Journey to A Post-Conflict Society: Colombia’s Transitional Justice System

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ABSTRACT

With the rise of internal conflicts and insurgency groups since the end of the Cold War, international norms regarding human rights have grown exponentially, developing into international law that seeks to hold States accountable. While not all countries are party to international justice mechanisms like the International Criminal Court, human rights undoubtedly concern the entire international community. Armed conflicts that boast longevity and depth of reach are therefore especially worrisome in the face of norms and institutions that aim to ensure respect for human rights and protect the victims of the conflict. Colombia, a country that has suffered from an armed conflict lasting more than a half century, has recently begun its transition from a post-settlement to a post-conflict society with the culmination of the Final Agreement to End the Conflict and Build a Stable and Lasting Peace. However, Colombia’s successful journey to a post-conflict society is contingent upon the functionality of its newly created transitional justice system. A particularly precarious yet critical component of Colombia’s Transitional Justice System is the Special Jurisdiction for Peace. In order for Colombia to achieve sustainable peace and protect victims’ rights, the extrajudicial and judicial aspects of the system must work to complement each other.

INTRODUCTION

International Norms and International Criminal Responsibility

After World War II, the international community recognized its responsibility to ensure that states that had carried out “wars of aggression” against third states and their own populations would suffer international legal ramifications (Olasolo, 2015, pp. 9). These international efforts were carried out through the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East, followed by the Declaration of Rights and Duties of Man in April of 1948, the Convention on the Prevention and Punishment on the Crime of Genocide and the Universal Declaration of Human Rights, both ratified in December of 1948 by the United Nations (UN) General Assembly, the Geneva Convention of 1949, and the Convention for the Protection of Human Rights of 1950 (Olasolo, 2015, pp. 9-10). Overall, the international community was “judicialized” following both World Wars (Simmons & Danner, 2010). Collectively, these declarations and conventions establish a set of international norms that obligate the state to fulfill its duty to protect its population.

This new international standard, however, does not mean each state has since abided by the norms created. In the post-Cold War era, it became difficult to hold states accountable and guarantee that perpetrators guilty of gross violations of human rights would be prosecuted, especially with the rise of armed conflicts and insurgencies. Moreover, Olasolo (2015) maintains that the international community failed to subject world hegemons to fair judgement in the post-Cold War world. He argues that this failure is grounds for an overall weak commitment to human rights and thus, the need for collective responsibility among states (pp. 12-15). Simmons & Danner (2010), however, explain the push for international justice mechanisms as being correlated to the disintegration of Cold War bipolar stability. They contend that states sought to “tie their hands” following a turbulent period in an effort to discourage civil conflict by increasing the costs to the return to violence (Simmons & Danner, 2010, p. 227). Regardless, the creation of international justice prevailed in the context of instability and internal conflicts, despite its criticisms for being a “tool of imperialism” and an “enemy of peace” (Encarnación, 2011).

The Creation of the ICC and its Limitations

In 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) resulted in the culmination of the Rome Statute, approved
by signatory states (Arsanjani, 1999, pp. 22). The ICC subsequently entered into force in 2002. Preceded by UN international criminal tribunals like those that took place in former Yugoslavia (1991–2017) and Rwanda (1991–2015), the ICC was not the first international court. Although a separate entity from the UN’s judicial organ, the International Court of Justice (ICJ), the ICC evolved from a request by the UN General Assembly that later moved to the UN International Law Commission (Arsanjani, 1999, pp. 22). At the end of the deliberations regarding the creation of an international court, seven countries, including the United States, voted against the treaty that would establish the ICC. However, the United States later signed the Rome Statute in 2002, making it a signatory state, although never actually becoming party to the ICC.

Established by governments to challenge state sovereignty, the ICC presents a paradox regarding state decision-making (Simmons & Danner, 2010, p. 226). Thus, countries like the United States, who have decided they benefit less from ICC membership and are able to attain the public goods of effective prosecution and democratic institutions without joining, have abstained from ICC membership. Thus, while the ICC affects norms that involve the entire international community with respect to particularly atrocious crimes committed, it is limited in that it only has jurisdiction over those member states who have voluntarily joined the ICC.

States party to the statute have therefore agreed that genocide, crimes against humanity, war crimes, and the crime of aggression fall under ICC jurisdiction (Rome Statute, 2002). Within these parameters, the role of the ICC is 1) to remind the state of its obligation to protect its population, prosecuting those responsible for international crimes and repatriating the victims, 2) to incentivize the state to comply with its agreed-upon obligations, and 3) to exercise, when the state cannot appropriately prosecute and/or repatriate though proper judicial and extrajudicial mechanisms, its right to intervene (Olasolo, 2015, pp. 17). The goals, therefore, upon which the ICC bases its mandate, are the severity and scale of the crime, comprehensive prosecution of perpetrators, and upholding states’ “contract with the ICC” to agreed-upon responsibilities (Robinson, 2003, pp. 485). The ICJ considers crimes against humanity to be especially heinous and carry a greater weight than all other international norms set out by international agreements (Olasolo, 2015, pp. 42). Given the UN-backed consensus on the weight of these crimes, along with the implicated duty of the state to prosecute them, international criminal responsibility has grown as an international norm.

Robinson (2003) states that due to the weight of serious international crimes victims must have a “sense of justice” in order for “real reconciliation” to occur, pointing to the individualization of crimes committed as especially critical for the state to garner legitimacy and help victims to move forward (pp. 489). However, for states entrenched in armed conflict, it is not always possible to pursue inflexible international prosecutorial standards as a means of achieving peace. Today, more than 90% of the victims of armed conflicts are civilians, which can be compared to a mere 5% at the beginning of the 20th century (Olasolo, 2015, pp. 13). These numbers of civilian casualties certainly complicate states’ obligations and the role of the international community. It is in this context of profound responsibility that transitional justice systems are criticized. Specifically, Robinson (2003) criticizes the “abstract manner” in which transitional justice systems approach the most atrocious crimes committed, reminding the international community of “the natural need for justice not only truth” (pp. 489–490).

