

## 16 A long walk for justice

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Colombia has been waiting for peace for more than half a century. While waiting, generations of Colombians have had their lives spoilt by war, violence, and tragedy. However, hope is in sight, with the possibility that greater peace will be established and consolidated through the implementation of the peace agreement with the FARC—EP (Revolutionary Armed Forces of Colombia).

The history of Colombia is the history of a country trying to come to terms with itself as a nation. Thus the drive for the consolidation of statehood, incurring numerous setbacks or limitations in this regard, has been central to the country's development in the last seven decades. One could view the current peace process with the FARC—EP as novel, but as Chapter 2 shows, Colombia is a country that has sought peace for more than three decades, with multiple attempts involving different actors, approaches, and negotiation schemes, and with differing degrees of success. Colombia's modern history is one of peace in the making in the middle of war, an example of state-building emerging from the midst of war.

The peace agreement with the FARC—EP emerged in a particular historical and political context. It is the outcome of a series of circumstances and elements that defined why the Government and the FARC—EP opted for a negotiated settlement, including the infrastructure and the capacity of the state to undertake this process and the way the process was structured. This agreement draws on lessons from previous failed peace processes with the FARC—EP and the existing peace infrastructure in Colombia, as shown in Chapter 3.

In the same way that Gabriel García Márquez brought some of the lyricism and rhythm of Latin American narratives to English speakers, the promise of the current peace agreements in Colombia between the FARC—EP and the Colombian Government offers the world a vision of peace crafted by Colombians, which presents a different approach to achieving justice for victims and achieving peace through recognizing local needs, contexts, and visions. As *One Hundred Years of Solitude* was a gift from Colombia to literature, the peace agreements could mark the beginning of the end of more than fifty years of war and can be seen as a gift from Colombia to humanity.

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This agreement has been in the making for several decades, and is in fact the outcome of a history of initiatives related to the Colombian state's quest for peace, in part through several peace negotiations. As Chapter 4 illustrated, transitional justice legal frameworks have been progressively included into the peace negotiations that took place in the country from 1980 until the formulation of The Victims and Land Restitution Law in 2011, before the recent agreements reached with the FARC—EP, and this has led to the adoption of transitional justice frameworks in Colombia that have been instrumental for peace negotiations with the diverse actors from the country's armed conflict.

The current transitional justice framework defined by the peace agreement between the FARC—EP and the Colombian Government is the outcome of this historical process. The complex and elaborate system of principles and interlocking institutions that comprise this framework is the outcome of changing needs and of the evolution of understandings as to how to achieve justice and transition away from war over time in Colombia. The institutions of the Truth Commission, the Search Unit for Missing Persons, and the Special Jurisdiction for Peace, as well as the measures for reparation which have been considered and stated guarantees of non-repetition, present a significant promise for peace to take hold in the country. However, these institutions will face uncertainties related to the implementation process: how the peace agreement is implemented and translated from commitments on paper to reality will provide legal stability (or instability) for different constituents and for the peace project in Colombia, as shown in Chapter 5.

### **A view from the South on peace and justice**

Peacebuilding and justice can be exercises of post-colonial thinking. As Mahmood Mamdani recently affirmed at the University of Cape Town (2017), the production of knowledge begins with ordering, and this ordering gives ranking to ideas and initiatives according to a series of different attributes that we use to ascribe them value and meaning.

The colonial project casts knowledge as built using categories, theories and ideas from the Global North, with validation and affirmation harvested in English, French, and German as opposed to isiXhosa or Quechua. The areas of peace and justice are no different, with the North historically used as a primary reference point. In doing so, pre-eminence has been given to the importance of the successes of the Nuremberg war trials: however, less attention has typically been paid to the lessons which could be learned from the failures of humanity with regard to Hiroshima, Nagasaki, Dresden, the gulags, and the colonial enterprises across the world in Indonesia, South Africa, Colombia, the Philippines, Algeria, Congo and many other countries. In many of these contexts, justice and retributive or reparative justice have not been pursued or fully achieved. Inasmuch as the North has been used as a point of reference for justice, we should be honest enough to recognize the lessons offered from its failures as well as its successes. An ideological

enthusiasm about the promise of a Western vision of the world obscures productive and critical engagement with the challenges created by its approach and its failures, such as the two World Wars, holocausts and genocides, and the decimation of native populations across the world through missionary and colonial enterprises.

