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**Transitional justice in Colombia: competing  
discourses in a peace agreement context**

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## **Abstract**

This research paper analysed the transitional justice discourses of the government, its political opposition, the FARC, and the civil society participants in the peace negotiation, and its particular understandings of peace and conflict in the context of the peace negotiation with FARC in Colombia. Based on the study of the competing discourses and how are they reflected in the mechanism to admin transitional justice – Special Jurisdiction of Peace – I argue that the mechanism definition has been part of a bargain between elites looking for the status quo preservation. Thus, the Special Jurisdiction of Peace privileges the governments' discourses, especially of the government in power, while excluding some of the demands from civil society representatives and FARC.

## **Keywords**

Transitional justice, Colombian peace agreement, Special Jurisdiction of Peace, discourse analysis

## Acronyms

ACORE	Asociación Colombiana de Oficiales Retirados de las Fuerzas Militares [Association of Retired Officials]
AUC	Autodefensas Unidas de Colombia [United Colombian Self-Defense]
CONPA	Consejo Nacional de Paz Afrocolombiano [Afro-Colombian Peace National Council]
CONPI	Coordinación Nacional de Pueblos Indígenas de Colombia [National Coordination of Indigenous Peoples of Colombia]
DA	Discourse Analysis
DDR	Disarmament, Demobilisation and Reintegration
ELN	Ejército de Liberación Nacional [National Liberation Army]
EPL	Ejército Popular de Liberación [Popular Liberation Army]
FARC	Fuerzas Armadas Revolucionarias de Colombia [Revolutionary Armed Forces of Colombia]
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo [Revolutionary Armed Forces of Colombia – Peoples’ Army]
FEDEGAN	Federación Colombiana de Ganaderos [National Federation of Cattlemen]
FIP	Fundación Ideas para la Paz [Ideas for Peace Foundation]
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
IHL	International humanitarian law
JEI	Jurisdicción Especial Indígena [Special Indigenous Justice]
JEP	Jurisdicción Especial de Paz [Special Jurisdiction of Peace]
LGTBI	Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed
NGO	Non-governmental organization
OACP	Oficina del Alto Comisionado para la Paz [High Commissioner for Peace Office]
ONIC	Organización Nacional Indígena de Colombia [National Indigenous Organization of Colombia]
PRT	Partido Revolucionario de los Trabajadores [Revolutionary Workers Party]

TJ	Transitional Justice
TRC	South African Truth and Reconciliation Commission
UARIV	Unidad para la Atención y Reparación Integral a Víctimas [Unit for Attention and Integral Reparation for Victims]
UN	United Nations
WPR	What's the Problem Represented to be

# **Transitional justice in Colombia<sup>1</sup>**

## **competing discourses in a peace agreement context**

### **1 Introduction**

#### **1.1 Statement of the research problem**

The concept of transitional justice was introduced in Colombia almost 15 years ago as part of the peace-building framework. Since then, diverse understandings, representations, and discourses of transitional justice have informed the decisions that have been made to deal with the country's violent past and present. This is especially the case in the academic and governmental spheres, and more recently in civil society organizations.

War and peace are not only a matter of arms but also about words. The discursive arena on war and peace can successfully justify the mobilization of fighters or the international support for a certain war, and in the same sense, peace discourses are often heavily contested (Frerks, 2013: 19).

Transitional justice alternatives, such as mechanisms to transition from a conflict to a post-conflict scenario, are also part of similar discursive constructions and contestations. Although the concept of transitional justice has often been portrayed as technical, neutral or apolitical, it is not. If, following Foucault, we understand discourse as a social practice, conceptualizations and definitions of reality are part of socio-historically and politically embedded constructions even when they are represented as objective and politically neutral (Frerks and Klem, 2005: 3).

In that sense, applying the discursive approach to peace and conflict research allows us to explain how certain perceptions of reality shape discourses, and also how the discourses construct and deconstruct reality. Behind any transitional justice program, there are assumptions and presumptions that have a direct effect on post-conflict strategies (Bacchi, 2009: xiv) because they inform strategies, policies and practices of justice.

This research thus starts from the assumption that discourses have material effects, and subsequently that discourses on justice shape justice strategies and institutions. As justice is understood as one of the key elements of peace in Colombia, discourses on justice are an important part of building a peaceful post-conflict society. Transitional justice mechanisms, such as the Special Jurisdiction of Peace, have been created in order to prosecute war

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crimes and human rights violations, and are a mutually accepted part of the peace negotiation process between the Colombian government and the FARC guerrillas. As a consequence, questions concerning who will be prosecuted and how; what exactly constitutes a crime worthy of prosecution, and who will be judged as perpetrators and who as victims are all crucial questions, not just discursively, but in the daily lives of Colombians who have lived through war, fought in war, supported war, benefited from war, and suffered because of war.

There are equally important questions pertaining to whom the actors are that have the power to answer those questions, the ideas that shape their answers, and how their answers will shape the future of Colombia. While this last question is beyond the scope of this research, this research paper does focus on the key actors and their relationships with the key concepts of transitional justice. Following the peace process negotiations between 2012 and 2016, I define the key actors as the government and its political opposition, the FARC, and the civil society. The key concepts embedded in the peace process that are shaping the main ideas about transitional justice are: justice, peace and conflict. This research will examine how each of the actors understands and relates to these concepts, keeping in mind that they are currently shaping the post-conflict peacebuilding strategies, mechanisms and institutions.

The debate about peace and justice started in negotiations that were led by the FARC and the Government and attended by participants from across civil society. It was from these negotiations that the initial ideas to create the first version of the transitional justice mechanisms emerged. The discussions have continued since the peace agreement was signed in 2016 and, in the last two years, numerous shifts have seen the introduction of new conceptualizations of justice and the transitional justice system. Political leaders opposing the peace process have been the most open proponents of these new ideas about justice and peace. These shifts indicate specific understandings about the violent conflict in Colombia and its victims, as well as about how the transition from conflict to peace should occur. Their ideas, and the institutions and mechanisms that would be built upon them, are seen by some observers and actors as a threat to existing peace-building strategies that could ultimately jeopardize the achievements of the peace process (Uprimny, 2018).

Applying a discourse analysis approach will enable me to study the understandings behind the competitive discourses on transitional justice in the post-peace agreement context in Colombia, and to examine the extent to which these discourses are part of the Special Jurisdiction of Peace mechanism. Therefore, rather than examining the legal provisions contained in the transitional justice section of the peace agreement, this research focuses on the meanings of basic concepts that the key actors relate to transitional justice - i.e. justice, peace, and conflict.



## 1.2 Research questions

### *Main research question*

What are the understandings of transitional justice that are offered by the key actors of the 2016 peace agreement in Colombia, and how are they reflected in the Special Jurisdiction of Peace mechanism?

### *Sub-questions*

- How do the key actors define justice?
- What ideas about conflict and peace inform these definitions of justice?
- What are the similarities and differences between the key actors' approaches to justice?
- How are competing discourses on transitional justice reflected in the Special Jurisdiction of Peace?

## 1.3 Context

Since 1980, successive Colombian Governments have negotiated the disarmament of armed groups. However, it was not until the beginning of the XXI century that transitional justice (TJ) appeared as a concept in the judicial and political arena. The term has become common in debates about the end of one of the oldest conflicts in Latin America. In general terms, it could be said that TJ experiences in Colombia have focused more on the judiciary framework to prosecute an ex-combatants than on essential social justice claims (Sánchez, 2017: 13).

Colombia has a long history of peace negotiations with numerous and diverse armed groups. From 1989 to 1991, the Colombian government signed peace agreements with four guerrilla groups: the urban group M-19, the Popular Liberation Army (EPL), the indigenous guerrilla group known as Quintín Lame, and the Revolutionary Workers Party (PRT). In 1994, the same happened with the Socialist Renewal Current, an ELN dissident group.

The accords were based on incentives for the mass disarmament, demobilisation, and reintegration of guerrilla members. The legal framework offered amnesty as part of its criminal procedure, and pardons for the insurgent groups, whilst providing some of its leaders with the possibility to participate in the national constitutional assembly of 1991 that redrafted a new constitution (Velásquez, 2018: 53).

Transitional justice as a concept was introduced in 2003, when then-president Álvaro Uribe Vélez formalised a secret round of negotiations to secure the disarmament of the United Colombian Self-Defense forces (AUC), the largest paramilitary federation in the country. The AUC demobilised in stages, starting in 2003 and finishing in 2006, a process that resulted in 37 AUC groups disarming. Uribe's government proposed an alternative sentencing law that offered amnesty to all demobilised armed actors, including the paramilitary

commanders that were responsible for human rights violations (Laplante and Theidon, 2006: 77).

This proposal was strongly criticised by both international and domestic advocates, who demanded judicial accountability and respect for the victims' rights (Rowen 2017: 630). The Government was therefore forced to change the judicial framework to prosecute paramilitary crimes, and did so with the advice of the International Center for Transitional Justice (ICTJ) (Rowen 2017: 630). What resulted was a paradoxical shift wherein the government and the paramilitary leaders went from rejecting any option other than complete amnesty to supporting the so-called Justice and Peace Law. Their new argument stated that it was necessary to find a balance between peace and justice, and also to recognise victims' rights to truth, justice and reparations (Uprimny and Saffon 2008: 174).

In 2006, the Constitutional Court, which included the obligation for ex-combatants to repay their victims and to tell the truth, approved the creation of an entirely new penal process to prosecute ex-combatants (Rowen 2017: 630). In exchange for providing voluntary confessions for their crimes, disclosure of all of their assets to repay their victims, and a promise not to return to illegal activity, the alternative judicial process gave paramilitary and guerrilla fighters sentences of five to eight years. Furthermore, the ex-combatants that were not accused of crimes against humanity or war crimes, were given the possibility of obtaining amnesty if they went through a Disarmament, Demobilisation and Reintegration (DDR) program (Rúa, 2015: 82).

The academic and political sector strongly criticised the elaboration, implementation and development of the Justice and Peace Law. Uribe's government was accused of instrumentalising transitional justice discourse according to their own interests, and creating a law that used the rhetoric of the truth, justice and reparation to promote impunity (Uprimny and Saffon 2008: 177) and benefit the perpetrators and not to the victims (Rúa, 2015: 82).

In the eight years since the law was approved, only 14 sentences have been passed, which suggests that the Law has not fulfilled its formal aspirations of reparation (Velásquez, 2018: 58). Other critics have pointed out that TJ was a foreign idea brought to Colombia by transnational advocates that would be supported by the government, regardless of the particular political context. They argue that the idea was better suited for academics than for the ones who have worked in the field (Rowen 2017: 633).

However, the law was also a starting point to talk about transitional justice and to use the categories and logic of justice to analyse the situation in Colombia (Uprimny and Saffon 2008: 171). It showed the necessity of re-thinking strategies for investigating all of the actors involved in all the human rights violations over 50 years of armed conflict that would not overburden the judicial system (Sánchez et al., 2016: 258).

Furthermore, the confessions during the Justice and Peace Law processes exposed the links between paramilitary expansion, massive land grabbing and forced displacement that some academics and civil society organisations had been reporting about for some time ( Salinas and Zarama, 2012). They gave a glimpse into the complex relationship between the paramilitaries and some

economic elites who benefited from the armed conflict. A review of academic literature showed that in the 35 sentences passed by this jurisdiction before 2015, 349 cases of corporate complicity in land-grabbing and with paramilitaries were mentioned (Marín and Bernal, 2018: 47).

#### *Victims and Land Restitution Law*

In 2011, the Government of President Juan Manuel Santos enacted the Victims Reparation and Land Restitution Law, popularly referred to as Victims' Law, as part of the transitional justice framework in Colombia. The new legislation provided financial reparations for the victims and the restitution of dispossessed land. Before this point, the victims' reparations were conceived from the position of judicial responsibility, rather than from a holistic standpoint that accounted for international standards (Rúa, 2015: 88). The Victims' Law indicated a break from Uribe's government in the sense that it acknowledged the existence of an internal armed conflict in Colombia, and that some state agents were also guilty of human rights violations (Rúa, 2015: 87).

