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Colombia's Jurisdicción Especial para la Paz (JEP): An Effective Instrument of Transitional Justice

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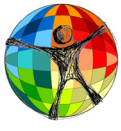

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ABSTRACT

In 2016 Colombia ended the longest civil war in the Americas with a peace agreement with the FARC (Fuerzas Armadas Revolucionarias de Colombia). The most-critiqued component of the peace agreement was the Jurisdicción Especial para la Paz (Special Jurisdiction for Peace, JEP), which is a tribunal responsible for administrating justice for crimes committed during the conflict. Some critics argue that the JEP promotes impunity by ordering non-custodial sentences. This paper argues that the JEP is a mechanism of transitional justice that respects Colombia's international obligations to investigate, prosecute, and sanction serious human rights abuses. It combines a qualitative review of social science perspectives on transitional justice with a legal analysis of the peace agreement, comparing it to and assessing its compliance with Inter-American human rights law.

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> "Éramos víctimas, pero también éramos verdugos [...] Huíamos de la violencia, sí, pero a nuestro paso la esparcíamos también. Asaltábamos haciendas; asolábamos sementeras y establos; robábamos para comer; metíamos miedo con nuestro estrépito; nos mostrábamos inclementes cada vez que nos cruzábamos con el otro bando. La guerra a todos envuelve."[1]
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> "We were victims, but also executioners [...] It's true we were fleeing from violence, but also spreading it. We robbed farms, ravaged planted fields and stables, stole in order to eat, scared people with our deafening racket, and were merciless whenever we encountered those of the opposing band. War involves everyone."[2]
>
> — La multitude errante | A Tale of the Dispossessed by Laura Restrepo, Colombian novelist

Introduction

In 2016, the Colombian government signed a peace deal with the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (Revolutionary Armed Forces of Colombia – People's Army, FARC-EP or FARC). The peace deal was historic, ending more than five decades of armed conflict and earning Colombian President Juan Manuel Santos a Nobel Peace Prize.[3]

Although celebrated as a great achievement for Colombia, the peace deal was not without opposition. Before it was adopted, the peace deal was presented to the Colombian people in a referendum on 2 October 2016 and narrowly rejected. Former President Álvaro Uribe led the "No" campaign, arguing that its justice component was too lenient on the former FARC fighters.[4] International human rights scholars such as José Miguel Vivanco, the Executive Director for the Americas of Human Rights Watch wrote that "the justice component of the agreement, as currently

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[1] Laura Restrepo, *La multitud errante* (Debols!llo, 2016) at 32.
[2] Laura Restrepo, *A Tale of the Dispossessed/La Multitud Errante*, translated by Dolores M. Koch (HarperCollins, 2003) at 21.
[3] The Nobel Prize, "The Nobel Peace Prize 2016: Juan Manuel Santos", (10 December 2016), online: *NobelPrize.org* <https://www.nobelprize.org/prizes/peace/2016/santos/facts/>.
[4] Geoff Dancy, "Achieving an Unpopular Balance: Post-Conflict Justice and Amnesties in Comparative Perspective" in James Meernik, Jacqueline H R DeMeritt & Mauricio Uribe-López, eds, *War Ends What Colomb Can Tell Us Sustain Peace Transitional Justice*, 1st ed (Cambridge University Press, 2019) 324 at 326.

composed, will compound impunity in the country and therefore puts the prospect of sustainable peace at risk."[5]

The most-critiqued component of the peace agreement referenced by Uribe and Vivanco is the section on justice, which establishes the *Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace, JEP). The JEP is a tribunal that is responsible for administrating justice for crimes committed in the context of the armed conflict before 1 December 2016.[6]

This paper will argue that the sentences handed down by the JEP in the context of transitional justice respect Colombia's international obligations to investigate, prosecute, and sanction serious human rights abuses. They do not, as Uribe and Vivanco claim, constitute a blanket amnesty or promote impunity.[7] I argue that the main criticisms of the JEP come from a bias in favour of Nuremburg-style transitional justice, and an ignorance of modern transitional justice that recognizes more than just prosecution of human rights abuses is needed to create a stable and lasting peace.

Three years after the peace agreement came into force, an analysis of its progress is deeply relevant for Colombia. Over the course of 2019, the peace agreement faced many obstacles. In May, a former FARC member was arrested by Colombian police on drug-trafficking charges just before he was to take his seat in Colombia's Congress as part of the peace deal.[8] The JEP ordered his release and he fled Colombia, lending credence to critic's claims that the JEP allows criminals to escape justice.[9] In

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[5] José Miguel Vivanco, "Colombia Peace Deal's Promise, and Flaws", (27 September 2016), online: *Hum Rights Watch* <https://www.hrw.org/news/2016/09/27/colombia-peace-deals-promise-and-flaws>.

[6] *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, 2016 at Art 5.1.2.I.9.: "Se aplicará únicamente a conductas cometidas con anterioridad a su entrada en vigor" ("It will apply only to crimes committed prior to its entry into force" [my translation].

[7] Dancy, *supra* note 4 at 326; Vivanco, *supra* note 5; José Miguel Vivanco, "Colombia: Fix Flaws in Transitional Justice Law", (8 October 2017), online: *Hum Rights Watch* <https://www.hrw.org/news/2017/10/09/colombia-fix-flaws-transitional-justice-law>.

[8] Boris Miranda, "Jesús Santrich, el excomandante de las FARC que pasó de detenido con pedido de extradición a congresista y ahora es buscado por Interpol", *BBC News Mundo* (22 August 2019), online: <https://www.bbc.com/mundo/noticias-america-latina-48301894>.

[9] Boris Miranda, "La misteriosa desaparición del excomandante de las FARC Jesús Santrich (y lo que le cuesta al proceso de paz en Colombia)", *BBC News*

August, a group of FARC members announced their withdrawal from the peace deal and returned to arms.[10] Finally, in November 2019, widespread protests have broken out in Colombia in protest against current President Iván Duque's government. One grievance cited by the protesters was President Duque's lack of implementation of the peace agreement as a central concern.[11]

Methodology

This paper will combine a qualitative review of social science perspectives on transitional justice with a legal analysis of the peace agreement, comparing it to and assessing its compliance with Inter-American human rights law. It will proceed in four parts. First, I will review relevant literature on the place of the obligation to investigate, prosecute, and sanction serious human rights violations in the Inter-American System in transitional justice theory. Second, I will discuss the origin and interpretation of this obligation. Third, I will discuss the context of Colombia's peace negotiations with the FARC and the details of the peace agreement. Finally, I will analyze the content of the peace agreement and recent activities of the JEP and compare it with the legal obligations identified in part two of the essay and transitional justice theory.

Transitional Justice: Literature Review

Transitional justice (TJ) is a field that deals with large-scale human rights abuses following periods of conflict or oppression. Pablo de Greiff, formerly the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, has defined TJ 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

Mundo (9 July 2019), online: <https://www.bbc.com/mundo/noticias-america-latina-48930722>.

