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### The Failure of Peace: Transitional Justice's Inefficacy in Upholding Victims' Rights in the Colombian Peace Process

Diana V. Bosch Alvarado  
*Fairfield University*, [dianabosch.12@gmail.com](mailto:dianabosch.12@gmail.com)

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## **The Failure of Peace: Transitional Justice's Inefficacy in Upholding Victims' Rights in the Colombian Peace Process**

### **Glossary**

**AUC** - Autodefensas Unidas de Colombia

**ELN** - National Liberation Army

**FARC-EP** - Revolutionary Armed Forces of Colombia - People's Army

**GMH** - Group of Historical Memory

**ICC** - International Criminal Court

**IHL** - International Humanitarian Law

**SGB** - Southern Guerrilla Bloc

**SIVJNRN** - Comprehensive System of Truth, Justice, Reparation and No Repetition

**TRC** - Truth and Reconciliation Commissions

**UDHR** - Universal Declaration of Human Rights

**UN** - United Nations

**UP** - Patriotic Union

### **Abstract**

In the interest of ending the 50 year-old internal armed conflict, the Colombian government and FARC-EP advance efforts to reach a peace agreement. The agenda of the Havana talks consists of five issues, one of which is at the heart of achieving peace: the protection of the rights of the conflict's victims. Nevertheless, what is the cost the victims have to pay to enter the new era of peace? On December 15, 2015, President Juan Manuel Santos and Rodrigo Londoño, leader of the guerrilla force, signed the "Agreement on Victims of the Conflict." With the implementation of transitional justice, the agreement outlines a set of special conditions that grant amnesty to the perpetrators of crimes considered "less severe." The agreement's use of transitional justice interferes with the full satisfaction of the victims' rights. This paper exposes this failure with an exploration of the conflict's history emphasizing human rights violations. In addition, it will develop into an analysis of transitional justice, its processes and limitations. Finally, this paper will examine the extent to which the agreement upholds the rights of the victims. In a case as complex as Colombia's, a peace process and an agreement on victims must acknowledge the harm delivered to the population to create reparations that guarantee justice.

### **Introduction**

The Colombian armed conflict is the last of its nature in Latin America. For more than half a century, multiple actors have fueled the conflict. One of them is *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP, Revolutionary Armed Forces of Colombia—People's Army). A wide range of military and terrorist tactics employed by the group position them as one of the most violent and

vicious criminal organizations in the world. Additionally, and most importantly, the commission of an exorbitant number of atrocities against the Colombian population by the guerrilla organization reflects a crisis of human rights violations.

The political climate in Colombia during the 1940's was propitious for the birth of a conflict. The rivalry between the Conservative and Liberal parties had as central axis the dispute of land control. For these major political parties, the acquisition of the presidency constituted an effective medium to implement land reformations that satisfied their respective needs. Such was the case of the Liberal administrations from 1930 to 1946, in which the party "inaugurated land reform that restricted ancestral privileges and unleashed furious political opposition from the Conservatives." (Molano 2000, 23) In rural areas, the ambiance reflected the political division seen in Bogota. Peasants who supported the Liberals fought Conservative-backed landowners and peasants who intended to protect the class order in the control of land.

The death of Jorge Eliecer Gaitan, a Liberal leader who pursued the presidency of Colombia in 1948 with his ideals on land reformation, deteriorated the already fractured social landscape of the country. From 1948 to 1958, Colombia would witness a period known as *la Violencia*. The Conservative government provided military support to peasants in rural areas. The overthrown party, on the other end, armed peasants in the interest of retaliating Conservative attacks. These confrontations between peasants were conducive to the creation of FARC. The Liberal Party, with assistance from Communist Party activists, formed a 10,000-man army. (Molano 2000, 24) Pedro Antonio Marin, a peasant fighter at the time, would become the commander-in -chief of FARC.

Although class struggle spearheaded the destructive course of action of the group against the government during the 1960's and early 1970's, FARC later transitioned to attacking and threatening civilians as a tactic to gain territorial control and undermine the government's legitimacy. This tendency continued until the early stages of the peace dialogues between President Juan Manuel Santos and the current commander, Rodrigo Londoño Echeverri, in 2012. As a result, the decision to formally initiate a peace process in Havana, Cuba was deemed as a victory for peace and international security. For once in Colombia, a possibility to halt decades of war and violence seemed a reality.

The Havana peace process overshadows the failures of past peace processes with the purpose of ending the internal conflict with other militant groups in Colombia such as *Ejercito de Liberación Nacional* (ELN, National Liberation Army). In the same way, this unprecedented event has battled the criticisms of the opposition, championed by former President Alvaro Uribe Velez, for the deplorable management of human rights violations throughout the creation of the different agreements on which the peace talks focus.

"The Agreement on Victims of the Conflict" was signed on December 15, 2015. This outcome of the peace process created the highest expectation given of Colombia's infamous history of human rights violations. Additionally, since the initiation of the peace dialogues in 2012, both negotiating parties have stressed their commitment to acknowledge the painful past of the victims and to compensate for the damage committed. Nonetheless, the agreement constitutes a mechanism to absolve the members of FARC-EP of any criminal responsibility, thus creating impunity for mass atrocities.