The tension between international normative standards held for states and realistic options for states moving forward with peace negotiations has become increasingly polemic in the wake of destructive armed conflicts rooted in cultural and historical violence. Conflicts that have resulted in large numbers of casualties and criminal activity complicate the legal landscape of the country even further.

THE COLOMBIAN ARMED CONFLICT AND PEACE AGREEMENT

Introduction to the Colombian Armed Conflict

Colombia, the third largest country in Latin America by population with the second largest military in Latin America after Brazil, has suffered from a seemingly endless armed conflict primarily between the Revolutionary Armed Forces of Colombia—People’s Army (FARC–EP) and the Colombian State for over a half century. The presence of other armed groups like the National Liberation Army (ELN), Popular Liberation Army (EPL), and paramilitary groups has given the Conflict multiple fronts, making it difficult to distinguish loyalties and involvement in the illicit economy. The origins of the FARC–EP date back to the political exclusion that resulted from Colombia’s period of extreme political persecution and violence between the Conservatives and Liberals (La Violencia: 1948–1958), military dictator Gustavo Rojas Pinilla’s National Security Doctrine,1 which deemed communism as the “internal enemy,” and the National Front2 (Trejos,
2011). Bushnell (1994) points out that while Colombia, unlike other Latin American countries, never experienced a populist revolution nor suffered from coups d'état, it has suffered from the continuation of high levels of political violence (pp. 437-438). Specifically, the anti-communist rhetoric generated from the death of political leader Gaitán and Colombia’s posture towards the United States, along with high levels of inequality and scarce economic opportunities throughout the country, jump-started the FARC-EP political opposition’s use of violence. The political opposition movement originated as a peasant effort to access power and create defense mechanisms in response to the authoritative, exclusory Colombian State. However, the movement quickly gave way to the emergence of guerrilla groups throughout the country. In July of 1964, with the mobilization of armed groups in full-swing, the opposition movement held a conference which proposed agrarian reform; however, this proposal was soon followed by the creation of the FARC-EP in 1966 through a similar conference (Trejos, 2011, pp. 67).

The Countless Responsible

While the Colombian State and the international community, led by the United States State Department, have specifically designated the FARC-EP as a terrorist group, violence erupted from all fronts of the war. The many-sided conflict became all the more complex with President Álvaro Uribe’s Democratic Security Policy, which aimed to strengthen the Colombian State by means of military force. The controversial policy resulted in unique opportunities for paramilitary groups to amass power in territories lacking a strong presence of the Colombian State. According to Gómez (2017), this policy represented “the most aggressive and belligerent position of its kind towards the guerrillas in the most recent decades” (pp. 516). In November of 2012, the ICC reported that while the FARC-EP systematically carried out attacks against civilians, both paramilitary groups and the Colombian State strategically committed acts of violence such as forced displacement and assassinations under the guise of combating rebel groups (Olasolo, 2015, pp. 38-39). The ICC specifically notes the false positives that justified the assassination of large numbers of civilians by state actors (Olasolo, 2015, pp. 38-39). The absence of effective state institutions and strong accountability mechanisms enabled state actors and paramilitary groups to perpetuate violence.

Impressive Levels of Violence and their Effects

While deaths associated with the Colombian armed conflict have diminished by about 82% since 2007, from 1,148 deaths to just 196 in 2016 (Gómez, 2017, pp. 526), Isacson & Sánchez-Garzoli (2013) maintain that “…the armed conflict has killed 218,094 Colombians since 1958, displaced up to 5.7 million since 1985, disappeared 25,007 since 1985, and involved 27,023 kidnappings since 1970,” demonstrating the scale of the conflict. As of 2017, the FARC-EP had abandoned about 90% of the area it previously occupied, with the remaining percentage being attributed to remaining dissidents (Gómez, 2017, pp. 527). However, Colombian territory remains complex, entrenched in criminality through the absence of the Colombian State. For example, by 2002, 154 Colombian municipalities lacked law enforcement. (Ospina, 2017, pp. 532). La Fundación Paz y Reconciliación has categorized Colombian territory today by the presence of the ELN, gangs, common crime, and FARC-EP dissidents, assigning some of the territory as being recovered by the Colombian State (Ospina, 2017, pp. 527). Furthermore, an analysis by InSight Crime (2018) suggests possible alliances between some FARC-EP dissidents and the ELN, which would violate the peace agreement and likely increase illicit activity in Venezuela and Colombia. Thus, it is upon these territorial uncertainties and problematic realities of criminality that the Colombian Peace Agreement struggles to survive.

The Peace Agreement

The severity of the Colombian Armed Conflict over the last half century, but more specifically the escalation of mass killings, civilian deaths, disappeared people, and forced displacement during the late 1990s and early 2000s necessitated immediate, effective action from the Colombian government and the international community. Neither peace negotiations nor the presence of armed groups is a new phenomenon for Colombia. However, what differentiates the November 24, 2016 Final Agreement to End the Conflict and Build a Stable

servative Party, it excluded third party actors from the political area and, therefore, generated more violence and led to the rise of insurgency groups like the FARC.

3 Although Colombia never experienced a traditional coup d’etat, the Conservative and Liberal oligarchs negotiated an agreement that ousted Rojas Pinilla. This transition of power cued the beginning of Colombia’s National Front.

4 Elíécer Gaitán, the Colombian presidential candidate for the Liberal Party in 1948, was assassinated on April 9, 1948 causing discontent from both Liberals and Conservatives and resulting in blame being placed on the Communist movement.