Some critics have said that the challenge of ensuring justice for more than 8 million people is more complicated than the Victims' Law recognises. According to Jamie Rebecca Rowen (2017: 642), the notion of 'transitional' in this bill suggests that the compensation would be finite, and that its perception of justice is short-sighted. Rowen argues that the idea of transitional justice continues circulating in Colombia "because the government has been able to craft an understanding of transitional justice that fits its needs. Rather than signalling radical political change, the idea of transitional justice has helped the government to provide a temporary solution for Colombia's ongoing conflict" (Rowen 2017: 642).

#### *Peace process with FARC*

On 18 October 2012, at a public event in Oslo, the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC) sat at the negotiating table to officially open a peace process would take place over the next four years in La Havana, Cuba (FIP, 2016a). From the beginning of the conversation, President Santos made it clear that the Government would only negotiate the end of the conflict and the establishment of a lasting peace, and not the country's economic, political and social systems (Jaramillo, 2013: 3).

The parties agreed to divide the conversation into cycles that would provide the structure of the six chapters of the final agreement. The six chapters were: agrarian development, political participation, ceasefire and FARC's reintegration process; solutions to the illegal drugs problem, victims' rights, and implementation (Gobierno de Colombia and FARC-EP, 2016a: 7–9). The fifth point, also known as the 'victims' rights agreement', was based on a human rights perspective that recognised that many different actors were responsible for the armed conflict in Colombia, not just the FARC and the state (Pabon and De Gamboa, 2018: 68). Within this section, the "Comprehensive System for Truth, Justice, Reparations and Non-Recurrence" combines judicial and extra-judicial mechanisms to prosecute severe violations

of human rights and infringements of international humanitarian law in order to clarify the truth of what happened during the conflict, repay the victims, and search for the disappeared. The Comprehensive System is composed of: The Truth, Coexistence and Non-Recurrence Commission, The Special Unit for the Search for Persons Deemed as Missing in the Context of and due to the Armed Conflict, and the Special Jurisdiction for Peace (Gobierno de Colombia and FARC-EP, 2016a: 9).

The Special Jurisdiction of Peace (JEP in Spanish), which is the focus of this research, is the judicial component of the comprehensive system. The purpose of the JEP is to administer transitional justice to the gravest and most significant crimes with important contextual implications in the conflict before December 1st 2016 (Jurisdicción Especial para la Paz, n.d.).

In June 2016, before starting to negotiate points pertaining to victims' rights, the Government and FARC released a public statement stating that the agreement was to be centred around the compensation of the victims, as well as announcing three new participation mechanisms. The first was the creation of the Historical Commission of the Conflict and its Victims, a diverse group of experts chosen by both negotiating parties that presented a document containing arguments about the causes of and reasons for the continuation of the conflict, and its effects on Colombia, from various perspectives. Secondly, four regional discussion forums were established in Villavicencio, Barrancabermeja, Barranquilla, and Cali to reflect upon the fifth point of the negotiation agenda. The third mechanism was an invitation to a delegation of victims to participate at the negotiations in Havana (Brett, 2017: 89). The 60-person delegation was divided into groups of 12 that visited the negotiating teams at different moments. The groups were composed of individuals that were selected based on the criteria of gender, the types of crime that were committed against them, as well as the group that perpetrated the crime (guerrillas, paramilitaries or the State) (2017: 27).

Achieving the active inclusion civil society members aside from victims in the negotiating process was not easy and required pressure from social movements. This was the case for women's organisations and indigenous and Afro-Colombian communities. When the peace talks started in 2012, women were not a part of either of the two negotiation teams, which reinforced the belief that war, as well as the ending of war, were issues for men (Céspedes-Báez and Ruiz, 2018, p. 93). Forty women's organizations joined forces to create a coalition called 'Mujeres por la Paz' (Women for peace) that spread one message: "there is no peace without women". Mujeres por la Paz led numerous forums across the country and a public demonstration of 8000 women in November 2013 that marched towards the presidential palace (Céspedes-Báez and Ruiz, 2018, p. 96). In response to the women's claims, FARC and the Government created a sub-commission of 18 experts on gender and feminism experts who flew to Havana to advise on the reformulation of the agreement.

Although indigenous and Afro-Colombian communities had been demanding participation in Havana to present their perspective for more than three years, they were only called to participate the day before the final agreement was announced. Some of the claims of Afro-Colombian and

indigenous leaders were included in the so-called 'ethnic chapter'(Verdad Abierta, 2016) .

The Final Agreement was reached on 24 September 2016 but was rejected by the majority of Colombians in a plebiscite on October 2. This led to a renegotiation of the chapters in the agreement and further modifications during the endorsement process. The Special Jurisdiction of Peace faced several changes that will be explained in chapter 5.

## 1.4 Methodological considerations

To conduct the research, I applied a Discourse Analysis (DA) methodology because I believe in the potential of using DA to unpack statements that may appear obvious, inevitable or natural, and also using DA to explore the process behind constructing different meanings of 'truth' (Goodwin, 2013: 170).

There are a variety of approaches to DA from multiple different schools across social science and policy studies. This research applies a post-structural approach that defines discourse “as an ensemble of ideas, concepts, and categories through which meaning is given to phenomena” (Gasper and Apthorpe, 1996: 2). The analysis of the Special Jurisdiction of Peace as a public policy uses post-structuralist and social-constructionist theories that understand policies as discourses. Under these conceptualisations, the ways that policies frame certain social problems and construct concepts, categories and subject positions, shape the world in which these policies are implemented (Goodwin, 2013: 170). I also find the understanding of discourse as a conversation, debate, and exchange to be functional; and also analysis that takes into different points of view and relies on intellectual exchange in policy-making (1996: 4). This research therefore integrates contributions from different approaches and does not adhere to a ready-made formula based on invariable assumptions, which is considered by some authors a constant danger in DA research (1996: 2).

According to Teun A. van Dijk, discourse can be analysed as structure, as process (Dijk, 1997b), and as social interaction (Dijk, 1997a). Discourses have three main dimensions: the use of language, communications of beliefs, and interaction in social situations. The challenge of discourse analysis is to formulate theories of the relationships between language users, beliefs, and interactions (Dijk, 1997b: 2).

However, it is insufficient to explain discourse solely through its internal structure and its process; discourse must be studied as a practical, social and cultural phenomenon (Dijk, 1997a: 20). Reading discourses as a social interaction means that they are part of broader sociocultural structures and processes; meaning that language users are not only speakers but members of social categories such as gender, class, ethnicity, and age that play a fundamental role in the act of writing or speaking (Dijk, 1997a: 21). Discourse does not, therefore, occur in a vacuum or possess a 'meaning' by itself. It is produced within a specific context (Phillips and Hardy, 2002: 4).

This research is focused on the study of **discourses as social interactions** and the context is therefore guided by the local and global characteristics of the social functioning of the texts, rather than by a context of

the verbal structures (Dijk, 1997a: 14). This requires the researcher to take a broader perspective that shows the social, political or cultural functions of discourse within certain institutions and groups, as well as within society and culture at large (Dijk, 1997b: 5). Contrary to a 'given' or 'static' social context that language users and their discourses 'obey' passively in a manner determined by their group, societal or cultural context, understanding discourses as social interactions allows actors to contribute to both construct and challenge their social contexts (1997b: 20). This research therefore understands discourse as a social practice that is shaped by social situations, structures, institutions, and power relations, but also as a mechanism for producing, reproducing or disputing contexts (Fairclough and Wodak, 1997: 258 in Wodak and Meyer, 2009, p. 5–6).

### *Power/Knowledge in Discourse*

According to Michel Foucault, power is intrinsically connected with the production of truth and knowledge. The truth about everyday reality is that it is a construction that is kept in place through a wide range of strategies that privilege and normalise specific views whilst excluding others (Mills, 2003b: 76).

Power works through knowledge and is not possessed but exercised. Power/knowledge regimes produce knowledge through the institutionalised practices of exclusion, representation, naming, and defining, and everyday practices (Mills, 2003b: 69). Thus, there is no absolute truth. In the words of Stuart Hall, there are no fixed meanings. Instead, meaning is constructed through language based on context, practices and interactions; and through systems of representation (Hall, 1997: 25). Powerful institutions produce discourses of what is normal and what is true, which are accepted by the majority of people through the process of normalization that occurs in their daily practices, without the need for brute force. Those discourses, practices and values can also be understood as shared 'cultural codes' to understand the world using the same conceptual maps (Hall, 1997: 22).

Discourses are therefore not merely a translation of reality into language, but “a system which structures the way that we perceive reality” (Mills, 2003a: 55). Rather than denying the existence of material reality, Foucault’s theory suggests that we can only think about, experience and comprehend material reality based on the discourses that we share and the structures that these discourses impose on our thinking (2003a: 56). In other words, material reality and discourses are mutually constitutive. There are, however, competing and conflicting discourses that are linked to competing and conflicting social structures, institutions and struggles. There are thus ways to resist and transform the dominant institutional discourses as “discourse is both the means of oppressing and the means of resistance” (2003a: 55).

Using such an approach to discourse, truth, power and knowledge allows this research to use discourse analysis as a methodology to understand how discourses on transitional justice have naturalised certain practices and values, and also how they are contested through counter-discourses.

### *1.4.1 DA Methods*

The first step to examine the competing discourses about transitional justice was to select three categories of analysis: peace, conflict and justice. A detailed reading of the Special Jurisdiction of Peace chapter in the Peace Agreement, made it possible to identify the centrality of those concepts in the definition of the new transitional justice mechanism.

As an analytical tool, categorisation is understood as a representational strategy that organises everyday knowledge by classifying actors, objects and ideas into specific groups for the purpose of justifying past and future actions (Sacks, 1992 in Leudar et al., 2004: 244). Classification would therefore have a direct impact on any transitional justice mechanism because such mechanisms are concerned with dispensing justice for past and future actions. For instance, the legal conceptualisation of conflict defines or redefines who gets prosecuted and who does not. Similarly, the conceptualisation of justice determines who has the power to guarantee a fair judicial process or to change the provisions of justice. The same is true with the conceptualisations of peace and victimhood as classifications determine what is peace and what actions would bring it about; as well as who victims are and what actions produce victimhood.

The tool was used to analyse the TJ mechanisms and the competing discourses that inform them. This is because, in this particular case, the Special Jurisdiction of Peace as a public policy was not solely the result of a Government decision, but the result of debate and discussions between a diverse group of actors that participated in its elaboration and execution at different levels.

Therefore, the next step in my methodology was to define the four principal actors in peace negotiations: the Government, its political opposition, the FARC, and the civil society participants in the peace negotiation (i.e. victims, women and the Indigenous' and Afro-Colombian' leaders). The selection of these four actors was based on their influence in the process of making the Special Jurisdiction of Peace.

An actor-orientation and constructivist approach starts with the recognition that realities are socially shaped and interpreted by different social positions, perspectives, and interests that vary between individuals and groups (Frerks and Klem, 2005: 2). Rather than determining the accuracy (i.e. the 'truthfulness') of the discourses, the purpose is to examine how and why social actors arrive at their multiple and diverse understandings, interpretations and representations, i.e. discourses, about reality (Frerks and Klem, 2005: 3). This does not mean that this research ignores the heterogeneous nature of the selected actors and the possibility for the co-existence of more than one discourse within a given actor.

In addition to categorisation, the selected texts were analysed through the 'What's the Problem Represented to be?' (WPR) method. This is a framework developed by Carol Bacchi that is based on four academic traditions: social construction theory, post-structuralism, feminist body theory and governmentality studies (Bacchi, 2009: xv). WPR consists of six interrelated questions that help researchers to unravel "problem representations" in

policies, and the assumptions, presumptions and silences that lie behind those policies (Bacchi, 2009: xv).<sup>2</sup>

The WPR method fits harmoniously with the post-structuralist assumptions that inform this research. It analyses policies as cultural products that give shape to 'problems' based on deep-seated cultural assumptions (Bacchi, 2009: x). Problems, in this sense, are not understood as troubling conditions, but as “the kind of change implied in a particular policy proposal”(Bacchi, 2009: xi). In this research, WPR allows me to focus on the central role that certain representations of justice, peace and conflict play in the transitional justice proposals made by the different actors. Furthermore, I ask how those representations of transitional justice are included or excluded in the problematization of “proper” justice to transition from a state of conflict to the peace contained in the Special Jurisdiction of Peace.