## Literature Review

### *Transitional Justice*

The past 50 years of conflict in Colombia belong to a history of gross human rights violations. The attempt of the government and FARC-EP to transition to an era of sustainable peace has to take into

account such a disturbing past. Therefore, the implementation of transitional justice into the peace process is fundamental to confront the damage visited upon the victims of the conflict.

The literature on transitional justice offers multiple definitions. It “can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” (Teitel 2003, 49) This interpretation, however, excludes the non-judicial mechanisms that transitional justice incorporates in its functions to secure peace. Additionally, it ignores the responsibility that other non-state actors bear under periods of violent turbulence. In the report “The rule of law and transitional justice in conflict and post-conflict societies,” former Secretary-General Kofi Annan provides an all-encompassing definition. It is “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” (Annan 2004, 4) To hold “society” liable for crimes committed against the population integrates the assumption that actors of different natures can participate in the execution of inhumane acts, such as guerrillas or criminal groups. He furthers the definition to the extent of considering both judicial and non-judicial mechanisms essential for a society to reconcile with a troubling past.

The salient feature of transitional justice, regardless of its various narratives, is its intention to facilitate the progression of a society from a past filled with violations of human rights to a future provisioned with justice, peace and security. In order for transitional justice to achieve this objective, it depends on the functionality of four distinct processes: a justice process, a reparation process, a truth process and an institutional reform process to guarantee no repetition. Each one interconnects with the other, thus fortifying their respective focus. Moreover, the results of these processes become the undeniable rights of the victims. In other words, the victims have the right to truth, justice, reparation and no repetition.

#### *Justice Process*

The perpetrators of past crimes should be investigated, prosecuted and punished for their actions. States have the duty to initiate a judicial process against those suspected of violating human rights (Gomez Isa 2014, 47). Under international law, crimes against humanity, genocide, war crimes and aggression, due to their gravity, always qualify for prosecution and punishment. “The right to justice demands that States maximize measures to prevent impunity for serious and systematic violations of human rights.” (Gomez Isa 2014, 47) Bringing perpetrators to justice, similarly, constitutes a reparation mechanism for victims and a preventive procedure against future atrocities.

The establishment of sanctions, nonetheless, can present a challenge to ensuring justice. If these have the potential to threaten the progress towards peace and reconciliation, then authorities have to resort to incentives and special sanctions. Governments have the prerogative of accommodating the enactment of punishment, if and only if certain crimes can be considered of minor gravity. Amnesty, pardon and reduction of sentence are alternatives to the traditional forms of punishment.

For this purpose, the creation of tribunals or units with special jurisdiction is vital. These institutions judge crimes depending on their degree of severity. The punishment or the special conditions, consequently, must be proportional to the final verdict. Most importantly, these limitations to justice must encompass full respect of the authority of human rights. But how can a government assure the citizens and the victims of abuses that the judgement of crimes excludes arbitrariness? How can principles of impartiality and objectiveness be secured in such a delicate process? Failure to recognize, within the judging process, the harm inflicted on victims and their rights promotes the creation of unjust sanctions. “An open door to impunity, to oblivion and to the absence of a full and effective reparation for the victims” (Gomez Isa 2014, 48) could result if no precaution is taken when judging a crime.

#### *Truth Process*

What happened? When did it happen? Who participated?

Answering these questions is central to the right of the victims and society to know the truth about the events that took place. In this context, the element of investigation from the Justice process carries an influential role as it will provide the information necessary for the victims to exercise their right to truth. At the same time, this benefits the victims in another way. “The knowledge that truth provides has to be accompanied by the recognition of the victims.” (Gomez Isa 2014, 54) Exposing the truth reveals the damage delivered to victims, which validates their experiences in the past and the urgency to compensate these in the present and future. In like manner, finding the truth serves as spiritual and psychological reparation for the victims.

The government has the duty to implement the mechanisms to recuperate and reconstruct the truth. The installation of truth and reconciliation commissions (TRC), therefore, becomes a requirement for this process. The investigation of past atrocities is as essential as elaborating recommendations for conceivable reparations for the victims. In different historical cases, TRCs possessed diverse functions. South Africa “had the power to investigate crimes committed during apartheid, including the use of subpoena and seizure powers, to have public hearings, and to recommend the granting of an amnesty for perpetrators in exchange for full disclosure. This commission was also allowed to award interim reparations and to make recommendations in this respect.” (Sandoval Villalba 2011, 8) In Argentina, on the contrary, the National Commission on the Disappeared had only the mandate to investigate disappearances between 1976 and 1983.

### *Reparation Process*

Transitional justice vindicates the right of the victim to receive reparation for the harm caused. Both state and individual actors, such as FARC, in the case of Colombia, have the obligation of repairing the victims for the harm inflicted, if found accountable for violations of human rights under international law. “Any state that breaches its international obligations (by action or omission) has the obligation to produce reparation.” (Sandoval Villalba 2011, 6) The 2002 Rome Statute of the International Criminal Court, moreover, holds responsible those individuals who commit crimes against humanity, war crimes, genocide and aggression.

Reparation appears in economic, symbolic and material forms. Nonetheless, Gomez Isa argues that independently of the reparation, there are psychological consequences that cannot be addressed with any type of approach. “First of all, we have to underline that reparation is not a panacea that will solve all problems related with the past...” (Gomez Isa 2014, 56) Victims of past atrocities have to live with the legacy of pain, anguish and damage for the days to come. Reparations, as a result, should be constructed as long-term processes and not moments of instant gratification.

