilization of AUC Forces

As the country entered the new century bolstered by U.S. aid under Plan Colombia, the fight against illegal narcotics and terrorism intensified, placing the paramilitaries at the center of military efforts to halt the growth of illegal armed groups. Partly in response to the looming threat of extradition to the U.S., the AUC announced a unilateral ceasefire and began negotiations with the government in 2002. Unlike the earlier negotiations with guerrilla forces, the AUC was not conferred political status, but rather participated as an armed group at the margins of the law, altering from the outset the government's approach to both combatants and their victims. Indeed, while former guerrilla combatants were afforded legal and political benefits under the DDR program of the 1990s at the same time that victims' rights were largely not addressed, the cornerstone of the peace process with the AUC was the coupling of benefits for the demobilized with victims' rights in a single legal instrument.⁸⁰

That instrument, Law 975 of 2005, known as the Justice and Peace Law (JPL), was developed in response to criticism of a proposed alternative sentencing law from both the international community and domestic victims' rights groups.⁸¹ The JPL was intended to correct the imbalances of previous laws by explicitly providing for the needs of both the demobilized and their victims. Eligibility under the terms of the JPL, which include the possibility of alternative sentencing, between 5 and 8 years of jail time, or conditional amnesty, or pardon, requires a commitment not to re-engage in illegal activities, as well as to contribute to the demobilization of their armed groups and provide information concerning the whereabouts of

⁸⁰ It should be noted that while this process was designed specifically for the demobilization of AUC forces, guerrillas were equally entitled to participate through their individual demobilization. The requirements and benefits were applied indiscriminately of an ex-combatant's former armed group.

⁸¹ Though it failed in Congress, the 2003 Alternative Criminal Sentencing Law would have guaranteed amnesty for all demobilized former combatants on the basis that retributive justice would not foster reconciliation. *Supra* n 74 at 497.

disappeared persons. As Jaramillo, Giha, and Torres stress, eligibility does not, however, guarantee participation, as an ex-combatant must initiate the JPL proceedings against himself.

Law 975 created a variety of institutions with the dual objective of facilitating peace and the reintegration of demobilized combatants and guaranteeing victims' rights to truth, justice, and reparations.⁸² The National Attorney General's Unit for Justice and Peace is charged with conducting investigations and preparing indictments of those who wish to receive the legal benefits offered by JPL, as well as verifying ex-combatants' compliance with the conditions laid out. The General Ombudsman for Justice and Peace is designated as guarantor of the protection of victims' rights and due process for perpetrators. The National Commission on Reparation and Reconciliation (CNRR) was established to develop strategies for protecting victims' rights and nurturing reconciliation. Acción Social (later reorganized as the Department for Social Prosperity) is responsible for assisting procedures related to property claims and the unlawful occupation or possession of assets; likewise, the organization calculates and pays the compensation ordered by the Justice and Peace Courts, as well as administers the Administrative Reparations Fund. The Fund for the Reparation of Victims, under the direction of Acción Social, holds the assets surrendered by the demobilized combatants, as well as resources from the national government and national and international donations directed toward reparations. Eight Justice and Peace Chambers were established within the Superior Courts of Barranquilla and Bogotá; judges are charged with adjudicating the restitution of assets to victims, as well as determining whether the requirements of JPL have been met and if a combatant is eligible for an alternative sentence.

The two legal regimes created by the JPL have important implications for the administration of justice in Colombia. If an ex-combatant believes he has not committed a crime,

⁸² Supra n 16.

or that there if no evidence to the contrary, he must provide a statement to the Prosecutor's Office and is then eligible for conditional amnesty and the benefits afforded under the DDR program. Alternatively, if a combatant has committed a crime, he may initiate JPL proceedings and seek alternative sentencing. In doing so, these so-called *postulados* "commit to contribute to the clarification of the truth, refrain from illegal and criminal acts, and declare and surrender all economic resources and assets to sustain proper victims reparations."⁸³ Following the free account given by the *postulado*, the prosecutor makes formal charges and initiates proceedings. After concluding a sentence under regular criminal law, the judge will determine the reduction of the sentence, followed by a proceeding to discuss the necessary reparations to victims.

Yet, as Alexander Wilde notes, "As implemented by the government, the law has produced little justice through prosecutions and fallen short of a global truth about the paramilitary past or its ongoing character in the present."⁸⁴ By October 2010, there were only 4,479 *postulados* out of a total of 54,297 individually and collectively demobilized ex-combatants. Though only roughly 8% of the demobilized population has been subject to JPL proceedings, the state was institutionally unprepared for the extent of crimes that would be confessed, and thus open to prosecutorial investigation. The process has moved at a halting pace; the first sentence was handed down in 2010 and by 2012 only 14 sentences had been reached.⁸⁵

While the JPL has led to the registration of more than 400,000 victims through ex-combatants'

⁸³ Supra n 78 at 224.

⁸⁴ Alexander Wilde, 'Human Rights in Two Latin American Democracies,' in Mark Ungar and Katherine Hite, eds., *Sustaining Human Rights in the 21st Century: Strategies from Latin America* (Woodrow Wilson Center, 2013): 61.

