

5 The Transitional Justice Framework agreed between the Colombian Government and the FARC—EP¹

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For Katia, a bright shooting star

Introduction

Colombia has experienced a violent conflict for more than five decades. Since the 1980s, successive governments have implemented differing justice frameworks in their efforts to achieve peace (see Chapter 4). The government of President Juan Manuel Santos negotiated a peace agreement with the FARC—EP (Revolutionary Armed Forces of Colombia). Peace talks began officially in November 2012, with the parties reaching an agreement on 24 September 2016. While the Constitution did not oblige the President to subject the agreement to public vote for its approval, President Santos publicly announced at the beginning of negotiations in 2012 that the agreement would be subject to a plebiscite. This was considered important for the political legitimacy of the agreement.

When the Colombian Constitutional Court reviewed the constitutionality of the plebiscite in July 2016 (i.e. prior to it taking place), it ruled that the agreement could be implemented by the President only if the plebiscite resulted in its approval, expressed through a vote of the citizens (Corte Constitucional de Colombia, 2016). In addition, the Colombian Congress had previously approved a constitutional amendment to give extraordinary powers to the Santos administration to implement the institutions and procedures that the agreement called for, and the Congress also had the power to approve these laws using a ‘fast track’ mechanism.² Thus, the implementation of peace agreements depended on the approval of the agreement through the plebiscite (Congreso de Colombia, 2016a).

On 2 October 2016, Colombians voted in a plebiscite and rejected the agreement by a razor-thin margin.³ Actors in Colombia and overseas were perplexed by the results of the plebiscite; it was expected that the possibility of peace would produce a consensus among Colombian citizens in favour of the agreement. The vote of the plebiscite against the agreements was not only a vote against peace; it reflected opposition to the demobilization incentives

given to the FARC—EP in the agreements. Some segments of the Colombian polity feared losing their economic and political advantages (acquired legally or otherwise), and other citizens opposed the agreements because they opposed Santos's policies in general, rather than the peace agreement specifically.

The vote against the agreements can be seen as evidence of a reduction in the state's legitimacy and the outcome of a dangerous polarization in Colombian society fuelled by some political parties, such as the Centro Democrático⁴, led by former President Uribe. A discourse of scepticism and fearmongering, coupled with a successful misinformation campaign, framed the proposed peace as a descent into a communist dystopia (La Silla Vacía, 2016) that would erode traditional family values. This proved effective in mobilizing Colombians against the agreement.

The success of the campaign against the agreement was aided by the Santos administration's ineffective communication of the agreement to large sectors of the population, and the failure of some political parties to adequately mobilize their constituents in favour of the agreement (Revista Semana, 2016). The irony of the outcome of the vote is that the agreement was in fact approved in the majority of the regions which are most affected by the violence (Registraduría Nacional del Estado Civil, 2016; Fundación Ideas para la Paz, 2016a). The idea of retributive justice and its 'absence' from the agreement was one of the main arguments made by the advocates of the campaign against the agreements, and one of the most important issues in the political, juridical, and ethical discussions in Colombia and abroad with regard to the transitional justice taking place in the country. An amended agreement was signed and ratified in November 2016 (see Chapter 3).

In this chapter we analyse the transitional justice framework defined by the peace agreements between the FARC—EP and the Colombian Government, as captured in point five of the final agreement signed in Bogotá in November 2016: the '*Sistema integral de verdad, Justicia, Reparación y No Repetición, incluyendo la Jurisdicción Especial para la Paz; y compromiso sobre Derechos Humanos*.'⁵ This system is designed to regulate the transitional justice framework agreed upon in the accords. It aims to recognize the rights of victims, impose certain judicial and extra-judicial burdens upon the members of the FARC—EP and other armed actors responsible for violations of human rights, and establishes guarantees of non-repetition through different mechanisms.

In analysing the transitional justice framework, we examine the principles that inspired the agreements on victims and four of the key mechanisms described in it: the Commission for the Clarification of Truth;⁶ the Unit for the Search for Missing Persons in the Context and as a Result of the Conflict;⁷ measures on Comprehensive Reparation for Peace Building; the Guarantee of non-Repetition; and the Special Jurisdiction for Peace.⁸

The Special Jurisdiction for Peace and its emergence as an iteration of the previous transitional justice frameworks implemented in Colombia is explored in the section which follows. In the final section, we analyse some of the challenges to the implementation of the transitional justice agreements,

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reflecting on the uncertainties surrounding the implementation of the agreements, and how this may provide legal stability (or instability) for different constituents and for peace in Colombia.

The principles and mechanisms defined by the transitional justice agreement

The agreement on the victims of the conflict starts with the recognition by the government and the FARC—EP that the main aim of this agreement is to compensate victims. In addition, it states that all the measures described in the agreement are intended to be comprehensive. This introductory portion of the agreement recognizes that the armed conflict in Colombia has multiple causes, and has resulted in great harm and suffering for the population. It describes the kinds of harms produced by the violence, including forced displacement, deaths, disappearances, sexual violence, and trauma; and it lists the different population groups affected by these harms, including women, children, and the poorest and most vulnerable population sectors (including minorities, Romani, indigenous groups and Afro-descendants) (Gobierno de Colombia y FARC—EP, 2016).