However, even more balanced interpretations of the approaches to peace and justice advanced in the North are unlikely to apply across the South. The realities of the Global South require the assertion of new approaches, that look beyond the imposition of ‘universal’ models from the North, and that create space for the emergence of ideas that adjust to the needs and the objectives of particular constituents and contexts across the world.

Such an approach should not be seen as an argument in defence of impunity and the deployment of pan-Africanism and pan-Americanism as mediocre excuses for sheltering war criminals. It is rather a plea to reassert and give prevalence to the voice of the victims and civilians in the countries where violence has taken place, so that they have the right to decide the way forward for their futures. Imposing ideal models onto others is another way of imposing one’s beliefs onto other human beings—another way of violating their rights. Every society has the right to decide what is better for them, and this reassertion of agency fosters responsibility and maturity for societies. However, the mechanisms for making these decisions may be compromised in contexts emerging from conflict. In these contexts, transitional justice can offer benchmarks for promoting discussions regarding possible interventions or approaches, making visible the tensions between competing options or interests.

In analysing the agreements reached in Colombia we should depart from an understanding that the institutional form that the agreements take is not entirely European or North American, as they are not fully based on Northern representations of the form an agreement should take and what it should include. Although the agreements are informed by international visions of justice, its realization will be only achieved if the text and implementation thereof allows the inclusion of local voices and become an equalizing tool that helps citizens affected by conflict to surpass the existing inequality, and the consequences of violence.

In the case of Colombia, the signing of the agreements with the FARC—EP marks and signifies the beginning of the country’s journey towards peace. The achievement of peace will depend on the implementation of the agreements, but also on the role taken by other players in the conflict, such as the paramilitaries and other armed groups, going forward.

### **Post-agreement, not post-conflict**

The text has explicitly avoided the use of the term post-conflict in describing the Colombian context. The term references cases where conflict has ended and implies that peace has been reached. The silencing of the rifles or the signing of a document does not immediately produce a state of peace. A

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peace agreement does not equate to peace, and failing to make this distinction fails to acknowledge the importance of fulfilling the promises stated in agreements.

Inequality and class in Colombia marginalize millions of Colombians on the basis of their accent or skin colour. To achieve peace it is important to address the inequalities created by a system that sees and treats indigenous groups, Afro-Colombians, Roma and peasants as lesser citizens and makes Colombia the most unequal country on the continent. For peace to take hold, the state and society should be able to deliver services and grant the effective entitlement of rights to all Colombians. The reality in Colombia is that these rights are granted on paper, but not guaranteed in reality; unless changes are made in the direction of reducing inequality, peace will likely not take root. In countries with high inequalities, recruiting the poor and mobilizing the marginalized around different armed movements is relatively easily facilitated. Thus while this peace process removes more than 7,000 cadres from the FARC—EP, each of these were once recruited, and the possibility of further recruitment must be minimized for peace to take hold in the Colombian territory.

If the implementation of these agreements is indeed taken seriously, Colombia then faces a challenge over the coming decades of a post-agreement phase, which will demand consistency, perseverance, and cohesion from the political élites in the country in delivering policies and programmes that can deal with the structural reasons for the emergence and existence of violence and high inequality in Colombia.

### *The debate between retributive and reparative justice and the idea of peace*

This volume recognizes the importance of both retributive and restorative justice practices, but advocates that a more holistic understanding of peace-building should transcend dichotomies between these pre-defined categories. Such a holistic approach would enable countries to draw on both approaches and sets of practices in developing justice models that are responsive to citizens' needs and interests. The justice model agreed upon can thus reflect and respond to the specific needs and social covenant of a country. Country-specific justice models may serve as a key element supporting countries bridging the post-agreement phase towards peace.