⁸⁵ In an attempt to streamline the process, the Attorney General changed strategies in 2013 in order to prioritize cases based on the crimes of homicide, displacement, forced disappearance, recruitment of minors, and gender-based violence. Instead of moving through the details of each case one by one, "macro-judgments" would be issued against the heads of the AUC and their inferiors would be subsumed under these cases through context and the outlining of general patterns of violence. One such case involved the sentencing of 458 ex-combatants for 19,000 crimes in December 2015.

free accounts, Jaramillo, Giha, and Torres question whether the process has sufficiently served victims' interests or the establishment of the truth of paramilitary crimes.⁸⁶

In a criticism of reparations under the JPL, García-Godos and O. Lid note a number of concerns. In order to receive reparations directly from a perpetrator through judicial proceedings, the law places a significant burden upon the victim in being able to individually identify the perpetrator and requiring their presence in court in order to make and substantiate their claims through either witnesses or written records. Likewise, a claim cannot be processed until a judicial proceeding has been completed, if at all, given that the scheme requires a perpetrator have the funds required for reparations.⁸⁷ While the Administrative Reparations Fund, established in 2008, allows for individuals to seek reparations from the state with a lower evidentiary threshold, it does not allow for claims to be made by victims of state agents. These limitations have been only partially addressed in the passing of the 2011 Victims' Law.

The Victims' Law was enacted following intense criticism from both domestic and international human rights groups, as well as rulings from Colombia's Constitutional Court requiring the government to adopt sweeping changes to its policies concerning internally displaced persons and land restitution. In her detailing of the law, Summers highlights the aims of the statute to comprehensively address the needs of victims through explicit transitional justice legislation designed to advance the goals of truth, justice, reparations, while likewise

⁸⁶ The main criticism in this respect is due to the focus of JPL proceedings on individual crimes, which have left the wider network of criminal financing and support of paramilitary crimes untouched. In their assessment of the law, García-Godos and O. Lid stress the significance of truth as the most significant form of reparations according to the victims' groups they interviewed and identify both judicial and historical truth as playing a role in the Colombian case. The judicial proceedings requiring 'free accounts' have been successful in amassing large amounts of information, such that by 2009 2,109 graves containing the remains of 2,570 people had been found. Meanwhile, the Historical Memory Group established by the CNRR under Law 975 was assigned with the investigation of emblematic cases of the conflict in order to construct a history that incorporates multiple narratives. *Supra* n 71 at 507.

⁸⁷ Summers notes the limited number of victims that came forward to make such claims, only 235,000 by 2008, given both a fear of retaliation from the paramilitary, as well as the time and financial constraints the process placed upon victims. *Supra* n 78 at 224.

ensuring non-repetition of crimes and victimization.⁸⁸ She notes the achievement of the law in decoupling the acquiring of victim status from the judicial process of the accused victimizer, while simultaneously shifting the burden of proof from the victim in cases of land restitution to the accused usurper or current occupier. The Law also considers the role of private business in fueling the dispossession of land and allows for rulings against corporations that require their paying into the Victims' Reparations Fund if found guilty. Significantly, the law also recognizes the need to compensate victims of state agents. Nonetheless, as Summers highlights, providing the security needed to make coming forward as a victim and claiming one's rights a safe endeavor remain elusive in the presence of a weak or absent state. Likewise, the decentralization of the process, conceding judgment in cases to local jurisdictions, has allowed for continued elitism favoring businesses and rampant corruption.

In a final criticism of the law, Summers recognizes the failure to incorporate substantial truth-seeking mechanisms as part of the reparation process as ultimately defeating any attempt at adequate material or symbolic reparations. The Victims Law succeeded in ushering in a new era in truth-seeking through its absorption of the functions of the CNRR and the Historical Memory Group it created, along with the establishment of the Center for Historical Memory, which publishes frequent reports and makes claim to various strategic objectives, including the fostering of societal understanding of the armed conflict, public memory, conditions for creating peace, and testimonial and documented legacy of the conflict.⁸⁹ Nonetheless, a comprehensive accounting of the conflict and its victims through the institution of a truth-commission has yet to be implemented. As García-Godos and O.Lid aptly remind, while the Justice and Peace process

⁸⁸ Ibid.

⁸⁹ Centro de Memoria Histórica, "¿Qué es el Centro Nacional de Memoria Histórica?" (January 28, 2014).

and the reforms initiated by the Victims Law represent significant advancements in terms of transitional justice in Colombia,

This opportunity must not blind us, however, to the need to address what Law 975 aims for—namely peace. As victim and victimizer are two sides of the same coin, without the effective demobilization and reintegration of illegal armed actors, the goals of justice and reparation for the victims of Colombian armed conflict are unlikely to be achieved.⁹⁰

While the JPL, along with the Victims Law, represent a watershed moment in Colombia in terms of its approach to transitional justice, the goal of peace has remained the priority in a pre-transitional environment in which violence and armed actors remain a constant. Transitional justice in this context is meant as an instrument of peace building and uniquely interwoven with DDR programs and an equal commitment to former combatants. Yet, taking stock of the process to date provides an underwhelming picture of success. Truth, as provided by the free accounts, has helped in concrete ways to unearth details on specific crimes, yet this judicial accounting is limited in both an historical and reparatory sense. Likewise, though the expansion of resources to assist in material reparations via alternative routes has eased the process for numerous victims seeking assistance, actual payouts have been both limited in number and quantity. Actual prosecutions have similarly suffered from a lack of expediency and breadth, while the reintegration of former AUC members must be cast in light of the tumultuous rise of alternative armed groups. These limitations on truth, justice, and reparations, along with reintegration, which are at the core of Colombia's approach to transitional justice, impart crucial lessons as to the institutional capacity for transitional justice within the country. These ideals and the reality of their efficacy in practice should inform analysis of the current government negotiations with the FARC.

⁹⁰ Supra n 71 at 516.