[10] Juan Carlos Garzón Vergara et al, "El anuncio de Iván Márquez y las 'nuevas' FARC: implicaciones y posibles impactos", (29 August 2019), online: *Fund Ideas Para Paz* <http://www.ideaspaz.org/publications/posts/1782>.

[11] BBC News Mundo, "4 motivos detrás de las multitudinarias protestas y cacerolazos en Colombia contra el gobierno de Iván Duque", *BBC News Mundo* (22 November 2019), online: <https://www.bbc.com/mundo/noticias-america-latina-50503455>.

accountability, serve justice and achieve reconciliation."[12] The International Center for Transitional Justice (ICTJ), an American-based non-profit, defines it as "the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response."[13]

The UN's Office of the High Commissioner for Human Rights (OHCHR) explains that TJ is framed by at least four pillars of international human rights law:

a) the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty;

b) the right to know the truth about past abuses and the fate of disappeared persons;

c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and

d) the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.[14]

Under this modern understanding, it appears clear that there is no tension between the obligation to investigate, prosecute, and punish and the aims of transitional justice. Indeed, this obligation is one of its pillars.[15] However, in early TJ scholarship, justice and peace were seen as two competing concepts, one of which would have to be sacrificed for the other. Ruti G. Teitel proposed a

[12] Pablo De Greiff, "Theorizing Transitional Justice" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice NOMOS LI* (New York: NYU Press, 2012) at 31.
[13] "What is Transitional Justice? | ICTJ", (22 February 2011), online: *Int Cent Transitional Justice* <https://www.ictj.org/about/transitional-justice>.
[14] Vereinte Nationen, ed, *Transitional justice and economic, social and cultural rights* (New York: UN, 2014) at 5.
[15] *Ibid*.

"Genealogy" of TJ that divides the development of the filed into three phases:

- Phase I is characterized by formalistic international trials of a completely defeated enemy, as was the case during the International Military Tribunal (IMT) at Nuremburg following the Second World War;[16]

- Phase II involves post-Soviet Union regime changes in Eastern Europe, South America and Africa and was characterized by a critique of international trials amnesties for human rights abuses, which were sometimes granted in exchange for establishing peace;[17]

- Phase III is the current phase, which appreciates the role of TJ in nation-building but also makes space for international justice. In this phase, peace and justice have come to be seen not as mutually exclusive, but as intertwined processes.[18]

As de Greiff explains, it is now well understood by academics that "transitional justice should be conceived of holistically," but governments and others tend to "think that the different measures can be traded off against one another."[19] This tendency identified by de Greiff reflects the Phase II tendency to think of TJ in terms of trade-offs between peace and justice.

Phase I: Strict Criminal Accountability

The first phase of transitional justice involved seeking non-repetition of human rights abuses through investigating, prosecuting, and sanctioning serious human rights violations. Following the Second World War, Allied forces set up the International Military Tribunal (IMT) at Nuremburg. This early exercise of international criminal accountability defined transitional justice as the prosecution of individuals for serious human rights abuses.[20] Academics agree it influenced all

[16] Ruti G Teitel, "Transitional Justice Genealogy Human Rights in Transition" (2003) 16 Harv Hum Rights J 69–94 at 70–71.
[17] *Ibid*.
[18] *Ibid*.
[19] Greiff, *supra* note 12 at 33.
[20] Teitel, *supra* note 16 at 70–71.

subsequent models, which position themselves either in line with or against Nuremburg. [21]

Teital argues that the defining characteristic of post-WWII transitional justice was the extension of the applicability of international criminal law from the State to the individual through the Nuremberg trials of Nazi leaders.[22] She argues that this phase is significant because "by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed."[23] Bronwyn Anne Leebaw adds that Nuremburg was revolutionary because it challenges the "demonization" of the losing group and channels the "desire for revenge" into fair procedures of punishment.[24] In terms of punishment, the Nuremburg trials were anything but revolutionary, however. Mark Drumbl observes that it was characterized by "a strict reliance on traditional modes of punishment."[25] This legalistic, criminal-accountability model of TJ remains influential today, as Teital and Leebaw observe that it is followed by the International Criminal Court and other international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[26]

These fair procedures of punishment are what Leebaw calls "legalism" in transitional justice.[27] In her view, legalism is an ideology based on the premise that formal justice is the epitome of goodness, and can be achieved by impartial rule following, and that justice is superior to politics.[28] However, she criticizes it for elevating "the law and 'rule of law' as the primary responses to conflict," without providing any "basis for understanding how laws become politically meaningful or legitimate."[29] That is, it focuses exclusively on rules and does not make space for an analysis of the political context that leads to violence, in addition to involving substantial delays and a significant physical distance

[21] Teitel, *supra* note 16 at 70–71.
[22] *Ibid* at 73.
[23] *Ibid* at 76.
[24] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge ; New York: Cambridge University Press, 2011) at 7.
[25] Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, UNITED KINGDOM: Cambridge University Press, 2007) at 50.
[26] Teitel, *supra* note 16 at 90.
[27] Leebaw, *supra* note 24 at 34.
[28] *Ibid* at 36.
[29] *Ibid* at 38.

from the victims. Moreover, legalism leaves little scope for making meaningful changes to help victims. As Susanne Reiff, Sylvia Servaes, and Natascha Zupan have observed, true justice for actors and communities in post-conflict societies can include rectificatory justice – which "rectif[ies] the injustices that are direct consequences of the war (i.e. past human rights abuses, war crimes)" – and redistributive justice – which addresses "socio-economic injustice, stemming from structural injustices and distributional inequalities that are often causes of conflict" – in addition to legal justice.[30]

Phase II: "Peace vs. Justice"

The second phase of transitional justice focused on achieving non-repetition of human rights violations through uncovering the truth about human rights violations and locating disappeared persons. Phase II is characterized by a debate about whether peace and justice can coexist and the birth of truth commissions, especially in Latin America.[31] Teitel understands this discourse of "peace vs. justice" as a critical response to the absolute legalistic Phase I model of transitional justice.[32] However, it is now recognized that peace and justice are not necessarily a dichotomy and can coexist.

The factor that distinguishes the Nuremburg trials from post-dictatorship transitional justice in Argentina is power. The Nuremburg trials followed the crushing defeat of Nazi Germany. By contrast, in democratic Argentina, the same military that had committed many human rights abuses during the dictatorial period continued to hold significant power.[33] In this period, many people argued that a dedication to criminal prosecutions for past human rights abuses could "endanger the authority and legitimacy of a democratizing government."[34] Leebaw adds that it would not even have been possible for Argentina to prosecute all those who committed human rights abuses under the dictatorship due to a lack of institutional capacity: too many members of the military

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[30] *Development and Legitimacy in Transitional Justice*, by Susanne Reiff, Sylvia Servaes & Natascha Zupan, Report from workshops co-organized by the Working Group on Development and Peace (Nuremburg: Building a Future on Peace and Justice Conference, 2007) at 5–6.
[31] Teitel, *supra* note 16 at 78.
[32] *Ibid* at 81.
[33] *Ibid* at 76.
[34] Leebaw, *supra* note 24 at 47.

and judiciary were involved in the abuses to bring them all to justice.[35] Thus, the debate of peace vs. justice was born.