5 The North Star makes contextual reference to Réspice Polum, Colombia’s exterior political strategy of rapprochement with the United States.
and Lasting Peace with the FARC-EP is its aptness for longevity, international commitment to transitional justice, and its promise to prioritize the victims. Although Colombians rejected the Final Agreement on October 2, 2016 by referendum vote (the NO vote won by 50.2%) mainly due to its perceived sentencing inadequacies, President Juan Manuel Santos sought to ratify the agreement through means of Congressional approval. The agreement was eventually confirmed and put into effect on November 30, 2016 (Ramirez & Olasolo, 2017, pp. 1015). The “fast track approval” of the Final Agreement, which sought to expedite legislation and reforms, such as Legislative Act 01 that legally support the Final Agreement, was then pushed through Congress on December 13, 2016 (Semana, 2016). The Final Agreement is composed of six complementary sub-agreements: 1) Towards a New Colombian Countryside: Comprehensive Rural Reform, 2) Political Participation, 3) Democratic Openness to Build Peace, 4) the End of the Conflict, which focuses on ceasefire, reintegration and disarmament, 5) Solution to the Illicit Drugs Problem and Mechanisms for Implementation and Verification, and 6) the Agreement on Victims, which addresses repatriation and transitional justice, “all of which must be read together as an indissoluble whole” (Ramirez & Olasolo, 2017, pp. 1011).

COLOMBIA’S TRANSITIONAL JUSTICE SYSTEM
THE COLOMBIAN INTEGRATED SYSTEM OF TRUTH, JUSTICE, REPARATION AND NON-REPETITION

Introduction to the System and its Constraints

The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition is the most important and controversial part of the peace agreement. It is composed of judicial and extrajudicial mechanisms which serve to ensure the 1) Human Rights of the Victims, 2) Truth, and 3) Consolidation of the Peace, which are the three goals laid out in the Havana peace talks regarding the victims of the conflict (“Acuerdo Final,” 2016, pp. 124). As previously mentioned, the transitional justice system proposed by the Final Agreement is integral in nature, meaning that it combines the use of extrajudicial mechanisms: The Truth, Coexistence and Non-Recurrence Commission and The Special Unit for the Search of Missing Persons with its judicial instrument, The Special Jurisdiction for Peace (JEP). Two other components of the Integrated System that focus on truth-seeking and victims’ rights are the Comprehensive Reparation Measures for Peacebuilding and the Guarantees of Non-Recurrence (“Acuerdo Final,” 2016, pp. 129).

The extrajudicial mechanisms of the Integrated System focus on conflict narrative, establishing the truth, and repatriation. To this end, the Final Agreement (2016) excludes the extrajudicial components from incriminating parties involved in the conflict with information obtained under their jurisdiction (pp. 134). Furthermore, judicial authorities cannot request the turnover of this information due to its confidentiality (“Acuerdo Final,” 2016, pp. 134). Instead, investigations and sentencing pertaining to serious violations of human rights and International Humanitarian Law as laid out by the Geneva Convention and Protocols fall under the jurisdiction of the JEP (“Acuerdo Final, 2016,” pp. 127).

According to the Final Agreement (2016), the Integrated System aims to seek justice through “retributive sanctions”, along with “restorative” and “reparative” methods (pp. 128). Its intention in permitting an alternative route to justice is to address crimes not punishable by the JEP and testimones obscured fear and coercion. In its search for comprehensive justice, the Integrated System sets certain guidelines, which are 1) the “realization of victims’ rights,” 2) “accountability,” 3) “guarantees of non-recurrence,” 4) a “territorial-based, equity-based and gender-based approach,” 5) “legal certainty,” 6) “coexistence and reconciliation,” and 7) “legitimacy” (“Acuerdo Final,” 2016, pp. 128). Subsequently, the extrajudicial and judicial mechanisms ensure commitment to each of these seven points. Whenever possible, however, the Integrated System looks to repair and compensate for all damages incurred by the victims of the conflict (“Acuerdo Final,” 2016, pp. 127).

In order to insure the longevity of the Final Agreement, the interconnectedness of all transitional justice mechanisms is imperative. Without this cohesion, the extrajudicial and judicial mechanisms cannot effectively provide the victims of the conflict with peace through truth, justice, and the reparations that they deserve. Ultimately, the failure of transitional justice in Colombia could push the country from its current plateau of peace into another peak in its history of violence. The successful cohesion of extrajudicial and judicial mechanisms has the potential to differentiate the 2016 Peace Agreement from unsuccessful attempts at peaceful resolutions.

EXTRAJUDICIAL MECHANISMS
The Truth, Coexistence and Non-Recurrence Commission

The Truth Commission prioritizes victims’ right to the truth and knowledge of the circumstances of the conflict through the facilitation of narratives. However, it still holds the Integrated System’s reparative goals of
coexistence, reconciliation and non-repetition to be equally as important (“Acuerdo Final,” 2016, pp. 130). To this end, the Truth Commission firstly promotes societal awareness of the events that occurred with special focus on children, women and gender-based crimes so as to grant visibility to victims whose accounts are frequently suppressed (“Acuerdo Final,” 2016, pp. 131). Second, the Truth Commission strives to advocate for the complete recognition of actors’ involvement in the conflict, including their individual and/or collective roles, so that victims may come to terms with the violence or damages they experienced (“Acuerdo Final,” 2016, pp. 131). Third, in order to guarantee the coexistence of perpetrators and victims, the Truth Commission recognizes the importance of democratic confidence, which contributes to an environment of respect for all members of society (“Acuerdo Final,” 2016, pp. 131). That said, while effective dialogue is necessary to clarify the atrocities realized throughout the conflict, an understanding of the goals of the Integrated System is necessary to instill legitimacy in Colombia’s democratic institutions.