Cycle 5: Current Government Negotiations with the FARC

Ongoing negotiations revolving around the 6-point agenda have been the source of serious contention both within the country and internationally, as debates have centered on what justice and peace can mean in Colombia. The “Agreement on the Victims of the Conflict: ‘Comprehensive System for Truth, Justice, Reparation and Non-Repetition’, including the Special Jurisdiction for Peace and Commitment on Human Rights” focuses on ten principles: recognition of victims, recognition of responsibility, satisfaction of victims’ rights, victims’ participation, uncovering the truth, reparations, guarantees of protection and security, principles of reconciliation, and a focus on rights. It proposes the creation of a commission dedicated to uncovering the truth, which builds upon an earlier agreement between the FARC and the government that established the Historical Commission of the Conflict and its Victims (CHCV), a group of experts mandated with establishing an historical record of the conflict.⁹¹ The new truth commission will work to promote peaceful coexistence and non-repetition in tandem with a separate unit dedicated to the search for the disappeared. The Agreement likewise addresses the establishment of a Special Jurisdiction for Peace, the judicial chambers which will hear the legal proceedings against demobilized combatants.

The September 23rd joint communiqué on transitional justice details the two procedures contemplated by the Special Jurisdiction for Peace, one for those who aid in establishing the truth and recognize their responsibility and another for those who do not or do so with delay.

⁹¹ The CHCV completed its mandate in February 2015. Its final report, “Contribution to the Understanding of the Armed Conflict in Colombia”⁹¹ is an 809 page tome comprised of individual sections written by the 14 members of the Commission, offering multiple perspectives on the conflict and engendering criticism from some observers who question whether a report that fails to resolve a unified understanding of the conflict truly contributes to truth and reconciliation. The Commission’s final report raises important questions for a future truth commission to consider, including the possibility of achieving a singular truth and whether multiple truths can form the basis of reconciliation. Teitel addresses the issue of contested narratives, most clearly identifying transitional moments as periods of contestation in historical narratives and their ability to alter the social meaning of prior conflicts in order to reconstruct their present and future effects. *Supra* n 44 at 87.

Those who do contribute to the truth and admit their responsibility will not face prison time, but will instead face restrictions on their liberty for five to 8 years and will be required to participate in acts of reparation and reconciliation. Those who delay in admitting their responsibility and contributing to the truth will face 5 to 8 years of jail time. Those who do not recognize their responsibility are subject to between 15 and 20 years of jail time. Political and related crimes will be covered by pardons and amnesties in a future law to be specified.

While the agreements to date have developed a broad framework for transitional justice, seemingly incorporating truth, justice, and reparations, alongside reintegration, skepticism prevails. Cognizant of the criticism, President Santos has maintained that the agreement, while not perfect, does require justice, but justice as qualified by the restraints of peace.⁹² Critics contend that such concessions leave not only the state open to international litigation, but also the victims exposed to continued violations of their rights. Human Rights Watch has been most vocal in drawing attention to the disproportionality of an alternative sentence for gross violations of human rights that provides for no jail time.⁹³ Likewise, supporters of the agreements point out that much remains to be specified, including how judges, along with the cases they will adjudicate, will be chosen.

The current polemic regarding Colombia's transitional justice policy revolves around two specific tensions. The first responds to the debate between the relationship between peace and justice and the prioritization of one over the other. This tension corresponds with the equally contested relationship between human rights and transitional justice itself. Through its national policy, the Colombian government has seemingly given its answer. The exceptional

⁹² President Juan Manuel Santos as quoted in, 'Acuerdo de justicia no es perfecto, pero es el mejor que se ha logrado: Santos,' *El Pais* (January 7, 2016).

⁹³ Human Rights Watch, 'Colombia: Agreeing to Impunity: Government, FARC Deal Sacrifices Victims' Rights to Justice,' (December 22, 2015).

circumstances have led to policies prioritizing both peace and victims, while asserting that justice is not solely the domain of legal accountability. If justice is conceived in such a way, the second tension corresponds to the ability to implement related policies. Colombia's prior experiences with transitional justice should be instructive in this respect.

From earlier analysis of the JPL, criticisms revolving around issues of institutional incapacity and unpreparedness, which led to a process that adapted as it went along, should inform the current design of institutional framework. While victims may have benefitted through the expansion of their rights, the lack of their incorporation from the start, along with the lack of specificity related to case selection and eligibility of former combatants, led to volatility in public perception of the process and in participants' success in the programs. Likewise, an obvious, though important point remains to be highlighted: despite the enactment of various transitional justice mechanisms, Colombia remains at war. If peace has always been the metric for these mechanisms' success, it is reasonable to question whether they are apt to deal preemptively with transitions to peace, or how they might be more effectively designed.

Addressing the challenges of transitional justice to achieve its aims and the persistence of conflict in Colombia re-focuses the discussion towards what has been identified as the most promising route of research, local justice, and its ability to bridge the gap between mechanisms and outcomes. Putting justice into practice inherently requires imagining justice at the local level. Whether the debates between national and international standards of justice or human rights and transitional justice are resolved, the laboratory for the pursuance of peace is at the grassroots. Any form of justice that intends to build peace in Colombia must be cognizant of context; justice on the ground is not just a concept, it will in practice seek to ameliorate abuses in the complex reality of conflict. Whether retributive justice, truth seeking, or other transitional

justice measures satisfy victims' rights may depend on local dynamics and the varied experiences of the conflict. Similarly, local experiences of war should impact the understandings of the realities of instituting justice and peace in areas deeply affected by violence. While this section has sought to trace the development of transitional justice policy in Colombia and the way in which justice has been conceived at the national level, the following section intends to deconstruct the possibilities of justice and peace at the "community" level. It will contend that the lived realities of the conflict require a transitional justice policy attuned to local experiences in a country disparately impacted by the conflict and the armed actors that have sought territorial control.