### *Institutional Reform – No Repetition*

“Reforming state institutions involved in, or that failed to prevent, the commission of heinous crimes is an essential element of the transitional justice processes.” (Sandoval Villalba 2011, 9) By doing so, a state is able to prevent the occurrence of the same atrocities that destroyed the society. This emphasizes the belief in no repetition. At the same time, it underpins the efforts of the state to transform the institutions that permitted the cultivation of violence and its prevalence. In this process, the justice and security sectors should be the primary focus of reform. “The police, military personnel, intelligence services, customs, certain segments of the justice sector, and non-state actors with security functions” (Sandoval Villalba 2011, 9) are entities that fall under the aforementioned approach. From a human rights standpoint,

implementing changes in these sectors is crucial if the aim is to bring to justice those responsible for violations and abuses.

*International Law*

Human rights are a matter of immense significance for the international community. World War II, for example, drew the line between inaction and cooperation amongst nation-states in circumstances of degradation of human dignity and violation of the liberties of men and women. The United Nations, as a result, has pledged to promote and preserve international peace through the advocacy and protection of human rights since its founding in 1945. The adoption of the Universal Declaration of Human Rights by the UN in 1948 constitutes a fundamental step towards the prevalence of human rights in all corners of the globe. Moreover, this milestone propelled the development of a vast number of treaties and conventions that concern specific rights. Amongst these are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights developed from the UDHR. (Valdivieso Collazos 2012, 624)

“The concern for the respect for the human species encourages the development of international legislation for the defense of human rights.” (Valdivieso Collazos 2012, 624) This type of legislation, in its majority, carries a penal condition. “The international regime on human rights devotes a whole normativity in different spheres (regional and global) that constitute mechanisms of inspection, protection and punishment to violations of these rights.” (Valdivieso Collazos 2012, 624) Such is the case of the Rome Statute and the Geneva Conventions.

Colombia is a state-party to both treaties. It signed the Rome Statute on December 10 of 1998 and ratified it on August 5, 2002. Regarding the Geneva Conventions, Colombia is member to all four conventions and Protocols I and II. For the purpose of this paper, only the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and Protocol II relating to the Protection of Victims of Non-International Armed Conflicts will be employed to analyze the situation of the victims in the Colombian armed conflict. The country ratified the Convention on November 8, 1961 and the Protocol on August 14 of 1995.

The Rome Statute established the International Criminal Court (ICC) on July 17, 1998. The treaty defines the crime of genocide, crimes against humanity, war crimes and the crime of aggression as “the most serious crimes of concern to the international community as a whole.” (Rome Statute 1998, 3) The exploration of the Colombian conflict reveals that all actors involved in the conflict have committed crimes against humanity and war crimes. Article 7 lists the acts that constitute crimes against humanity. Some examples include murder, extermination, deportation, deprivation of physical liberty, enforced disappearance of persons and rape. Furthermore, Article 8 defines war crimes as “grave breaches of the Geneva Conventions of 12 August 1949.” (Rome Statute 1998, 5) Some acts pertinent to the Colombian armed conflict are willful killing, causing great suffering to the body or health and enlisting children. “States that ratify the statute bind themselves to investigate, judge and sentence with adequate punishment those who committed the crimes of genocide, aggression, war and crimes against humanity.” (Valdivieso Collazos 2012, 625) States that do not obey this mandate must extradite those who perpetrated previous crimes in order to be judged by the ICC.

The four Geneva Conventions of 1949 prevail in the realm of International Humanitarian Law (IHL). (Valdivieso Collazos 2012, 625) These “pretend to humanize wars imposing prohibitions of penal character to the individual.” (Valdivieso Collazos 2012, 626) Article 4 of the Fourth Geneva Convention defines who is protected at times of war. “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict.” (Geneva Convention Relative to the Protection of Civilian Persons in Time of

War 1949, 170) In the same way, Protocol II Relating to the Protection of Victims of Non-International Armed Conflict includes internal wars within the sphere of rules of law of armed conflicts. Article 4.1 emphasizes the humane treatment of persons who do not participate directly in the conflict. Moreover, the article prohibits certain acts such as taking hostages, acts of terrorism and the recruitment of children.

### **Blood and Violation of Human Rights**

The internal armed conflict in Colombia between FARC-EP and the government dates back to the 1960s, more specifically, to 1964. (Hataway 2015, 163) Nonetheless, the period known as *La Violencia*, which lasted from 1948-1957, preceded and propelled the awakening of the conflict and the formation of FARC-EP. *La Violencia* began in 1948 with the assassination of Jorge Eliécer Gaitán, a Liberal candidate who aspired to win the presidential post. This episode exacerbated the economic and political disparities rooted in the social fabric of the country. Tensions between the two major political parties –the Liberals and the Conservatives— escalated to a bloody confrontation that extended to rural areas. The impact of bipartisan divisions over land control facilitated the permeation of the violence. After Gaitán’s death, the Conservatives installed their power in the government with Laureano Gomez as head of state in 1950. “Gómez’s victory and continued Conservative control contributed to the formation of Liberal ‘guerrilla squads’ in rural areas which were organized to retaliate against Conservative farms and villages.” (Offstein 2003, 101) *La Violencia*, which left a death toll of 200,000 people, (Offstein 2003, 101) ended with the creation of the National Front in 1958.