The recognition of all the victims of the conflict and of the responsibility of different groups—not only the FARC—EP and the state—for the victims' conditions is one of the guiding principles of this agreement. The agreements provide for the participation of victims to assure the satisfaction of their rights, the clarification of the truth, reparation for victims, guarantees for their personal safety, and reconciliation, as well as the guarantee of non-repetition.

A human rights perspective informs the agreements reached and the transitional justice model agreed on by the parties. This rights perspective is a lens through which the harm that the armed conflict has caused victims is acknowledged, and informs the approach through which the Government, the FARC—EP, other groups, and society in general aim to respond to victims' demands and needs.

The transitional justice system agreed in the peace agreement is considered to be holistic. In a holistic approach, transitional justice mechanisms are complementary, in the sense that all efforts to protect the rights of the victims to justice, truth, reparation, and the guarantee of non-repetition are interrelated and not exclusive of each other (de Greiff, 2012).

Therefore, the agreement considers that justice cannot be achieved in the absence of any of the proposed mechanisms or the victims' rights described above—all of which are regarded as necessary for justice. The comprehensive system thus entails different mechanisms such as: The Commission for the Clarification of Truth; The Unit for the Search for Missing Persons in the Context and as a Result of the Conflict; Measures on Comprehensive Reparation for Peace Building; and the Guarantees of Non-Repetition (see Figure 5.1).

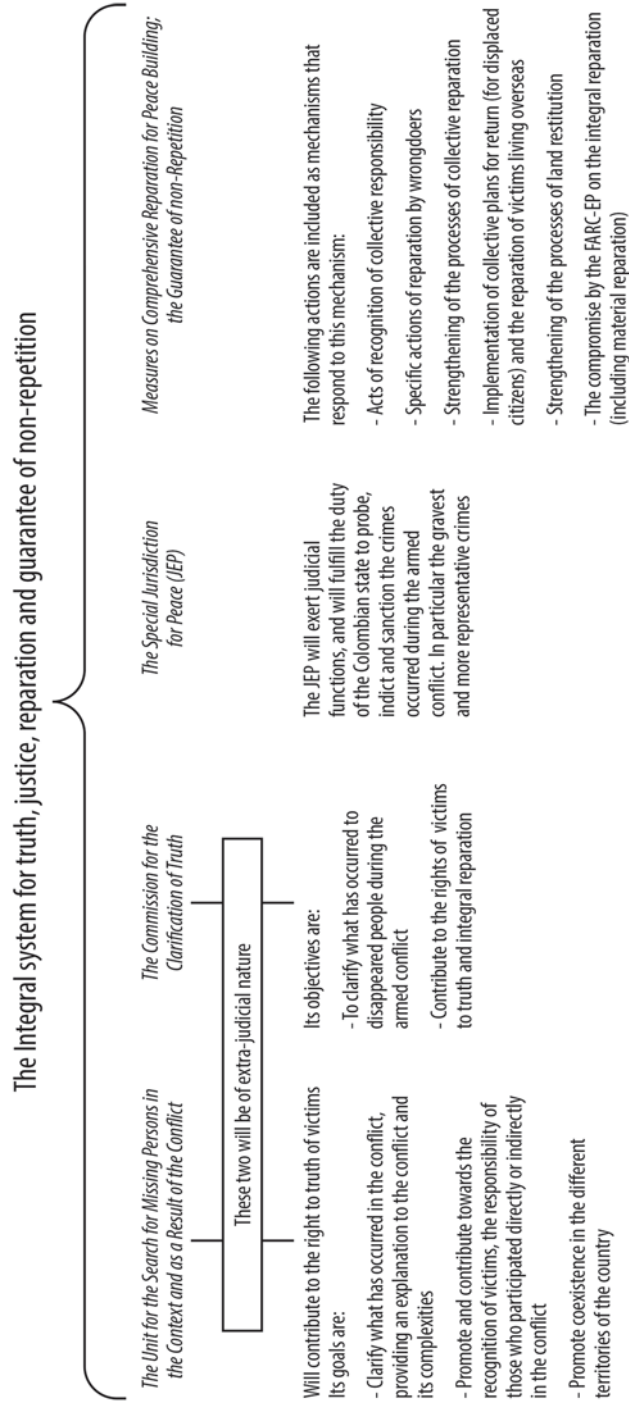


Figure 5.1 Components of the integral system for truth, justice, reparation and guarantee of non-repetition in Colombia
 Source: Own elaboration.