Taking the Grassroots' Pulse

Increasingly, the standardized 'tool-kit' of transitional justice—the mechanisms that have come to be supported and exported by those in field—has been challenged by a re-focusing of policy outcomes on the people and communities they are meant to serve. 'Local' transitional justice contrasts the requirements of international norms with the desires and needs of victims on the ground, thus problematizing the disjunction between a burgeoning field and the subjects on which it stakes its claims. The critical questions that emerge in this instance are for whom is transitional justice speaking, and are victims' voices being heard? Likewise, a turn to the local in transitional justice policy requires shifting the unit of analysis from the national to the community, humbling policies that suggest cohesion in a nation state in which alternative institutions and disparate conflict realities have come to structure demonstrations of violence and peoples' reactions to them. Societal reconciliation and national peace thusly become distant

abstracts as resolution at the local level, contemplating the micro-dynamics of conflict and the victims it has registered, moves to the forefront of policy concern.

In their introduction to a comprehensive volume on local transitional justice, Rosalind Shaw and Lars Waldorf suggest that listening to the voices of victims and ‘localizing’ transitional justice leads to a destabilization of the field itself.⁹⁴ The intellectual and normative frames of transitional justice, they argue, are un-grounded in the realities of conflict situations, requiring not only the enumerating of lessons learned and best practices in a given environment, but a fundamental questioning of the transcendence of these frames as a whole. They raise the need for transitional justice to engage with affected persons in order to assess how mechanisms both address their needs and respond to their priorities in post-conflict settings. In their conceptualization, localized transitional justice is a place-based approach that makes the essential recognition that victims’ voices must not be subsumed by international standards or elite priorities. Likewise, they argue, customary law, which may govern in a particular locality, must not be conflated with the primitive, nor instituted as a nod to the traditional with a similar disregard for outcomes.

Their work highlights a number of significant points. First, while transitional justice may have made an of-recent turn towards the local, the case-by-case basis of this re-focusing has not yet significantly altered the field itself, leaving intact the frames that misguide the standardization of policy prescriptions. This issue is not only part and parcel of debates concerning the tensions between human rights and transitional justice and international standards and national policies, but likewise obstructs a self-conscious re-thinking of the field as a whole. Is transitional justice entering a new phase? Is it even the right field to address these post-conflict

⁹⁴ Rosalind Shaw and Lars Waldorf, ‘Introduction: Localizing Transitional Justice,’ in Rosalind Shaw, Lars Waldorf, and Pierre Hazan, editors, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010): 3—26.

concerns? Second, localizing transitional justice requires restructuring the priorities and practice of these mechanisms in order to ensure their responsiveness to the needs and desires of victims and local communities and their engagement with the same. Third, their place-based approach draws attention to the need to recognize conflict as heterogeneous, not only across, but within national borders. By approaching the use of customary law, they draw attention to the emergence of un-official channels that govern both conflict and its resolution. A place-based approach is sensitive to the realities of conflict and the forces that may drive those living within them.

Addressing the work of Sverker Finnström, in the same volume, they summarize:

Finnström describes what we might term a pragmatic pluralism in which people select, in different contexts and different historical moments, which of several strategies will best allow them to survive and to reconstruct their lives. ‘The much-debated issue about the restorative and retributive dimensions of justice,’ he argues, ‘is not really about any final either-or. Rather, in the moments of everyday life, it is a kind of acceptance of the complexities of the situation so that life can go on’⁹⁵

In Colombia, the first of these issues has played out in the previously discussed tensions between the two camps designated as either “friends” or “enemies” of peace. While the national government has chosen a path that aligns itself with international standards of transitional justice, eschewing the strict demands for prosecutions made by the international human rights movement in favor of policies that compromise on retributive justice in order to attain peace, these policies leave much to be desired in terms of their engagement with victims and local communities. Likewise, disaggregating the conflict in Colombia following a place-based approach brings to the surface the multiple realities of violence lived throughout the vast and unevenly affected territory.

⁹⁵ Supra n 94 at 22.

In their detailing of state institutions at the local level and their effect on victimization and justice in the conflict, Mauricio García-Villegas and Jose Rafael Espinosa suggest that what they term ‘institutional apartheid’—the privileging of one region over another—has led to the extreme vulnerability of the rights of Colombians in the peripherals of the country and their increased victimization compared to more favored areas.⁹⁶ Their measure of the efficacy of local official channels of justice, calculated as the relationship between the presence of career track judges and the successful prosecution of homicides in the area, reveal striking results. They find that municipalities with ‘low’ and ‘very low’ efficacy ratings generally correlate to areas in which there is a prevalence of coca crops, high levels of forced displacement, the presence of illegal armed groups, and higher percentages of Afro-Colombians and indigenous populations. The findings represent a vicious cycle in the conflict: state absence in traditionally Afro-Colombian and indigenous areas leads to the proliferation of armed groups and illegal economies that intensify the victimization of these vulnerable populations and lead to further state abandonment as armed groups increase their territorial control.