With this coalition, Liberals and Conservatives established a power-sharing government in which they would alternate the presidency every four years. Moreover, the National Front aimed to mitigate the violence between the members and supporters of the Conservative and Liberal parties. Both political wings acknowledged that rural discontent generated this violence. Nonetheless, “the government’s struggle to address legitimate concerns of rural (and urban) poor while maintaining a strict two-party Liberal/Conservative political framework allowed groups with alternative political ideologies to synthesize into guerrilla-style movements.” (Offstein 2003, 103) Not only were these products of partisan rivalry, but they also appeared as a result of local disagreements over land and control of coffee crops. Their political agenda included the promotion of rural land reforms and better wages. (Offstein 2003, 102) One of these movements, the Southern Guerrilla Bloc (SGB), developed into Colombia’s strongest group –*las Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*. Its affiliation to the Colombian Communist Party reflected its left-wing, Marxist ideals. (Hataway 2015, 166) FARC’s original social revolution shifted to criminal and terrorist activities in order to gain economic, political and territorial control. This resulted in destructive consequences in civilian life. “Two other guerrilla movements whose roots can be traced to the period of the [*Violencia*] and early years of the National Front agreement are the *Ejército de Liberación Nacional* (National Liberation Army or ELN) and *Ejército Popular de Liberación* (Popular Liberation Army or EPL).” (Offstein 2003, 104) FARC-EP, ELN and EPL became involved in the production, protection and distribution of illicit drugs. (Hataway 2015, 167) At the same time, right-wing paramilitary forces, which later united under one group, *Autodefensas Unidas de Colombia* (AUC), emerged with the support of some sectors of the Colombian armed forces, politicians and landlords to counterattack the insurgency of the aforementioned guerrilla groups. This is the multilayered and heterogeneous nature that characterizes the Colombian armed conflict.

As Colombian writer and journalist Alfredo Molano remarks, FARC consolidated its power between 1970 and 1982 when the number of fighters increased to 3,000. At the same time, the support of peasants matched this previous transformation in rural zones. Nonetheless, landowners repressed peasant movements and expelled small tenants from the lands they cultivated (Molano 2000, 26) obliging the displaced to settle in areas dominated by the guerilla.

One of the early attempts to achieve peace through diplomatic means occurred during the presidency of Belisario Betancur (1982 - 1986). With the recent installation of a Peace Commission, Betancur offered to “legalize the FARC’s political activity and to convert their military force into a political party.” (Molano 2000, 27) The offer led to the creation of the Patriotic Union (UP) in exchange of a verifiable ceasefire and a termination of kidnappings. The presidency of Virgilio Barco, contrary to its predecessor, did not have any peaceful nuances. In 1987, the army attacked the the Fifth Front of FARC in the department of Uraba. (Molano 2000, 27) At the same time, paramilitary forces supported by the army, killed indiscriminately activist of the Patriotic Union. Three presidential candidates of the left were assassinated during Barco’s last days in office; Jaime Pardo Leal and Bernardo Jaramillo of the UP and Luis Carlos Galan of the Liberal Party. According to Molano, the right wing argued at the time that paramilitaries, considered self-defense groups, “should be recognized as the third actor in the conflict.” (Molano 2000, 30) In areas where no government presence existed, paramilitary forces acted as representation of the government’s army.

More than 50 years of confrontation have invaded the lives of Colombians with pain, brutality and bloodshed. The multiple dimensions of the war have created a heterogeneous universe of victims. The Law of Justice and Peace (Law 975), enacted in 2005 by the Colombian congress, defines the victim as: the person who has suffered individually or collectively direct harm such as temporary or permanent injuries that cause any type of physical, psychological and/or sensory disability (visual and/or auditory), emotional suffering, financial loss and detriment of their fundamental rights. These harms must have resulted from crimes committed by members of organized armed groups at the margins of the law. (Procuraduría 2007, 15) Although the law excludes those victimized by official state agents, (García-Godos and Lid 2010, 501) it is crucial to distinguish that all participatory actors in the conflict, including the state (police and armed forces), have responsibility in the execution of crimes that violate human rights. In Colombia, crimes that range from murder and kidnappings to bombardments of public spaces construct the victimhood of the individual.

The violence during the 1990s augmented the number of victims. (Hataway 2015, 168) Figure 3 demonstrates that in the beginnings of the decade, both homicides and kidnappings reached unprecedented numbers when compared to previous years. By the time, approximately 25,000 homicides and 2,500 kidnappings had been carried out. Table 10 reiterates the previous numbers of homicides and kidnappings with statistics from 1964 until 1996. For example, undoubtedly, the number of homicides changed dramatically starting in the year 1985 with 12,922 cases. Five years after, the number of homicides equaled to 24,304.