Above all, the Truth Commission seeks to recover the facts of the conflict related to serious human rights abuses, especially infractions to International Humanitarian Law that are massive in scale and systematic in nature (“Acuerdo Final,” 2016, pp. 134). In an effort to recognize the scope of the conflict, the Truth Commission underlines the collective responsibility of all actors involved, emphasizing the conflict’s social impact, the interrelationship between the armed conflict and the illicit economy, the demographic effects (i.e. migration and mass displacement), and the historical use of exclusion and violence to satisfy political objectives (“Acuerdo Final,” 2016, pp. 134-135). Thus, the report published by the Historical Commission of the Conflict and its Victims, established in 2014, is key to fully understanding the manifestation of the Colombian Armed Conflict in a historical context, serving as the Truth Commission’s foundation.

Limitations of the Truth Commission

The Final Agreement (2016) has given the Truth Commission three years, not including its organizational period and the realization of its final report, to carry out its extrajudicial mandate (pp. 138). During this period, the Truth Commission will create public spaces of discussion in which different voices and perspectives might be heard (“Acuerdo Final,” 2016, pp. 136), maintaining a territorial approach in order to distinguish the situation of each individual territory (Ramirez & Olasolo, 2017, pp. 1040). The ultimate goal of the Commission is for actors who participated both directly and indirectly in the conflict to fully explain the violence that took place. Apart from reflective measures, the Truth Commission will publish a final report that will be monitored by an advisory committee, composed of a diverse, impartial group of representatives from human rights and international organizations.

The Truth Commission focuses its efforts on perpetrators capable of receiving amnesty and lesser-penalties through the Law 1820 on Amnesty, Pardon and Special Treatment and the Law 975 of Justice and Peace (applying to paramilitary groups). In other words, those that fall outside of punitive sentences may participate in the Truth Commission in order to qualify for more generous legal sentences, while ensuring the disclosure of the truth about the atrocities that took place (Ramirez & Olasolo, 2017, pp. 1040). In this respect, the Truth Commission seems to offset many of the shortcomings of the judicial mechanism of the Integrated System by providing bad actors with an incentive to participate in reconciliation efforts through the disclosure of facts and a truthful narrative. Even so, the Truth Commission should be wary of crossing the line between ensuring victims’ narratives and acting as the JEP’s source of technical information about the Conflict (Ramirez & Olasolo, 2017, pp. 1040).

The Special Unit for the Search of Missing Persons

The mission of the Special Unit for the Search of Missing Persons is humanitarian in nature. It seeks not only to locate all disappeared persons as a result of the conflict but also, when applicable, to repatriate remains of loved ones to corresponding family members (“Acuerdo Final,” 2016, pp. 139). In order to provide victims with clarity regarding the events that occurred, the Unit investigates the status of all disappeared persons, individually submitting final reports to each victim’s family, presenting the Truth Commission with its findings (“Acuerdo Final,” 2016, pp. 139). In order to effectively carry out its mandate, the Unit will work alongside the National Institute of Legal Medicine and Forensic Sciences of Colombia and will have access to related government databases (“Acuerdo Final,” 2016, pp. 140). Additionally, the Unit is obligated to provide the public with updates every six months regarding progress made (“Acuerdo Final,” 2016, 141). Through the repatriation of remains and the investigative findings produced by the Unit, victims of the conflict may gain some closure. In accordance with its extrajudicial nature, the findings of the Unit cannot be used to implicate direct or indirect responsibility in crimes committed (“Acuerdo Final,” 2016, pp. 141-142). However, the JEP can request technical

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6 Constitutional Law 1820 was created to bolster the Final Agreement regarding those able to receive amnesty and special treatment before the law; it applies to those involved in political offenses, FARC-EP members and state officials.
forensic reports and other materials found on the scene of the crime (“Acuerdo Final,” 2016, pp. 141).

**THE SPECIAL JURISDICTION FOR PEACE**

**Introduction**

The JEP achieved Congressional approval on November 28, 2017 (Gutiérrez & Montoya, 2018), but was officially set in motion on March 15, 2018 with the report from the Executive Secretary of the JEP (Gutiérrez, 2018). Persons seeking to enter into the JEP after the start of its complete functionality will be subject to ordinary jurisdiction (Ballesteros, 2017). The JEP must also fulfill all investigative and prosecutorial duties no later than 15 years from its start date, complying with its agreed-upon temporal limitations (“Acuerdo Final,” 2016, pp. 145).

**Defining Relative Peace**

According to the Final Agreement, the JEP views justice and peace as codependent, believing them to be fundamental human rights that should be guaranteed to all Colombians. While international norms promulgate the perspective that peace is the absence of violence, the way in which peace and justice are defined differs according to cultural norms and relative violence. For example, peace may be characterized as the level of security felt, even if this security is not legitimate. The word for peace varies in its cross-cultural meaning as well; in Arabic “sala'am” is understood as peace through justice, while “pax”, usually used in peaceful time periods (i.e. Pax Romana), refers to the absence of violence (Van Metre, 2017). In Gómez’s (2017) analysis Iván Márquez, a key FARC-EP negotiator, maintains his perception of peace:

*We are a belligerent force, a revolutionary political organization, with a national project outlined by the Bolivarian Platform for the New Colombia…. we are encouraged by the conviction that our harbor is peace, but not the peace of the vanquished, peace with social justice (Semana, 2012, October 13). (pp. 245)*

Márquez demonstrates that, for the FARC-EP, peace means social justice, or justice from an authoritarian Colombian government’s political exclusion. Due to the relative understanding of peace, keeping the peace is the greatest challenge to the Final Agreement. To this end, the JEP recognizes its duty to reintegrate ex-guerrilla FARC-EP members back into the community in order to repair Colombian society. Given Colombia’s current transitional status as a post-settlement, not post-conflict society, the JEP aims to adequately administer justice unto wrongdoers while maintaining the peace. The JEP’s complementary function within the Integrated System reflects this goal.