While local perspectives and visions of justice should be central, key concepts within the retributive and reparative approaches may prove valuable. The debate between restorative and retributive justice can inform the possibilities and the implementation of initiatives, including via lessons about their usefulness or their weaknesses in supporting processes of reconciliation and state-building. For example, the emphasis on restorative justice can bring to light the importance of supporting the regaining of agency of former victims of the conflict, as well as the possibility of either reconciliation or coexistence/cohabitation.

Whereas much of the literature dealing with transitional justice depicts a romanticized idea of reconciliation, we need to be aware that imposing a reconciliation perspective might be unfair on victims, as it imposes on them the obligation of having to forgive and, in some cases, embrace their victimizers. Victims have the choice and the right to forgive or not to forgive, and they should be allowed this possibility. A distinction between reconciliation and cohabitation/coexistence should thus be made. The latter allows for the possibility of being able to share the same space with a harm-doer and does not impose onto victims the obligation to forgive. As Chapter 10 argued, the importance of understanding the psychosocial processes of victims allows for the recognition of mechanisms that can assist victims to regain agency.

Retributive justice has a value and an importance for society as well. If for a society the possibility exists of cadres serving time in jail or in alternative punishments that are ways of redressing the harm caused to society, this should be considered. Imposing a reconciliatory framework that is seen as unjust can in fact delegitimize both a peace process and the transitional justice agreements. The receptor of former cadres is society, and society should be willing to accept former fighters. In this sense the search for alternative penalties that serve a restorative and retributive potential have the possibility of improving the reconciliation process and reduce recidivism, as Chapter 8 argued.

Restoring the rights of those who otherwise would be victims if the war continued is as important as retributive and reparative justice for victims of past harms. Saving lives holds a significant restorative potential of the rights of the victims that otherwise would exist in the future. Whereas impunity and the capacity to restore, or retribution should be considered, we should not forget that the continuation of warfare is most likely to create more victims whose rights will need to be restituted and/or restored. Justice thus cannot be presented separately from the idea of peace and a ceasefire. Is justice worth the life of more human beings? Or is the dignity of past victims more valuable than stopping a conflict? These are questions without easy answers, and where accurate forecasts of what will happen are hard to understand. The most we can do regarding this dilemma is to present informed guesses, being mindful of the consequences—the possibility of impunity versus the continuation of war. That is why, instead of a language of assertiveness, the debates around justice should come framed within a language of reflection. A social construct is hard to measure and to understand; its nature is relative and cannot be mandated from other latitudes.

### **The challenges**

The promise of peace and justice brought by the transitional justice agreement is tempered by the challenges that lay ahead. The context in which the agreement is being implemented is that of a country in which drug lords and paramilitaries continue to operate, and in which some sectors within the

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armed forces and the political élites remain against peace and the possibility of agreement being implemented. The assassination of social leaders after the ratification of the agreements is proof of the serious challenges facing implementation and the hurdles that need to be surpassed to realize the agreement.

The truth is that what has been signed between the FARC—EP and the Colombian Government constitutes the best-case scenario for the implementation of a transitional justice process. Thus, in order to understand what the process will mean in practice necessitates an understanding of how abstract expressions and commitments made in the agreement will be translated into programmes and guidelines that can be implemented at the fringes of the Colombian state, where state capacity is weak, resources are scarce, and challenges are plentiful. These challenges are evident with regard to land; gender; memory; reconciliation; demobilization, disarmament, and reintegration (DDR); and education policies. These multiple and complex challenges highlight the necessity of building sound institutions and policies that can enact change.

To do so it is important to depart from the understanding that the component related to transitional justice in the agreement provides only a limited legal framework for addressing distributive justice issues in contexts of exclusion from access to goods and services. Issues such as the lack of peasants' rights and access to land in Colombia are an important example of this. As Chapter 6 illustrated, a restitution programme has been established through a land restitution law (Law 1448 of 2011) to tackle this lack of rights in the context of the armed conflict and to create a series of legal mechanisms and institutions that have the sole objective of supporting the restitution of land rights for the victims of the conflict in Colombia. This is promising but, again, numerous challenges will need to be addressed for the programme to succeed. Previous land restitution processes in Colombia have had mixed outcomes, and have foregrounded a series of challenges that will require consideration regarding the asymmetries between victims and offenders and their capacity to use the existing institutions and mechanisms, and the need to understand the roles that different institutions play in these processes. However, these previous processes have also generated an institutional framework and a series of state institutions devoted to these goals. This is the departure point for the implementation of the transitional justice agreement between the FARC—EP and the Colombian Government. While challenges with regard to land restitution remain, the institutional capacity to address this has improved.