According to the Group of Historical Memory (GMH) of the National Center for Historical Memory in Colombia, the conflict has caused the death of approximately 220.000 people between 1958 and 2012. (Grupo de Memoria Histórica 2013, 31) “Of these deaths, 81.5% corresponds to civilian deaths and 18.5% to combatant ones.” (Grupo de Memoria Histórica 2013, 32) For instance, in 1999, the paramilitaries assassinated Jaime Garzón, a well-respected journalist, humorist and political satirist. The GMH declares that the armed conflict leaves a disturbing balance of victims: 25,007 disappearances, 1,754 victims of sexual violence, 6,421 boys, girls and adolescent victims of forced recruitment, 4,744,046 displaced people, 27,023 kidnappings between 1970 and 2010, and lastly, 10,189 victims of antipersonnel mines between 1982 and 2012. (Grupo de Memoria Histórica 2013, 33)

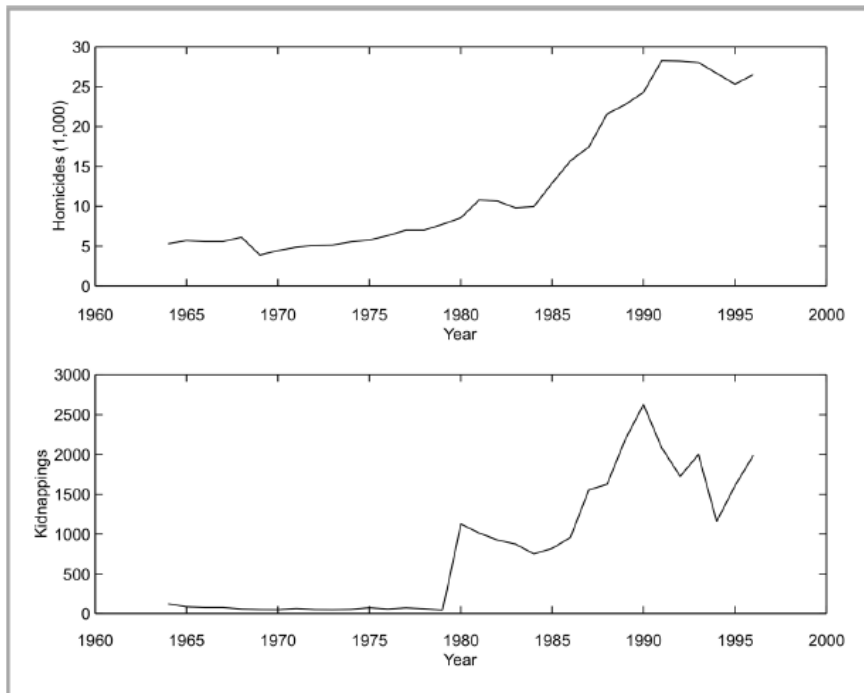
FARC-EP is responsible for 238 massacres and 489 kidnappings between 1980 and 1989. Diagram 10 proves the prominence of kidnappings in the belligerent behavior of FRAC-EP (teal line). In 1998, the guerrilla group carried approximately 1,800 kidnapping, which exceeds the amounts of the rest of the actors. Between 1996 and 2002, the use of kidnappings reached its highest level. FARC-EP became the leading perpetrator of this crime with 8,578 in its record. (Grupo de Memoria Histórica 2013, 67) A renowned case is that of former senator and presidential candidate Ingrid Betancourt when she was



kidnapped by FARC-EP on February 23, 2002. Andrés Felipe Pérez, the terminally ill son of Corporal Norberto Pérez, died in 2001 in the hopes of seeing his father liberated. FARC-EP never granted Andrés' wish, who had pleaded multiple times for the freedom of his father.

Concerning forced recruitment, FARC-EP is the main recruiter of children and adolescents with 3,060 cases. The guerrilla group obliges minors to participate, directly or indirectly, in the execution of hostilities or in military actions. (Grupo de Memoria Histórica 2013, 84) Rape constitutes one of the strategies of the group to recruit children. The painful testimony of an adolescent girl reveals the suffering that no child should experience. To prevent the recruitment of her brothers and preserve the life of her father, the victim had to accept her own rape by a FARC-EP commander. (Grupo de Memoria Histórica 2013, 83) The recruitment of children and adolescents constitutes a crime against humanity (Rome Statute, Article 8.2). On the other hand, Article 8.1 of the Statute considers rape as a war crime.

Figure 3. Homicides and kidnappings, 1964-1996.



Source: Offstein, Norman (141)

Table 10. Homicides and kidnappings in Colombia, 1964-1996.

Year	Homicides	Homicide Rate	Kidnappings
1964	5,342	31	122
1965	5,728	32	84
1966	5,612	30	76
1967	5,607	29	76
1968	6,151	31	55
1969	3,908	19	50
1970	4,455	21	49
1971	4,885	23	63
1972	5,118	23	50
1973	5,175	23	49
1974	5,566	24	53
1975	5,788	24	73
1976	6,349	26	55
1977	7,014	28	71
1978	7,013	27	59
1979	7,749	33	44
1980	8,561	28	1,126
1981	10,798	36	1,014
1982	10,665	32	927
1983	9,800	32	876
1984	9,969	32	752
1985	12,922	40	821
1986	15,735	48	962
1987	17,447	52	1,554
1988	21,604	63	1,627
1989	22,772	65	2,186
1990	24,304	69	2,626
1991	28,280	78	2,080
1992	28,225	77	1,725
1993	28,048	75	1,999
1994	26,676	70	1,158
1995	25,318	65	1,608
1996	26,510	67	1,986

Source: Offstein, Norman (140)