Chile, Argentina's neighbour, also experienced a dictatorship in the second half of the 20th Century. Authoritarian military rule in Chile, which was headed by Augusto Pinochet, began in 1973 with the overthrow of President Salvador Allende, and resulted in the murder, disappearance, and torture of tens of thousands of Chileans at the hands of the State.[36] In 1978, Pinochet's military government introduced an amnesty law, preventing the prosecution of crimes including homicide, kidnapping, and assault that took place from 1973 to 1978, the harshest years of the dictatorship.[37] Like in Argentina, and unlike in Nuremburg, Pinochet's regime was never decisively overthrown. Even after Pinochet was voted out in 1988, he retained "significant support" in Chile and members of his regime guided the country's transition to democracy.[38] In this way, Chile achieved peace but not justice. Chile's 1978 amnesty law remains on the books and the dictatorial-era constitution remains in force.[39] Amnesty International has emphasized that Chile's amnesty law served as a serious obstacle to uncovering the truth of the dictatorship and halted many investigations in the 1990s until Chile's Supreme Court decided not to apply the amnesty to cases of serious human rights violations in 1998.[40] In an effort to hold Pinochet accountable for human rights abuses despite the amnesty law, the doctrine of universal jurisdiction for crimes against humanity was used in an (unsuccessful) attempt to extradite Pinochet from the United Kingdom to Spain.[41] He eventually did face charges in Chile after 1998, but died before being

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[35] *Ibid* at 45.

[36] Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill Nijhoff, 2015) at 263.

[37] *Ibid* at 264.

[38] *Ibid*.

[39] Véjar, Francisco, "Chile: ¿Qué pasó con el país más próspero de América Latina?", *Semana* (26 October 2019), online: <https://www.semana.com/mundo/articulo/chile-que-paso-con-el-pais-mas-prospero-de-america-latina/637666>.

[40] Guadalupe Marengo, "Chile: Amnesty law keeps Pinochet's legacy alive", (11 September 2015), online: *Amnesty Int* <https://www.amnesty.org/en/latest/news/2015/09/chile-amnesty-law-keeps-pinochet-s-legacy-alive/>.

[41] Francesca Lessa & Leigh A Payne, eds, *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012) at 1.

convicted.[42] Today, Chile is moving in the direction of the third phase of TJ – a combination of peace and justice – as it moves to prosecute crimes from its dictatorial period. Nevertheless, Amnesty International criticizes the amnesty law's continued presence in Chile's legal system, saying that it "sends the message that Chile is not yet ready to fully break free from its darkest years and fight impunity."[43]

Truth commissions were also born out of transitional justice's second phase. Leebaw defines truth commissions as "temporary institutions designed to investigate patterns of political violence and abuse."[44] She observes that truth commissions share a number of characteristics: they analyze the causes and consequences of political violence, they almost always involve taking statements of victims, and they do not have the power to prosecute alleged perpetrators.[45] For Teitel, the most important part of truth commissions is that they can offer a broader analysis of the human rights abuses, as opposed to the "single-minded" focus of criminal trials on individual accountability.[46] They emerged as a way to "offer a broader historical perspective" on abuses, "rather than mere judgments in isolated cases."[47] In Phase II, "truth commissions [were seen] as a pragmatic alternative in contexts where prosecuting those responsible for past injustices would be preferable, but limited, impractical, or unfeasible."[48] In other words, criminal accountability was the ideal, but the "peace vs. justice" model was practical. Contemporary scholarship, the third phase of TJ, recognizes that true justice, which can include addressing socio-economic injustice,[49] is an integrated process, not a trade-off.

Phase III: Contemporary Transitional Justice and the "Gray Zone"

Contemporary transitional justice scholarship has moved beyond the "peace vs. justice" dichotomy and recognizes that peace and justice are intertwined processes. The current phase of TJ is characterized by two understandings: (i) that traditional legal

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[42] *Ibid*.
[43] Marengo, *supra* note 40.
[44] Leebaw, *supra* note 24 at 9.
[45] *Ibid* at 10.
[46] Teitel, *supra* note 16 at 79.
[47] *Ibid*.
[48] Leebaw, *supra* note 24 at 10.
[49] Reiff, Servaes & Zupan, *supra* note 30 at 6.

standards are not always appropriate to apply to situations of systemic political violence and (ii) that fragile justice systems of societies in transition may not be equipped to deliver Western-style criminal prosecutions on the scale necessary after mass political violence. This latter understanding has also resulted in the emergence of hybrid international criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Special Court for Sierra Leone, and the Special Criminal Court in the Central African Republic.[50]

The current phase was launched by South Africa's post-apartheid Truth and Reconciliation Commission (TRC) in 1994, and advances restorative justice as an alternative to the strict framework of criminal accountability.[51] This phase also recognizes that it is important to take into account the local context to find what mix of truth-seeking and criminal accountability is appropriate for a given situation. Archbishop Desmond Tutu, the chairman of South Africa's TRC, often framed restorative justice as in opposition to criminal justice, but in reality the two concepts can occur together, and one does not rule out the other.[52] Indeed, Leebaw observes that many South African leaders associated with the TRC "went on to become staunch supporters of the International Criminal Court."[53]

Recalling that transitional justice seeks to address mass political violence, contemporary transitional justice scholarship recognizes that "mass complicity is a defining feature" of such violence.[54] In societies in transition, many individuals involved in human rights violations are neither strictly victims nor perpetrators. Rather, people fall into what Primo Levi coined as the "gray zone" in his book *The Drowned and the Saved*. For Levi, we, as humans, "tend to simplify history" into binaries: "us" vs. "them", "friend" vs. "enemy", "victim" vs. "perpetrator."[55] However, in reality, as Levi experienced in Auschwitz, large-scale oppression requires collaboration on the part of the oppressed in order to maintain

[50] For more details on these Hybrid Tribunals, see Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (Springer, 2015).
[51] Leebaw, *supra* note 24 at 10.
[52] *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions*, ICTJ Briefing, by Paul Seils, ICTJ Briefing (International Center for Transitional Justice, 2017) at 9.
[53] Leebaw, *supra* note 24 at 10.
[54] *Ibid* at 3.
[55] Primo Levi, *The Drowned and the Saved*, reprint edition ed (New York: Vintage, 1989) at 36.

the system of oppression, and those who do collaborate usually do so in the interest of self-preservation under impossible circumstances:

> [...] the harsher the oppression, the more widespread among the oppressed is the willingness, with all its infinite nuances and motivations, to collaborate: terror, ideological seduction, servile imitation of the victor, myopic desire for any power whatsoever, even though ridiculously circumscribed in space and time, cowardice, and, finally, lucid calculation aimed at eluding the imposed orders and order. All these motives, singly or combined, have come into play in the creation of this gray zone, whose components are bonded together by the wish to preserve and consolidate established privilege vis-à-vis those without privilege.[56]

Thus, when addressing situations of systemic violence, it simply does not make sense to judge individuals based on the same criminal justice standards as during times of peace, because often perpetrators of human rights abuses are neither as fully "innocent" nor fully "guilty" as a standard conception of criminal law would require.