The importance of adopting a gender lens in understanding the impact of violence on women and minorities is vital; however, a narrow understanding of gender, and of gender harm as primarily related to sexual violence, has led to a missed opportunity to delve into more structural issues that affect women negatively in Colombia. As Chapter 7 showed, a particular interpretation of gender—and what constitutes a war crime, read through a gender lens—has overlooked the particularities of gender and war in the Colombian context,

thus embracing a northern epistemology of gender and how it should be understood in relation to transitional justice, obscuring other harms women experience in conflict, such as land loss and dispossession. This presents a dilemma, as the importance of sexual violence should not be undermined, but the fixation on this as the only gendered crime has left aside a large population of women that have been victims of other crimes in Colombia. Chapter 7 further reflected on the challenges women face in the restitution of their rights, as land ownership traditionally follows a patriarchal line, and survivors from war are left to prove their rights in a system where ownership and titling is predominantly attached to males.

The understanding of victims and victimization, however, should also consider the role and the importance of victimizers in a transitional justice process, as cadres who were victimizers may have also been victims. Recognizing this, and taking it into account in DDR, may reduce the risks of recidivism following the conclusion of demobilization processes. Supporting demobilization processes is critical. As Chapter 8 argues, reflecting on the combatants' reintegration into society is central to avoiding recidivism. Recidivism will ultimately affect victims' abilities to exert their rights. Peace will thus rely on synergies between the DDR process and transitional justice institutions and processes. The effectiveness of institutions such as National Council for Reincorporation (CNR), and their capacity to link with transitional justice processes such as the Truth Commission, or the implementation of reparatory measures, will determine the level of support for the reintegration of FARC—EP members into receiving communities and the broader Colombian society. The society that produced war fighters is the same one that will need to embrace them once again as part of society.

However, reconciliation cannot be defined purely in legal terms. It is important to understand its psychological aspect and relation to the societal processes of reconciliation/coexistence/cohabitation. Reconciliation cannot be legislated; it demands an understanding of and reflection on how reconciliation and transitional justice mechanisms can enhance the potential for reconciliation. As Chapter 10 argued, embracing a deeper understanding of reconciliation can facilitate the use of transitional justice mechanisms to support processes through which victims regain their agency, heal psychosocial damage and activate social action and civic engagement within society. Therefore the implementation of transitional justice mechanisms cannot be seen as delinked from psychological and social processes, as the harms caused by human rights violations and violent conflict are experienced by both the individual and the collective. By using a psychosocial lens in truth commissions, it is possible to stress the significance of the processes and procedures for addressing those psychosocial harms in contributing to national reconciliation/coexistence/cohabitation.

These processes of social healing can be aided by memorialization processes, which constitute a form of symbolic reparation. Memorialization processes have the potential to rethread social relations in deeply divided

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societies, dignify the survivors, and re-establish relations between victims and the state. In Colombia, the institutional programme of symbolic reparations emerged in 2005 with the Peace and Justice Law and was further developed in 2011 through the Victims and Land Restitution Law. However as Chapter 9 discusses, the institutional framework for this programme and its design has, paradoxically, become a barrier to victims' involvement. Although the standardization of these processes—and the number of procedures that victims need to go through and requisites they need to fulfil in order to make the participatory component of each law effective—are well-crafted for accountability, they are not conducive to creating trust for citizens aiming to regain their agency and rebuild their trust in the state institutions. Hyper-bureaucratic approaches can affect victims' ownership of symbolic reparation processes and create mistrust, undermining the role of memory as a transitional justice mechanism. Thus, for victims' participation to be effective, the social dynamics of their participation needs to be considered in the design of such mechanisms. If the goal of victims' inclusion in symbolic reparation processes is to be realized and their participation not treated tokenistically, simply to meet the requirements of a bureaucratic procedure, then the needs of victims should be considered in these processes.