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The Commission for the Clarification of Truth, Coexistence, and Non-Repetition

The agreement recognizes the clarification of truth, coexistence, and non-repetition as one of the mechanisms that victims' organizations have demanded, thus its inclusion not only responds to best practices in the field but also to the citizen's demands (de Greiff, 2012). The Commission has three goals (Gobierno de Colombia y FARC—EP, 2016):

- i To clarify what happened over the course of the conflict by explaining its complexity and describing the serious human rights violations⁹ and breaches of international humanitarian law that occurred in the course of the confrontations, in order to promote a societal understanding of the conflict and make the lesser-known aspects of the conflict visible.
- ii To acknowledge victims as: agents whose rights 'were infringed' by society and as political agents who can contribute to the country's transformation. To recognize the responsibility of all the institutions and individuals who have participated directly or indirectly in the conflict.
- iii To promote coexistence in the territories where the conflict primarily took place through the peaceful resolution of conflicts and the construction of a democratic culture that promotes tolerance, co-operation and solidarity.

All these goals are based on the premise that truth-building is essential for peacebuilding and reconciliation. The goals and mandates of the Commission for the Clarification of Truth, Coexistence, and Non-Repetition must be understood in conjunction with the other points of the agreement, such as rural development; mechanisms for the prevention of the production and trafficking of illicit drugs; and demobilization, disarmament and reintegration (DDR). This means that in order to build sustainable peace, it is necessary to undertake the task of a truth commission, but the successful implementation of the other elements of the agreements by the state are also necessary (see Chapter 3). Ascribing the whole project of peace and reconciliation to a truth commission might be overambitious, and can hamper its efficiency and effectiveness (de Greiff, 2012).

One of the main aspects of the truth-telling mechanisms included in the agreement between the FARC—EP and the Government is the principle that both actors have a moral and political commitment to respect the rights of victims by contributing to the clarification of the truth and acknowledging their responsibilities. It is important to mention that the Commission is not a judicial body: 'its activities will not be of a judicial nature and cannot imply any criminal accusation against any of those who appear before the Commission [...] and the information [collected] cannot be transferred by it to judicial authorities' (Gobierno de Colombia y FARC—EP, 2016). This serves in principle to maximize the number of involved actors that can contribute towards the work of the Commission. This includes illegal actors, individuals

or institutions that suffered directly or indirectly from the conflict or participated in it, and are willing to testify or confess to crimes that they would not be willing to talk about under other circumstances.

Truth commissions are one of the most commonly used mechanisms to bring the history and the memory of past human right violations into the public space in countries transitioning from repressive regimes, civil wars, or internal conflicts. Truth commissions have had different purposes and focuses, emerging in some cases as substitutes for criminal prosecutions, as part of processes of democratization away from dictatorship, or as part of transitions away from civil conflict. In other cases (in Peru, for example), truth commissions were created prior to the initiation of criminal prosecutions, and their results were used as inputs in criminal prosecutions.

Currently, truth commissions are understood as an official, yet extrajudicial mechanism that is not meant to replace criminal prosecutions, but rather to complement the juridical truth with a wider historical account of the political, economic, and social conditions that gave origin to human rights violations, so that the actors involved in the violence recognize their actions, and victims have a space where their histories can be heard (Uprimny Yepes & Saffon Sanín, 2006).

The Colombian Truth Commission's period of study is the entirety of the Colombian armed conflict, but given that the conflict has lasted over 50 years, the Commission has the authority to establish priorities for its research. The Commission has a working period of three years to produce a final report (Gobierno de Colombia y FARC—EP, 2016). To clarify the diverse and complex causes of the conflict, the Commission can analyse previous historical events, and its work can be supported by other previous reports and research,¹⁰ such as the work of the Historical Commission on the Conflict and its Victims¹¹ and other initiatives.

The Search Unit for Missing Persons in the Context and as a Result of the Conflict

The agreement explicitly addresses forced disappearances, given that it is one of the main crimes of the Colombian armed conflict.¹² The transitional justice agreement recognizes that many people have been 'disappeared' due to actions by state agents, the FARC—EP and other armed groups in Colombia. Some victims' organizations focusing on disappeared persons expressed their satisfaction with the establishment and objectives of this unit (Fundación Ideas para la Paz, 2016b). The goal of the Unit for the Search for Disappeared Persons in the Context and as a Result of the Conflict is to contribute to satisfying victims' rights to truth and reparation. The unit is transitory, and has a non-judicial, humanitarian character. It has three main functions (Gobierno de Colombia y FARC—EP, 2016):

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- i To account for the universe of disappeared citizens within the armed conflict and identify those still alive.
 - i To identify the remains of the deceased.
 - ii To co-ordinate and promote the processes of ‘searching, identifying, locating, and the dignified return of remains’.

These activities must be co-ordinated with other state institutions such as the National Institute of Legal Medicine and Forensic Science, the Truth Commission, and the Special Jurisdiction for Peace, among others, in order to report the unit’s actions and provide information, and to allow for the active participation of victims and their organizations, and international organizations such as the International Committee of the Red Cross and the International Commission on Missing Persons.

