

UiO : **Faculty of Law**
University of Oslo

Transitional Justice as Structural Justice

An Institutional Analysis of the Colombian Peace Agreement

Candidate number: 8024

Submission deadline: 1 June 2020

Number of words: 19,970



Dedication

To all the victims of a long and painful war

Acknowledgements

I would first like to sincerely thank my wife for her endless patience and constant help throughout the process. As well as my mother, father and sister for their unconditional support throughout my years as a student.

Thank you to my supervisor, Stener Ekern, for his dedication, knowledge and excellent teaching skills. His comments have been greatly valuable for this thesis.

Finally, a special thanks to the professors, friends, classmates and staff at the Norwegian Centre for Human Rights for two inspiring years of learning.

Table of contents

1	INTRODUCTION	1
1.1	Theoretical framework	4
1.2	Institutions	5
1.3	Colombia’s armed conflict	7
1.4	El Salvador	9
1.4.1	Institutional selection	10
1.5	Methodology and methods	11
2	THEORETICAL FRAMEWORK.....	13
2.1	Transitional justice	15
2.2	Transitional justice as structural justice.....	19
3	ARMED CONFLICT IN COLOMBIA AND JUDICIAL AND EXTRA- JUDICIAL INSTITUTIONS.....	24
3.1	Colombian armed conflict	25
3.2	Judicial institutions: the ordinary system and the Comprehensive System.....	30
3.2.1	The judicial system between 1991 and 2016	30
3.3	Comprehensive System of Truth Justice Reparation and Non-Repetition	35
3.3.1	The Special Jurisdiction for Peace	36
3.3.2	The Truth Commission	39
3.3.3	Special Unit for Finding Missing Persons	41
4	EL SALVADOR AND THE REFORM OF THE NATIONAL CIVIL POLICE ..	43
4.1	Policies and laws determining the course of the PNC.....	45
4.2	Change of discourse: human rights approach ‘in theory’	48
4.3	Risk of new institutions with old practices.....	50
5	TRANSITIONAL JUSTICE AS STRUCTURAL JUSTICE: COLOMBIAN INSTITUTIONS	51
5.1	Transitional justice as structural justice through the Comprehensive System	52
5.2	Lessons from El Salvador and the PNC	54
5.3	The Comprehensive System after three years of implementation: strengths and challenges	58
6	CONCLUSION	63

TABLE OF REFERENCE.....67

Acronyms

AUC	United Self-Defense Forces of Colombia
ANSP	National Academy of Public Security
CIL	customary international law
ELN	National Liberation Army
EPL	Popular Liberation Army
FARC	Revolutionary Armed Forces of Colombia—People's Army
FMLN	Farabundo Martí National Liberation Army
IACtHR	Inter-American Court of Human Rights
IDPs	internally displaced people
ICC	International Criminal Court
IHL	International Humanitarian Law
M-19	19th of April Movement
OC-HCHR	Office in Colombia of the UN High Commissioner for Human Rights
PNC	National Civil Police
UN	United Nations

1 Introduction

The Colombian armed conflict has been perhaps the most protracted internal conflict in modern history. It began in the 1960s with the creation of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). Colombia is still far from being a country at peace, but in 2016, the government and FARC signed a peace agreement that ended the armed conflict between the largest guerrilla group in the country and the state. I will use the case of Colombia's 2016 Peace Agreement to examine the role of institutions in transitional justice by analyzing (1) how institutions contributed to the conflict; and (2) most importantly, their role in a peacebuilding context.

For the sake of the assessment, I will lean on the theoretical framework of transitional justice as structural justice.¹ This theory assumes that state institutions which have contributed to conflict have to be restructured or replaced if they are to successfully contribute to peacebuilding during transitional justice.² The theory also intends to move the traditional focus of transitional justice from being mainly criminal justice, to a more holistic-type justice that not only addresses violations of civil and political rights, but equally so, addresses violations of economic, social and cultural rights. The end result would be to ensure institutions and systems working efficiently to avoid that large groups keep being marginalized.³

In analyzing the institutions' role in a peacebuilding context, I assume the following: first, reforming, or abolishing and creating new institutions is necessary for reconciliation in transitional contexts. This follows the logic that to increase individuals trust vis-à-vis gov-

¹ This theory was initially worked by Krista K. Thomason, ed. *Transitional Justice as Structural Justice*, *Theorizing Transitional Justice* (Burlington: Ashgate Publishing Company, 2015). Thomason in Krista K. Thomason, "Transitional Justice as Structural Justice," in *Theorizing Transitional Justice*, ed. Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi, (Burlington: Ashgate Publishing Company, 2015).