Justice, reconciliation and coexistence require coming to terms with how we learn about war and its history. The pedagogical and educational strategy devised in post-agreement Colombia should not settle on a fixed and institutionally authorized narrative of what happened. Devising an appropriate educational strategy for the post-agreement phase will first require understanding how war and its history have been learned about in the past, and which mechanisms have facilitated reflection upon its history and its nature. In the case of Colombia, it seems that understandings of conflict and war amongst young people have been primarily shaped through television, even in places where the conflict has been viciously active. In addition to this, and as Chapter 11 has argued, there is a great heterogeneity in the conflict and peoples' experiences of it across the Colombian territory. This makes attempting to develop a single mainstreamed version of the Colombian history impossible or artificial. Instead, this heterogeneity demands a series of strategies and pedagogies that will allow future citizens to learn about their country in a way that adjusts to their contexts and allows for reflection on the role of war in their communities. Such an endeavour has the potential to become transformative. Through the mandated peace curriculum, education can become a tool for reconciliation and cohabitation, a space for reflection and debate, a place for democracy.

***The lessons: Not reinventing the wheel***

The Colombian case is a promising example of a holistic model of justice, responsive to both local needs and international legal restrictions, and incorporating both retributive and reparative elements of transitional justice.

However, the model's innovative design still requires implementation. Lessons from other contexts provide important indications and warnings. As the cases of South Africa, Peru, Bosnia and Herzegovina, and Sri Lanka show, a series of lessons is available to inform transitional justice practices in Colombia as the country seeks to rethread the social compact and promote reconciliation and coexistence.

The case of South Africa points to the importance of political consistency in the implementation of the large and complex changes needed to bring meaningful improvements in the lives of the citizens of a country. In a similar case to South Africa, Colombia will face challenges in effecting the structural improvements that will allow for the real emancipation of its citizens. It will be important to take stock of the suggestions that the Colombian Truth Commission will make, especially related to issues of structural change, and ensure that they inform policy and institutional changes. Failure to do so would leave in place the structural conditions that gave rise to violence in the first instance and sustained it over time unchanged, and result in an incomplete process of reconciliation, as suggested in Chapter 12. As William Ospina, a Colombian poet, argues, wars do not end when the body count is finished but when the reasons for the war cease to exist. Advancing structural change will demand visionary leadership from the political establishment. This type of leadership is not yet evident in Colombia, as élites clash for political posts rather than pursue the project of a nation beyond war.

The case of Peru, as described in Chapter 13, demonstrates the challenges of implementing transitional justice mechanisms as part of political transition. The most vital lesson from the Peruvian case for Colombia is the importance of legitimacy in any attempt to establish historical truth and change. The quality of professional and technical staff available to a truth commission cannot be underestimated in order to achieve this legitimacy; its work should not be left to politicians. Indeed, if trials and processes are seen as partial or biased, then transitional justice processes may be constrained in their ability to contribute to a reconciliation project and may instead contribute to the polarization of the political landscape (something that some Colombian politicians are working towards already). It is further important that alliances are built to connect actors at regional levels with groups that might be supportive of the Truth Commission's findings and proposals, such as students, labour unions, peasant groups and those located at the fringes of the state. This serves to strengthen the bonds between the state and its institutions, and supports the participation of those excluded by the state during the conflict in the consolidation of the Colombian state. The importance of mobilizing political support for the findings of the Truth Commission at all levels must not be underestimated if the goal is to consolidate the legacy of its work. Political support is particularly important in relation to the construction of official history/histories for future generations. Given the contentiousness of the peace agreements in Colombia, as shown by the rejection of the agreements in the plebiscite of 2 October 2016, this is a key element to take

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into account. Finally, a peace accord or a transitional agreement does not only imply an end point for the conflict. It marks the beginning of a transitioning process in which the interaction and participation of different social actors in different areas of public life becomes institutionalized and part of the daily life of a democracy in the making.