Reparation: Measures for Comprehensive Reparation for Peacebuilding

Another important aspect of the system of justice agreed upon is its complex conception of reparation, which includes early measures for the acknowledgment of collective responsibilities.¹³ Mechanisms to implement this include a national plan for collective reparations and territorial plans for collective reparations, individual and collective psychosocial rehabilitation, collective processes of return for displaced persons, and the reparation of victims living abroad, as well as measures for land restitution.

The agreement expressly states that all groups and individuals who have caused harm during the conflict must contribute to repairing the injuries they caused and that this contribution ‘will be taken into the account in order [for them] to receive any special treatment in matters of justice’ (Gobierno de Colombia y FARC—EP, 2016, p. 146). This recognizes that there were several groups other than the state and illegal armed groups that participated directly or indirectly in the conflict and benefited in some way from it.¹⁴ The mechanisms outlined in the paragraph above provide avenues for this reparation.

In addition, the agreement states that in its reincorporation into civilian life, the FARC—EP must carry out actions that contribute to reparation. For example, they will undertake reparatory actions by participating in the reconstruction of infrastructure, particularly in territories affected by the conflict; and in programmes to remove anti-personnel mines, by participating in programmes for the substitution of illicit crops; and by contributing to the search, location, identification and recovery of remains of persons reported missing or dead.

The agreement expressly affirms that the FARC—EP, as an insurgent organization, ‘commits to contributing to material reparations for victims and in general to their comprehensive reparation, on the basis of the events identified by the Special Jurisdiction for Peace’ (Gobierno de Colombia y FARC—EP, 2016, p. 186).¹⁵ The inclusion of this provision is in fact is one of

the interesting outcomes of the amendment process which followed the initial rejection of the agreements. The explicit obligation of the FARC—EP to redress victims with their own resources was included in the amended and adopted agreement. As the FARC—EP participated in drug production and trade activities, extortion, and kidnapping, it is likely that they have resources to make this contribution.

It is important to understand that the model of transitional justice proposed for Colombia benefits from Colombia's long experience with reparations, and the establishment of an institutional capacity for this (see Chapter 4). The agreement on victims has the potential to articulate and strengthen procedures for reparation within the context of existing legislation and institutions.

Guarantees of non-repetition

Achieving peace whilst avoiding a relapse into violence is an important goal: however, its attainment depends on the extent of the actual and effective implementation of the provisions in the agreement, including the mechanisms regarding victims. Besides the measures on victims, the accord also creates a unit for persecuting criminals and dismantling criminal organizations. As was shown by the experience of the demobilization and reinsertion of former members of the Autodefensas Unidas de Colombia (AUC)¹⁶ as part of the peace process with the paramilitaries, such measures are necessary to address the risk that criminal structures will continue operating (Centro Nacional de Memoria Histórica, 2015).

Even in the case of a full demobilization and reintegration into civilian life by the totality of the FARC—EP, a series of armed groups that operate in different parts of the country (paramilitaries or other guerrilla groups) will remain. Their existence presents a looming risk to the agreements and their implementation, as these groups may attempt to profit from the power vacuum generated by the demobilization of FARC—EP units. There is also a high risk of retaliations against former combatants and demobilized cadres¹⁷ (MAPP/OEA, 2017). In the case of Colombia, the possibility of non-repetition depends on the dismantlement of other insurgent and criminal organizations across the country. This in turn depends on the consolidation of other peace processes, ensuring the monopoly of violence by the state, and the establishment of mechanisms that could demobilize these groups—which is something to bear in mind as regards the current peace process with the Ejército de Liberación Nacional (ELN)¹⁸.

The Special Jurisdiction for Peace

To analyse the structure of the Special Jurisdiction for Peace, it is important to consider the Justice and Peace Law (JPL),¹⁹ and how the experience in implementing it informs the current framework. It can be argued that the

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current transitional justice setting was in fact incepted by the lessons learned in enacting the JPL.

The lessons from the Justice and Peace Law

During the first peace process with the paramilitary forces undertaken by the Colombian Government, the Uribe administration created a legal framework for facilitating the demobilization of the AUC. The draft legislation was very generous in protecting the rights of the victims in its declaration of principles, but did not establish legal instruments to implement these rights. The draft bill sought a formula for peace that did not meet the demands for justice for the victims of the crimes committed by the AUC (Uprimny Yepes & Saffon Sanín, 2006). This legislation became the Justice and Peace Law, Law 975 (Congreso de Colombia, 2005).²⁰

After this law was approved by Congress, the Constitutional Court of Colombia reviewed the legislation, considering the challenges brought against it by organizations and citizens who claimed that Law 975 did not guarantee victims' rights (Corte Constitucional de Colombia, 2016). The rulings by the Constitutional Court and the modifications this court made to Law 975 sought to provide legal instruments that, while offering generous reductions of penalties to the armed actors, would also seek to guarantee the victims' rights to truth and reparation (Uprimny Yepes & Saffon Sanín, 2006).