In summary, I believe that the combination of WPR and categorisation facilitate a critical analysis of the Special Jurisdiction of Peace mechanism, and of the understandings of transitional justice offered by the principal actors of the 2016 peace agreement in Colombia.

### ***1.4.2 Text selection***

I started by reading all of the public statements made by the government, the FARC and civil society representatives regarding transitional justice that were contained in the *Library of the Peace Process with the FARC-EP* (OACP, 2018). This is an eleven-volume compilation of the most relevant public statements made by the various actors that was edited and published by the High Commission for Peace Office in Colombia (OACP). Notably, the publication does not contain public statements delivered by the political opposition regarding the peace agreement.

To select documents for analysis, I followed Foucault’s suggestion of focusing on 'prescriptive texts', which expose rules, opinions and advice for how problems should be addressed (Focault, 1986 in Bacchi, 2009: 34). I prioritised speeches where the actors not only referred to transitional justice in general, but also included their views on what TJ should look like in a post-agreement scenario. Other selection criteria included the time period, and I included speeches delivered at the beginning of the negotiation process in November 2012 and at the time the JEP was passed into law in November 2017. I also prioritized statements that displayed actors' understandings of the key categories for my analysis: justice, peace and conflict.

To study FARC’s discourse on transitional justice, this research focused on the analysis of the three official statements released by the guerrilla peace delegation in Havana during their negotiations with the Government.<sup>3</sup> Unlike FARC, the Government had a more diverse group of official spokespersons from their peace delegation. For this research I decided to only select statements made by Juan Manuel Santos.

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<sup>2</sup> The six guiding questions are summarised in the chart on Appendix 1.

<sup>3</sup> All analysed documents are listed in Appendix 2.



The discourses that were opposed to the peace process, and, more specifically, opposed the Special Jurisdiction of Peace, were produced by a variety of actors. Opposing actors included: the Conservative Party, some evangelical churches, the Colombian Association of Retired Military Officials, (ACORE), and some economic groups like the National Federation of Cattlemen (FEDEGAN) (Gómez, 2017: 242). However, I decided to focus on the statements released by the former President Álvaro Uribe and his Democratic Centre party, who have been in power since August 2018, because of their influential role in the renegotiation and modification of the Peace Agreements.

For the civil society organizations and individuals, I selected official statements that they brought to the negotiating table and some documents that outlined their propositions regarding TJ.

### ***1.4.3 Scope and limitations***

This research is based on secondary data and the analysis is limited to the trials component of the transitional justice system of the peace agreement, as well as a reduced number of categories and actors. I am aware that empirical research with different actors that participated in the elaboration of the Special Jurisdiction of Peace would have provided a more extensive and broader spectrum of analysis. Furthermore, an opportunity to study more categories and more actors' discourses would have enhanced the complexity of the research.

My positionality in this research was influenced by my previous work as a journalist covering armed conflict in Colombia, and especially by my experience reporting on Justice and Peace Law trials. This made me more aware of the social power relations that underpinned the TJ discourses and the material effects of these on the lives of Colombia's most vulnerable citizens. As a Colombian citizen, I supported the peace conversations with FARC. However, I do not think that this impeded my ability to provide a critical analysis of the peace agreement and the competing discourses on TJ.

## 2 Theoretical framework

### 2.1 The state of the relevant academic fields

According to the Secretary-General office of the United Nations (UN), effective governing and judicial systems that respect human rights and the rule of law are necessary to promote reconciliation and lasting consolidated peace (United Nations, 2010: 3). For the UN, transitional justice is crucial for the establishment or re-establishment of the institutionalism, and has been defined as:

the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (United Nations, 2004: 4).

The UN refers to mechanisms such as truth commissions, trials, amnesties, reparation programs, memorials, venting and lustration procedures, among other things that are implemented by societies during processes of transition and transformation (Mihir, 2017: 1). Whatever combination of mechanisms and procedures a government or civil society chooses, they must conform to international norms (United Nations, 2010: 3).

Although policymakers, donors, and actors involved in international cooperation in the field of TJ have widely accepted the above definition, there is not a fixed meaning of the concept. In academia, there is still a debate about the nature and boundaries of TJ, as well as a discussion about the social relations of power involved in the construction of the mainstream understanding of transitional justice. Among scholars, TJ is generally understood as the measures implemented under international law to address large-scale and serious crimes (de Greiff, 2010: 2). Ruti Teitel, one of the most influential scholars in the field, has defined TJ as “the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel, 2014: 49). According to Teitel (2014: 52), the evolution of transitional justice can be divided into three phases. The first, 'the post-war phase', began after the end of World War II in 1945. The Nuremberg Trials, a symbol of this phase, took two precedents set in the aftermath of World War I: the predominance of international law over national law, and the adverse effects of the severe collective sanctions on Germany. These precedents led to new liberal focus on individual judgement and responsibility. This first phase of transitional justice occurred in unique conditions that facilitated interstate cooperation, war crime trials, and sanctions.

Phase II began in the aftermath of the Cold War. The decline of the Soviet Union, and the end of US - Soviet bipolarity had tremendous impacts on the southern cone of South America, Eastern Europe, and Central America.

Once, the question of national law vs international law was raised, and the result was many nation-state trials that were based on international jurisprudence to legitimise the new regimes and advance nation-building, modernisation, and the rule of law (2014: 54). The values of the rule of law were not only based on retributive justice anymore; peace and reconciliation began to be considered as part of a more complex and diverse understanding of the political conditions of transition. In this phase, the TJ aim was to unveil an alternative truth about past violations, which led to the rise of the justice vs truth debate and the emergence of Truth Commissions in different parts of the world (Teitel, 2014: 55).

The third “steady-state” phase started at the end of the 20th century and continues to this day. It is associated with the expansion and normalisation of transitional justice; What was once an exception became the new norm. The principal symbol of this stage is the International Criminal Court (ICC), created in 1998 to prosecute war crimes, genocide, and crimes against humanity under international law. The ICC was ratified by 123 countries that are signatories to the Rome Statute (ICC, n.d.). According to Teitel (2014: 65), there are many new dilemmas brought about by the expansion of the law of war. This includes the establishment of a humanitarian law that serves the broader purpose of regulating the conduct in war, which contributed to the foundations of an emerging law on terrorism.

#### *Transitional justice as globalized agenda*

The globalisation of TJ created a new scenario where the dichotomy between peace and justice was dismissed by international organizations because of the new consensus that a lasting peace would not be possible without grievances being addressed first (Kent, 2017: 204). In the 2004 UN Secretary-General report, Kofi Annan pointed out “Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another” (United Nations, 2004: 8). Thus, blank amnesties or 'forgive and forget' policies, as there were in the post- Cold War phase, are no longer suitable for the new accountability standards (Fijalkowski, 2017: 116), and cannot be applied to signatories of the Rome Statute. In the words of Rosemary Nagy, this is a 'global project' in which “the question today is not whether something should be done after an atrocity but how it should be done” (Nagy, 2008).

A leading view put forward by this approach understands transitional justice as being associated with a specific set of mechanisms, closer to the UN definition. For example, Pablo de Greiff<sup>4</sup> argues that despite the disagreements about the boundaries of the concept and its implementation, there is a consensus regarding the minimal core elements that transitional policies must have: “prosecutions, truth-telling measures, reparations for victims, and some initiatives tending towards institutional reform, particularly the vetting of security sector personnel. Other elements frequently said to be parts of transitional justice include memorialization efforts as well as local justice

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<sup>4</sup> United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and former Director of Research at the ICTJ.

initiatives” (Greiff, 2010: 2). However, this approach has been criticised for its “top-down” application and its “one-size-fits-all” approach (Sharp, 2014: 9).

The International Center for Transitional Justice (ICTJ), an NGO that is advising on transitional justice initiatives in more than 20 countries, describes four main strategies for dealing with massive violations: prosecution, truth-seeking, reparations, and institutional reform (ICTJ, 2011b). This approach was inspired by the holistic model, proposed by the co-founder of the ICTJ, Alex Boraine and provides five essential pillars for transitional justice. They are: 1) retributive sanctions to those deemed responsible for human rights violations, 2) truth recuperation, 3) reconciliation processes that include the reintegration of ex-combatants, 4) non-repetition guarantees and 5) reparations (Boraine, 2006). This is the model that has been most popular among policy-makers, scholars, and TJ practitioners in Colombia (Sánchez, 2017: 29).

According to Dustin Sharp (2014: 3), another problem is that for the last 30 years ‘transition’ has been assumed to mean the transition to a Western-style liberal market democracy. Although today’s TJ field is increasingly interdisciplinary, most of the debates are still narrow and thin, focused on human rights, legalisms, and political science domains that do not problematise the idea of the liberal peace (Sharp, 2014: 7). Similarly, Zinaida Miller (2008: 272) refers to the close relationship between policymakers and scholars as creating a ‘snowball effect’ that does not provide a critical examination of the international actors and the social relations of power involved in the understanding of TJ.

#### *Critical perspective: assumptions and silences of TJ*

In recent years, critiques of conceptualizations of TJ have increased as the field has aged and matured. Scholars and practitioners are calling for broader agendas and the reframing of the concept (Bell, 2008: 13). The expansion has been reflected in more inclusive and complex approaches that have brought new scopes, methodologies, and actors into consideration. For instance, recent works in the field have been demanding a more participatory approach and less top-down interventions (Lundy and McGovern, 2008); more reflections on what transition means and how to understand it within violent democratic societies (Ni Aolain and Campbell, 2005); questioning the capacity of traditional TJ mechanisms to contribute to and/or obstruct accountability for human rights violations (Skaar et al., 2016); including more critical analyses of gendered justice gaps (Björkdahl and Mannergren Selimovic, 2017), and studying the inclusion of local justice practices as a response to transitional justice aims (Clark, 2007).

I have focused on some scholars who are critically examining the understandings of transitional justice as a discourse and practice and exploring the assumptions, silences, and social relations of power involved in the construction of the concept.

Nagy (2008: 277–278), for instance, insists that the focus on the set of mechanisms outlined in the dominant approaches of TJ has resulted in a narrow understanding of violence and transitional responses to it. She claims that trials and truth commissions have structured their conceptions of violence and justice based on the assumption that a focus on legal processes will

provide the best solutions for dealing with social harm, an assumption that implicitly privileges liberal democratic ideals. Nagy (2008: 287) argues that because transitional justice is a discourse and a practice embedded in power relations, the same is true for its definitions of who is accountable for what, where and when. It is a one-size-fits-all discourse focused on massive violations of human rights that tends to ignore structural violence, gender inequality, and foreign involvement in its understanding of violence.

Likewise, Miller (2008: 266) argues that the transitional justice project's narrations on peace and conflict may perpetuate silences and invisibilities wherein physical atrocities are seen as intolerable while structural violence is accepted. According to Miller, TJ actors and practitioners hardly ever mention social exclusion, economic rights, redistribution, and development, and when these factors are mentioned, they tend to remain as a part of the contextual background. More specifically, the TJ literature fails to explore the economic causes and consequences of conflict, the liberal economic ideas that inform transitions based on liberal peace assumptions, and the government development plans that accompany the transition process (Miller, 2008: 267).

In this sense, Miller (2008: 267) disputes the idea of false neutrality and transitional justice's apolitical legal mechanisms. The mainstream TJ concept already holds political positions regarding inequity, redistribution, and development. The problem is that seen through this lens, the narrative of conflicts become political and unidimensional. Two examples include: the aftermath of the South African Truth and Reconciliation Commission (TRC) where the story of apartheid focused on racism and individual violations and not on the story of an economic-colonial project that created a system of abuses; and the fact that the Rwanda genocide become a story of 'ethnic hatred' rather than understood to be a consequence of colonial constructions that perpetuated the unequal distribution of resources (2008: 281).