² *Ibid.*, 76.

³ Iris Marion Young, *Responsibility for Justice* (New York: Oxford University Press, 2011). Structural injustices include for instance lack of access to basic goods, denied economic opportunities, or being marginalized from social life.

ernmental institutions, those institutions that are perceived as conflict-fueling or unfair must be restructured or replaced to avoid the feeling of disenfranchisement among those affected. Second, long-term prospects of peace and democracy depend upon the state's institutional capacity to address injustices that could fuel future conflicts, such as violations of civil, political, economic, social, and cultural rights. If people feel marginalized by governmental institutions, or alienated by transitional justice, they can lose hope in the process, jeopardizing prospects of peace and democracy.

Third, continued violence in post-peace agreement eras affects the legitimacy of governmental institutions. Even institutions not directly involved in law enforcement and post-war created institutions, may lose their public support if the levels of violence continue to be high after a peace treaty. Fourth, transitional justice as structural justice adds on the traditional basis of transitional justice. Thus, retributive and restorative justice are still essential in contributing to the realization of human rights, to peace and democracy, and to institutional legitimization.

To exemplify the research questions and assumptions, I will analyze Colombia's ordinary justice system⁴ to understand if and how it contributed to the armed conflict in Colombia. I will then compare this system to the three newly created institutions following the Peace Agreement, namely (1) the Special Jurisdiction for Peace (hereafter Special Jurisdiction) which is a judicial institution that will provide conditional amnesties for those who participated in the conflict and who commit to adhere to the Court and contribute with truth-telling; (2) the Truth, Coexistence and Non-Recurrence Commission (hereafter Truth Commission); and (3) the Special Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict (hereafter Special Unit), which will complement the work of the Special

⁴ In the context of transitional justice, the ordinary justice system refers to the system that existed prior to a peace agreement. It is differentiated from any judicial or extrajudicial institution created specifically to deal with the conflict in post-conflict societies.

Jurisdiction. The Truth Commission seeks the truth of what happened in the context of the internal armed conflict, in order to shed light to the violations committed therein, and to offer society a broad explanation of its complexity and give an account that includes all voices. Meanwhile the Special Unit directs, coordinates and contributes to the implementation of humanitarian actions to search for and locate living persons presumed missing in the context and by reason of the armed conflict, and in the case of death, where possible, the recovery, identification and dignified delivery of the remains.⁵ These new institutions form part of the Comprehensive System of Truth, Justice, Reparations and Non-Repetition and are central to the implementation of the Agreement.

A comparative analysis of the ordinary justice and the transitional justice systems in Colombia will be complemented by reviewing what happened in a similar situation in El Salvador. As the theoretical framework is examining transitional justice as structural justice, through the role played by institutions, a non-judicial institution from El Salvador will help understand and clarify if and how such institution has contributed to conflict and if and how it contributes to peace. The point of the case study is to shed light on the need to replace or reform institutions deeply involved in the armed conflict. The El Salvador case study was chosen for the purpose of this thesis because this country went through a peace process a few decades ago. Thus, it will allow for deeper understandings of the long-term goals that were to be achieved with the modification of several institutions. Furthermore, the case of El Salvador is another example of structural injustices that spurred to an armed conflict framed in a left vs right ideological battle, similar to the one in Colombia.

⁵ Gobierno de Colombia, "Acuerdo Final Para La Terminación Del Conflicto Y La Construcción De Una Paz Estable Y Duradera (Version Translated to English)," (Bogotá 2016), Point 5, 135.