Despite the modifications of the Constitutional Court, additional problems were associated with the implementation of the JPL. These related to the institutional weaknesses of the judicial system in Colombia and the lack of appropriate legal instruments to ensure that the mandate of the law was achieved (Uprimny Yepes, et al., 2006). The JPL appeared not to have taken into account the context of institutional weakness inherent in the Colombian criminal justice system, and in this sense failed to consider and establish mechanisms and procedures to respond to these challenges. The JPL, as approved by Congress, was a law created to respond to an extraordinary situation, enacted with ordinary tools (de Gamboa, 2010).

The emergence of challenges facing the implementation of the law was thus no surprise. These included: the low capacity of the criminal justice system; insufficient co-operation between the different state agencies involved in the process; difficulties in effectively monitoring the demobilization and reinsertion of the members of the armed groups; a lack of clarity regarding which governmental entity was responsible for the process of DDR; problems of co-ordination among state institutions in managing and using information related to the JPL process; the absence of resources to protect ex-combatants, witnesses, victims, prosecutors, and judges; and the creation of institutions with several duties but without the clear legal mandate or enough resources to fulfil them (International Crisis Group, 2006).

Significant power and economic asymmetries between the demobilized AUC members and the victims were also not addressed by the law (see

Chapters 6 and 7). Therefore the guarantees of victims' rights depended almost entirely on the capacity of the state and its institutions to guarantee the legitimate defence of the victims' rights in a context where demobilized AUC members were better positioned to command effective legal representation (de Gamboa, 2010).

The negotiations with the FARC—EP regarding the victims and their rights thus departed from the Santos Government's recognition that previous transitional justice norms, such as the JPL, did not fully assure victims' rights, the promotion of peace, or the strengthening of the rule of law. The previous peace process with the paramilitaries produced just thirty-five sentences from the pool of 4,643 cadres that had been identified to be charged. The process with the paramilitaries appeared to operate as a *de facto* amnesty, and demonstrated the challenges of implementing a transitional justice framework in Colombia (Verdad Abierta, 2015).

The Government also acknowledged other failures from the peace process with the paramilitaries. The truth mechanisms implemented were recognized as very limited, since they depended on what the paramilitaries chose to admit in the judicial proceedings. In addition, the negotiation team recognized the tensions between a maximalist tradition (the obligation of the state to prosecute all grave violations of human rights) and an approach valuing peace and non-repetition; and the challenge of finding a normative pathway balancing concerns for justice, peace, and non-repetition in a context with strongly held claims, often without available supporting evidence (Orozco Abad, 2012).

The negotiators adopted a hybrid approach, able to meet international standards whilst responding to the particularities of the Colombian context.

The Justice Component of the Agreement on Victims

When the FARC—EP entered into a negotiation process with the Colombian Government, they did not entertain the possibility of embracing a transitional justice framework. They considered this system to be created by their opponent (the Colombian state), and they argued their actions in rebelling against the state should not make them punishable (El Espectador, 2015). However, by the end of the peace process, the FARC—EP had committed themselves to a transitional justice framework that complied with international standards and to a comprehensive agreement on victims' rights.

The agreement on victims supports the creation of a Special Jurisdiction for Peace. This agreement managed to address concerns about the sovereignty and self-determination of the state whilst complying with the principles of international human rights law. The jurisdiction will consider serious human rights violations and breaches of international humanitarian law committed in the course of the conflict between the FARC—EP and the state.

The jurisdiction applies to all those who participated directly or indirectly in the armed conflict. This includes members of the FARC—EP, representatives from the state,²¹ and other individuals or groups who were not

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combatants but who engaged in the financing of or collaboration with paramilitary groups, without having been coerced to do so (Gobierno de Colombia y FARC—EP, 2016).²²

The agreements defined a jurisdiction that is not solely focused on the dyad of the government and the FARC—EP. In that sense, the agreements and the jurisdiction set in place can promote a wider reconciliation that transcends the process with the FARC—EP. As it stands now, all groups and individuals can recognize their responsibilities in the armed conflict, and all have the same opportunity to take advantage of certain legal benefits in order to establish the truth about their responsibility and assure the reparation of victims. As such, the agreements speak to a wider notion of peace beyond the agreements with the FARC—EP. In addition, they establish the possibility of creating a framework that can be easily implemented should other groups decide to negotiate their demobilization with the state.

The jurisdiction established by the agreements aims to investigate crimes against humanity. The agreement recognizes that according to the Rome Statute of the International Criminal Court (ICC), those who commit these crimes are not eligible for amnesties or pardons. Although judges can prioritize those ultimately responsible and focus on certain serious crimes, they must investigate all the grave crimes enumerated without restrictions.²³ Second, the jurisdiction establishes a series of incentives for those who committed grave crimes to submit to justice voluntarily (in return for some benefits) and disincentives to those electing not to submit to this voluntarily (they will face more severe sanctions). In all cases, offenders must also submit themselves to the other components of the comprehensive system contained in the agreement on victims (truth, reparation, and non-repetition).