The doctrine of command responsibility was developed in international criminal law to address systemic violence hierarchical institutions such as armed forces, in which subordinates are commanded to perpetrate human rights violations. According to Guénaël Mettraux, the creation of this doctrine was one of "the most significant advances of the post-war era" of international criminal law.[57] In domestic criminal liability, individuals can only be held accountable for their own actions, according to the principle of legality.[58] Command responsibility, as defined in Article 28 of the *Rome Statute*, military commanders or an individual "effectively acting as a military commander" can be held criminally responsible for violations of international criminal law or international humanitarian law committed by their subordinates if they "knew or, owing to the circumstances at the time, should have known" that the crime would be committed or "failed to take all necessary and reasonable measures within his or her power to prevent" the commission of such crimes.[59] While command responsibility helps ensure that commanders cannot escape punishment simply because it is their subordinates who

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[56] *Ibid* at 43.
[57] Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press) at 5.
[58] *Ibid* at 10.
[59] *Rome Statute of the International Criminal Court*, A/CONF.183/9 1998, United Nations Treaty Collection Entered into force 1 July 2002.

commit crimes, as Mettraux says, "[t]he law, however, is often too simplistic an instrument to reflect the moral ambiguity of life."[60] Despite the existence of the doctrine of command responsibility, superiors often escape punishment due to other factors such as "the selectivity of international prosecutions and the general reluctance of domestic authorities to prosecute violations of international law."[61]

In addition, States in transition often lack the capacity to conduct a full criminal investigation into every abuse that had occurred during a time of systemic political violence. Such investigations require a large amount of resources in order to gather the required evidence to prove criminal responsibility beyond a reasonable doubt. Laurel Fletcher and Harvey M. Weinstein write that it is impossible to prosecute every person when there has been mass political violence, so decisions will necessarily need to be made about who will face justice.[62]

Criminal trials are also insufficient to mend the wounds of a society that has experienced civil war or mass repression under, for example, dictatorship. Fletcher and Weinstein observe that criminal trials do not impact bystanders who observed the violence but did nothing to stop it, and question whether the individualization of guilt through criminal tribunals can "contribute to a myth of collective innocence."[63] That is, a myopic focus on Nuremburg-style criminal justice ignores the "gray zone" of mass complicity that is inherent to periods of mass human rights violations. This focus can distract from the important work of truly rebuilding a society after conflict or dictatorship. To truly rebuild a society, in addition to criminal trials, "broader initiatives in rule of law, humanitarian assistance, democracy building, and economic development the task of resuscitating a 'sick society'" are required.[64]

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[60] Mettraux, *supra* note 57 at 271.
[61] *Ibid* at 272.
[62] Laurel E Fletcher & Harvey M Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24:3 Hum Rights Q 573–639 at 579.
[63] *Ibid* at 580.
[64] *Ibid*.

Obligation to Investigate, Prosecute, and Sanction Serious Human Rights Violations in the Inter-American Human Rights System

The obligation to investigate, prosecute, and punish serious human rights violations is both a theoretical pillar of transitional justice and a binding obligation in public international law. This is true both in the United Nations human rights system and in the Inter-American Human Rights System.[65] The obligation functions in a similar way in both systems, so in the interest of scope I will focus my analysis on the Inter-American system due to the depth of its jurisprudence, its relevance to Colombia, and, of course, my experience at the Inter-American Court of Human Rights (IACtHR) as an intern during the International Human Rights Internship Program.

Obligation to Respect and Guarantee Human Rights

In the Inter-American system, the obligation to investigate, prosecute, and sanction serious human rights violations flows from the *American Convention on Human Rights*.[66] Article 1 establishes the state's obligation to respect and guarantee human rights in its jurisdiction:

> Article 1. Obligation to Respect Rights
>
> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The Inter-American Court of Human Rights further interpreted this article in the *Case of Velásquez Rodríguez vs. Honduras*, its first decision, finding that it creates two obligations: (i) an obligation for states to respect rights and freedoms guaranteed in the *Convention* and (ii) an obligation to guarantee or ensure "the free and full exercise" of the rights contained in the *Convention*.[67] The

[65] See, for example, in the UN System: *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976), article 2.
[66] *American Convention on Human Rights*, 1969.
[67] Some IACtHR decisions are available in English. I will cite the official English translation where available: Inter-American Court of Human Rights,

obligation to respect rights is a limit on the way the State can exercise its authority (it cannot violate rights).[68] The obligation to guarantee and ensure rights is a positive obligation to "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[69] Crucially, the Court establishes in *Velásquez Rodríguez* that this second obligation includes a duty to "investigate and punish any violation of the rights recognized by the *Convention*."[70]

The obligation to investigate, prosecute and, where appropriate, sanction serious human rights abuses applies to acts committed to private actors in addition to State agents. *Velásquez Rodríguez* establishes that the State is responsible for investigating illegal acts that violate human rights, even when they are "initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified)."[71] Furthermore, the Court emphasizes that the investigation must be "serious."[72] As such, the State can be held responsible for not properly addressing (prosecuting) human rights abuses committed on its territory by private actors, such as criminals.

Amnesties

The term "amnesty" has its roots in the idea of pardon, and has been used by societies following war for millennia, with records dating as far back as the Athenian Civil War in 404-403 B.C.E.[73] In contemporary international law, amnesties are understood to be "legal measures adopted by states that have the effect of prospectively barring criminal prosecution against certain individuals accused of committing human rights violations," including state agents and non-state actors.[74]

07/29/1988, *Case of Velásquez Rodríguez v Honduras (Merits), Series C, No 4* at paras 165–166 [*Velásquez Rodríguez*].

[68] *Ibid* at para 165.

[69] *Ibid* at para 166.

[70] *Ibid*.

[71] *Ibid* at para 172.

[72] *Ibid* at para 174.

[73] Lessa & Payne, *supra* note 41 at 3.

[74] *Ibid*.