The imposition of transitional justice initiatives that are separated from local contexts, their realities and their representatives poses a great risk. While the transitional justice process will be held in Colombian courts, the distances (geographic, bureaucratic, social) between the provinces and the war affected areas of the country and the centre of the country resembles the distances between Sarajevo and The Hague which problematized the transitional justice process in Bosnia and Herzegovina as described in Chapter 14. The challenges in the transitional process in Bosnia and Herzegovina signal the challenges and pitfalls of how a limited scope in transitional justice can affect its legitimacy within local populations and thus affect the prospects for the sustainability of transitional justice. In a country as diverse as Colombia, it is therefore important to be aware of the local needs and local contexts in the processes of designing and implementing transitional justice initiatives. Without this, there is a risk that the process may be perceived as being alien and imposed, as in the Bosnia and Herzegovina models.

Finally, an additional important element of legitimacy required for the success of transitional justice processes is that the process is regarded by citizens as seriously and meaningfully pursuing its stated objectives, rather than operating as a token policy to generate international standing or legitimacy in accordance with the desires of the international community. Chapter 15 discusses this in relation to the case of Sri Lanka's long-fought civil war between the Government armed forces and the Liberation Tigers of the Tamil Eelam, after which transitional justice was used instrumentally to demonstrate to an international audience the 'liberal' and 'democratic' nature of the country. This put the rights of the victims at risk. If the justice needs of the victims of the civil war and the other multiple episodes of violence that engulf the recent history of countries departing from war are to be addressed, realizing a social justice-centred agenda and investing in building an accountable state is paramount where structural changes must be effected.

### **The promise of peace**

The difference between magical realism and the peace agreement signed in Colombia is that the former was never required to come to life and materialize. However, for peace to take a hold in Colombia it is necessary that the signatories of the agreement and its attendant institutions manifest the promise of the agreement. They need to translate the magical into reality, and this demands the capacity of the state to finally fulfil the promises it has failed to deliver on since its independence. It is not enough that the beautiful and powerful ideas of peace are captured on paper and enchanted with a couple

of signatures; this alone cannot overwrite 50 years of violence. If Colombia proves it is capable of implementing these agreements, the country would prove that magic can be transmuted into reality, and peace grafted onto contexts of war.

The challenges are as great as the promises of justice and peace. To achieve this promise, the country needs to overhaul its leadership, its citizenry, and its institutions. In a country that almost closed the office of its High Commissioner for Peace whilst in the middle of the implementation of a peace process (La Silla Vacía, 2017), and in which the promise of peace has been sequestered by political parties and their interests, it is evident that some sectors of the economic and political élite lack the vision to move the country away from violence. However, the agreements and the transitional justice process constitute an overture and an opportunity that could facilitate these processes of change.

Although the FARC—EP presents itself as the sole victim of this armed conflict and the representative of the victims of the country, they have in fact co-created the victims. The FARC—EP, like the paramilitaries, is a ‘Frankenstein’s monster’ that Colombian society has created, and its existence has helped to conceal corruption, incompetence, and institutional weakness, as well as erode popular belief in the possibility of peace. This distrust is the legacy of the policies of the FARC—EP and its leadership in previous peace processes, where periods of peace and ceasefire were used as opportunities to facilitate warfare. This legacy is as harmful as the void promises of peace made by the state. Now it is the responsibility of both the political establishment and the FARC—EP and its leadership to grant the Colombian citizens the rights they have denied to them for decades: peace and justice.

This transformation will not be immediate. It will demand institutional consistency in the prioritizing and pursuit of peace and the implementation of the peace agreement and the transitional justice agreement, framing this as an objective of the nation, rather than that of a President, a Government, or a political party. Only in this way can the efforts and policies needed to move through the post-agreement phase into peace be ensured for the coming decades. Peace requires consistency, and breaking the back of a political economy of warfare will require plans that are crafted to deliver in the long term, to the middle of the century, to guarantee that the structural issues of inequality, political participation, and access to justice are dealt with.

The case of Colombia and the promise of peace and justice that is now emerging illuminate both the fragility of the contexts in which transitional justice attempts are made, but also the courage of the citizens and Colombian peoples’ resilience in the search for justice.

The dignity, and the future, of Colombia as a nation rely on the treatment that it gives to its victims. History is watching.

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