1.1 Theoretical framework

Traditionally, transitional justice has been a set of theories developed by focusing on regime shifts, where justice falls between two different political systems. Teitel's understanding of transitional justice was largely inspired by the end of the Cold War and the fall of communism, as well as by the fall of the dictatorships in South America in the 1980s. She argued that ideas of full retributive and corrective justice for what happened in the past are considered necessary precursors to liberal change.⁶ Furthermore, she argues, in transitional justice settings, the concept of justice is partial, contextual and the idea of justice itself is always a compromise.⁷ Transitional justice in her eyes has evolved due to three main events: (1) the post-Second World War Nuremberg Trials; (2) the post-Cold War phase that initiated democratization processes; and (3) and the contemporary-phase of transitional justice.⁸ The third stage was formalized by the creation of the permanent International Criminal Court (ICC) in 2002, following the ad hoc tribunals in Rwanda and Yugoslavia.

Over the past fifteen years, scholars on transitional justice have turned to investigate the importance of structural justice within transitional justice.⁹ The reason for this is that the first two decades of the twenty-first century have seen more cases of transitional justice resulting from a negotiated end to an armed internal conflict, than cases of collapsing political regimes. Given the new scenario dynamics, transitional justice as structural justice claims that because there is not necessarily a strong political change, instead, after negotiated solutions to armed conflicts, those political, judicial, social, and economic institutions that had aided the

⁶ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 4.

⁷ *Ibid.*, 9.

⁸ "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003).

⁹ See for instance Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007)., Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly*, 29, no. 2 (2008). 275-89, and Thomason.

armed conflict, thus creating some sort of structural injustice, must be replaced or reformed for transitional justice to work in a post-peace agreement era. While this theory emphasizes the importance that structures have on the conflict and on justice, it does not disregard traditional ways of transitional justice (retributive and restorative justice). In fact, it argues that traditional forms of justice in transitional societies are necessary, as these focus directly on the violent events or regime. But it also calls for placing other institutions like those addressing economic and social issues at the center of transitional justice, rather than at the periphery.¹⁰

Transitional justice as structural justice highlights the importance of placing the work of the truth commission closer to those who suffered the conflict the most, and tribunals ensuring that victims of the conflict feel included in the transitional phase. If transitional societies do not feel that truth commissions or tribunals are accomplishing justice, transitional justice will be alien and distant to those that have to live together after atrocities.¹¹ Therefore, the new structure (via institutions) put into place for transitional societies must ensure that certain groups are not disenfranchised when moving forward. It is precisely here where more research is needed to evaluate the theory of transitional justice as structural justice. This is also the main purpose of this thesis: to add to the existing literature of transitional justice by providing a case study that tests the normative aims of transitional justice as structural justice, exemplified by the case of Colombia.

1.2 Institutions

In this research, I will limit the scope of the unit of analysis to political institutions. In this sense, the most general understanding of political institutions is that they are “the rules of the

¹⁰ Thomason, 79.

¹¹ Ibid.

game,”¹² which are composed of formal and informal rules. On the one hand, formal rules are those “formal arrangements for aggregating individuals and regulating their behavior through the use of explicit rules and decision processes enforced by an actor or set of actors formally recognized as possessing such power.”¹³ On the other hand, informal rules are based on routines, customs, compliance procedures, habits, decision styles, social norms, or culture.¹⁴ For the purpose of this thesis, the focus will be on the “formal” rules of the game. By doing so, I will be especially looking at understanding institutions and change. Specifically, (1) when can institutions be changed; (2) why do they change; and (3) how do political actors influence modified or newly created institutions.

Previous research shows that it is during formative moments that political actors can change the nature of the “game.”¹⁵ Such moments occur when existing political institutions are no longer able to handle the new situation. At which point, political actors are able to shape the political institutions of the future, which sometimes they do by establishing favorable rules for themselves.¹⁶ Elster suggests that institutions must be constructed according to certain moral standards, such as shared conceptions of justice.¹⁷ Hence, it is of primary importance for this study to see how the concept of justice is understood among political actors and institutions, as well as analyzing if and how these newly created rules favor those ones who created them.

¹² Bo Rothstein, "Political Institutions: An Overview," in *A New Handbook of Political Science*, ed. Robert E. Goodin and Hans-Dieter Klingemann (Oxford: Oxford University Press, 1998), 145.

¹³ Margaret Levi, "A Logic of Institutional Change," in *The Limits of Rationality*, ed. Karen Schweers Cook and Margaret Levi (Chicago: Chicago University Press, 1990), 405.

¹⁴ Ibid.