**Transitional Justice and the JEP**

According to Olasolo (2015), transitional justice systems must confront both the interests of peace and the interests of justice in the face of crimes against humanity committed during armed conflicts (pp. 20). The United States Institute of Peace (2008) concludes that transitional justice should entail both judicial and non-judicial measures, pointing out the limitations of individual prosecution in administering justice to those collectively responsible. It also maintains the impracticality and fiscal implications of prosecuting a multitude of cases. In this context, therefore, transitional justice systems mainly prosecute those tied to gross human rights violations. In other words, transitional justice systems tackle the unique “intersection space between politics and law” (Gómez, 2017, pp. 240), keeping in mind the social and historical context of the conflict and the resource and time-related limitations.

**THE JEP AS ATYPICAL**

In the case of Colombia, the transitional justice system is especially atypical in the wake of normative, retributive forms of justice, which can be attributed to Colombia’s lack of a complete post-conflict transition (Gómez, 2017, pp. 239). Moreover, the duration of the Colombian Armed Conflict has made it difficult to prioritize cases and distinguish political crimes resulting from years of continuous violence and oppression from atrocities committed in the context of the Colombian Conflict. The March 2018 report that marked the official commencement of the JEP speaks to these exact challenges. It states that 6,400 state and non-state actors of the armed conflict, along with 11,800 victims have submitted themselves to the JEP in an effort to attain lesser penalties or to seek justice (Gutiérrez, 2018). The executional challenges of the JEP due to the conflict’s longevity, high rate of societal involvement, number of victims, and its role in the historical perpetuation of violence are subsequently reflected in its structure and make-up. The Colombian government’s lack of influence in peripheral regions has further exacerbated the presence of criminality and the illicit economy in zones affected by the Colombian Armed Conflict.

The judicial mechanism of Colombia’s Integrated Transitional Justice System thus reflects Colombia’s transition from a post-settlement to post-conflict society. The JEP has a specific mandate to ensure justice yet uphold peace, meaning that it works to complement the extrajudicial aspects of the Integrated System. To this end, the JEP does not have greater value than other mechanism in order to maintain all objectives of the Integrated System: Truth, Justice, Reparation, and Non-Repetition.
Objectives and Principles

First and foremost, with respect to the JEP, the Final Agreement (2016) lays out the State’s responsibility to promote and protect human rights, centralizing peace as a guaranteed right and implicating the State’s obligation to provide security from violence to all Colombians (pp. 143). The key objectives of the JEP therefore reflect its primary goal to promote justice yet actively support the right to peace, keeping victims’ rights delineated by the Final Agreement at the center of its mandate. Especially considered are victims’ right to truth and judicial security, meaning that those guilty of gross human rights violations should be prosecuted accordingly in pursuit of these guarantees (“Acuerdo Final,” 2016, pp. 144). In understanding post-settlement state security guarantees, the Colombian State should also seek reparation to victims whenever possible.

The JEP also maintains judicial autonomy from the Colombian State as a special justice system (“Acuerdo Final,” 2016, pp. 144). This means that the JEP has the final word regarding the grey area between national and international law, giving the JEP room for interpretation. While the JEP is autonomous in its decision-making, it must respect the Colombian Penal Code, specifically the principle of favorability, along with international law (“Acuerdo Final,” 2016, pp. 147). The principle of favorability essentially allows those who receive sentences subject to change due to the appearance of new laws, to obtain the most favorable sentences provided for by applicable law.

As a result, the JEP sets aside the Incidental Judicial Panel to clear up confusion resulting from cases that fall under multiple jurisdictions (“Acuerdo Final,” 2016, pp. 145).

Application and Break-down

In terms of accessibility, those eligible to receive sentences from the JEP must fully comply with the terms of the Final Agreement. Access to the JEP is conditional, contingent upon the disarmament and demobilization of armed actors directly or indirectly involved in the conflict (Ramírez & Olasolo, 2017, pp. 1022). Amnesty or pardon as a potential result of judicial proceedings is only applicable to those that completely terminate their involvement in political rebellion against the Colombian State (“Acuerdo Final,” 2016, pp. 145). Where amnesty does not apply, sentencing is contingent upon JEP participants’ commitment to uphold the Integrated System (“Acuerdo Final,” 2016, pp. 145). If JEP participants fail to comply with all aspects of the Integrated System, sentencing could result in amnesty, pardons, special treatment, or sanctions.

This will be inadequate for perpetrators and will not help to promote peace and justice. The Final Agreement (2016) clarifies that acceptance of roles and wrongdoings in the conflict do not fully amount to upholding the truth (pp. 146). Instead, JEP participants must comply with their obligations to the Truth Commission in order to ensure victims’ understanding of the facts of the Conflict, in addition to upholding all other aspects of the Integrated System.

Application of the JEP as part of the Integrated System can be broken down into cases that fall under two types of laws: 1) Law 1820 on Amnesty, Pardon and Special Treatment, which constitutionally upholds important aspects of the JEP and 2) international law that address grave human rights violations to which Law 1820 does not apply (Ramírez & Olasolo, 2017, pp. 1024-1025). Ordinary crimes unrelated to the conflict fall beyond the jurisdiction of the JEP. However, due to Colombia’s complicated terrain and historical context, defining applicable law means navigating an undoubtedly grey area. All crimes related to the armed conflict, however, must fall under JEP jurisdiction.

Penalties

JEP sentencing for crimes falling under Law 1820 could result in either “non-de jure amnesty” or pardon, though they must apply to political offenses (Ramírez & Olasolo, 2017, pp. 1024). Special treatment can only be applied to state officials whose cases are reviewed by the Chamber for the Determination of Legal Situations (Ramírez & Olasolo, 2017, pp. 1029). Political offenses, as stated by the Final Agreement (2016), are those related to “rebellion, sedition, rioting, the illegal bearing of arms, [and] deaths in combat...” (pp. 150). As such, a political offense must be specifically associated with the Colombian Armed Conflict; finance tied to rebel groups is also included as a punishable crime (“Acuerdo Final,” 2016, pp. 151).