Due to the obligation to investigate, prosecute, and sanction serious human rights violations, there is no question that broad amnesties are prohibited under international human rights law and, specifically, in the Inter-American human rights system. The IACtHR established the prohibition on blanket amnesties for serious human rights violations in the case *Barrios Altos Vs. Perú*:

> 41. This Court considers that **all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance**, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[75] (emphasis added)

The Court explains that the prohibition on amnesties for serious human rights violations is not unique to the Inter-American human rights system. Rather, it exists in the jurisprudence of all organs of the universal human rights systems, the European Court of Human Rights, the African Court of Human and Peoples Rights, and in the highest courts of various countries in Latin America.[76]

In periods following armed conflict, amnesties for some crimes are permitted under International Human Rights Law, but the prohibition on amnesties for serious human rights violations remains. [77] Indeed, International Humanitarian Law encourages the use of amnesties after the end of a non-international armed conflict. According to *Additional Protocol II* to the Geneva Conventions,

> At the end of hostilities, the authorities in power **shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict**, or those deprived of their liberty for reasons

[75] Inter-American Court of Human Rights, 03/14/2001, Series C No. 75, *Caso Barrios Altos Vs Perú Fondo* at para 41; More recently, see also Inter-American Court of Human Rights, 09/04/2012, Series C No. 250, *Caso Masacres de Río Negro Vs Guatemala Excepción Preliminar, Fondo, Reparaciones y Costas* at para 283.
[76] Inter-American Court of Human Rights, 11/24/2010, Series C No. 219, *Caso Gomes Lund y otros ("Guerrilha do Araguaia") Vs Brasil Excepciones Preliminares, Fondo, Reparaciones y Costas* at para 170.
[77] Inter-American Court of Human Rights, 10/25/2012, Series C No. 252, *Caso Masacres de El Mozote y lugares aledaños Vs El Salvador Fondo, Reparaciones y Costas* at para 284.

> related to the armed conflict, whether they are interned or detained.[78] (emphasis added)

The Court's early jurisprudence on amnesties referred to policies following the transition from dictatorship to democracy, rather than in armed conflict as is the case in Colombia.[79] The first case to address amnesties after armed conflict was the case of the *El Mozote Massacre* in El Salvador, which recognized the encouragement of the use of amnesties in *Additional Protocol II*, but also emphasized that international humanitarian law in general, like international human rights law, prohibits amnesties for war crimes and crimes against humanity.[80]

Sanctioning Serious Human Rights Violations

The IACtHR establishes that the punishment for serious human rights violations must be "proportionate." In the words of the court:

> With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasize that the punishment which the State assigns to the perpetrator of illicit conduct **should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events**.[81] (emphasis added)

The Court is reticent to weigh in on the specifics of punishment would be reasonable for which crimes, preferring to leave those determinations to domestic criminal justice systems. The IACtHR has stated that "the Court cannot substitute the domestic authorities in determining the punishment for the crimes established by domestic law" but has stated that it can examine whether a given punishment is "proportional."[82] The Court also states that the principle of proportionality is part of an

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[78] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609 1977 at Art 6(5).

[79] Inter-American Court of Human Rights, 10/25/2012 *Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas.*, *supra* note 77 at para 284.

[80] *Ibid* at para 286.

[81] Inter-American Court of Human Rights, 05/11/2007, *Caso de la Masacre de La Rochela Vs Colombia Fondo, Reparaciones y Costas*, *Series* C, No 163 at para 196 [*Masacre de la Rochela*].

[82] Inter-American Court of Human Rights, 05/26/2010, Series C No. 213, *Caso Manuel Cepeda Vargas Vs Colombia Excepciones Preliminares, Fondo, Reparaciones y Costas* at para 150.

international legal framework made up of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,*[83] the *Inter-American Convention to Prevent and Punish Torture*,[84] the *Inter-American Convention on Forced Disappearance of Persons*,[85] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[86]

For an idea of what kinds of sentences might be acceptable to the IACtHR, it is possible to look to jurisprudence on the topic at the European Court of Human Rights (ECHR), to which the IACtHR often looks for inspiration when addressing new areas of law.[87] Like the IACtHR, the ECHR is reticent to specify the length of sentences required for serious human rights violations.[88] However, the ECHR favours custodial (prison) sentences for serious human rights violations, stating that separating the offender from society an important part of prevention.[89] In addition, the ECHR suggests that non-custodial punishment for serious human rights abuses could be ineffective in practice.[90]

Thus, human rights law in the Inter-American system dictates that punishment for serious human rights abuses must be "proportionate" to the gravity of the offence, but the IACtHR declines to specify the type and length of sentences required. The ECHR indicates a preference for custodial sentences, which could influence future IACtHR jurisprudence on the topic. Drumble

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[83] *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Economic and Social Council Resoultion, by UN ECOSOC, Economic and Social Council Resoultion 1989/65 (New York: United Nations Economic and Social Council, 1989) at Principle 1.
[84] *Inter-American Convention to Prevent and Punish Torture*, 1985 at Art 6.
[85] *Inter-American Convention on Forced Disappearance of Persons*, 1994 at Art 3.
[86] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984 at Art 4(2).
[87] See, for example, Erik Fribergh & Pablo Saavedra Alessandri, *Dialogue across the Atlantic: Selected case-law of the European and inter-American human rights courts* (Oisterwijk, The Netherlands: Wolf Legal Publishers, 2016).
[88] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press, 2009) at 118.
[89] European Court of Human Rights, 10/24/2002, App. No. 37703/97, *Mastromatteo v Italy* at paras 69–72.
[90] European Court of Human Rights, 09/30/2004, App. No. 50222/99, *Krastanov v Bulgaria* at para 60; European Court of Human Rights, 12/20/2007, App. No. 7888/03, *Nikolova and Velichkova v Bulgaria* at para 55.

observes that even Nuremberg-style international criminal tribunals such as the ICTY and the ICTR do not set minimum sentences.[91] Indeed, they "have the power to impose any sentence ranging from one-day imprisonment to life imprisonment for any crime."[92] Therefore, a wide range of sentences could be acceptable under international law, and there is no clear obligation to impose custodial sentences in the Inter-American System.

The next section will provide an overview of Colombia's conflict and assess the policies of the country's peace agreement with the FARC against the criteria established in the Inter-American System and International Human Rights Law.

Case Study: Colombia

During his lecture upon receipt of the Nobel Peace Prize in 2016, former Colombian president Juan Manuel Santos said, "With this new [peace] agreement, the oldest and last armed conflict in the Western Hemisphere has ended."[93] Indeed, Colombia's conflict with the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (Revolutionary Armed Forces of Colombia – People's Army, FARC-EP or FARC) was the most significant conflict in Colombia. However, Colombia continues to live through a fragile state of conflict, with the ICRC reporting at least five ongoing armed conflicts in the country in 2019.[94] This section will describe the background of Colombia's conflict with the FARC, the goals of the peace negotiations that led to the 2016 peace agreement, the content of its justice mechanism, and its principal criticisms.