¹⁵ See for instance Rothstein. and Stephen Krasner, "Approaches to the State: Alternative Conceptions and Historical Dynamics," *Comparative Politics* 16, no. 2 (1984).

¹⁶ Rothstein, 159.

¹⁷ Jon Elster, "The Possibility of Rational Politics," in *Political Theory Today*, ed. David Held (Cambridge: Polity Press, 1991).

1.3 Colombia's armed conflict

The Colombian armed conflict is one of the longest armed internal conflict in recent history. FARC began fighting in the 1960s, then as a smaller peasant-supported group fighting for social justice. By the turn of the millennium it had recruited (forcefully and voluntarily) some 18,000 fighters, claiming to espouse a Marxist ideology.¹⁸ Around the same time as FARC was created, ELN was established as another armed guerilla group rooted in a leftist ideology, but its ranks were dominated by students, catholic church radicals, and left-wing intellectuals hoping to replicate Fidel Castro's communist revolution.¹⁹ From the 1980s onwards, both FARC and ELN became heavily involved in drug trafficking and other organized crime, in effect making this their main source of income. With the increase of drug trafficking and the strengthening of local drug lords and cartels, rural landowners organized a paramilitary counterforce to protect themselves from the leftist guerrilla groups. The largest paramilitary group, the *Autodefensas Unidas de Colombia (AUC)* consisted of right-winged self-defense forces, and was officially established in 1997, reaching an estimated 14,000-18,000 fighters.²⁰ Other left-winged guerrilla groups, while small compared to these three main actors, also existed, mainly, *Movimiento 19 de Abril (M-19)* and *Ejército Popular de Liberación (EPL)*. The latter two played an important role in two aspects, first, they were the first guerrilla groups to negotiate peace treaties and go from illegal armed political movements to disarmed and legitimate political actors, albeit with many difficulties. Second, M-19 members also contributed importantly to the drafting of the 1991 Constitution.

¹⁸ Chandra Lekha Sriram, *Peace as Governance: Power-Sharing, Armed Groups and Contemporary Peace Negotiations* (Hampshire; New York: Palgrave Macmillan, 2008), 22-4.

¹⁹ Claire Felter and Danielle Renwick, "Colombia's Civil Conflict," (Council on Foreign Relations, 2017), Accessed 23 November 2019.

²⁰ Sriram, 152.

While the conflict in Colombia has been most commonly presented as a left vs. right political conflict, the character of the conflict has changed over time. The ideological fighting has been both affected and fueled by disputes over economic resources, mainly oil, but also cocaine, and most recently illegal mining.²¹ Neither oil nor cocaine are the underlining causes of the conflict, but it has undoubtedly affected its dynamics. Every armed group in Colombia has been associated with drug trafficking and ruthless fighting, not only against ideological adversaries, but also between themselves, to control drug trafficking routes. Because controlling drug trafficking routes means a stable source of income.

In 2012, the government began formal peace talks with FARC. A new change in government and a debilitated FARC were the two main conditions that opened for the possibility to negotiate peace. The negotiations were focused on five main points: (1) a comprehensive rural reform; (2) political participation; (3) end of conflict; (4) solution to the problem of illicit drugs; and (5) agreement on victims of the conflict. Additionally, there was a sixth point dealing with implementation, verification and public endorsement.²² After four years of negotiations, the parties agreed to each of the six points in the agenda and the agreement was set to a popular vote by the Colombian people, in a referendum on 2 October 2016. 50.2% of the voters were against the agreement,²³ which was a massive blow to the years spent negotiating. Nevertheless, the agreement was briefly renegotiated with those advocating against it and was signed on 24 November 2016 and passed as law by both chambers of Congress by the end of the same month.

²¹ Ibid., 145.

²² Colombia.

²³ BBC Mundo, "Colombia: Ganó El "No" En El Plebiscito Por Los Acuerdo De Paz Con Las Farc," 2 October 2016, Accessed 28 November 2019, [tps://www.bbc.com/mundo/noticias-america-latina-37537187](https://www.bbc.com/mundo/noticias-america-latina-37537187).