García-Villegas and Espinosa’s conclusion that transitional justice must consequentially incorporate a regional focus responds to a need to address institutional capacity in any policy that intends to mitigate conflict and begin to establish or restore state presence as a foundation for achieving peace. Nevertheless, their work remains cognizant of the parallel systems of justice and institutions that have developed concurrently in areas where the state has been absent. Recognizing the presence of both official and unofficial institutions within the country highlights the significance of what has been theorized as ‘wartime political orders’.⁹⁷ In his development of

⁹⁶ Mauricio García-Villegas and Jose Rafael Espinosa, ‘The Geography of Justice: Assessing Local Justice in Colombia’s Post-Conflict Phase,’ *Stability: International Journal of Security & Development*, 4 No 1 (2015):1—21.

⁹⁷ Paul Staniland, ‘States, Insurgents, and Wartime Political Orders,’ *Perspectives on Politics*, 10 No. 2 (June 2012): 243—264.

the concept, Paul Staniland suggests that a typology of such orders—who rules and how—is necessary in order to move beyond the description of conflict areas as violent and identify how power is both mediated and negotiated between contending actors in a particular conflict zone. The arrangements, he continues, have various implications on patterns of violence against civilians, governance, economics, and post-war politics.⁹⁸ Applied to Colombia, his typology contends that the distribution of territorial control of armed actors, along with the level of their cooperation, significantly shape conflict dynamics and necessarily influence post-conflict policies that must address these complex and multiple realities.

That order exists within conflict and that who is in control matters should be further elaborated for its significance in transitional settings. Accounting for regional variation in transitional justice policy must consider which armed group established order in a given area and how. Evidence from Colombia suggests that not only were paramilitaries more indiscriminate in their killing of civilians, they also enjoyed greater levels of collaboration with official state institutions.⁹⁹ Guerrillas, on the other hand, were more selective in their killing of civilians and worked against the state, creating new institutions, rather than capturing those already in existence. Research in this direction raises a number of issues for justice in Colombia.

First, the collusion between the state and paramilitaries demands greater investigation as the failure of the JPL process to fully dismantle the structure of the AUC left intact the corrupt and violent structures both official and unofficial that allowed for continued abuses. The consequences of this failure can be seen in the continued presence of paramilitaries and BACRIM throughout the country. Likewise, the FARC's establishing of order through unofficial institutions that carried out the functions of the state (such as an alternate justice system) must be

⁹⁸ Ibid. 243

⁹⁹ Supra n 26.

considered in a post-conflict setting. How is the state to react to these institutions into which populations in FARC-controlled areas have long been socialized?¹⁰⁰

Apart from consideration of these orders and institutions as they interact with the state is the second concern regarding their interaction with the populations within the areas under their territorial control. These areas are distinguished by varying levels and types of violence to which populations have been subject, along with the reactions to everyday life in these wartime political orders. In her study of the orders that emerge within internal conflict, Ana Arjona argues that re-focusing the unit of analysis to local communities will not only reveal the multiplicity of conflicts within one war, but will, likewise, help determine the success of interventions that seek to address the same. In her study of what she terms “wartime institutions”, Arjona contends localities must be the focal point of such research because of the ways in which war segments territory. She proposes a wartime social order typology that seeks a way to “conceptualize the emergence (and breakdown) of order as well as of the set of rules and arrangements that structure political, economic, and social interactions in war zones.”¹⁰¹ Her data on Colombia reveal the significance of wartime institutions in mediating issues related to public order and interpersonal conflicts and evidence the infrequency with which the courts were used. As Arjona’s work suggests, localities in conflict zones are socialized to solve problems through unofficial channels; where the state is absent, alternative institutions emerge. The reality of Colombia’s decentralization and the uneven experience of war over time and space have serious implications for post-conflict possibilities. She suggests:

¹⁰⁰ On this point, García-Villegas and Espinosa note, for example, that the FARC has been increasingly transferring administrative control in the areas in which they have established order to local community action boards. They suggest that the state imposition of formal institutions to replace these locally conceived justice procedures without first considering their possible functionality and complementarity in a post-conflict setting would be ill-guided. *Supra* n 96.

¹⁰¹ *Supra* n 3 at 1362.

The presence of armed groups brings about profound changes to local communities, shaping not only how war affects them (as victims) but also how they react to it (as agents). Variation in wartime social order, is therefore, likely to transcend the war, creating challenges and opportunities for reconciliation, reconstruction, and development.¹⁰²

Her research contends that local inhabitants have three options available to them in the presence of armed actors, either fleeing, resisting, or collaborating.¹⁰³ Their responses are the result of surviving in environments in which armed groups may establish their rule in ways that range from coercion and a strict reliance on violence to comprehensive rule in which the armed group becomes the de facto conciliator in a range of civilian affairs.

Civilian responses to the presence of armed actors and the wartime orders and institutions that develop and newly structure their lives have significant implications for future prospects of peace, justice, and reconciliation. One such challenge to the defining of justice in a context of war stems from the phenomenon of “vertical victimization” in which war incentivizes affected communities to privatize the use of violence through the politicization of private life. Vertical victimization challenges the simple victim-perpetrator dichotomy, muddying the practice of justice in environments in which the line between either has been blurred in a context of war. In her study of the limits of transitional justice in these instances, Keren Marín González documents events in a small Colombian community in which rumors contribute to the murder of neighbors, denunciations of local enemies as guerillas leads to their incarceration, and attempts to take advantage of demobilization benefits lead to false information that shuts down a school

¹⁰² Ibid. 1382.