Background of Conflict in Colombia

The civil war with the FARC has never been the only conflict in Colombia. Colombia's experience of violence over the past half-century is characterized by different phases involving different

[91] Drumbl, *supra* note 25 at 50.
[92] *Ibid*.
[93] Juan Manuel Santos, "Juan Manuel Santos - Nobel Lecture 2016", (2016), online: *NobelPrize.org* <https://www.nobelprize.org/prizes/peace/2016/santos/26112-juan-manuel-santos-nobel-lecture-2016-2/>.
[94] ICRC, "Colombia: Five armed conflicts – What's happening?" (2019), online: <https://www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening>.

armed groups. The first phase was a period known as *La Violencia* in the 1950s, which the Inter-American Commission on Human Rights (IACHR) says started after a change in government from the Liberal to Conservative Party.[95] This change caused "a violent confrontation between the two political groups during the 1950s, while the persecution of members of the Liberal Party in the rural areas provoked the rise of armed groups."[96] Then, in the 1960s, 1970s, and 1980s, several left-wing *guerilla* armed groups emerged, including the FARC, the ELN, the *Movimiento 19 de Abril* (known as the M-19).[97] In addition, drug trafficking became a destabilizing force in Colombia in this period.[98]

In the face of this emerging violence, the Colombian government's actions sometimes exacerbated violence, and its collaboration with armed actors further complicated the question of establishing the identity of parties to the conflict. As the IACHR describes:

> The State reacted to the resurgence in violence and in 1965 promulgated [...] a state [...] of emergency (*estado de excepción*), *Decree 3398*, which allowed groups of civilians to arm themselves legally. *Decree 3398* was converted into permanent legislation in 1968, and the so-called "*grupos de* autodefensa" ("self-defense groups") were formed under those provisions, with the support of the armed forces. Those paramilitary self-defense groups were linked to economic and political sectors, established close ties with drug-trafficking, and were strengthened notably in the late 1970s and early 1980s. In the 1980s, these groups began to become notorious for committing selective assassinations and massacres of civilians.[99]

In a number of cases, the Inter-American Court of Human Rights has found the Colombian State to be responsible for human rights violations of these paramilitary groups due to their collaboration with Colombian armed forces.[100] The paramilitaries, under the

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[95] *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, by IACHR, Open WorldCat (Washington, D.C.: Inter-American Commission on Human Rights, 2014) at para 42.
[96] *Ibid*.
[97] *Ibid* at para 43.
[98] *Ibid*.
[99] *Ibid* at para 44.
[100] Inter-American Court of Human Rights, 07/05/2004, *Caso 19 Comerciantes Vs Colombia Fondo, Reparaciones y Costas*, *Series* C, No 109 [*19 Comerciantes*]; Inter-American Court of Human Rights, 09/12/2005, *Caso de la "Masacre de Mapiripán" Vs Colombia Fondo*, *Series* C, No 132 [*Masacre de Mapiripán*]; Inter-American Court of Human Rights, 05/11/2007 *Masacre de la Rochela*, *supra* note 81; Inter-American Court of Human Rights, 07/01/2006, *Caso de las Masacres de Ituango Vs Colombia Fondo*, *Series* C, No 148 [*Masacres de Ituango*]; Inter-American Court of Human Rights,

umbrella of the *Autodefensas Unidas de Colombia* (United Self-Defence Forces of Colombia, AUC), demobilized as part of a peace process in Colombia in 2006.[101] Nonetheless, it is widely acknowledged that there were serious flaws with the peace process, and many of those fighters who participated rearmed in other armed groups, especially in criminal gangs known as *bandas criminales* (BACRIM).[102]

Conflict with the Fuerzas Armadas Revolucionarias de Colombia (FARC)

Of all of these actors, Colombia's war with the FARC has been the most significant. The more than five decades of conflict left more than 220,000 people dead and six million people displaced.[103] At its core, the FARC's grievances against Colombia's central government were about inequality and failed land reform policies in rural areas.[104] From the time it was founded in the 1960s by rural peasants, the FARC grew to become one of the largest insurgent groups in Latin America and became involved in Colombia's drug trade in the 1980s and 1990s.[105] At the time of the peace deal the FARC had between 13,900 and 15,000 members (estimations by the Colombian military and the FARC themselves, respectively), and were able to conduct military operations across the country.[106] Peace with them, therefore, was a big step for Colombia. So big, in fact, that it resulted in Colombian President Juan Manuel Santos receiving the Nobel Peace Prize in 2016.[107]

Motivations for the Peace Agreement

The goals of the peace negotiations were to bring peace to Colombia, to reveal the truth of what happened during the conflict, and to respect Colombia's obligations under international

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11/27/2007, *Caso Valle Jaramillo y otros Vs Colombia Fondo, Reparaciones y Costas, Series* C, No 192 [*Valle Jaramillo y otros*].

[101] Laura Ávila, "AUC Profile", (25 May 2011), online: *InSight Crime* <https://www.insightcrime.org/colombia-organized-crime-news/auc-profile/>.

[102] *Ibid*.

[103] *Colombia's Final Steps to the End of War*, Latin America Report, by ICG, Latin America Report 58 (Bogotá/Brussels: International Crisis Group, 2016) at i.

[104] Garry Leech, *The FARC: The Longest Insurgency* (London, UNITED KINGDOM: Zed Books, 2011) at 19–20.

[105] *Ibid* at 56–57.

[106] ICG, *supra* note 103 at 7.

[107] The Nobel Prize, *supra* note 3.

human rights law. The final peace agreement, entitled *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera* (*Final Agreement to End the Conflict and Build a Stable and Lasting Peace*, hereafter "Peace Agreement") was agreed to on 24 November 2016.[108]

Colombia's war with the FARC ended not because the FARC was militarily defeated, but as the result of four years peace negotiations held in Havana, Cuba. Then-President Santos described the negotiations in his Nobel lecture as "serious and often intense, difficult negotiations."[109] The International Crisis Group (ICG) provided an analysis of the conflict just before the 2016 referendum on Colombia's peace deal with the FARC. ICG observed that military "setbacks" experienced by the FARC led it to the negotiating table, but its report is emphatic that the "FARC was never defeated on the battlefield."[110] Thus, the negotiations for peace relied upon compromises on both sides. One of the trade-offs was the types of sentences that combatants would receive for crimes committed during the war.

President Santos described the motivations of the negotiations in his Nobel lecture. His overarching message was that the goal was peace, saying "When people asked me whether I aspired to win the Nobel Peace Prize, I always answered that, for me, the actual prize was peace in Colombia. Because that is the real prize: peace for my country!"[111] Seeking an end to the war through negotiations rather than military force required a recognition of the human dignity of people on both sides of the conflict: "Seeking victory through force alone, pursuing the utter destruction of the enemy, waging war to the last breath, means failing to recognize your opponent as a human being like yourself, someone with whom you can hold a dialogue with."[112] He explained that the negotiations were "conducted with a heavy emphasis on human rights" and that the victims "want justice, but most of all they want to know the truth."[113]

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[108] *Final Peace Agreement*, *supra* note 6.
[109] Santos, *supra* note 93.
[110] ICG, *supra* note 103 at 6–7.
[111] Santos, *supra* note 93.
[112] *Ibid*.
[113] *Ibid*.