Sharp (2014: 9) argues that TJ narratives are grounded in neutral, technical and, apolitical language in accordance with the human rights discourses that veil the political assumptions and purposes of the TJ project (Sharp, 2014: 9). He also agrees that the TJ consensus to 'do something' is entirely focused on large-scale human rights atrocities and physical violence, and ignores the issue of economic rights (2014: 2). This is partly a consequence of the early construction of a field where the notion of transition was conceived of in relation to Western liberal market conceptions of democracy and the rule of law.

TJ discourse and practice have material effects. Going back to the TRC, Sharp explains that the Commission limited the category of victim to focusing on individuals that suffered violations of their human rights, which consequently meant that the structural injustices of apartheid itself remained unaddressed in the background. As a result, "two decades since the end of white rule in South Africa, apartheid has ended, but the de facto economic and social status quo has not changed to the degree many would have hoped" (Sharp, 2014: 11). Based on this, the author proposes that the notion of transition in TJ should be reconceptualised and reoriented from a transition to democracy, to a 'positive peace' approach that addresses structural violence (2014: 23).

Some scholars have received the inclusion of social-economic issues as part of the conceptualisation of TJ with scepticism. Lars Waldorf (2012: 179) does not deny the importance that recognising social-economic inequalities plays in preventing future conflict, but insists that the short-term, legal and corrective nature of transitional justice means it is unrealistic to expect it to resolve these issues. Waldorf argues instead that this can be achieved through democratic policies. De Greiff (2010: 40–41) argues that adding economic crimes to the duties of trials and truth commissions could overburden the transitional justice process and create broad opposition from the economic elites.

Rather than refuting these issues, the UN attempted to incorporate some of them into its understanding of TJ. In 2006, Louise Arbour, the United Nations High Commissioner for Human Rights, said that:

Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crises and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices (Arbour, 2006: 3–4).

However, as Lekha Sriram argues, as long as transitional processes remain embedded in a peacebuilding framework that promotes free markets and democracy, it is unlikely that socioeconomic issues will be taken into account (Sriram, 2014: 28). The evident danger for Sriram “is that promoting marketisation without dealing with past grievances over inequitable resource distribution may lead to the revival of old grievances or create new ones” (2014: 24).

## **2.2 Theoretical perspectives of this research**

In this research, I focus on the critical theoretical perspectives on transitional justice mentioned above. I start with the conception of TJ as discourse and as a practice that has material effects on society. As Nagy (2008: 291) argues, “the institutions of transitional justice are, at base, definitional. They serve not only to delineate past and future but also to define violation and crime, victims and perpetrators, injustice and morality. They demarcate the boundaries of acceptable demands by a citizenry newly awarded its rights and narrate themselves as instruments of justice, political will, stability and peace”.

Secondly, my hypothesis that the foundations of the Colombian peace process with FARC (2012-2016) are based on the mainstream understanding of transitional justice as part of the liberal peacebuilding agenda is a critical perspective that allows me to unpack the assumptions and silences behind the Special Jurisdiction on Peace.

Thirdly, I emphasise the social relations of power involved in the definition of a TJ process. In 1986, Guillermo O’Donnell and Samuel

Huntington, quoted by some of the critical perspective scholars, emphasized that TJ is the result of a series of bargains between elite groups based on their interests, and that the level of justice is dependent on which elite perpetrator groups dictate the terms of the transition (O'Donnell and Schmitter, 1986 in Paige, 2009: 346).

### **3 What justice means?**

#### **3.1 Special jurisdiction of peace's debate**

For the first time in Colombian history, the design of transitional justice mechanisms became part of the peace process agenda. In 2012, the Government created the Legal Framework for Peace in an attempt to translate the international standards on transitional justice into the Colombian Constitution. However, the proposition was rejected by FARC during negotiations (Semana, 2013). Furthermore, as explained earlier in the context section, some representatives of the civil society participated in the discussion about the TJ model.

The most charged discussion was the definition of the judiciary mechanism to investigate, prosecute, and sanction against crimes against humanity and other violations to the international humanitarian law (IHL) (Gómez, 2017: 240). Total amnesties were not an option as they were in previous peace processes because Colombia was both a signatory to the Rome Statute and a country under preliminary examination by the ICC (Uprimny et al., 2014: 13).

Peace negotiations with FARC were framed under the globalization, or phase III stage of TJ (Teitel, 2003). This provided the TJ debate with four particular characteristics: a transition beyond the justice vs peace debate; more monitoring by international courts such as the ICC and the Inter-American Court of Human Rights (IACHR); stronger demands of no-impunity in terms of truth, justice, and reparations from different actors; and political dissensions being 'translated' into judiciary disputes (Uprimny et al., 2014: 15).

The controversy focused on the questions of what may be sanctioned, who may be prosecuted, and how. Despite the use of legal and seemingly neutral vocabulary, the debate became politicised: "The meaning of transitional justice continues to evolve in Colombia. While an analysis of the Justice and Peace Law reveals how different actors first instrumentalised transitional justice, the peace process with FARC highlights how politicised the idea has become" (Rowen J.R., 2017: 641).

In September 2015, the FARC and the Government announced the creation of a Special Jurisdiction for Peace (JEP) that will be charged with taking "decisions that offer full legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to acts committed in the context of and during said conflict and which represent serious breaches of international humanitarian law and serious violations of human rights" (Gobierno de Colombia and FARC-EP, 2016a).



### 3.2 FARC's understanding of justice

An overview of the FARC's discourse related to transitional justice during the negotiation process reveals changes in the conceptualization of justice within the transition context. For instance, at the beginning of the peace talks and because of their political nature, FARC claimed amnesties and transitional justice based on a truth commission. However, by the end of the negotiations they started to accept the necessity of a judicial process. Furthermore, the third document analysed here shows how FARC adopted some of the Government's arguments and strategies, such as highlighting the benefits of a peace based on truth, justice, reparations and no repetition, as well as redistributive justice being the best possible solution (FARC-EP, 2018c: 523).

However, in general terms, there has been no significant shift in FARC's conceptualisation of the categories. They upheld the essence of their demands throughout all of the conferences and the previous peace processes. FARC have always argued that a disarmament agreement is not a peace agreement if there is no change in the structural causes of the violence. The structural causes include: inequality in land distribution, the lack of guarantees for their participation in politics, and more recently, the need to find a solution to both the paramilitary and the drug trafficking economies (Medina, 2009: 202).

According to FARC, the justice system is partly responsible for the reproduction of violence because it is founded on a 'criminal law of the enemy' that has obscured the state's responsibility for the conflict, while imprisoning innocent people and political opponents. Thus, in a transitional scenario, the new TJ mechanisms to judge FARC cannot be part of a justice branch that they feel has been politicised (FARC-EP, 2018a: 230). This justice system, according to FARC, must be centred on the truth because they see truth as the most important mechanism to heal victims: "Without truth reconciliation is not possible. The Truth must mark the only way to rebuild Colombian society after years of confrontation (...)"(2018a, p. 226) [Translation by TN].<sup>5</sup> It could be said, then, that FARC put more effort into truth initiatives than the judicial process.

However, the question of 'what kind of truth?' remains. FARC is focused on the truth about the structural causes that have caused and perpetuated conflict in Colombia since the 1930s. They are looking to find the 'real truth' about the roots of the conflict in order to undermine the 'false' conflict narrative being spread by the Government. It is a conceptualisation of truth that is more characteristic of Phase II of TJ from after the fall of the dictatorships on the southern cone of America, where transitional justice processes focused on the construction of an alternative history of past abuses (Teitel, 2003: 55). Victims, defined as political agents leading mobilization processes, must participate in the transitional justice process, as well as in the construction of truth; and their reports need to be heard. Furthermore, it could be said that FARC's discourses are more focused on a historical side of 'the truth' than on immediate concerns such as the locations for the burials of the

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<sup>5</sup> Quotes translated by the author from Spanish to English.

dead, and information about the disappeared, which are both truths that victims' organisations have been asking for.

FARC argues that all the actors must be part of the transitional system in a future tribunal, and contributors to the Truth Commission. A transitional justice system should also reach and even-handedly prosecute civilians involved in the conflict instead of only combatants (FARC-EP, 2018b). This is especially the case for, the civil heads of the state, corporations, and landowners that financed armed groups. All of those actors must engage with the process of victim reparations according to the types of victimisation they were responsible for. However, as the head of the dominant and exploitative regime, the state must accept the primary responsibility in a judiciary process and should be in charge of the financial reparations to the victims.

This also leads to a broader notion of who the victims are. If more actors recognise their responsibility, more victims can be included. For instance, FARC would recognise victims of the economic system, victims of foreign interference, victims of extrajudicial executions, and political prisoners as victims of the conflict.

FARC firmly demands amnesty for political crimes (i.e. crimes related to their political activities that cannot in any case lead to a custodial sanction). Also, because they recognise themselves as a political organisation that fought collectively, they do not want to be tried as individuals.

Finally, because injustice is only one of the causes of systemic violence, a new transitional justice system is not going to work if the other structural causes of violence, such as unequal land distribution, or the lack of guarantees for political participation do not change. So, while the legal aspects of justice are important for FARC, they do not see them as enough to achieve social justice and reconciliation.

### **3.3 Government's competing understandings of justice**

During both the plebiscite campaign in 2016 and the aftermath of the peace agreement's rejection in the plebiscite, the Special Jurisdiction of Peace debate has been framed as part of a polarised political confrontation between two former allies: the administration of then President Santos, and the Democratic Centre Party led by former president Uribe (FIP, 2016b). This is a narrow conceptualization that has prioritised the powerful actors and ignored a range of other competing actors and discourses.

Indeed, the Governmental discourses have things in common. Both start from a mainstream liberal conceptualisation of peace as a means for promoting democracy and free markets, with a focus on massive human rights violations that exclude economic violence (Sharp, 2014: 28). Therefore, neither of the discourses problematized neoliberal economic practices and development plans as roots of the conflict and as possible causes of new violence (Miller, 2008: 267). Both approaches ignored structural violence, gender inequality, and foreign involvement (Nagy, 2008: 287).

### *Santos administration's discourse*

Based on the analysis, it could be said that the Santos administration's discourse on transitional justice is a translation of the so-called 'TJ 'global project' (Nagy, 2008: 276), with ICTJ's advice "at the heart of the peace negotiations" (ICTJ, 2011a). Supported by international legal standards and drafted in technical and apolitical vocabulary, the Government suggested a "holistic", "victim-oriented" TJ process to enhance prosecutions, truth-seeking, reparations, and some institutional reforms.

The then President Juan Manuel Santos argued that transitional justice required the deployment of the necessary mechanisms to achieve justice in times of transition from armed conflict to peace (Santos, 2018c). Therefore, transitional justice is the cornerstone of the process because it is called to lead to the end of the conflict with the satisfaction of victims' rights in a transitional scenario wherein the victims would be unafraid to speak up and the victimisers would be incentivised to accept their crimes. Rather than a 'justice or peace' dichotomy, Santos insisted that the agreement would attempt to achieve a peace with the highest standards of justice (Santos, 2018b: 467). Justice must therefore enforce national and international regulations, (i.e. the Constitution, the Rome Statute and the ICC guidelines) to prosecute war crimes, and violations of human rights and international humanitarian law:

The guerrilla told us: "We would be the only guerrilla that put aside its weapons to go to prison and we will not accept that". We responded: "We understand that position, but you have committed crimes, some crimes that are listed in national and international jurisprudence, and the country simply cannot, as it was done in the past, offer a blank amnesty". Here we do not forget everything that happened, because where are the rights of the victims, the rights to the truth, the rights to reparation, the rights to justice? (Santos, 2018b: 467) [Translation by TN].