¹⁰³ Ana Arjona, “One National War, Multiple Local Orders: An Inquiry into the Unit of Analysis of War and Post-War Interventions,” in Morten Bergsmo and Pablo Kalmanovitz, eds., *Law in Peace Negotiations*, No 5 (FICHL Publication Series, 2009): 126.

for being labeled a site of guerilla activity.¹⁰⁴ The solution Marín suggests in such cases is legal pluralism, the strategy likewise promoted by García-Villegas and Espinosa, in which official legal measures and alternatives, such as the community board, work in tandem to facilitate reconciliation and the mending of community ties. Marín states,

...this type of justice is above all else constructive; instead of working through penal channels that establish charges of innocence or guilt, it seeks a mechanism that allow the conflict to be negotiated and to simultaneously promote better living conditions¹⁰⁵

While the specific mechanisms that these boards use to achieve justice are not well enough enumerated, it should be of significance for the state to contemplate practices of justice that have emerged in communities that have for decades remained outside of official reach.

Further destabilizing the perpetrator-victim dichotomy, Shaw and Waldorf highlight the moral gray zones that often characterize intrastate conflicts, especially in instances of structural violence.¹⁰⁶ The consequences of being labeled as either may result in a person's depoliticization, obfuscating rather than contributing to an understanding of a conflict into which one may have been drawn due to political and structural reasons. In Colombia, the peace processes in the 1990s and the demobilization of the AUC forces in the early 2000s only partially addressed the structural conditions that have allowed for violence to continue for more than five decades. While the current process approaches the FARC as political opponents of the state, local communities under their control continue to face the stigma of being labeled as collaborators, terrorists, and equally, as innocent victims whose relationship with guerrilla forces is, in certain cases, stripped of its political underpinnings. Similarly, as Rosalind Shaw reminds,

¹⁰⁴ Keren Marín González, "Entre vecinos: retos de la justicia transicional a nivel local. El caso se la Sierra de la Macarena, Colombia," *El Ágora*, Vol 15 No 2 (July-December 2015).

¹⁰⁵ *Ibid.* 490.

¹⁰⁶ *Supra* n 94 at 8.

the victim-perpetrator dichotomy, in its failure to address pre-conflict injustices, complicates the linking of DDR with transitional justice where rights to benefits may be contested, thus encouraging resentment rather than reconciliation in fragile conflict and post-conflict environments.¹⁰⁷

Turning to the alternative response of resistance, Esperanza Hernández Delgado addresses the role of indigenous, black, and peasant communities in their own peace-building efforts, establishing the agency of those most directly affected by the war as independent from the both the state, armed actors, and international influence. She states:

These communities did not know the pacifist doctrine of Ghandi, Martin Luther King, or Mandela and yet from their needs and own processes they have created, adapted, and marked out grassroots peace initiatives, open to further improvement, in which peace has been conceived of as a defense of life, civil resistance to armed conflict, protections of the autonomy and self-determination of communities facing armed actors, political participation, grassroots development, a deepening of democracy, and a defense of culture, among other things.¹⁰⁸

Their acts of resistance and the forces against which these communities have resisted should be carefully considered in any discussion of justice and peace in Colombia. In her study of four such communities, Gretchen Alther highlights the role of these self-declared “peace communities” in providing an alternative path to building peace at the grassroots.¹⁰⁹ These most marginalized and victimized communities refuse to take up arms or collaborate in any way with any armed actor, be it the paramilitary, guerrillas, or the state; in turn, such defiance has turned them into targets of these same forces. Drawing on the work of John Paul Lederach, Alther

¹⁰⁷ Rosalind Shaw, ‘Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment, in Rosalind Shaw, Lars Waldorf, and Pierre Hazan, editors, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010): 111—134.

¹⁰⁸ Esperanza Hernández Delgado, ‘La paz y la no violencia adquieren significado propio en Colombia en las iniciativas de paz que construyen las bases desde lo local,’ *Convergencia Revista de Ciencias Sociales*, Vol 9 Num 30 (September-December 2002): 165.

¹⁰⁹ Gretchen Alther, ‘Colombian Peace Communities: The Role of NGOs in Supporting Resistance to Violence and Oppression,’ *Development in Practice*, 16 No. 3 (June 2006): 278—291.

proposes such communities as a necessary layer in an effort to achieve peace through reconciliation. Likewise, she acknowledges peace communities as the natural site for the resolution of the conflicts that they face, “Building peace from the grassroots rests on the idea that those who suffer most are those who best understand how to resist—and what resistance means.”¹¹⁰ Her work helps to re-orient post-conflict strategies towards support for communities as protagonists in the building of peace and safe spaces for life to go on.

If these sites of resistance are seen as a model for grassroots peace-building efforts, their methods, such as declared neutrality and a focus on participatory democracy, community organizing, and self-protection, should inform justice policies that seek to remediate the causes and consequences of conflict. Focusing on the community level brings to forefront the need to expand transitional justice policy to incorporate historical and distributive justice aspects that respond to the structural violences of the ongoing conflict. As Alther argues, support for peace communities may represent a strong bulwark against future violence, fostering the goal of non-repetition at the base of transitional justice methods. Justice and peace must thus respond to the multiple challenges facing these communities and the non-violent alternatives that they propose. Consequently, security, economic opportunity, and political rights enter into the matrix of what justice may come to mean in Colombia.

This section has sought to draw attention to recent literature arguing in favor of localizing transitional justice as a means of attuning policies to lived realities on the ground in order to improve the success of mechanisms employed by the field. The conflict in Colombia is fruitful evidence of the way in which such a re-orientation may come to destabilize the field itself, requiring the adaptation of its intellectual and normative frames. The idea of multiple conflicts within one conflict breaks down any national narrative and disallows for one-size fits all models

¹¹⁰ Ibid. 281.

across countries, let alone across a singular country. Re-thinking transitional justice from this perspective opens the door to conflict actors, restoring agency to those assigned within the common tropes of victims, perpetrators, innocent bystanders, etc. In this way, the effects of localizing transitional justice should be most felt by those for whom mechanisms are intended to aid. While the evidence of wartime orders and institutions and their effects is ample, accounting for them within transitional justice policy must be similarly scrutinized through empirical research.