These messages are repeated in the preamble of the final peace agreement. The preamble sets out that Colombia's Constitution gives the State a duty to pursue and maintain peace:

> Bearing in mind that Article 22 of the Political Constitution of the Republic of Colombia establishes peace as a right and as a mandatory duty; that Article 95 states that the exercising of the rights and freedoms enshrined in the Constitution implies responsibilities, which include striving towards the achievement and maintenance of peace; [114]

It also states that peace is required for the enjoyment of all human rights:

> Emphasising that peace has come to be universally described as a superior human right and as a prerequisite for the exercising of all other rights and duties incumbent upon individuals and citizens; [115]

Finally, and significantly, the peace agreement states its intention to respect principles of international human rights law and international humanitarian law, which include the obligation to investigate, prosecute, and punish serious human rights violations:

> Bearing in mind the fact that the new Final Agreement encompasses each and every one of the accords reached in developing the Agenda of the General Agreement signed in Havana in August 2012; and that in order to achieve that, the parties, always and at every stage, have upheld the spirit and scope of the rules of the National Constitution, the principles of international law, international human rights law, international humanitarian law (its conventions and protocols), the stipulations of the Rome Statute (international criminal law), the decisions of the Inter-American Court of Human Rights concerning conflicts and conflict termination, and other resolutions of universally recognised jurisdictions and authoritative pronouncements relating to the subject matters agreed upon;[116]

Thus, the Colombian government was fully aware of its international obligations when it signed the Final Peace Agreement.

Justice in the Peace Agreement: The *Jurisdicción Especial para la Paz* (JEP)

The Final Peace Agreement, signed on 24 November 2016, created the *Jurisdicción Especial para la Paz* (Special Jurisdiction

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[114] "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace", (24 November 2016), online: *Off Pres Colomb* <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> s Preamble [*Final Agreement*].
[115] *Ibid*.
[116] *Final Agreement, supra* note 114.

for Peace, JEP), which is the justice component of the *Sistema Integral de Verdad, Justicia, Reparación y no Repetición* (Integral system for truth, justice, reparation, and non-repetition) of the peace agreement. Its role is to administer transitional justice and to catalogue the crimes committed as part of the armed conflict that took place before the end of the war on 1 December 2016. Its mandate is limited to 20 years.[117]

The Justice provisions of the agreement are in line with international human rights law's prohibition on amnesties for serious human rights violations. It states that no amnesties will be provided for crimes against humanity, genocide, or serious war crimes, as well as the taking of hostages or deprivation of liberty, forced disappearance, sexual violence, forced displacement, or forced recruitment of minors.[118] In line with the aforementioned recommendations of *Additional Protocol II* to the Geneva Conventions, it does allow for amnesties for political crimes.[119]

Nonetheless, it is impossible to ignore that the sentences allowed under the JEP are lenient. Even serious human rights violations would be tried under the JEP, which has minimum sentences of 5 years and maximum sentences of 8 years of "effective restriction of liberty and rights" (such as freedom of residence and movement).[120] These restrictions on liberty include staying in a particular village where they reside, under UN surveillance, and undertaking community-service reparations work. [121]

Criticisms of the Peace Agreement

Support for the peace deal was not unanimous. The Colombian government and the FARC announced the first version of the peace deal Havana on 24 August 2016.[122] This deal was put to a referendum on 2 October 2016 and, surprisingly,

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[117] *Final Peace Agreement*, *supra* note 6 at Art 5.1.2.I.9.: "Se aplicará únicamente a conductas cometidas con anterioridad a su entrada en vigor" ("It will apply only to crimes committed prior to its entry into force" [my translation].
[118] note 114 at Art 5.1.2 (II), para 40.
[119] *Ibid* at Art 5.1.2 (II), para 23.
[120] *Ibid* at Art 5.1.2 (III), para 60.
[121] *Ibid*.
[122] ICG, *supra* note 103 at 2.

narrowly defeated.[123] President Santos mentioned that "people in Colombia and indeed the whole world, were shocked."[124]

The main criticism of the peace agreement was that its sentences for those found guilty of serious human rights abuses were not sufficiently punitive, and that they constituted a *de facto* amnesty. Former president Álvaro Uribe led the referendum campaign against the peace agreement, arguing that FARC members should face harsher terms of imprisonment than the peace agreement allowed for.[125] Human Rights Watch (HRW) said that the deal would "compound impunity" and "put the prospect of sustainable peace at risk."[126] Geoff Dancy adds that opposition to the peace agreement made strange "bedfellows" of Colombia's "hard-right" politicians such as Uribe and human rights advocates such as HRW.[127] While criticisms from the political right demanded harsher punishment for former FARC fighters, human rights advocates wanted harsher petalites for both FARC members and state actors.[128] Some commentators have called Uribe's opposition to the agreement hypocritical, because, as President, he was responsible for promoting impunity during Colombia's peace agreement with the AUC in the early 2000s.[129]

In 2017, almost a year after the Final Peace Agreement came into force, José Miguel Vivanco of HRW published yet another criticism of the JEP. Chief among them was an allegation that its promise to subject confessed war criminals to "effective restrictions on freedoms and rights" provided "no reason to believe [its sentences] would constitute a meaningful punishment in light of the gravity of the crimes."[130] Vivanco also expressed concerns that the JEP would not apply consequences to perpetrators who fail to comply with established sanctions.[131] Vivanco raised other technical objections to the agreement, but

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[123] *In the Shadow of "No": Peace after Colombia's Plebiscite*, Latin America Report, by ICG, Latin America Report 60 (Bogotá/Brussels: International Crisis Group, 2017) at 1.
[124] The Nobel Prize, *supra* note 3.
[125] Dancy, *supra* note 4 at 326.
[126] Vivanco, *supra* note 5.
[127] Dancy, *supra* note 4.
[128] *Ibid*.
[129] Ariel Ávila, "La mafia que nos gobernó: La resistencia civil de Uribe no es contra la impunidad, sino para lograrla." *Semana*, online: <https://www.semana.com/opinion/articulo/ariel-avila-uribe-critica-impunidad-pero-su-gobierno-la-fomento/473939>.
[130] Vivanco, *supra* note 7.
[131] *Ibid*.

for the purposes of scope I have chosen to focus on sentences, which are the main criticism of the JEP.

Assessing Compatibility of the Peace Agreement with Colombia's IHRL Obligations in the Inter-American System

Despite criticisms of the JEP, a detailed comparison of the Final Peace Agreement with the international human rights obligations of the Inter-American Human Rights System reveals no conflict between Colombia's transitional justice process and its international obligations.

There is no firm requirement that "punishing" human rights violations result in jail time. While the European Court of Human Rights has suggested that custodial sentences may help prevent the recurrence of future human rights abuses, its observation is not binding. What is more, contemporary transitional justice theory suggests that an overly punitive Nuremburg-style approach to addressing past abuses is not conducive to creating a stable and lasting peace. Punishment for crimes committed is certainly not enough to guarantee a lasting peace in a context as complex as Colombia.