Crimes that violate International Humanitarian Law, encompassing crimes against humanity, war crimes, and acts of genocide, generally warrant ICC intervention if the State itself fails to adequately prosecute. This is because large scale crimes infringe upon the Rome Statute, which party states like Colombia are obliged to uphold, along with their commitment to international law. In a post-settlement context, the JEP functions to separately address breaches to international norms, which has prompted debate over Colombia’s obligation to human rights and the role of the States. Human rights whistleblowers like Amnesty International and Human Rights Watch, along

7 “De jure” in this context refers to “lawful amnesty” as specifically laid out in Law 1820 on Amnesty, Pardon and Special Treatment. In the context of the JEP, amnesty granted is “non-de jure” given the transitional nature of the JEP. However, the JEP must grant amnesty within the bounds of politically-related crimes as provided for by Law 1820. Its “non-de jure” makeup gives the JEP more leeway in its sentencing.

8 See points 40 and 41 of the Special Jurisdiction for Peace of the Final Agreement (2016).
with other international organizations, have voiced concerns regarding Colombia's potential nonconformity with international law and norms as an ICC member state.

According to Ramirez & Olasolo (2017), Law 1820 allows certain ex-FARC-EP combatants to qualify for reduced sentences as part of the JEP; those that have already been indicted or are being investigated through ordinary justice mechanisms, and those that have been handed over to national authorities; the other two groups that potentially qualify to receive judicial benefits of the JEP are political offenders and state officials (pp. 1020). Those prosecuted for grave human rights violations encompass but are not limited to these groups, including actors implicated in the armed conflict like paramilitary groups (Ramirez & Olasolo, 2017, pp. 1025). The JEP may also concede crimes as punishable before the law, meaning a lesser penalty could apply if deemed appropriate. Sanctions are only applicable to ex-combatants of FARC-EP. Application of such sanctions, however, do not indicate expulsion from participation in the political arena (“Acuerdo Final,” 2016, pp. 150). As the Final Agreement (2016) states, only members of armed groups part of the peace agreement may receive any potential benefits or alternative penalties of the JEP (pp. 148).9

**JEP COMPONENTS AND PROCESS**

In an effort to clarify the functionality of the JEP, along with the differences in sentencing (i.e. amnesty, pardons, special treatment, alternative penalties), it is important to understand its components and judicial process. According to the Final Agreement, the JEP is composed of The Chamber on the Acceptance of Truth, Responsibility and Determination of Facts,10 The Investigation and Prosecution Unit,11 The Chamber for the Determination of Legal Situations,12 The Chamber on Amnesty and Pardons,13 and The Tribunal for Peace.14 While all chambers and mechanisms of the JEP work fluidly in their pursuit of justice, the Tribunal for Peace specifically deals with crimes deemed by international law as especially heinous.

The Truth Chamber receives reports and judgements from the Attorney General’s Office, among other national and international bodies (“Acuerdo Final,” 2016, pp. 154). Based on the information given it must determine the relevance of each case to the JEP. In other words, it decides whether parties were involved in crimes related directly or indirectly to the Colombian Armed Conflict (“Acuerdo Final,” 2016, pp. 154). From there, the Truth Chamber gives the accused the opportunity to negate or accept participation in acts presented before the JEP. Depending on the response and context of the case, the Truth Chamber then sends the accused to the Investigation Unit, which receives those that fail to accept responsibility for wrongdoing, or the Legal Situations Chamber, which accepts persons who cannot receive amnesty or pardons (“Acuerdo Final,” 2016, 156-157). Where Law 1820 applies, the Truth Chamber sends such persons to the Chamber on Amnesty and Pardons (Ramirez & Olasolo, 2017, pp. 1029).

The Chamber on Amnesty and Pardons sees those parties that may be eligible to receive JEP non-de jure amnesty or pardon under Law 1820 for politically motivated crimes against the Colombian State. State officials that are being processed to receive special treatment are sent to the Legal Situations Chamber in order to define applicable sentences in accordance with Law 1820. The Chamber on Amnesty and Pardons will especially note the recommendations provided for by the Truth Chamber when processing cases (“Acuerdo Final,” 2016, pp. 157).

The Chamber for the Definition of Legal Situations determines the applicable law for each case received and acts as oversight for other JEP components. The Chamber also serves to define much of the grey area that results in the overlap between jurisdictions and agreements preceding the Final Agreement. According to Ramirez & Olasolo (2017), the primary focus of the Chamber are cases involving special treatment pertaining to state officials, given three antecedents: 1) a request from the Truth Chamber 2) the JEP’s awareness of implicated parties, or 3) an application from for special treatment (pp. 1030).

The Investigation and Prosecution Unit “satisfies the victims' right to Justice when there is no acknowledgement of collective or individual responsibility” in crimes committed (“Acuerdo Final,” 2016, pp. 159). That established, its main objective is to prosecute perpetrators in the context of the Tribunal for Peace. Depending on the situational and temporal factors of the defendant's confession, or lack thereof, before the Truth Chamber,
along with the Unit’s investigation, the Tribunal for Peace may employ a series of sanctions.

### The Tribunal for Peace

The Tribunal for Peace is made up of different sections that streamline the sentencing process in order to strengthen its administrative goals and effectiveness. The Tribunal for Peace is broken down into the “First Instance Section for Cases Involving the Acceptance of Facts and Responsibility,” “The Trial Section,” “The Appeals Section,” and “The Review Section” (Ramirez & Olasolo, 2017, pp. 1032-1037). Each part corresponds to the truthfulness of the party, and the Tribunal for Peace categorizes alternative penalties accordingly.