In her summary of research to date, Skaar suggests that micro-level studies of justice at the local level—assessing how transitional justice mechanisms perform empirically—have offered the most valuable insights into achieving reconciliation in post-conflict societies. Yet, expanding upon Skaar’s understanding of local justice, limited to the processes originating within civil society that aim at restorative justice, may be the most significant challenge in localizing the field as whole. Specifically, it is key to draw a distinction between the concepts of local justice and localizing justice, as they entail unique, though related, challenges in both the design and testing of transitional justice policy.¹¹¹ Local justice can be understood as the practices that emerge within a locality, such as the use of community action boards in the case of Colombia, as alternatives to official processes where these are either absent or insufficient. Localizing transitional justice requires consideration of these local justice mechanisms, along with additional factors, such as the effects of wartime orders and institutions on victimization and participation in conflict, in order to re-orient policies towards a place-based approach. Indeed, while localizing transitional justice would, as García-Villegas and Espinosa recommend, oblige the Colombian government to assess a possible incorporation of community board action into future policy, it would likewise caution that local justice must be evaluated to ensure it

¹¹¹ *Supra* n 94.

complies with demands for respect for human rights, especially in the case of women and children, and is not enacted in a fetishism of the traditional.

In Skaar's determination, measuring the impact of local justice thus contends with the following challenge:

Unlike formal transitional justice mechanism, which have become an export 'industry' where international funding and international expertise has 'transported' various transitional justice mechanisms to virtually all corners of the world, local justice practices are rooted in local experiences and are therefore not immediately comparable¹¹²

The development of localized transitional justice policy is similarly strained by issues of comparability, compounded by the demands of a field that relies heavily on donor funding and expertise from international sources. In their study of the impact of truth commissions from the local perspective, Michal Ben-Josef Hirsch, Megan MacKenzie, and Mohamed Sesay identify three principal obstacles in bridging the international transitional justice paradigm with local perceptions of the mechanism in order to accurately account for their success from the community stakeholders' point of view.¹¹³ The first concerns the overlap between advocacy, scholarship, and practice, resulting in a severe professional and sociological bias that privileges certain international organizations over local partners, converting transitional justice into an elite effort that assumes a mechanism's benefit without the advantage of peer review or community input. The second calls into question the methodological bias towards surveys, focus groups, and quantitative data analysis that may further marginalize such groups as women and children. The third contemplates the epistemological challenge of arriving at shared understandings of such concepts as 'justice' and 'peace', suggesting that not only the methods of transitional justice, but also its language may not be translatable in varying contexts. Their work suggests there is a long

¹¹² *Supra* n 2 at 87.

¹¹³ *Supra* n 2.

road ahead for the localizing of transitional justice, yet, the optimism surrounding micro-level studies and their possible contribution to improving the success of transitional justice mechanisms should encourage continued research.

Localizing transitional justice in Colombia is an enormous undertaking that must be conscious of the multiple conflicts that have emerged within a war that has enveloped the country for decades. While this section has focused on the need for transitional justice policy to respond to local dynamics, including local justice practices and the effects of wartime orders and institutions as a starting point, aligning mechanisms with local realities in order to ensure their success must likewise contend with issues of gender, geography, age, ethnicity, etc. While wartime orders and institutions have a significant impact on such demographic considerations, transitional justice policy, from its design to its implementation, must be cognizant of such micro-data in order to design interventions that correspond to local needs rather than a normatively biased framework for justice. Re-orienting transitional justice policy towards the local recognizes the community as the starting point for reconciliation. In this way, justice in Colombia is invariably layered, contested, and a process that requires a fundamental re-thinking of both the conflict and a future peace.

Conclusion

A principal argument of this thesis is that without justice and reconciliation at the local level, peace in Colombia will remain elusive. Similarly, the achievement of these aims will require localizing transitional justice in such a way that reconciles international standards and domestic practice through the contextualization of justice in the communities that will ensure its success. While focusing on dynamics at the grassroots is a reminder of whom justice is meant to serve

and of the need to open safe spaces for marginalized voices in the design and implementation of transitional justice policy, this is not to say that local forms of justice should trump national and international practices. Indeed, local practices must too be analyzed for their legitimacy and respect of human rights, especially those of women and children. Instead, it suggests that in order for justice to serve the purpose of building peace, it must begin at the *community* level, with an understanding of the ways in which conflict has been experienced, lived, and resisted, as well as the socializing effects it has had on understandings of justice and daily practices in affected communities. Coming to terms with justice as a singular concept may be a fruitless task; it is not panacea. Instead, its contributions to peace must be viewed in tandem with efforts to ensure an end to the recourse to violence. It is a piece of the puzzle in the rebuilding of state and society relations and the structural conditions that have permitted conflict to define Colombian history for more than a half century.

Returning to the question of what justice is in Colombia acquires greater complexity when approached from a perspective that considers the various layers and voices that stake equal claim to determining an answer. A first step requires resolving tensions between standards as expressed by the international human rights movement and the transitional justice field. This thesis argues that the Colombian government has made its determination, favoring an approach to transitional justice that understands such interventions as inherently flexible to compromise under exceptional circumstances. National policy has eschewed a strict human rights understanding of justice as principally retributive in nature, instead focusing policies towards restorative measures and alternative punishments aimed at reconciliation and achieving peace in a country under severe duress.