There is an emphasis on the international community as a witness of the process: "Colombian peace is also the peace of the continent and, therefore, the whole world has its eyes on us. What we will or will not do resonates far beyond our borders" (Santos, 2018a: 137).

Furthermore, similar to FARC, the Government believed that the Special Jurisdiction of Peace should not solely be designed for former guerrilla members. Since the beginning of the peace process, Santos promised that military members and other prosecuted state agents would receive the same judiciary benefits as FARC: "There will be no special treatment of justice for the FARC if there is not - at the same time - a differentiated treatment, but simultaneous, equitable and symmetrical, for our military and police" (Santos, 2018a: 524) [Translation by TN]. That does not mean that they were considered as equals in the eyes of the Government. The same logic was applied to the civilians that actively participated in the conflict. However, the President has always made it clear that civilians who participated in the conflict as a result of coercion were innocent and that peace would not be a 'witch-hunt' of companies.

According to the Government, Colombia could only move forward as a society if it satisfied victims' rights. Victims' rights have therefore been at the centre of a number of public policies led by the Santos administration (Santos,

2018c), such as the promotion of the 2011 Victims' Law. The 'victim-centred' or the 'victim-oriented' perspective claim for restorative justice and victims' rights to truth, an approach increasingly taken in the recent TJ literature, has criticized by some scholars for its lack of reflection upon what victims' rights actually means (Sriram and García-Godos, 2013: 5).

Supported by international legal standards, the Government defined the victims' rights that needed to be satisfied: truth, justice, reparation, and non-repetition. In the same normative discourse, a victim is a person or collective that suffered damages as a consequence of human rights or IHL violations in the context of the conflict (UARIV, n.d.). Santos portrayed victims as benevolent human beings looking for a specific kind of truth; a homogeneous group with a shared suffering, who were supportive of the peace agreement in order to avoid future victimisation:

If you ask the victims what their main demand is, it is not the money, it is not the land, much less the revenge (...) For the most part, victims want, in the first place, to be recognized. They want to know what happened to them and find out what happened to their loved ones (Santos, 2018b, p. 114) [Translation by TN].

This homogeneous conceptualisation of victims leaves out the victims' organisations with specific claims, such as those demanding land restitution and the imprisonment of their aggressors; or more complex readings where victims can also be perpetrators. Although victims' rights are named as the centre of the peace process, victims are not seen as proactive political actors with specific perspectives regarding the transitional justice agreements.

Finally, the Government has portrayed itself as the expert in the field who have learned lessons from previous transitional justice experiences in Colombia, such as the Victims' Law and the Peace and Justice Law. The official discourse uses technical rather than political language to justify political decisions that have material effects. For instance, based on some of the principles of TJ as a global project, Santos claimed that investigating all of the crimes that occurred during the conflict would be impossible and ineffective; therefor prioritizing, the most significant crimes and the highest ranking commanders. He argued that it would be impossible and inefficient to have the same institutions in charge of prosecuting crimes and seeking the truth, and that the trials and Truth Commission should be two separate and independent mechanisms. He insisted that the Commission must find "useful" truths rather than structural causes of conflict (Santos, 2018c: 116).

#### *Peace process opposition discourse*

Among the political opposition to the peace process with FARC, the Democratic Centre Party best represents the discourse of justice competing with that of the Government. The public debate among scholars, politicians, and analysts has been centred on the rhetorical strategies of the so-called 'No' campaigning from the 2016 plebiscite: the lies, distortions and the fear mongering that contributed to the success of the 'No' campaign and defeat of the peace accord plebiscite (Basset, 2018: 243). This research is focused on

how this particular oppositional discourse problematized justice in transition and the assumptions that informed it.

In general, it could be said that it is a nationalistic discourse with a focus on the past. More specifically, the discourse focused on the perceived achievements of the Álvaro Uribe Vélez administration and its 'democratic security' policy. Its definition of justice in times of transition has three main characteristics: prioritisation of the 'rule of law' and the constitutional order, strong defence of the 'honourability' of members of the military, and a focus on retributive justice. Despite the political perspectives of this discourse, the critiques and their propositions are embedded in judiciary and technical debates that are difficult for those who are not familiar with the law or the field of political science to follow (Uprimny et al., 2014: 13). First, the idea that justice must be always framed in relation to the 'rule of law' and institutionalism, even in times of transition, results in only the State being able to prosecute and administrate justice (Duque, 2017). Thus, justice is not relative, and the Special Jurisdiction of Peace (JEP) is consequently not lawful:

with this agreement, justice has been relativised, based on the ideology of the perpetrators. Is there a difference in the Colombian law between a homicide perpetrated by the paramilitaries or committed by the FARC? Is there, in the Colombian law, any differentiation of a kidnapping committed by the FARC or by a paramilitary group? No, it does not exist, because in the rule of law enshrined in the Constitution there is no differentiation (Duque, 2017)  
[Translation by TN].

According to this view, a new TJ system must therefore be part of the judiciary branch, meaning that its sentences would be under the supervision of the Supreme Court. The applicable law must be the Colombian constitution supported by international law, and all the judges must be Colombian nationals (Centro Democrático, 2016). According to Uribe, only the Attorney General Office should investigate and prosecute, and civil society and victims' organisations should not send reports to the JEP, as some of them are biased against military members and could endanger Colombia's institutionalism (Uribe, 2016).

This view relies on the assumption that the 'rule of law' and the State's institutions work correctly, and, importantly, that the structure of the State was not involved in causing or reproducing violence. Uribe compared Colombia with other Latin American countries to remark that Colombia had not suffered under long-lasting dictatorships: "Our democracy has been permanently improving without having to give in to terrorism" (Uribe, 2016). Moreover, this view comes from a mainstream understanding of TJ as the transition to democracy or the implementation of the 'rule of law' (Sharp, 2014: 35).

Secondly, the focus of the peace process is reduced to FARC demobilisation, meaning TJ would only be designed to prosecute guerrilla members. Legal regulations to pursue civilians and state agents already exist, and the President is not allowed to agree on a new judicial system to link them to criminal groups (Uribe, 2016). Civilians and state agents could only be part of a transitional justice process if they accepted it voluntarily. Military members that decided to take part in the TJ mechanisms would receive all of the legal benefits, and would also deserve different judicial treatment as any attempt to

treat them as equals of FARC members would be an insult to their honour. Therefore, justice must not apply the same chain of command for Armed Forces and FARC (Centro Democrático, 2016). This discourse is also a battlefield for the truth. According to Uribe, if FARC were to condition the justice system, they would impose a discourse wherein guerrillas are seen as political actors involved in a social struggle, while the State would be portrayed as the perpetrators (Uribe, 2016).

Thirdly, prison sentences and restrictions on the liberties of high ranking guerrilla commandants are necessary parts of the 'rule of state' equilibrium, and provide exemplary ways to redress the victims (Duque, 2017). Not imprisoning or, extraditing FARC members and granting them political participation (guaranteed by the Peace Accords) provides a bad example for the rest of Colombia:

This disguised amnesty is also granted without forgiveness, without repentance, without handing over the money of the third richest terrorist group in the world to redress the victims. The criminals admit the suffering caused and justify it (Uribe, 2016) [Translation by TN].

The proponents of this view usually refer to some of the crimes more widely condemned by Colombians such as the rape of minors, forced abortions, and the kidnapping and killings of members of the state military.

Both the Democratic Centre Party and the Government refer to the importance of international law, but use it as a counter-argument. According to Uribe, the Rome Statute allows for sentence reductions, but also demands retributive justice (Uribe, 2016). A peace agreement is thus a violation of international legal standards<sup>6</sup>. The anti-impunity approach, that has been promoted by legal scholars and activists around the world, justifies trials under a narrow assumption that legal processes are the best way to solve individual and social harm (Fletcher and Weinstein, 2002: 584), and focuses on individual accountability, which ignores systemic responsibilities (Miller, 2008: 275).

### **3.4 Civil society discourses**

To study some of the civil society discourses involved in the TJ debate during the peace negotiation process, I divided the analysis into victims, women's organisations, and representatives of ethnic communities. This decision was based on how they were included in the peace negotiations, with a full understanding that the mode of inclusion itself is something that can be debated.

Unlike that of the Government,, there is no technical or neutral language in civil society's discourses, and peace is conceptualized as a positive peace (Galtung, 1969) that includes social justice propositions to tackle structural

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<sup>6</sup> Article 77 of the Rome Statute states that imprisonment is necessarily part of the punishment the International Criminal Court may impose on a convicted person. This may be for a specified time or a life imprisonment. In addition, the Court might also order fines and forfeitures, but imprisonment being the primary punishment (ICC, 2002: 54).

violence. That is why, although most of the victims were invited to present the victims' rights perspectives, their demands included issues related land, education, and political participation, among other things.

### *Victims*

Sixty individuals representing the victims were divided into five groups of twelve and invited to Havana. As it was explained earlier, these diverse groups were composed of external actors, and the conversations with the Government and FARC were conducted in secret. At the end of each meeting, the groups of victims released a concise statement containing no fully developed ideas on justice, peace and conflict. However, it could still be seen that their conceptualization of justice went further than retribution, and they claimed for justice “not as revenge, but as a right and a commitment to peace” (Segunda delegación víctimas, 2018), and found truth, the recognition of responsibilities, restitution of rights and the guarantees of non-repetition to be the issues of highest importance. Victims demanded a truth about what happened, but also a truth about both the causes of and the responsibilities in the war (Quinta delegación víctimas, 2018).

They portrayed themselves as heterogeneous groups that did not pretend to represent the total number of victims within Colombia (Primera delegación víctimas, 2018). That heterogeneity is reflected by some of their specific demands. For instance, the only delegation that included a victim of anti-personnel mines called for humanitarian demining processes (Cuarta delegación víctimas, 2018). Furthermore, the statement that includes a more profound conceptualization of structural violence was part of the fifth delegation that contained a significant number of politicians, black activists and victims of State violence (Quinta delegación víctimas, 2018).

Thus, victims' claims during the peace process were more related to their positionality and their social struggles than to the condition of victimhood. Indeed, a study that analysed the data from the Justice and Peace Survey concluded that there were small differences between how victims and non-victims felt about certain aspects of transitional justice, such as punishment, truth-seeking, historical memory, and reparations. Instead, differences depended on other factors such as religion (Nussio et al., 2015: 19).

### *Women*

Women and feminists that were included in the Havana negotiations had clear message: Women had to be part of the peace agreement because their rights could not be agreed without their presence, and their inclusion was not to be restricted to the victims' component of the peace negotiations, but instead to the whole Accord. Women' rights organisations participants defined themselves as the pluralistic voice of a wide variety of women, including: indigenous, peasant, feminist, LGBTI, victims, and ex-combatants, amongst others (Casa de la Mujer et al., 2014).

According to them, the peace process, and by extension the TJ system, must acknowledge women and LGBTI people's differential experiences of discrimination, exclusion, racism, and homophobia during the conflict. This

was specifically in relation to structural violence and the historical practices of patriarchy and militarism (Cumbre Mujeres y Paz, 2016), based on a system that reproduces an unequal distribution of land and resources based on gender (Casa de la Mujer et al., 2014). These demands have been largely ignored by the mainstream understandings of TJ, and only in the last years few have they been included in some programs. According to Nagy, when the disproportional impact of structural violence on women is ignored, women tend to appear as indirect or secondary victims of deceased family members (Nagy, 2008: 285).

Consequently, women's organisations proposed a TJ mechanism that, in addition to the criminal justice component, assured that women and LGBTI people's experiences would be addressed under a differential approach. Moreover, they demanded the recognition of the responsibilities of all actors involved in gender-based violence (Cumbre Mujeres y Paz, 2013: 63). Additionally, they demanded a balanced composition of men and women at the negotiating table, in the Special Jurisdiction of Peace, and in all of the institutions created in a post-agreement scenario. The main argument was that the presence of women would reduce the possibility that the TJ mechanism and the peacebuilding design would reproduce male subjectivity and interests. This claim has been further developed by feminist scholars (Ní Aoláin and Turner, 2007 in Céspedes-Báez and Ruiz, 2018: 104)

One of the coalitions of women's rights NGOs pushed for the prohibition of amnesties for perpetrators of sexual violence against women (2018: 100). Some scholars and activists have pointed out the narrow understanding of women in conflict that came out as a result of these interventions:

Women's NGOs, movements, and advocates succeeded in including their voices in these points, but they ended up reinforcing an idea of women tied to victimhood and of sexual violence as the paradigmatic crime against women (Céspedes-Báez and Ruiz, 2018: 101).