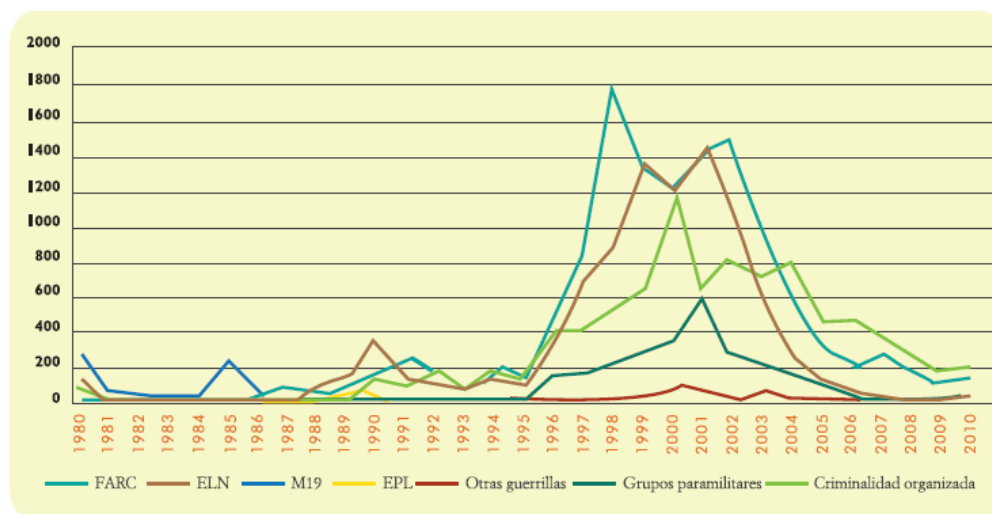


Figura 10. Evolución de los secuestros por conflicto armado en Colombia según grupo responsable, 1980-2012. Fuente: Cifras & Conceptos para GMH.

Source: Grupo de Memoria Histórica (67)

## Santo's Quest for Peace: Havana Talks

Since its beginnings, the presidency of Juan Manuel Santos has geared towards one sole goal: achieving peace with the conclusion of the armed conflict. As a result, his efforts to initiate an exploratory phase with FARC-EP with the purpose of engaging in a peace process were paramount. From February 23 until August 26 of 2012, the Colombian Government and FARC-EP met in Havana, with the host country and Norway serving as guarantors. With this role, Cuba and Norway “make sure that the terms of the agreement will be fulfilled.” (Armengol 2013, 7) On the other hand, the government of the Bolivarian Republic of Venezuela fulfills the role of logistics facilitator and companion. As a companion, Venezuela “was instrumental in bringing about the talks.” (Hataway 2015, 181) The initial rapprochement between FARC-EP and the government resulted in the *General Agreement for the Termination of the conflict and the Construction of a Stable and Durable Peace*.<sup>1</sup>

The government and FARC-EP agreed, amongst other things, the initiation of “direct and uninterrupted talks about the points of the Agenda here established.” (Acuerdo General, 1) These points are:

1. Comprehensive agrarian development policy,
2. Political participation,
3. End of the conflict,
4. Solution to the problem of illicit drugs and
5. Victims

The only point that has not materialized into an agreement is Point 3 - End of the Conflict. It is expected that the Government and FARC-EP will reach an agreement in March 2016. However, the Agreement on the Victims of the Conflict, signed on December 15, 2015, will be the focus of this paper as it deals with the rights of the victims of the conflict and the mediums of reparation for the pain inflicted upon them throughout the years of the armed conflict. “To compensate the victims is at the center of the agreement National Government – FARC-EP.” (Acuerdo General, 3) In furtherance of this objective, both parties will deal with sub-points on the human rights of victims and truth.

In order to assess the situation of victims of the conflict, a special system was designed to investigate crimes, impose sanctions and establish reparation programs for the victims. The Comprehensive System of Truth, Justice, Reparation and No Repetition (SIVJRNR for its acronym in Spanish) possesses the prerogative to carry out these functions. Within this system, an installation of bodies, such as the Commission for the Clarification of Truth, Coexistence and no Repetition; the Special Unit for the Search of People Reported Missing in the Context and by Reason of the Conflict; the Special Jurisdiction for Peace, will focus on specific tasks. For example, the Special Jurisdiction for Peace will be composed of chambers that “investigate, clarify, prosecute and punish grave violations of human rights and grave infringements of International Humanitarian Law.” (Acuerdo sobre las Víctimas del Conflicto, 7) As it will be demonstrated, there are multiple irregularities within this jurisdiction that compromise the declared commitment of the Colombian government and FARC-EP to human rights. Similarly, this jurisdiction exposes violations of IHL on behalf of the government.

To ensure justice to the victims, the proceedings will be classified according to the provision of truth and responsibility by the perpetrator in question, or the lack thereof. The following bodies will integrate the previous processes:

**A) Chamber of Recognition of Truth, Responsibility and of Determination of Facts and Conduct.** One of its main functions is to decide which cases fall under its competency. The Chamber will examine the events and behaviors that emerged throughout the duration of the conflict. In order to accomplish this, it will work other authorities, such as the Attorney General. Additionally, it will receive the reports of victims and human rights organizations.