The “First Instance Section for Cases Involving the Acceptance of Facts and Responsibility” applies to those that acknowledge involvement and responsibility in the events that took place in the context of the Colombian Armed Conflict (“Acuerdo Final,” 2016, pp. 161). These parties truthfully provide the details of what happened at the first chance given, thus warranting the “least punitive sanctions.” The “Trial Section,” however, addresses those perpetrators who fail to recognize the truth of what happened or wait until the trial proceedings to admit to their involvement in crimes (“Acuerdo Final,” 2016, pp. 162). Those that never admit to the truth of the conflict receive “ordinary sanctions” and those that admit to their role in the conflict during the Trial receive “alternative sanctions.”

Depending on the conclusions resulting from the Trial, the Tribunal for Peace can send cases back to the Chamber on Amnesty and Pardon or the Chamber for the Definition of Legal Situations when amnesty, pardon, or special treatment is instead believed to be applicable (“Acuerdo Final,” 2016, pp. 162). The “Appeals Sanction” in turn allows for individuals or parties to appeal any conclusions made by the Trial (Ramirez & Olasolo, 2017, pp. 1036). The mandate of the “Review Section” is to review the sentences decided upon by the Trial, ensuring that they are fair, adequate and compliant with the objectives of the Integrated System. Additionally, it settles disputes between the different branches of the JEP, backchecking all conclusions made (“Acuerdo Final,” 2016, pp. 163-164).

### Sanctions

The sanctions provided for by the Tribunal for Peace, specifically in the “First Instance Section for Cases Involving the Acceptance of Facts and Responsibility” and “The Trial Section” lay out a series of alternative penalties depending on the 1) “level of truth” of each participant, 2) “seriousness of the sanctioned conduct,” 3) “level of participation and responsibility” and 4) “commitments to repatriate the victims and to non-repetition” (“Acuerdo Final,” 2016, pp. 17). The “least punitive sanctions” administered to those who fully disclose the truth upon the first opportunity given by the JEP receive punishment restorative in nature. These restorative sanctions will mostly fall under public works projects, further broken down by rural and urban zones (“Acuerdo Final,” 2016, pp. 173-174). Those that do not recognize responsibility for crimes in the Truth Chamber will receive more punitive sentences. Those receiving “alternative sanctions” based on the disclosure of facts and responsibility during Trial proceedings will receive anywhere from 5 to 8 years of confinement. The “Trial Section has leeway to decide the applicable penalty based on the Colombian Penal Code (“Acuerdo Final,” 2016, pp. 174). Lastly, those that have completely failed to disclose the truth and accept responsibility in crimes committed, after being found guilty, are subject to 15 to 20 years of confinement in order to prevent non-repetition (“Acuerdo Final,” 2016, pp. 175).

### CHALLENGES

#### Limitations of the Integrated System

While the Special Jurisdiction for Peace (JEP) has been given 15 years to complete its legal proceedings, the Truth Commission has been given a 3-year limit (Ramirez & Olasolo, 2017, pp. 1041-1042). The temporal limitations of the Truth Commission and the JEP are contradictory due to the integral nature of the Integrated System. The Integrated System cannot successfully utilize extrajudicial and judicial mechanisms so as to complement each other if the Truth Commission and the JEP do not hold the same time constraints. The failure to uphold each mechanism within Colombia’s Transitional Justice System could lead to an overall failure of the Final Agreement to protect victims’ rights, uphold justice, and promote lasting peace.

Another potential failure of the Integrated System is the assurance of perpetrators’ admittance to crimes committed and subsequent truth-telling. In order for the JEP to function in its entirety, all other aspects of the Integrated System: The Truth Commission and the Special Unit for the Search of Missing Persons must adequately fulfill their roles. If the victims are not guaranteed their rights to the facts and the truth of the Conflict, reconciliation for Colombia in the long run will be extremely difficult. Vélez (2018) points out that two

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15 See Part I found under the List of Sanctions (classified into three different types) of the Final Agreement (2016).
16 See Part III found under the List of Sanctions (classified into three different types) of the Final Agreement (2016).
17 See Part II found under the List of Sanctions (classified into three different types) of the Final Agreement (2016).
departments greatly affected by the Conflict, Huila and Caquetá, not only have experienced few public acts of forgiveness by ex-FARC-EP combatants but also have seen the increased presence of political campaigns by ex-FARC-EP fighters. The current post-settlement challenges that the departments face display the difficult task of providing political participation to the FARC-EP and allowing for restorative and reparative sanctions at the same time. The tipping point of Colombia’s Transitional Justice System’s functionality will be its ability to uphold perpetrators to agreed-upon obligations and sentences while keeping victims at the center of the transition to a post-conflict society.

Another problem with the Integrated System is its jurisdiction in relation to other national and international legal bodies. Principally, the JEP confronts the Colombian Constitutional Court and the Colombian Penal Code. While the JEP claims its authority and autonomy in the face of the Colombian Court System, the interplay of the Constitution and previous legislative acts and international law will undoubtedly present legal contradictions, especially with regard to the selection of JEP cases and determining those most responsible for crimes (Caldas, 2016, pp. 107-108).

Are the Alternative Penalties Adequate?

According to Olasolo (2015) tension exists between those who advocate for criminal responsibility as a means of attaining lasting peace and those that consider it to hinder post-conflict peace (pp. 42-43). However, as Dorado (2016) explains, there is a difference between legal and political arguments with respect to advocating for punitive sentences (pp. 99). Critics of criminal responsibility in transitional justice system argue that punitive sentencing is ineffective. They contend the sentences would not lead the armed actors to disarm, nor would it lead the actors to demobilize. If anything, critics of sanctions assert that the punitive sanctions encourage impunity (Olasolo, 2015, pp. 42-43). While the former is political in nature, legal arguments against restorative and reparative JEP sentencing include victims’ right to justice and international norms that condemn impunity (Dorado, 2016, pp. 99-100). Legal arguments in favor of transitional justice systems and the use of amnesties point to the limitations of punitive sentencing. In other words, there are certain crimes and situations that traditional prosecution fails to address. One of the shortfalls of traditional prosecution is that it encourages “collective innocence,” meaning that those collectively responsible for crimes may be given a legal loophole (Dorado, 2016, pp. 109).