### *Indigenous and Afro-Colombian communities*

Afro-Colombian and indigenous communities decided to join forces to demand the inclusion of ethnic perspectives in the peace agreement to acknowledge the self-determination of their communities, and their special rights granted by the Constitution. They primarily claimed a prior consultation with the ethnic communities to approve and implement the deal in their territories (Arias and Moreno, 2018). In the end, the Government and FARC also included them in the same category to include the so-called ethnic chapter in the final agreement.

However, Afro-Colombians and indigenous people have different experiences of conflict, even within the same communities. The representation of the indigenous people in Havana was the National Indigenous Organization of Colombia (ONIC), an association that includes 47 regional indigenous organisations from 28 different departments with diverse experiences of the conflict and different understandings of peace and justice. An interesting example is the indigenous peoples of Cauca in the southwestern region of the country that has rejected the presence of FARC guerrillas in their territory since the 1980's. In addition to constant demands against the human rights



violations committed by the Armed Forces, they have claimed that FARC leadership has a systematic militarised strategy to affect the indigenous people in Cauca, their culture, and their territories (Aguilera, 2014: 312–316).

Nonetheless, there is a common agenda that Afro-Colombian and indigenous communities brought to the negotiating table. In general, it can be said that they proposed an agreement and TJ mechanisms that acknowledged the violent structures of colonisation, discrimination, exclusion, and racism, which have had a disproportional impact on the ethnic communities (CONPA, 2018: 477). Instead of an individualistic approach, Afro-Colombian and indigenous leaders asked for the recognition of collective and environmental victimisations (ONIC, 2016: 498). Therefore, the reparations had to be seen in terms of social, economic and cultural rights (CONPI et al., 2016: 12). Moreover, there must be concertation for the DDR programs for indigenous and Afro-Colombian guerrilla members.

The TJ mechanisms also had to consider the practices and customs of the ethnic groups, and attend to their pluralistic processes, languages, and traditional ways of transmission; and any JEP decision was to consider the principles of unity, territory, autonomy, and culture. Moreover, the mechanisms themselves had to include members of the indigenous and Afro-Colombian communities, and these communities' reports had to be considered in the trials (CONPI et al., 2016: 9).

Specifically, indigenous representatives demanded the recognition of the supremacy within their territories of Special Indigenous Justice (JEI in Spanish), a system “developed autonomously by the Government of each indigenous community and is ancestral, for life and harmony with Mother Earth” and entrenched in the Constitution (ONIC, 2016: 499). Their main concern was that the imposition of a new legal system would potentially undermine JEI's credibility.

## 4 Understanding peace and conflict

The discourses discussed above on transitional justice relied on specific understandings of both the conflict and the peace process. These understandings are tied to the social locations and specific interests of the actors, and are indicative of the differences in future strategies for the post-conflict reconstruction of the country.

### 4.1 FARC discourse

FARC recognises the existence of the conflict (or the war) and its narrative is strongly connected to the history of the last century in Colombia (Medina, 2009). In that sense, in their speeches, there are reiterative references to 'La Violencia', the confrontation between the Colombian Conservative Party and the Liberal Party in the 1940s and 1950s, and to the anti-insurgency policies driven by the Government as part of a Cold War strategy. Based on the analysis of the speeches, I argue that FARC's understanding of conflict relies on three propositions that are the backbone of its conceptualisations of peace and justice.

First, FARC argues that the origin of violence and its reproduction is structural, embedded in the political, economic, social and cultural structural conditions of domination, exploitation and inequality that still exist in Colombia (FARC-EP, 2018b: 243). The state, as the head of the dominant and exploitative regime, carries the main responsibility for the violence in Colombia. According to FARC, capitalism as the economic system is one of the structural causes of the conflict (Aguilera, 2014: 190). However, as a Government requirement, the change of socio-economic system was always off the table, and thus not present in FARC's proposal for the future transformation of the society.

Those dominant structural power and social inequalities were the reasons why FARC decided to exercise the right of rebellion (FARC-EP, 2018a: 244). Thus, the conflict did not start when the guerrilla group was created. Consequently, FARC understands peace as a positive peace (Galtung, 1969) in the sense that it is not limited to the end of the armed fighting but to the end of the structural violence. This means that changing the structural causes of the conflict is a condition to achieving peace:

In the current political scenarios, all sides talk about "transition" and the kind of justice that we need to achieve it. But, moving up from the current condition to another implies necessarily to implement structural changes in the institutional framework that allow reconciliation based on social justice. So, then, it would be inconsistent to pretend that all the components of the distrusted institutions remain intact (FARC-EP, 2018a: 224) [Translation by TN].

The State is the first one called upon to reformulate itself towards the purpose of peace. FARC considers that the state and its institutions have designed and implemented terrorist policies that led to a false narrative of the conflict in which FARC is portrayed as the only victimizer in order to hide the State's responsibilities in the conflict.

Second, according to FARC, the Colombian conflict has had multiple actors and they are just one among them. In that way, the guerrilla group does not limit its notion of conflict to the combatants in the battlefield but instead includes other actors such as political parties, companies, and corporate leaders in various economic sectors, landowners, transnational corporations, media outlets, the Church, and foreign powers, especially the United States. Therefore, to achieve peace all the actors need to tell the truth, and foreign powers have to cease any form of interventionism, advice or foreign military involvement (FARC-EP, 2018b: 161). The FARC considers that media and the Government have manipulated forgiveness discourse to reduce FARC to a machine of victimization (FARC-EP, 2018d: 161).

Third, FARC defined itself as a political actor, implying that the political right to rebellion against the dominant power framed their actions during the conflict. The rebel group added that they were never defeated, thus the Colombian conflict has neither victors nor losers. Hence, peace is constantly defined as a political solution that requires political and social forgiveness to enable reconciliation. A peace scenario cannot be reproduced with this 'winners and losers' logic, and that is why FARC is willing to work with other actors involved in the conflict to satisfy the rights of victims and affected communities in general (FARC-EP, 2018a: 229).

## 4.2 Government discourses

### *Santos Administration's discourse*

According to the Government, Colombia needs peace to fulfil victims' rights as broadly as possible because peace is the supreme good of every society, and is a constitutional duty of the State. The Government is looking for a liberal peace that does not compromise the country's neoliberal development model, nor the democratic institutional model, and does not represent a risk to the region (Doyle, 2005: 463). Furthermore, this is not a negative peace (Galtung, 1969) because it is not limited to the "the silence of weapons" (El Tiempo, 2016). But neither is it a positive peace, as it does not seek to change the structural violence. Rather, the Government understands the issues included in the agenda (i.e. agrarian development, political participation, drug trafficking) as reforms necessary to avoid the prolongation of the conflict, but not as the elements of the root causes of it.<sup>7</sup>

The peace process is presented as a result of the Government's plan that has meticulously followed, step by step, three chronological phases: the previous work that made an agreement possible, the agreement, and the transition. The argumentative structure of the Government's discourses oversimplifies, or does not problematize the voices, facts and counter

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<sup>7</sup> Paraphrased from the non-published work. Navarrete, T (2018). 'What transition means? An argumentative and metaphorical analysis of the Colombian government discourse in the FARC peace agreement context'.

arguments that have played key roles in the peace process debates in Colombia.<sup>8</sup>

Unlike FARC, the Government discourse appeals to the future and to progress, and not to the past.

A Colombia in peace will shine like a star on the international scene; a Colombia in peace will allow us to move forward faster towards equity; a Colombia in peace will facilitate us to become the most educated nation in Latin America; a Colombia in peace will be safer because the public force dedicated to war will focus on improving the security of citizens, of Colombians; a Colombia in peace will attract more investments that will create more and better jobs; a Colombia in peace will turn us into a tourist power; a Colombia in peace will take better care of the environment, of that wonderful biodiversity that we must preserve (Santos, 2018a: 515) [Translation by TN].

The Government's peace conceptualisation does not problematize to what extent the economic system; the development model, and the institutional structures have caused or exacerbated the conflict. The conflict is portrayed as an obstacle that needs to be torn down because it has slowed the economic progress in Colombia, and this is the reason why the State has not been able to fully guarantee rights to its citizens, especially in the most remote regions of the country. In this spirit, recognition of conflict was a practical decision to move forward. What kind of conflict the Government speaks of is a 50 year conflict that has left thousands of victims. This implies, without saying it directly, that the conflict started with the establishment of the FARC guerrilla group. Furthermore, the Government recognizes the FARC and ELN (National Liberation Army) guerrillas, some civilians and demobilized paramilitary groups as the main actors in the conflict. The State, mostly referring to certain state agents, has been seen as a participant, both actively and passively. Other illegal armed groups that appeared after the paramilitary demobilisation called, Bacrim (criminal bands) by the Government have been categorized as organised crime and not considered actors in the conflict.

#### *Peace process opposition discourse*

The Democratic Centre Party representatives have openly denied the existence of an internal conflict in Colombia. President of the Senate, Ernesto Macías said in his speech at Iván Duque's presidential inauguration on the August 7<sup>th</sup> 2018: "In Colombia, there has not been a civil war or an armed conflict, but a terrorist threat against the State" (El Herald, 2018). Therefore, they do not recognise FARC as a political actor and, instead, portray them as terrorists (El Herald, 2018) a cocaine cartel (Duque, 2017) and the principal criminals of Colombian history (Uribe, 2016). On the other hand, the Armed Forces are described as protecting the sovereignty and providing security under the rule of law and civilians are represented as victims (Duque, 2017).

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<sup>8</sup> Paraphrased from the non-published work. Navarrete, T (2018). 'What transition means? An argumentative and metaphorical analysis of the Colombian government discourse in the FARC peace agreement context'.

It is a simplistic conceptualisation of the conflict focusing on FARC crimes. The State is portrayed as a victim and many other actors are ignored. There are no considerations for structural violence and the historical context are of secondary importance. According to Sharp (2014: 12), “when conflicts are viewed through a one-dimensional lens, prevention of human rights abuses becomes a simplistic function of punishment and impunity”.

With that in mind, peace is conceptualised as a right in the Constitution that cannot be framed outside its legal boundaries. There will not be peace with impunity, which means, there will not be peace without punishment (Duque, 2017). Based on Government proposals, a peace agreement is limited to the achievement of a negative peace, to allow demobilisation and reintegration of the guerrilla members into the democracy. But there cannot be agreements on land distributions or political participation (Centro Democrático, 2016). It is also a liberal peace: “The only thing that guarantees a lasting peace is a respected and stable democracy, with great strength in private initiative and social policies” (Duque, 2017).

Victims have the rights to truth, justice, and reparation. As part of the reparations, the Government propose a ‘winners and losers’ scenario in which FARC must be prosecuted, must redress the victims, ask for pardons, and must repent for their actions (Centro Democrático, 2016). However, there is no demand for an equal kind of reparation to the victims of the state, and Uribe’s administration did not demand the protection of victims’ rights under the same conditions in the past, when the TJ mechanism to prosecute paramilitary members was created.

### **4.3 Civil society discourses**

#### *Victims*

According to victims groups’ public statements, truth is the basis for peace; a truth that can be constructed by listening to victims’ experiences (Segunda delegación víctimas, 2018). During the peace negotiation, victims wanted to be viewed as agents and not be recognized only by their suffering. One of them said: “We do not accept being the emotional touch in a negotiation” (Caracol Radio, 2014). Thus, as a group, victims demanded other actors not to instrumentalise their experiences (Segunda delegación víctimas, 2018)

Victims call for a positive peace with specific social justice demands to address structural violence, such as access to education, health, essential sanitation services (Tercera delegación víctimas, 2018), and political inclusion (Quinta delegación víctimas, 2018). Regarding the conflict, victims list the State, FARC, and other armed groups (ELN, EPL and paramilitaries) as the main perpetrators.