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<sup>1</sup> *Acuerdo General para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*

**B) Peace Tribunal,**

- a. Section of first instance in case of recognition of truth and responsibility, which will enact sentences.
- b. Section of first instance in case of absence of recognition of truth and responsibility. This one will host trials and formulate prison sentences.
- c. Section of sentence revision will receive cases that have been sanctioned by other justice bodies or by the office of the General Attorney. The sanctions must not constitute amnesty or pardon.
- d. Appeals section

**C) Chamber of Amnesty or Pardon** will depend on the work of the Chamber of Recognition of Truth, Responsibility and of Determination of Facts and Conducts. In such manner, it will be determined which cases qualify for amnesty or pardon.

**D) Chamber for the Definition of Judicial Situations** will define the judicial situation of people who shall not be subject of amnesty or pardon and of those who will not be required to recognize responsibility if they have received amnesty or pardon.

**E) Unit of investigation and accusation** will be in charge of satisfying the victims' right to justice in the absence of individual or collective recognition of responsibility.

**Room for impunity: The Agreement on the Victims of the Conflict**

The victims of the conflict deserve their rights to justice, truth, reparation and no repetition to be upheld. From the genesis of the peace process, the Colombian Government and FARC-EP assert their compromise to the victims concerning the protection of their rights. In the *General Agreement for the Termination of the conflict and the Construction of a Stable and Durable Peace*, they declare that “the respect of human rights in all confines of the national territory is a goal of the State that should be promoted.” The centrality that both parties attributed to the issue of victims generated the *Agreement on the Victims of the Conflict* on December 15, 2015.

The foundations of the agreement derive from the *Declaration of Principles for the Discussion of Point 5 of the Agenda: 'Victims'* of June 7, 2014.<sup>2</sup> The principles establish the framework that the parties respected in the creation of the agreement on victims. They corroborate the rights of the victims and the inherent protection these rights should receive: recognition of the victims, recognition of responsibility, fulfillment of the rights of victims, participation of victims, clarification of the truth, reparation of victims, guarantees of safety and security, guarantee of no repetition, principle of reconciliation and focus on human rights.

In order to respect the aforementioned principles, the Agreement on Victims of the Conflict creates *la Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace). “To access the special treatment provided in the Justice component of the SIVJRN, it is necessary to contribute with full truth, reparation for the victims and ensure no repetition.” (Acuerdo sobre las Víctimas Del Conflicto, 23) Point 60 of the agreement delineates the sanctions that the special treatment provides. These sanctions must have the greatest restorative and reparative function of the harm caused. Moreover, they must correspond to the degree of recognition of truth and responsibility provided.

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<sup>2</sup> Comunicado Conjunto – La Habana, junio 7 de 2014 “Declaración de Principios para la Discusión del Punto 5 de la Agenda: ‘Víctimas’”

Concerning “serious crimes,” those who contribute with truth and recognize their responsibility before the Chamber of Recognition will obtain sanctions with a “minimum duration of the fulfillment of the reparative and restorative function of the sanction of five years and a maximum of eight.” (Acuerdo sobre las Víctimas Del Conflicto, 39) Additionally, the person or group in question will have effective restrictions of liberty, the right to residency and the right to movement. Nevertheless, these restrictions will neither translate into time in jail or prison, nor any equivalent form of detention.

The punishment for the members of FARC-EP responsible for crimes against humanity and war crimes hinders the justice process of transitional justice. The literature of transitional justice claims that perpetrators of past crimes deserve to be penalized. To prevent impunity, governments must impose sanctions for serious and systematic violations of human rights. (Gomez Isa 2014, 47) FARC-EP’s commission of war crimes and crimes against humanity fulfill the previous description. Under the jurisdiction of the Rome Statute, these types of crimes merit penalties. Article 77.1 of the treaty states that a person convicted of a crime defined in Article 5 must receive punishment in the form of “a) imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” (International Criminal Court 1998, 54) Evidently, the sanctions of the Special Jurisdiction for Peace fail to respect the victims’ right to justice. In the same manner, the sanctions for serious crimes threaten the compliance of the Colombian government to the Rome Statute.

Point 60 states that “the sanctions will have as essential finality to satisfy the rights of the victims and consolidate peace. [The sanctions] must have the greatest restorative and repairing function to the damage caused.” (Acuerdo sobre las Víctimas, 39) The government and FARC-EP consider the lack of jail and security measures as worthy to satisfy the rights of the victims, specifically, the right to justice. Furthermore, the sanctions with restorative and reparative function do not reflect what the Rome Statute establishes as punishment for severe crimes. Projects in rural and urban zones and areas of the national territory where landmines and war explosives remain will both respect the right to justice and reparation of the victims. These are some of the sanctions:

1. Participation in/execution of programs that protect the environment,
2. Participation in/execution of programs that replace cultivations of illicit use,
3. Participation in/execution of programs of construction and amelioration of road infrastructure,
4. Participation in/execution of programs of eradication of landmines

The text develops the description of sanctions by asserting that the establishment of these will depend on “calibrating” the crime. Consequently, the sanction will coincide with the severity of the crime. For example, “those who did not have a decisive participation in the most severe and representative crimes, even when involved in them” (Acuerdo sobre las Víctimas, 40) will receive sanctions lower to five years. “In this case, the minimum of sanction will be of two years and the maximum of 5 years.” (Acuerdo sobre las Víctimas, 40)

This point does not specify if the duration of the sanction refers to time in jail or a program with restorative purposes. It is necessary to ask, if these are the corresponding sanction for the most severe crimes, what does the agreement deem as an appropriate sanctions for crimes of less gravity? Moreover, does the Agreement provide accountability to perpetrators, even if they did not have a “decisive participation”? After all, the government and FARC-EP professed their commitment to the principle of recognizing responsibility as a guarantee to uphold the right to justice.