Nevertheless the course of transitional justice in the country must be empirically assessed, as recent research argues, based on the empirical results of a mechanism's outcome in practice. While a call for a more fact-based driven field of transitional justice proposes methodological challenges, early studies suggest a prioritization of the community as the unit of analysis may significantly challenge the pre-conceived benefits of specific mechanisms. Continued research may help to illuminate the tangled relationships between such concepts as truth, justice, peace, and reconciliation in order to more aptly design policy to follow elucidated causal pathways.

Following the course of research laid out by such scholars as Shaw and Waldorf and Hirsch, MacKenzie, and Sesay, along with others focused on micro-level studies as the key to encouraging a re-thinking of transitional justice policy, will require academics, advocates, and practitioners to fundamentally re-asses the field. Evidence from Colombia suggests multiple avenues for continued research. How can transitional justice effectively operate within a context of continued violence and what additional peace-building policies should it be considered alongside? How can it operate to more effectively to contend with structural violences that belie calls for non-repetition and peace conceived of more broadly than as an absence of physical aggressions? Such questions are essential to ensuring interventions aimed at justice and peace remain aware of the environments in which they operate. Likewise, they underscore the need for efficacy in the design and implementation of transitional justice policy in the practical sense of prescribing mechanisms that will not only be successful, but in a realistic sense, financially feasible.

The importance of funding in conflict and post-conflict societies cannot be overstated. In Colombia, estimates suggest post-conflict policies will require more than 30 million USD.¹¹⁴ Directing funds towards mechanisms that will achieve their intended aims is a critical consideration. Concern for the verticality of the human rights movement and the elitism that pervades the transitional justice field must be addressed if more localized policies are to be developed. The marginalization of local voices that results from a hierarchy which places communities as the receivers of global knowledge without their participation in the design of policy only serves to further alienate transitional justice from the same, highlighting a critical disconnect between the multiple layers of justice in transitional settings. In Colombia, this disconnect became glaringly clear as both the demobilization of guerrillas in the 1990s, as well as the JPL processes unfolded. The failure of the collective reparations program in 1990s, as noted by Jaramillo, Giha, and Torres, stemmed in large part from insufficient consulting with the communities which were to receive the supposed benefits of infrastructure projects, a problem that has persisted under the JPL, which has been plagued by limited funds, along with incompatibilities between ex-combatants' skills and community needs.¹¹⁵ Likewise, fear and resentment have resounded in communities that have received demobilized paramilitaries without prior knowledge or preparation.

Bridging the gap between these layers draws attention to the critical role of local and international advocates and activists in making known the priorities and needs of communities, as well as the organizing capability of such communities themselves.¹¹⁶ In their study of obstacles impeding the success of reparations programs, RS Ratner, Andrew Woolford, and

¹¹⁴ El Pais, 'Congresistas piden dos puntos más del PIB para financiar el posconflicto,' (February 9, 2016).

¹¹⁵ Supra n 16.

¹¹⁶ Highlighting the role of international advocates and activists in such a way suggests both their privileged position and the need for the use of that position to garner support and attention for the affected communities they intend to serve.

Andrew C. Patterson, identify 23 steps to the claims process, from the identification of an actionable claim to judging that claim a success. In Colombia, while they note resistance from perpetrators and third parties, it is societal conditions that forestall the success of claims for reparations. This category is defined by continuing conflict, legal barriers, primacy of the claim compared to opposing interests, and an institutional unwillingness to move forward out of protective self-interest. They summarize, “despite middling success up to that point... various mobilization challenges existed in the form of deep societal divisions and imbalances of power, preventing the group from drawing upon its resources to surmount these obstacles.”¹¹⁷ It is precisely in the face of such challenges that Rodríguez-Garavito’s argument in favor of a human rights eco-system gains significant traction. He contends that a decentralization of the human rights movement to encourage greater collaboration and complementarity between international, national, regional, and local organizations will enable new leverage points to counterbalance continuing rights abuses. Symbiosis may be the key to enlivening what has been termed Colombia’s ‘immobile present’.¹¹⁸

The anecdotal ‘vaccines against violence’ that opened this thesis were intended to treat the causes and symptoms of conflict in mid 1990s Bogotá and formed part of a larger campaign to build a “culture of citizens”. This concept embraced actions aimed at constructing a peaceful co-existence, feelings of belonging, respect for a shared heritage, and the recognition of the rights and obligations of being a citizen. Intended to in part reduce levels of violence, Stacey L. Hunt in her study of the campaign, questions its success in achieving this explicit goal. What it did do, however, was fundamentally alter the way in which the state and its citizens conceived of themselves and of each other, legitimizing the state despite continued violence and educating

¹¹⁷ Supra n 2 at 253.

¹¹⁸ Supra n 84 at 38.

citizens to actively assume functions, such as security and justice, traditionally provided by the state.¹¹⁹ Conflict has long been the principal architect of state and society relations in Colombia; the challenge for transitional justice policy will be to respond to the resultant institutions and structural conditions. Justice and peace may be pre-conditioned by the recognition that neither is synonymous with an absence of violence. Defining either must, instead, begin with knowing the conditions they are meant to treat in the communities that have too long suffered chronic insecurity and marginalization.

¹¹⁹ Stacey L. Hunt, “Cultura Ciudadana. Una nueva Mirada al límite entre el estado y la sociedad,” *Íconos Revista de Ciencias Sociales*, Num 52 (May 2015): 119—141.

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