1.4 El Salvador

From 1980 to 1991, El Salvador was immersed in a violent war between the leftist guerrilla Farabundo Martí National Liberation Army (FMLN) and the government. To put an end to the violent conflict that left 75,000 people dead, 8,000 enforced disappearances, and hundreds of thousands tortured, displaced and victims of sexual violence, the government and FMLN signed a United Nations (UN) brokered peace agreement on 16 January 1992. The main objectives of the agreement was (1) demobilization and demilitarization of the country; (2) democratization and respect for human rights; and, (3) reconciliation of the Salvadoran society.²⁴ Since then, a series of legal and political obstacles have been put in place to make accountability nearly impossible.

One of the Peace Agreement provisions was the creation of a truth commission tasked with investigating serious acts of violence that had occurred since 1980. While working in a hostile environment, the Truth Commission had eight months to carry out its investigation. The final report found that security forces, state-sponsored paramilitary groups, and death squads were responsible for most human rights violations.²⁵ It recommended among other things to pursue structural reform of the judiciary, and banning individuals identified as key perpetrators of gross human rights violations from public services.²⁶

The Truth Commission's work had little impact in reconciliation due to lack of political and judicial will to carry out its recommendations. Three days after publicly presenting the report on March 1993, right-wing President Alfredo Cristian, proclaimed the need to "erase,

²⁴ Jo-Marie Burt, *Transitional Justice in the Aftermath of Civil Conflict: Lessons from Peru, Guatemala and El Salvador* (Washington, D.C.: Due Process of Law Foundation, 2018), 45.

²⁵ The Commission on the Truth for El Salvador, "From Madness to Hope: The 12-Year War in El Salvador," (1993), Recommendations, General Conclusions.

²⁶ Burt, 46.

eliminate, and forget the past in its entirety.”²⁷ Two days later, the legislature passed a blanket amnesty law. It was only in 2016 that the Constitutional Chamber of the Supreme Court of Justice declared that the amnesty law violates the country’s constitution as well as international human rights law.²⁸

1.4.1 Institutional selection

I will analyze the police forces in El Salvador. The reason not to choose a directly similar institution to the ordinary justice and the transitional justice systems in Colombia is twofold. On the one hand, judicial and extrajudicial institutions, as the ones created in Colombia, were poorly developed in El Salvador. For instance, the Truth Commission had a very limited timeframe to achieve a monumental goal, which was to investigate “grave acts of violence... whose impact on society urgently demand[ed] that the public should know the truth... because incidents of this kind ought to be subjected to the exemplary handling of the tribunals of justice.”²⁹ As explained above, the government did not take seriously the results presented by the Truth Commission. On the other hand, transitional justice as structural justice allows for comparison of different institutions, not only judicial institutions. Hence, by choosing a comparative analysis of diverse institutions, it enriches the discussion of the theory of transitional justice as structural justice.

The institutions I will analyze in this comparative analysis will be the civil police forces, both their role in the armed conflict as well as their role in peacebuilding after the Peace Agreement. The new National Civil Police (Policía Nacional Civil – PNC) in El Salva-

²⁷ Cited in Burt, 46.

²⁸ Corte Suprema de Justicia de El Salvador, "Sala Constitucional, Expediente 44-2013ac," (Sentencia de 13 de Julio de 2016).

²⁹ Cited from Stener Ekern, "Building a Better World by Establishing a Truth Commission: Incomplete Healing in El Salvador," *CMI Working Paper, CHR Michelsen Institute* 7 (2018).

dor had positive *a priori* elements that could, to some extent, address the issues that caused widespread human rights violations during the armed conflict, however, the PNC had many challenges. I will identify these challenges, in order to find lessons learned in the respective phases of transitional justice.

1.5 Methodology and methods

The goal of the present thesis is to examine the role of institutions in transitional justice in bringing reconciliation and respect for human rights. The main methodological approach will be comparative and qualitative, involving two main steps: (1) in-depth case study of Colombia's 2016 Peace Agreement; and, (2) comparative analysis between the roles of selected law-enforcement institutions in Colombia and El Salvador.

The first step is to provide an overview of the civil war in Colombia and a detailed understanding of the main transitional justice institutions of the 2016 Peace Agreement. The transitional justice as structural justice theoretical framework will be used to analyze the Agreement and see to what extent the institutions (units of analysis) have contributed to peacebuilding in their first three years of implementation. The point of tracing the role of institutions in the implementation process so far is to explain variation of the specific comparative case studies vis-à-vis the theoretical framework. Additionally, it will provide a clearer basis for analyzing what needs to be done from an institutional point of view for the Peace Agreement to make justice.