The stated objective of the Final Peace Agreement is to ensure a stable and lasting peace in Colombia by bringing an end to the conflict and complying with the State's obligations under international human rights law. The Agreement follows the guidelines of international humanitarian law by allowing amnesties for political crimes, which are essential for ending civil wars according to *Protocol II* to the Geneva Conventions. It does not allow amnesties for serious human rights violations, in line with international human rights law.

Indeed, it is possible to frame the debate on whether the Final Peace Agreement, and consequently the JEP, result in impunity as a debate on what kind of transitional justice is best suited to help countries enter a period of peace, democracy and respect for human rights after war or dictatorship. The JEP is criticized for not conforming with a legalistic, Nuremburg-style model of transitional justice. In this way, its critics conform to a phenomenon identified by Leebaw, who writes that "[p]roponents of human rights legalism also tend to oppose the use of amnesties

or political pardons as strategies for negotiating an end to civil wars."[132]

2019: Challenges to the JEP

In 2019, Colombia's Peace Agreement has encountered some serious obstacles. Under Section 3.2.1.2.a. of the *Final Peace Agreement*, demobilized FARC members can take seats in Colombia's congress as members of a new political party, later announced to be called *Fuerza Alternativa Revolucionaria del Común* (Common Alternative Revolutionary Force), the acronym of which is also "FARC".[133]

In May 2019, as former FARC commander Seuxis Paucias Hernández Solarte (known as Jesús Santrich) prepared to take his seat in Colombia's congress, he was arrested on drug trafficking charges, for which he also faced potential extradition to the United States.[134] Santrich had been subject to the JEP. Colombia's *Fiscalía*, the Office of the Attorney General, argued that the crimes he was charged with occurred after this date and so he was subject to the regular justice system.[135] The JEP declared that the alleged crimes actually fell under its jurisdiction.[136] In the end, the Supreme Court of Justice found that as a member of Congress Santrich enjoyed immunity from prosecution, and ordered his release on 30 May 2019.[137]

One month after his release, Santrich fled his protection detail and is suspected to have disappeared into Venezuela.[138] Santrich's disappearance gave the impression that he was evading justice, and dealt a serious blow to the legitimacy of the peace process in Colombia by supporting critics' claims that the JEP allows for impunity.

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[132] Leebaw, *supra* note 24 at 7.
[133] Francesco Manetto, "Fuerza Alternativa Revolucionaria del Común, nuevo nombre de las FARC", *El País* (1 September 2017), online: <https://elpais.com/internacional/2017/08/31/colombia/1504216451_908943.html>.
[134] Miranda, *supra* note 8.
[135] BBC News Mundo, "Liberan al exguerrillero de las FARC Jesús Santrich tras una larga batalla legal entre instituciones de Colombia", *BBC News Mundo* (30 May 2019), online: <https://www.bbc.com/mundo/noticias-america-latina-48454084>.
[136] Miranda, *supra* note 8.
[137] BBC News Mundo, *supra* note 135.
[138] Miranda, *supra* note 9.

This Santrich saga led to the *Peace Agreement*'s biggest challenge to date: on 29 August 2019, Luciano Marín Arango (known as Iván Márquez), formerly a senior FARC commander, announced in a video that he would return to arms along with Santrich. This blow to the Peace Agreement was significant because Márquez was the head negotiator for the FARC during the peace talks in Havana, and because he is the highest-ranking FARC member to date to take up arms.[139] However, it must be noted that the mainstream FARC members actively taking part in the peace process condemned Márquez's announcement: the New FARC dissidence is a small subsection of the fighters who accepted the Peace Agreement. Rodrigo Londoño, known as "Timochenko", the leader of the FARC during the time of the peace negotiations and now of the political party, called Márquez's announcement a "public break from the party" and said that he will "suffer the consequences of his actions" (my translation).[140] Colombia's Truth Commission warned that this announcement would jeopardize the entire peace process.[141]

Response of the JEP to the Santrich-Márquez Defection

The JEP's response to the Santrich saga and Márquez's defection should assuage the worries of HRW that there would be no repercussions to those who violated the terms of the peace process.[142] Immediately after the video was released, Santrich and Márquez were the first individuals to be expelled from the JEP.[143] This means that, if captured by Colombian law enforcement, they would be subjected to the regular rules of Colombia's justice system and, if convicted, eligible for a prison sentence, or possibly extradition in the case of Santrich. The JEP

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[139] *Containing the Border Fallout of Colombia's New Guerrilla Schism*, Latin America Briefing, by ICG, Latin America Briefing 40 (Bogotá/Brussels: International Crisis Group, 2019) at 1.

[140] Santiago Torrado, "Duque acusa a Maduro de resguardar a los disidentes de las FARC que retoman las armas", *El País* (30 August 2019), online: <https://elpais.com/internacional/2019/08/29/colombia/1567107853_540879.html>.

[141] El Tiempo, "'No se construye la paz convocando a un nuevo ciclo de guerra'", *El Tiempo* (29 August 2019), online: <https://www.eltiempo.com/politica/proceso-de-paz/comision-de-la-verdad-habla-de-decision-de-ivan-marquez-de-retomar-las-armas-406660>.

[142] Vivanco, *supra* note 7.

[143] "¿Cuál es el estatus judicial de los guerrilleros que se rearmaron con Iván Márquez?" *Semana* (18 September 2019), online: <https://www.semana.com/nacion/articulo/estatus-judicial-de-los-guerrilleros-que-aparecen-con-ivan-marquez/632345>.

also began expulsion procedures for former FARC members who appeared in the video with Márquez and Santrich, once they were identified.[144] This response represents the strength of the JEP and its commitment to justice without amnesty and its promotion of peace.

Conclusions

During my internship at the Inter-American Court of Human Rights, justice Juan Ramón Martínez Vargas from the JEP came to the Court to talk about the JEP's important work. While he spoke to the Court's interns and visiting professionals, said he hoped that the JEP could be a model for transitional justice in the world. My work on this research essay has convinced me that this is the case. The JEP was carefully constructed to balance the need for amnesties to end non-international armed conflicts as set out in international humanitarian law, with the need to ensure punishment for serious human rights violations in international human rights law. It reflects current transitional justice theory, which is cognizant of the difficulties of establishing peace in post-conflict contexts and realizes that categories of "guilty" and "innocent" can overlap. Finally, its strength in the face of the return to arms of some FARC members in 2019 shows its commitment to avoiding impunity for those who do not respect the terms of the peace process.

[144] Semana, "Identifican y piden expulsar otros siete guerrillos que aparecen con Iván Márquez" *Semana* (17 October 2019), online: <https://www.semana.com/nacion/articulo/solicitan-que-sean-excluidos-de-la-jep-siete-comparecientes-de-las-farc-que-estan-con-ivan-marquez/636355>.

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