Guerrillas that submit themselves to the Special Jurisdiction for Peace will not have their political rights affected. This implies that former FARC—EP cadres are still eligible for public posts and can run for election at a local, regional or national level. This has been strongly criticized by the opposition to the peace agreements, who argue that those citizens who committed crimes should not be eligible to participate in politics at all. A series of conditions has been decided by the Constitutional Court of Colombia in order to clarify the ambiguity with regards to the tension between justice and political participation for guerrillas brought by the Special Jurisdiction for Peace (Corte Constitucional de Colombia, 2017). For guerrillas to maintain the benefits of the special jurisdiction, they will have to comply with all the requirements of the special justice court for truth and reparation of the victims, as well as a not being involved in any criminal activity after 1 December 2016. Otherwise they will lose all the benefits of the transitional justice framework.

The agreement also acknowledges the existence of political crimes. Therefore it gives the state space to operate within international humanitarian law and the Colombian Constitution, allowing the state to grant amnesty exclusively to FARC—EP rebels. The amnesty law approved by the Colombian Congress establishes the criteria and enumerates the different political crimes

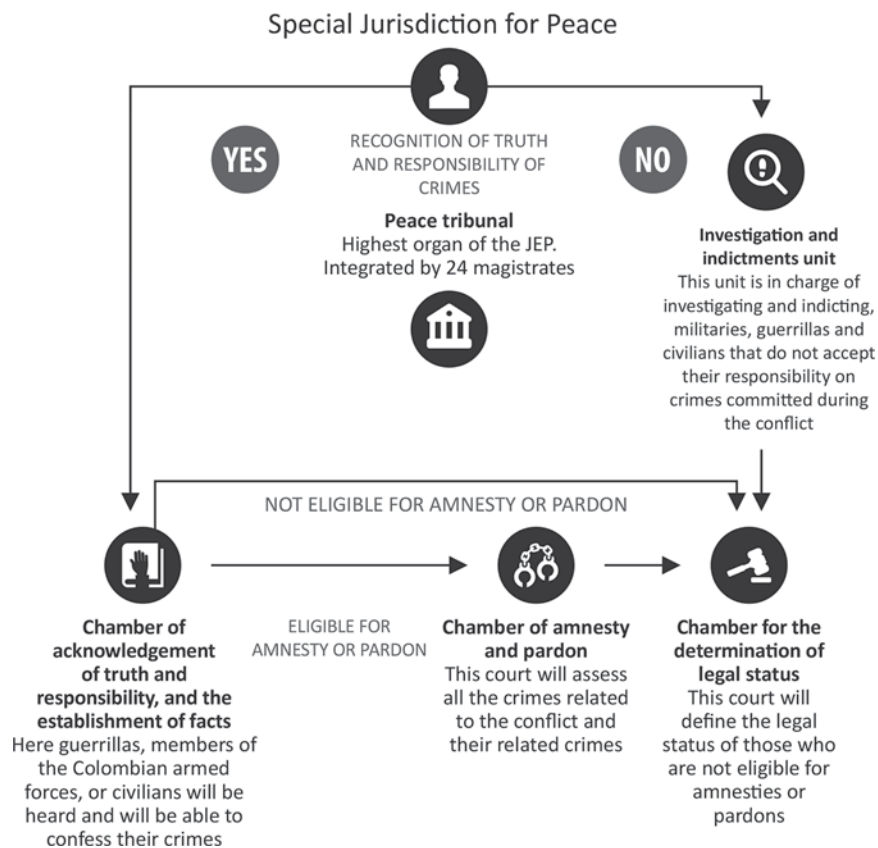


Figure 5.2 How does the special jurisdiction for peace in Colombia work?
 Source: Own elaboration.

that will be eligible for amnesty. These include rebellion, sedition, military uprising, and assassination in combat compatible with international humanitarian law. It also links drug trafficking to political offences if the purpose of this activity (drug trafficking) was linked to the financing of rebellion, not for the purpose of personal enrichment.

A series of provisions was tabled with regard to the members of the security forces. In 2016, Congress established a similar arrangement resembling the amnesty and pardons given to the FARC—EP²⁴ in Law 1820. As with the Special Jurisdiction for Peace, amnesties or pardons for crimes against humanity are not granted under this Law. In addition, these benefits will not apply in the case where offences constitute a threat to the morale, discipline, interests and honour of the armed forces, in accordance with the military penal code. In addition, these benefits are conditional on state agents' fulfilment of their obligation to make reparations to victims and contribute towards the truth (Congreso de Colombia, 2016b).

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The Special Jurisdiction for Peace is composed of several bodies (see Figure 5.2). These comprise: the Chamber for the Acknowledgment of Truth, Responsibility, and the Establishment of Facts; the Peace Tribunal; the Chamber for Amnesty and Pardon; the Chamber for the Definition of Legal Situations; and the Investigation and Indictments Unit.

The peace agreements achieved between the FARC—EP and the Colombian Government envision a holistic transitional justice model. In line with this vision, the agreements proclaim the connection and synergy between the rights of victims to truth, reparation, and guarantees of non-repetition. The content of the agreements on victims create a series of institutions that aim to redress and guarantee the rights of the victims. These institutions have been shaped to respond to the needs and particularities of the Colombian context, and appear to fulfil the requirements of international human rights standards. If this system manages to fulfil its mandate in practice, it will constitute a textbook example of a hybrid model of transitional justice (Sriram, 2010).