#### *Women*

Truth, justice, reparation and non-repetition guarantees are necessary conditions to end the conflict (Casa de la Mujer et al., 2014), but achieving peace implies a transformation of the structural causes that started the conflict and the recognition of the historical role women have in peacebuilding (Cumbre Mujeres y Paz, 2016). That is why women’s organizations asked the

negotiating table to consider their propositions for all chapters of the agreements, and not only in the victims' rights section.

The definition of structural causes includes a gender perspective. As *Mujeres por la Paz* concluded in their National Meeting of Women for Peace, “from the women's perspective, peacebuilding means a new way of doing politics, which implies decentralising power, eradicating historical, patriarchal and militaristic practices” (Cumbre Mujeres y Paz, 2016: 2). Moreover, “Peace is the reflection of a fair, free, plural and egalitarian world” (Casa de la Mujer et al., 2014) [Translation by TN].

There is not an extended conceptualisation of conflict in the public statements, but they remarked that violence and militarisation have had a disproportional impact on the lives of women and LGBTI people, and the importance of recognising the variety of actors that have participated in the conflict causing pain, marginalisation, and exclusion is of vital importance.

### *Indigenous and Afro-Colombian communities*

According to the statements released by the Afro-Colombian and indigenous representatives in Havana, ethnic and racial discrimination has been one of the root causes of the social and armed conflict. The ethnic groups, as they identify themselves, are victims of the racist and discriminatory practices of the state that deny them the fundamental rights guaranteed by the Constitution. Consequently, indigenous and Afro-Colombian communities have been particularly affected by the conflict (CONPA, 2018: 478).

For them, land appropriation is central to understanding the conflict. Afro communities argue that after the expedition of the Law 70/1993, that conceded collective land titling to ancestral Afro-Colombian communities, the war increased in their territories through an extraction-based economic model that caused severe damage to the environment (Cortes-Ruiz, 2016: 13). Similarly, indigenous people consider that the war has been functional to an energy-mining colonization model of the ethnic communities and peasant territories. That it is a war in which FARC guerrilla has prioritised a militaristic strategy rather than a political agenda (ONIC, 2014: 118).

For these reasons, most of the claims of ethnic communities were not focused on the victims' rights section or the Special Jurisdiction of Peace, but on other aspects of the peace agreement more related with the particular conditions of their communities, such as self-determination over their land, the expansion of coca crops in their territories, and illegal recruitment of the youngest members of their communities.

In this way, social justice peace must be territorial, biodiverse and ethnic. Thus, it is a positive peace designed to solve the roots of the conflict (CONPI et al., 2016: 13) and to return to indigenous and Afro-Colombians the right to decide about a development model for their own territories (CONPA, 2018: 479).

For the indigenous representatives in Havana “peace means living in harmony with Mother Earth and its elements, including community life. It is the respect for our traditional and spiritual authorities, to the sacred sites, for the rivers and mountains, for the seas and oceans, for the forests and jungles,

animals and people” (ONIC, 2016: 501) [Translation by TN]. It is a concept of peace that it is not only achieved through a peace agreement (ONIC, 2014: 113).

## **5 Discursive reflections on the Special Jurisdiction of Peace**

### **5.1 Transitional justice debate in the post-Peace Agreement context**

After Colombians rejected the agreement in the plebiscite of October 2016, FARC and Santos' government decided to re-negotiate the peace agreement with some of the political and religious leaders of the opposition, headed by the Democratic Centre Party, whose propositions mostly focused on the reformulation of the victims' rights point (FIP, 2016b). Although they did not reach a final arrangement, in November 2016 FARC and government announced a new peace agreement that included some of the propositions of the 'No' campaign. After that, the guerrillas started their transition from being a guerrilla group to becoming a political party (Casey, 2016).

While Santos was still in power, some sections of this new agreement, including the creation of the JEP, were endorsed with significant changes by the Congress and ratified by the Constitutional Court. In the time after the agreement, more political voices of the opposition, and some from Santos Administration that had joined them<sup>9</sup>, were involved in defining what kind of justice would be implemented in Colombia after FARC demobilisation. At this point, the TJ deliberation and the final decisions about the mechanisms were considered amongst a centralised political elite. In O'Donnell and Schmitter's words, it was a bargain between elites to determine the terms of the transition according to their interests (O'Donnell and Schmitter, 1986 in Paige, 2009: 346).

In January 2018, the Special Jurisdiction of Peace was inaugurated with the modifications included (Semana, 2018), but the debate about what its mission was is still ongoing, and the power relations in the Government changed. On July 17th 2018, Iván Duque, the candidate of the Democratic Centre that promised more modifications to the JEP, was elected as President (Casey and Abad, 2018).

Thus, to analyse how the competing discourses are reflected in the Special Jurisdiction of Peace, this research is focused on four milestones that defined the Jurisdiction as it is today. 1) The first peace agreement of August 2016 (Gobierno de Colombia and FARC-EP, 2016a) 2) The second peace agreement of November 2016 reached after the plebiscite (Gobierno de Colombia and FARC-EP, 2016b) 3) The Special Jurisdiction Peace Law Endorsed by the Government on April 2017 (Congreso de Colombia, 2017) and ratified by the Constitutional Court in November 2017 (Corte Constitucional, 2017) and 4) The later regulation to JEP in July 2018 (Congreso de Colombia, 2018).

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<sup>9</sup> After the plebiscite, some parties from the Santos' administration coalition, such as Cambio Radical, did not support the JEP and led the initiatives to re-formulate it.



## 5.2 Transition to what and justice for whom

During these four moments, there were a variety of TJ aspects in dispute, but I focused the analysis on the following questions: transition to what end? TJ to whom and how? And justice by whom and for whom?

### *Transition to what end?*

The aim of the first peace agreement is the end the conflict and the construction of lasting peace (Gobierno de Colombia and FARC-EP, 2016a: 1). However, the Government and FARC made it clear that they have different expectations of what must be the final goal of the agreement, expectations that are informed by their conceptualisations of conflict and peace. Thus, according to the Government, the aim is to reverse the effects of conflict and change the conditions that have facilitated violence. For FARC, the purpose is to contribute to solving the structural causes of conflict, such as the lack of access to land (2016a: 1). A few pages later, the document of the agreement indicates that the end of the conflict means to start a transition that:

contributes to a greater integration of our territories, a higher social inclusion - especially of those who have lived on the margins of development and have suffered the conflict - and to strengthen our democracy to expand it in all the national territory ensuring the discussion of social conflicts through institutional channels, with full guarantees for those who participate in politics (2016: 4) [Translation by TN].

Thus, the terms of the transition are familiar to the Governments' discourses on transitional justice and peace. It is a liberal peace perspective to promote democracy, or the expansion of the rule of law in the territory, and its inclusion in the neoliberal economic model of Colombia. The terms of the transition were not the centre of the discussion because these did not represent a threat to the interests of the armies, business and political elites. According to O'Donnell and Schmitter (1986 in Paige, 2009: 346), the main focus of elites bargaining on TJ was the legal-institutional reform, rather than socioeconomic transformations. Therefore, the bargain in Colombia has drawn towards the trials and the definition of who the perpetrators are and how they must be punished. The outcome is a Special Jurisdiction of Peace that does not threaten the status quo of the elite, based on the logic of "settling a past account, without upsetting a present transition" (2009: 347)

### *TJ to whom and how?*

The *first Peace Accord* determined that the JEP would investigate and prosecute all actors (i.e. ex-combatants, military members, civilians, and state agents), who had direct or indirect participation in the conflict, including the civilians who sponsored, not through coercion and threats, paramilitary groups (Gobierno de Colombia and FARC-EP, 2016a: 134). The document excluded from this procedure the President and former Presidents and paramilitary members that already went through the Peace and Justice Law trials.

Following the Rome Statute, international humanitarian law and international human rights law, the agreement forbids amnesties to crimes

against humanity, genocide, and war crimes, including sexual violence, focusing on the most significant crimes and the higher ranked commanders (2016: 136). FARC ex-combatants that accept their responsibility, tell the truth, and compensate the victims through social service work, receive liberty-restricted sanctions, not imprisonment, from five to eight years, without losing their political rights (2016: 297). In this scenario, military commanders must take responsibility for the crimes committed by their subalterns, even if they did not take an active role in the actions, but rather through negligence (Pabon and De Gamboa, 2018: 79).

The *second agreement* extended the sanctions benefits to the state agents and civilians but made clear that telling the truth does not mean to accept any responsibility (Equipo Negociador del Gobierno, 2018: 257). It also limited the liberty-restriction sanction to FARC members to specific locations and urged that FARC economic reparation to the victims be a requisite (OACP, 2018: 240). The condition of reparations does not apply to other actors. As Miller explains (2008: 284), the focus on reparation in the mainstream TJ approach contributes to the definition of who is guilty and who is the victim. When reparation is compensation and not a redistribution of wealth, the debates are narrowed to who 'owes' whom and how.

The *Special Jurisdiction of Peace's Law* issued by the Congress went further and determined that the participation of civilians - the so-called third-parties in the conflict - and civil servants in the Special Jurisdiction of Peace would be only voluntary (Congreso de Colombia, 2017: 14). The decision was confirmed by the Constitutional Court on the basis that JEP is a mechanism to end the conflict and reincorporate FARC members into civilian life. Therefore, forcing non-combatants to join the new jurisdiction is unconstitutional (Corte Constitucional, 2017: 20–21). It is an interpretation that relies on a simplified assumption of conflict as a confrontation between combatants on the battlefield. Furthermore, Congress excluded from the scope of the JEP the funders of illegal armed groups and limited it to the so-called physical crimes included in the Rome Statute (Congreso de Colombia, 2017: 17). The Congress also narrowed the understanding of the command chain responsibility; military commanders, but not civilians, must be investigated only in cases where they had explicit and effective knowledge about the crimes (2017: 28).<sup>10</sup>

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<sup>10</sup> Pursuant to Article 28 of the ICC's statute, commanders and other superiors (non-military) may be deemed to be responsible for the crimes committed by subordinates under her effective authority and control when she failed to control them and to take all the necessary measures to prevent the commission of the crime. The treatment of the military commanders' and civilian superiors' responsibility differs slightly. Both are responsible if they know, or should have known about their subordinates' acts, and if they did not take preventive measures to avoid the crime and punish the subordinates. However, in the case of civilian superiors, they end up being responsible when 'The crimes concerned activities that were within the effective responsibility and control of the superior' (ICC, 2002: 19).

Lastly, during the Law's regulation, among other modifications, the Congress called for a special procedure and chamber in the JEP for the prosecution of military members. Until this is completed, they are not obliged to be part of the JEP (Congreso de Colombia, 2018: 34).

To summarize, after the modifications, JEP prosecutions are only mandatory for FARC combatants and military members, but not under the same conditions, meaning that there is not equal access to justice for all victims. Therefore, it could be said that the limitations of the scope of the Special Jurisdiction of Peace ended up narrowing the transition discourse into a demobilisation process and framed the discussion as a one-dimensional understanding of the Colombian conflict as a fight between combatants.

### *Justice by whom and for whom?*

The discussion of who is prosecuting whom is connected with the reasons to diminish the scope of the Special Jurisdiction of Peace, while the debate about victims' rights has been **secondary**. However, the outcome of the TJ bargain occurred at the expense of civil society demands.

The *first peace agreement* established that JEP would **be formed** by national and foreign judges with independence from the judicial branch and full authority to investigate and prosecute any human rights violation related to the conflict (Gobierno de Colombia and FARC-EP, 2016a: 130). As the Government advised and according to TJ traditional set of mechanisms, it created a Truth Commission in charge of clarifying violence patterns, context, and regional dynamics in which the human rights violations occurred. However, the information consigned by the Commission cannot be part of the judicial process of the Special Jurisdiction of Peace.