Among the JEP’s staunchest political opponents are members of the Central Democratic Party, headed by former President Uribe. Uribe’s supporters hold the position that the FARC-EP does not actually intend to uphold their part of the agreement and are not committed to long-lasting peace. Instead, those opposed to the JEP believe that the FARC-EP actually seeks to strategically position itself politically so as to seize more power (Gómez, 2017, pp. 242). Since the May 2018 Colombian Presidential Elections, Colombian society has experienced a political climate of divisiveness. In a politically divided society like Colombia that confronts socioeconomic inequalities and high rates of organized crime, the prospect for sustained peace is precarious. Given Colombia’s difficult realities, a defense of amnesties and alternative penalties can be made. Dorado (2016) makes this sort of defense in a “context in which criminal persecution poses a serious danger to values such as peace and democratic order,” further justifying amnesties by their “transitional” nature, as amnesties are both conditional and complementary (pp. 104-105). While transitional justice systems undoubtedly have their limitations, alternative penalties and provisions for amnesties are necessary to peace-building in armed conflict zones. For one, parties involved will not come to the negotiating table without incentives to do so. Furthermore, large-scale armed conflicts in countries like Colombia have involved countless armed actors; it is nearly impossible to prosecute all those implicated in the conflict.

Obligation to International Norms, Institutions, and Law

The now normative “universality of human rights” implies that there are no “cultural,” “temporal,” or “relative” exceptions (Peces-Barba, 1994, pp. 614). It is upon this basis that certain crimes are recognized as serious violations to human rights, and thus, warrant prosecution. International organizations and agreements uphold these standards as part of their goal to hold states responsible to serious human rights violations, particularly those that breach International Humanitarian Law. As an ICC member state Colombia has voluntarily “tied its hands”. In other words, in submitting itself to the ICC, Colombia is committed to upholding international norms and law by means of prosecution and has agreed to ICC intervention when it fails to adequately prosecute perpetrators of International Humanitarian Law (Olasolo, 2015, pp. 54). Due to its alternative penalties, Colombia’s Transitional Justice System is limited in terms of how effectively it can hold human rights violators accountable. Moreover, seemingly contradictory to the goal of victims-centered justice, JEP sanctions serve to apply lesser sentences when possible because of the Integrated System’s transitional nature. As opposed to those retributive in nature, JEP sanctions seek to be restorative and reparative in the context of post-settlement reconstruction. That said, conflict actors, even those guilty of the most heinous crimes, will unlikely receive penalties that measure to crimes committed.
The Office of the United Nations High Commissioner for Human Rights (2009) explains the possibility for “disguised amnesties,” “whose operation is prescribed in regulations interpreting laws that, on their face, may be compatible with international law but which, as interpreted by their implementing regulations, are inconsistent with a State's human rights obligations” (pp. 9). The OHCHR (2009) gives the Côte d’Ivoire’s 2007 Ouagadougou Political Agreement and the Argentina’s Punto Final as examples of national legal provisions that ultimately violated the State’s commitment to upholding international law and norms regarding human rights. In the case of Colombia, Caldas (2016) expresses his concern for maintaining the peace and prosecuting those accountable due to the JEP’s special treatment of state officials (pp. 109). As seen in transitional justice systems that served to promote justice in times of democratic transition, guaranteed impunity from the State does not aid in society’s reconciliation with what happened nor does it encourage non-repetition. Caldas (2016) adds that Human Rights Watch (2016) released a report specifically speaking out against the “false positives” or collateral damage that, as previously mentioned, has been used to justify many mass killings by members of Colombian Armed Forces (pp. 109). In this sense, without the full cooperation of the Colombian State to effectively condemn those responsible for crimes committed, sentences leading to impunity may arise.

CONCLUSION

While international law and standards function to protect the world’s most vulnerable populations, the context and necessities of states engulfed in armed conflicts complicate applicable norms. As international organizations intended to bring justice to the victims, institutions like the International Criminal Court and Special UN Tribunals, Human Rights Watch, and Amnesty International have maintained positions in favor of punitive measures. However, in order for post-agreement societies to successfully obtain post-conflict status, the State must not only pursue justice and victims’ rights but also sustained peace. On cursory review, it seems that justice and peace could work together to achieve the same goals. However, in the face of armed conflicts, their unique objectives may result in contradictory outcomes.

Peace agreements too heavily focused on punitive sentences in order to satisfy normative justice goals have limitations. They leave little room for incentivizing disarmament, guarantee prosecutorial limitations, and serve to represent a plateau in violence rather than lasting peace. Therefore, the Integrated System’s transitional justice strategy reflects a compromise, replacing full amnesty and strictly retributive punitive penalties for alternative sentences (Urueña, 2017, pp. 110). While concessions regarding sentencing seem to dispute international norms, the Final Agreement maintains its commitment to justice and victims’ rights. It pursues these goals in the context of a post-settlement society. Therefore, the argument that “there is no peace without justice” (Olasolo, 2015, pp. 20), implying that the Colombian Transitional Justice System does not pursue justice and thus, fails to protect the peace, is far off the mark. Instead, the Integrated System seeks to encourage peace through attainable and restorative measures. Warranting skepticism, though, is the Integrated System’s ability to function as a conglomerate of complementary mechanisms and navigate international and national legalities. If even one of the extrajudicial components fails to comply with its role, or if parties implicated in the conflict receive unfair sentences contradictory to those laid out in Final Agreement, a comprehensive failure will occur. This will result in Colombia’s failure to transition to a post-conflict society.
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