However, in spite of the achievement of the agreements, it is important to reflect on the challenges facing their implementation.

The long road to justice and peace: From text to institutions, justice and statehood

In order to analyse the challenges with regard to the implementation of the transitional justice framework agreed between the FARC—EP and the Colombian Government, it is important to understand the political context in which the implementation of the agreements takes place and the challenges that some provisions within the transitional justice agreements may create, as well as the structures and the inter-institutional co-ordination required for effective implementation.

Since the agreements process began, the political landscape has become dangerously re-polarized in Colombia. This polarization resembles the split between political actors that preceded the bipartisan violence of the 1940s and 1950s from which the FARC—EP emerged. This polarization was illustrated in the results of the plebiscite on the peace agreement and the related debates in the Colombian Congress. The Santos Government **has** the majority in the Congress, which **has** allowed the translation of the agreements into normative and operative laws, such as the Amnesty Law (Congreso de Colombia, 2016a), and the law that regulates the transitional justice system (Congreso de Colombia, 2017). These advances can be rolled back if opponents to the agreements decide to reform the peace agreements (El País, 2017). Thus, if a political party that opposes the agreements filibusters the implementation of the peace agreement or wins the next elections, they can stifle or reverse the implementation of the transitional justice agreements. If this occurs, the stalled or stunted implementation of the agreements would fall short of the commitments signed in the agreements, leading to a default on peace agreements produced by selective negligence.

Within the provisions of the agreements, there is great concern in relation to the provisions related to the crimes committed by members of the Colombian armed forces (Revista Semana, 2017). A provision regarding command responsibility establishes that a military commander must answer for the crimes committed by his subalterns. In this case, a superior must be accountable for the actions of the soldiers under his command, even in the case when he has not taken any active role in these actions, but through negligence or apathy did not take appropriate corrective or preventive measures (Uprimny Yepes, 2017). This provision can be interpreted to apply to civilians as well.

International human rights practice establishes that the proof of knowledge by a superior of the crimes committed by his subalterns can be based upon effective or inferred knowledge.²⁵ It also states that hierarchical responsibility is ascribed on a case-by-case basis; it thus allows inquiries into cases where control and leadership is exerted *de facto*. However, in the legislation that regulates the agreements, only explicit and effective knowledge is considered as proof. The Special Jurisdiction for Peace would thus not be able to investigate and inquire into cases where military commanders were negligent. There is therefore the risk of the provision of half-truths in the cases where members of the armed forces committed human rights violations. In addition, the laws and regulations tabled in Congress will limit the understanding of the command responsibility; with the effect of limiting the scope of investigations and interventions by the ICC. This may mean that in some cases the actions of military commanders will not be prosecuted at all. The decision by the Colombian constitutional court with regards to the Special Jurisdiction for Peace did not elaborate on this, keeping alive the risk that the framework implemented in Colombia might not fulfil international standards of transitional justice (Corte Constitucional de Colombia, 2017).

In addition, questions remain with regard to the incentives for civilians involved in the conflict (for example as sponsors of armed groups) to participate in the transitional justice process as witnesses or subjects of legal inquiry. While they may not have criminal responsibility (e.g. an industrial agent who was extorted and funded a particular group, or a cattle grower who funded counter-insurgency paramilitary groups), they could have information and knowledge of the actions in the conflict that are vital to establishing the full truth and to enabling state institutions to understand the organizations and agents that were linked to war and violence. The decision by the Constitutional Court declared that third parties such as civilians involved in the conflict cannot be obliged to participate in this jurisdiction. However, this does not absolve them (civilians) from their legal or penal responsibility. Therefore civilians should be judged by the existing judicial institutions and courts. Thus, it would be expected that those civilians who want to benefit from the legal framework for peace could present themselves voluntarily to the Special Jurisdiction for Peace (Corte Constitucional de Colombia, 2017).

Although the implementation of the transitional justice agreements is necessary for peace, transitional justice by itself it is not sufficient. Inter-

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institutional coordination, commitment, and political consistency are required from the state, so that the other elements of the agreement (relating to political participation, rural reform, demobilization, illicit crops and drug production) are implemented. These additional elements of the agreements point to other structural issues that define the Colombian conflict. Without solid institutions in place, the road for peace will be bumpy; however, peace-making always departs from a point of state weakness, rather than strength and efficiency.²⁶ This is the departure point for Colombia, as the state aims to consolidate its institutions and navigate towards peace and a new social covenant.

It is in this context that the agreed-upon transitional justice system will take its place. The ambitious aims and objectives of the transitional justice agreements require efficiency, synergies, and a holistic operation from state institutions to ensure that victims' rights are redressed and the structural conditions that gave rise to the conflict can be dealt with. However, there is still ambiguity regarding how the agreements will be enacted, as laws regulating the provisions of the agreements conform to the text of the agreements verbatim. The agreements have defined the goals for the state, but not the processes of how to reach these goals. The repetition of objectives will not realize them, and may risk creating a hollow mythology of justice and peace that can in fact erode the legitimacy of the state in the long term.