As it has been defined in past TJ legal frameworks in Colombia, international law standards determine who is a victim and who is not, as well as the definition of victims' rights in terms of truth, justice, reparation and non-repetition. But, following the suggestions of the civil society groups in Havana, there is a differential approach recognisant of the disproportional impact of the conflict on women, LGBT communities, indigenous people, and Afro-Colombians. The agreement also ratified that any JEP decision concerning the Special Indigenous Jurisdiction needs to be previously consulted with them. Moreover, the reports presented by civil society and victims' organisations to the JEP had the same importance as the authority's reports (2016a: 149–151).

After the plebiscite, *the second agreement* established a 15-year temporal limit to JEP, eliminated the direct presence of foreign judges and created an appeal procedure and determined that its sentences would be under the vigilance of the Supreme Court (Equipo Negociador del Gobierno, 2018: 240–253), in accordance with the claims of the Democratic Centre Party.

Despite what civil society representation in Havana demanded, the role of victims changed under this new agreement and their representation was focused more on their suffering instead of their political agency. The civil society and victims' organisations' reports presented to the JEP lost the power to start an investigation and their presence is only required in 'contradictory trials' (Equipo Negociador del Gobierno, 2018: 252).

Furthermore, following the suggestions of the evangelical churches and the Conservative Party (FIP, 2016b), the gender approach in the agreement was modified because of the argument that the so-called 'gender ideology' was a threat to the traditional family values (Chaparro and Martínez, 2017: 12). Thus, in the second agreement signed by the Government and the FARC, any mention to the gender equity was changed to "equity between men and women" (Equipo Negociador del Gobierno, 2018: 274); eliminating all the allusions to the LGBTI population. It is evident that the transgressive gender-role perspectives are still perceived as hazardous to the status quo (Chaparro and Martínez, 2017: 13).

## 6 Conclusions

The key actors selected for this research paper have different definitions and expectations of justice in transition that are tied to their social positions as well as their specific interests. On the one hand, FARC understands justice as social justice that requires, among other things, a truth-unveiling process for all actors involved in the conflict. On the other hand, for the civil society representatives in Havana, any attempt at justice needed to start with the recognition of the unequal, racist, and discriminatory structures that have had a disproportional impact on some civil society sectors based on class, race, gender, and location. Meanwhile, the Governments' competing discourses include a set of mechanisms driven the international legal standards to end the conflict, and a more retributive justice approach represented by a 'winners and losers' trials scenario.

The discourses on transitional justice rely on specific understandings of both the conflict and the peace. On one side, FARC sees peace in a positive way as social justice, thus to achieve it, it is necessary to end the structural conditions of inequality and domination that caused the violence; in another positive sense, for civil society representatives peace means tackling social inequality and the inclusion of plural discourses. On the other side, the Government's competing discourses coincide with a liberal conceptualisation that focuses on crimes against humanity, rather than structural violence, while the conflict is considered an obstacle by the former administration, and a terrorist threat by the current Government.

After the peace accord was signed by the parties and rejected in the plebiscite, the definitions of Special Jurisdiction of Peace and the terms of the transition have been parts of a bargain between elites looking to preserve the status quo. The outcome so far has privileged the Government's discourses, especially those of the government in power, while ignoring some of the demands made by civil society representatives and FARC. Thus, the terms of the transition are still driven by a liberal peace project; justice has been reduced to a 'winners and losers' scenario resulting in trials to prosecute combatants; and more benefits for the Armed Forces. The peace conceptualisation has been narrowed to a more negative sense that prioritises the demobilisation and prosecution of FARC and some military members; and the understanding of conflict has been simplified to a unidimensional perspective of the battlefield in which state forces face an insurgency group.

In a broader sense, the post-structural discourse analysis of this research and the critical theoretical perspectives on TJ, contribute to unpacking the assumption of TJ as a set of neutral or pragmatic mechanisms to deal with a violent past. It allows for a broader understanding of TJ as a particular 'solution' to deal with a particular representation of the problem. The analysis also indicates that the discourses of justice in transition are embedded in particular understandings of peace and conflict informed by the assumptions, presumptions, social positioning, and specific interests of the actors involved.

Finally, this research contributes to a broader analysis of TJ discussions in Colombia, framed outside the box of the legal boundaries. This technique is key to further examinations of how peace and conflict discourses embedded in the TJ mechanisms are shaping strategies for post-conflict reconstruction, and to some extent defining the future of the country.

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## Appendices

### Appendix 1 - WPR question guiding

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1	What's the problem represented to be?
2	What presuppositions or assumptions underlie this representation of the problem?
3	How has this representation of the problem come about?
4	What is left unproblematic in this problem representation? Where are the silences? Can the 'problem' be thought about differently?
5	What effects are produced by this representation of the problem?
6	How / where is this representation of the problem produced, disseminated and defended? How could it be questioned, disputed and disrupted?

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### Appendix 2 - Documents for analysis

#### FARC

- 05-08-2013 Statement of the FARC-EP Peace Delegation. The historical responsibility of violence: implications of recognition of State as part of the conflict, the right to peace and importance of historical memory P. 160 – 161 (Volume III)
- 03-09-2014 Statement of the FARC-EP Peace Delegation. Comprehensive rights of victims for peace and national reconciliation: ten elementary proposals. *Library of the Peace Process with the FARC-EP*. P. 224-226, 229 – 231, 234 – 236, 290 – 292 (Volume V Part I)
- 15-12-2015 Statement of the FARC-EP Peace Delegation. Message to the Colombian people about the final closure of the Special Jurisdiction for Peace and the Partial Agreement about Victims. The benefits of the Special Jurisdiction for Peace and its implications regarding impunity and justice. *Library of the Peace Process with the FARC-EP*. P. 522 – 527 (Volume V Part II)

## **Governments**

### *Santos' administration*

- 25-07-2013 Declaration of Juan Manuel Santos. Public Hearing Intervention of the Legal Framework for Peace. Foundations and details of the Legal Framework for Peace: no impunity, comprehensiveness and conditionality, among other aspects. *Library of the Peace Process with the FARC-EP*. P. 137 – 145. (Volume III)
- 23-07-2014 Declaration of Juan Manuel Santos. Intervention in the 'Culture of Peace and transitional justice' Forum. Considerations on victims, justice and truth commissions, and their importance in the Peace Process scenario *Library of the Peace Process with the FARC-EP*. P. 112 – 117 (Volume V Part I)
- 23-09-2015 Declaration of Juan Manuel Santos. Agreement and justice issues in the Peace Process with the FARC-EP. The definition of date to sign the Final Agreement, the Agreement on the bases of a justice system and the importance to think of a Colombia without conflict. *Library of the Peace Process with the FARC-EP*. P. 514 – 519 (Volume V Part II)

### *Democratic Centre Party*

- 26-09-2016 Manuscript of Álvaro Uribe regarding the peace Agreement published by newspaper El Colombiano the day that the First peace agreement was signed.  
<http://www.elcolombiano.com/colombia/acuerdos-de-gobierno-y-farc/acuerdo-de-paz-manuscrito-de-alvaro-uribe-DF5052072>
- 2016 Bases of a national peace agreement. Democratic Centre Party proposals to re-negotiate the agreement after the plebiscite.  
<http://static.iris.net.co/semana/upload/documents/bases-de-un-acuerdo-nacional-de-paz.pdf>
- 06-04-2017 Senator Iván Duque's intervention in the public hearing regarding the lawsuit for the Legislative Act for Peace in the Constitutional Court  
<http://www.alvarouribevelez.com.co/es/content/intervencion-del-senador-ivan-duque-en-la-audiencia-publica-en-la-corte-constitucional-en-el>

## Civil Society

### *Victims*

- 16-08-2014 First delegation of Victims. Release. Words of thanks to the Bureau and ratification of the commitment of the victims to build peace. P. 92 -93 (Volume V Part I).
- 10-09-2014. Second delegation of victims. Release. Gratitude of victims for peace efforts and the invitation to meet with the Mesa, and demand that the parties guarantee their rights. *Library of the Peace Process with the FARC-EP*. P. 126 (Volume V Part I).
- 02-10-2014 Third Delegation of Victims. Release. Recount of the symbolic act offered, expressions of support for the Process and rejection of the threats and stigmatization of those that have been the object of the victims who have met with the Mesa. *Library of the Peace Process with the FARC-EP*, P. 151 -152 (Volume V Part I).
- 02-11-2014 Fourth Delegation of Victims. Release. Recount of the eight considerations expressed by the victims, regarding the Peace Process. *Library of the Peace Process with the FARC-EP*. P. 182 -183 (Volume V Part I).
- 16-12-2014 Fifth Delegation of Victims. Release. Count of the calls to advance in the Process, to listen to the communities most affected by the conflict and to promote the necessary mechanisms to build peace. *Library of the Peace Process with the FARC-EP*. P. 217 (Volume V Part I).

### *Women's rights organisations*

- 25-10-2013 First National summit women and peace: proposals systematization. Organizations: Casa de la Mujer, Ruta Pacífica de las Mujeres, Red Nacional de Mujeres, Mujeres por la paz, Colectivo de Pensamiento y Acción Mujeres, Paz y Seguridad, Grupo de Seguimiento de la Resolución 1325, Conferencia Nacional de Organizaciones Afrocolombianas – CNOA –, Iniciativa de Mujeres Colombianas por la Paz – IMP – y la Asociación Nacional de Mujeres Campesinas, Negras e Indígenas de Colombia – ANMUCIC <http://cumbrenacionaldemujeresypaz.com/sistematizacion/>
- 15-12-2014 Statement: Women's organizations to be part of the peace agreement and not pact their rights without them. Organizations: The House of Women, Women for Peace, with its delegate ASODEMUC; Mujeres Arte y Parte en la Paz of Colombia, with its delegate the Colombian Theater Corporation, and the Women for Peace Summit, with its delegates Peaceful Route for Women, National Network of Women and Alliance Initiatives of Colombian Women for Peace -IMP. <https://www.humanas.org.co/archivos/63a.pdf>
- 21-09-2016 Second National summit women and peace: Political manifesto. Organizations: Casa de la Mujer, Ruta Pacífica de las



Mujeres, Red Nacional de Mujeres, Mujeres por la paz, Colectivo de Pensamiento y Acción Mujeres, Paz y Seguridad, Grupo de Seguimiento de la Resolución 1325, Conferencia Nacional de Organizaciones Afrocolombianas – CNOA –, Iniciativa de Mujeres Colombianas por la Paz – IMP – y la Asociación Nacional de Mujeres Campesinas, Negras e Indígenas de Colombia – ANMUCIC  
<http://cumbrenacionaldemujeresypaz.com/encuentros-nacionales/2da-cumbre-2016/>

*Afro-Colombians and Indigenous people*

- 28-06-2016 Statement of the National Indigenous Organization of Colombia (ONIC). Meeting with the negotiation teams in Havana and the representatives of indigenous peoples, their idea of peace and the requirement to be present in the Final Agreement. *Library of the Peace Process with the FARC-EP*. P. 498 – 501 (Volume VII)
- 8-01-2016 Stament of the Afro-Colombian Peace National Council (CONPA). Facing the advances in the Negotiations between the Government and the FARC-EP, we are still waiting for an answer. Claim by the Afro-Colombian community to the negotiation table demanding participation in the Peace Negotiations. *Library of the Peace Process with the FARC-EP*. P. 476- 479 (Volume VII)
- 2016 Joint proposal of six indigenous and afro organizations: CONAFRO, CONPI, MASEAQCH, FEDEMICHOCÓ PODER CIUDADANO, CONPAZ. Proposals for Inter-ethnic Peace dialogues. Analysis and Territorial Ethnic Approach of the Peace conversation in Havana Cuba. <http://jafethpaz.com/propuesta-interretnica-de-dialogos-de-paz/>

\**Library of the Peace Process with the FARC-EP*

<http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2018/Biblioteca-del-Proceso-de-Paz-con-las-Farc-EP.aspx>