The comparative method will be used to pinpoint the role played by institutions in previous peace agreements. The case studies will provide an insight of what ought to have happened and will work to critically assess the Colombian situation. The idea will be to draw parallels and sort out differences between the agreements themselves, as well as on the role of institutions in the implementation phases in the respective countries. There will be a special

focus on if and how justice has been achieved, and then, the findings will be used as a point of comparison with the Colombian case. These comparisons will allow us to empirically examine the institutional contributions on upholding human rights, as a way to achieve justice. The main purpose of combining these two methods in a few-n research is to add to the existing literature on transitional justice as structural justice with a study that provides empirical evidence about the role of institutions in some specific transitional societies.

2 Theoretical framework

Understandings of transitional justice have been broadened for the past 30 years. There has been a constant discussion of which elements constitute the concept of transitional justice, including but not limited to victims' recognition, reconciliation, civil trust, democracy, and liberalization. Parallel to this, there has been a discussion of what transitional justice implies, where it does begin and where it does end. In a widely-cited statement, then-UN Secretary General Kofi Annan defined transitional justice as:

“[...] compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”³⁰

This definition is interesting and can serve as a starting point, given that it collects what have been the most common elements used on practice in transitional societies. However, it is too generic to use in all cases, as a one-size-fits-all practical definition. In this section, I will enter the discussion of theorizing transitional justice before discussing what I believe is a more holistic theory of transitional justice.

Some scholars have asked the question of whether transitional justice mostly deals with choosing a legal approach, focused on redressing civil and political rights, in order to respond to their legacies of repression;³¹ others have asked if it is more about finding which are the morally justified responses to past legacies of violence;³² more recently, a group of scholars have begun to shift the focus of the discussion to ask whether it is enough to discuss

³⁰ United Nations Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," (2004), S/2004/616.

³¹ Teitel, *Transitional Justice*.

³² Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017).

and address violations of civil and political rights, while economic, social and cultural rights are in effect part of different processes. These scholars argue that legal and moral presentations of transitional justice are insufficient because transitional justice is not complete when retributive and restorative justice is addressed.³³ Moreover, they point out that addressing the economic, social and cultural grievances of disenfranchised victims must be central rather than peripheral in the discussion of transitional justice.

I agree with those claiming that economic, social, and cultural rights should be addressed on an equal footing with civil and political rights. I will first present the traditional legalistic account of transitional justice, as well as different attempts at theorizing transitional justice. I will focus on the contrasts between positivist and natural law when it comes to societies in transition. An understanding of this contrast helps visualizing the different rationalizations of what rule of law may actually mean in moments of political change or peace processes. I will then present the moral justifications of transitional justice in an attempt at fleshing out a holistic view of the academic discussion on the field. Finally, I will argue why transitional justice is in the need of moving from more restricted conceptions so that they can properly address the needs of specific societies. To do this, I will use Thomason's theory of transitional justice as structural justice. Her theory focuses primarily on reforming or abolishing political, social and economic institutions that give rise to violence, and establishing new institutions which will counteract economic, political or social marginalization.³⁴ I will furthermore build on Thomason's revision of Young's account of structural injustice to explain why it is important to understand the role of political institutions.

³³ David Little, "A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies," *Ethics & International Affairs* 13 (1999), and Thomason.

³⁴ *Ibid.*, 71.

2.1 Transitional justice

Teitel was a pioneer in popularizing the term transitional justice. In her intent to theorize it, she started out by asking two main questions: (1) what legal approaches do societies in transition adopt in responding to their legacies of repression? and (2) what is the significance of these legal responses for these societies' liberalizing prospects?³⁵ To answer these questions she first explained how the rule of law in specific cases of transition looked like, before looking at the different legal approaches adopted by societies in transition. She characterized the rule of law as the threshold dilemma of transitional justice and made an account of what it can mean in such periods.³⁶