While the laws, norms and principles tabled in Congress aim to achieve peace, the practice of implementing the peace agreement is still uncertain.²⁷ It is vital to develop a clear series of guidelines and principles that operationalize the agreements and the processes associated with them. Explicitly articulating the way these synergies must take place will reduce the risk of tensions, misunderstandings and delays that can compromise the approach to peace for Colombia.

Notes

- 1 This text is part of the research project, 'Public Policies against the Armed Conflict in Colombia and Transitional Justice'. It is also framed within the research project, 'The Residues of Evil in Post-Totalitarian Societies: Responses from the Perspective of Democratic Politics', reference FFI2012-31635, financed by the Spanish Ministry of Finance and Competitiveness.
- 2 The 'fast-track' mechanism allows the shortening of the processes that laws usually have to go through in Colombia, reducing the number of debates in the Senate and the Chamber in Congress.
- 3 The outcome of the vote was: 50.21% of voters voted opposing the agreements and 49.79% voted in favour of the agreements (6,431,376 votes to 6,377,482 votes). The abstention rate was 63% of eligible voters (21,833,898).
- 4 Democratic Centre.
- 5 Agreement on Victims of the Armed Conflict: A Comprehensive System of Truth, Justice, Reparation, and Non-Repetition, including the Special Jurisdiction for Peace; and the Commitment to Human Rights.
- 6 *La Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición.*
- 7 *Unidad especial para la búsqueda de personas dadas por desaparecidas en el contexto y en razón del conflicto armado.*

- 8 *Jurisdicción especial para la paz.*
- 9 According to a former Colombian Government official, ‘serious violations’ are those committed in accordance with a plan or policy.
- 10 Such as the reports from the *Grupo de Memoria Histórica* (Historical Memory Group), created by the Peace and Justice Law (Law 975). Nowadays, this group has become the *Centro Nacional de Memoria Histórica* (Center for Historical Memory), a national public entity.
- 11 The *Comisión Histórica del Conflicto y sus Víctimas* (Historical Commission on the Conflict and its Victims) was established as part of the negotiation process. The final report comprises different narratives on the description and explanation of the Colombian conflict (Comisión Histórica del Conflicto y sus Víctimas, 2014).
- 12 According to the *Unidad de Víctimas* (Victims Unit), 45,646 Colombians have been ‘disappeared’ since 1985.
- 13 This form of collective responsibility for wrongs committed, as described in the final agreement, is more akin to political apology than to acts of forgiveness. Although the agreement refers to forgiveness, in the public discourse of Colombian groups, in the Justice and Peace Law (Law 975), and in the agreement between the FARC—EP and the Colombian Government, there is a tendency to describe collective acts acknowledging responsibility as acts of interpersonal forgiveness. However, interpersonal forgiveness is a private and a volitional act between offenders and offended. In political apologies, a person who publicly represents an institution, organization or other group, recognizes the wrongs committed by such groups, and does so in their name (Griswold, 2007; de Greiff, 2008; de Gamboa & Herrera, In Press).
- 14 It is not clear if those who benefited from the violence have to contribute towards reparations.
- 15 In principle, if the FARC—EP has any material goods, they must report them. Otherwise they would not be ‘contributing comprehensively’ to reparations, which could negatively affect the legal benefits that they enjoy as a party to the agreement.
- 16 United Self-Defence Forces of Colombia.
- 17 These retaliations could occur because some guerrillas retaliate against the FARC—EP because they agreed to peace, or take place in order to provoke violence to ensure the conflict continues.
- 18 National Liberation Army.
- 19 *Ley de Justicia y Paz.*
- 20 *Ley 975 de 2005.*
- 21 The Agreement establishes different conditions that apply to the judgment of agents of the state.
- 22 The Constitutional Court of Colombia decided that the Special Jurisdiction of Peace could not oblige civilians to subject to the special jurisdiction. Thus, the involvement of civilians in the JEP will be only take place when civilians present themselves voluntarily to it.
- 23 In fact, the prosecutor of the International Criminal Court, Fatou Bensouda, stated that the justice system outlined in the agreement complies with the Rome Statute (El Tiempo, 2016).
- 24 Opposition from retired members from the Armed Forces rejected the possibility of them to be judged under the same system as the FARC—EP.
- 25 This can be proved when with the information available to superiors could allow leaders to infer the possibility of atrocities.
- 26 Some Colombian analysts equate this process to trying to sail a ship on rough seas while attempting to fix it (Pizarro Leongómez & Valencia, 2009).
- 27 Examples of this are the norms that regulate the Special Jurisdiction for Peace and the Commission for the Clarification of Truth, which do not explain or provide

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guidance on how institutions can co-operate and share information with regards to judicial and extra-judicial inquest.

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