These sanctions and projects carry implications for the Colombian government and FARC-EP. Although they possess a restorative and conciliatory nature that will assist victims, they “do not reflect the accepted standards of appropriate punishment for grave violations.” (Human Rights Watch 2015, 1) Consequently,

the government violates its obligation to uphold international treaties such as the Rome Statute, the Fourth Geneva Conventions and Protocol II. These sanctions disregard the suffering of the victims and do not respect their right to justice. The implications for FARC-EP would equal the evaluation of their crimes and the establishment of punishment under the jurisdiction of the ICC. Because the Colombian government fails to enact appropriate sentences that reflect the gravity of crimes, especially of those listed in the Rome Statute, the ICC would have to intervene and try the members of FARC-EP. The greatest consequence of all these unsuitable sanctions is the subsequent failure of the peace process and its conclusion, if it ever happens. If the government and FARC-EP “avoid meaningful punishment, then the peace agreement itself would be illegitimate, unfair, and unlikely to help achieve the goal of a lasting peace.” (Hataway 2015, 188)

The promises made by the Colombian Government and FARC-EP to the victims of the conflict become insignificant when, on paper, what is being agreed reflects no consideration of the violation of human rights. The *Agreement on the Victims of the Conflict* exposes the multiple injustices that will hinder the provisions of justice, truth, reparation and no repetition. Moreover, this particular agreement demonstrates the infringement of international law concerning crimes against humanity and war crimes. The Colombian government does not comply with the various international treaties to which it is a member

### **Conclusion: Will Colombia have peace?**

The extensive literature on transitional justice provides an opportunity to better understand the dynamics of a peace process. Its multiple definitions, concepts and functions demonstrate that its utilization has been vast in post-conflict cases. In the same way, the literature explains how the different processes within transitional justice e.g. justice, truth, reparation and no repetition interfere with the functionality of each other.

The justice process dictates that the state has the duty of investigating, judging and punishing those responsible for violations of human rights. Severe crimes such as the ones defined by the Rome Statute must always account for punishment. Additionally, the truth process declares that victims have the right of receiving the truth of what happened and how it happened throughout the conflict. Knowing the reality is equivalent to a form of reparation, which also constitutes one of the rights of the victims. The fortification of the historical memory also accounts as reparation for their deteriorated emotional and psychological states. Thirdly, dignifying the victims through the alleviation of their suffering with symbolic, material or financial means constitutes the focus of the reparation process. Last but not least, the government must reform the institutions that permitted the commission of crimes or that by omission did not prevent them. The main component in this process is the guarantee of no repetition.

The multidimensionality of the Colombian conflict, its tremendous length and complexity serve as the appropriate field for the creation of complications when planning and implementing transitional justice. Without doubt, all the actors that have participated in the conflict are responsible for Colombia's deplorable situation of human rights. Guerrilla groups, paramilitaries and state actors must pay for the high toll of victims. Because FARC-EP is the groups with which the government is currently negotiating, the peace process must ensure that the punishment for their members correlates to the crimes they have committed. Evidently, the guerrilla group in one of the main perpetrators of atrocities such as homicides, kidnappings, forced displacement, amongst others.

The Agreement on the Victims of the Conflict must fortify the justice component if the objective is for the peace process to succeed. The Colombian government and FARC-EP must adhere to what transitional justice states. What they propose on the agreement falls short in providing justice to the victims. In the same way, due to the interconnection of justice with the other processes, the victims do not recognize if the government and FARC respect their rights to truth, reparation and no repetition.

## (Annex - October 2, 2016 Referendum)

### Colombia's Rejection of the Peace Referendum

The peace process accounts as one of the most controversial events in contemporary Colombian history. Deep-rooted views heavily represented the sectors that opposed and favored the process. And although media polls and political analysts assured a monumental victory of the "Yes," the bipolarization already incarnated in the country changed the course of the referendum into an unexpected "No."

The research, documentation and completion of this paper occurred before the October 2016 Referendum. It is essential to address this event in the context of this paper and its main argument. How do the Referendum results modify the basis of this paper?

The views of the author concerning the Peace Process and the Accord on Victims represented the shared views of a majority in Colombia and abroad. This invisible but existent group opposed the poor consideration of the victims' rights in the formulation of judicial mechanisms to punish those responsible for crimes committed during the conflict. It is this same group that questioned the reparation methods with which FARC members intended to "compensate" for the harm inflicted in so many lives. And finally, this sleeping force certainly denounced the lightness demonstrated by the government to include the voices of the victims throughout the process. Therefore, it comes to no surprise the strict results in which the "No" rejected the negotiations by 100,000 more votes of those for the "Yes." Therefore, rather than modify the argument of this paper, the Peace Referendum results reiterate and endorse the various concerns here emphasized. At the same time, the victory of the "No" constitutes a demanding call for a just reformation of the accords in the interest of fulfilling the needs of the victims, especially, their rights.

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