To explain what rule of law means, Teitel discussed positive in contrast to natural law. In societies in transition, there can be two ways of interpreting existing law, on the one hand, positivists argued, that adherence to the rule of law included recognition of the previous law as valid. Prior written law, even when immoral, should retain legal force and this law should be followed by the successor courts until being replaced.³⁷ On the other hand, theories of natural law attempt to offer a procedural understanding of substantive justice values. Given the immorality of the previous legal framework, the rule of law needs to be grounded in something beyond adherence to preexisting law.^{38 39}

Following her discussion on the meaning of the rule of law in societies in transition, she goes on to elaborate the different legal approaches that societies adopt to respond to legacies of repression. These are criminal justice, historical justice, reparatory justice, administra-

³⁵ Teitel, *Transitional Justice*, 213.

³⁶ *Ibid.*, 11.

³⁷ *Ibid.*, 13.

³⁸ *Ibid.*

³⁹ This dichotomy was used by Teitel to understand different transitional societies as it was for instance the political flux happening after Nazi Germany and the Hungarian transition with the fall of the Cold War. Her understanding of transitional justice has been highly influenced precisely by the end of the Cold War and the transition from dictatorial regimes in Latin America.

tive justice, and constitutional justice. Teitel argues that in times of transition, what is deemed fair and just is not necessarily arrived at in deliberations under idealized conditions and regular procedures.⁴⁰ Nonetheless, any of the types of justice that she considers as legal approaches are responses to a fragmentary but shared vision of justice, arguing that, above all it is corrective. Transitional criminal justice goes beyond punishing individual perpetrators in order to serve the overall corrective purpose of the penal system in a society.⁴¹ According to her, this is a backward-looking mechanism. It is exactly here where Teitel's theory of transitional justice falls short, for even if her assumption is widely accepted in stable democracies, in societies in transition there is a constant need for more than corrective justice. I argue that in transitional justice, victims need to be at the center, meaning that individual prosecution must be one element instead of the element. This means that transitional justice cannot be, as Teitel argues, *primarily* backward-looking, but instead, transitional justice ought to be, *primarily* forward-looking.

De Greiff agrees with this observation when he challenges Teitel's assumption that, under normal circumstances, legal mechanisms are either backward-looking (criminal, reparatory, and administrative justice) or forward-looking (rule of law measures and constitutionalism).⁴² The problem with her assumptions is that there is no real consensus among scholars on how criminal, reparatory and administrative justice ought to be conceived as essentially retrospective, or that the rule of law and constitutionalism ought to be thought in prospective terms.⁴³ De Greiff offers the following definition:

“Transitional justice refers to the set of measures that can be implemented to redress the legacies of massive human rights abuses, where "redressing the legacies" means, primarily, giving force to human

⁴⁰ Teitel, *Transitional Justice*, 224.

⁴¹ *Ibid.*, 225.

⁴² Pablo De Greiff, "Theorizing Transitional Justice," *American Society for Political and Legal Philosophy* 51 (2012): 59.

⁴³ *Ibid.*, 60.

rights norms that were systematically violated. A non-exhaustive list of these measures includes criminal prosecutions, truth-telling, reparations, and institutional reform. Far from being elements of a random list, these measures are a part of transitional justice in virtue of sharing two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and to democratization).⁴⁴

Transitional justice for him is, in a nutshell, “the set of measures implemented in various countries to deal with the legacies of massive human rights abuses.”⁴⁵ The most traditional measures in these contexts are criminal prosecution, truth telling, reparations, and institutional reform. He argues that instead of having this list as a pick and choose, one-size-fits-all solution, transitional justice must see these elements as parts of a whole. His work explains the relationships between the different measures that are to be considered elements of transitional justice. Interaction between each of the measures listed above can be a way to make up for their limitations.⁴⁶ Following this logic, De Greiff then decides to theorize transitional justice not in backward and forward-looking dynamics, but instead using a ‘sets of goals’ model, with two necessary initial components (intermediate goals) for transitional societies (recognition and civic trust) and with two final goals (reconciliation and democracy).

In principle, De Greiff’s definition of transitional justice comes as comprehensive and is divided into reachable goals to make it possible to operationalize. However, this definition too, falls short of what transitional justice ought to be. Yes, it is true that reconciliation and democratization can be the final goals of transitional justice, and that without the recognition of victims and civic trust, it will be almost impossible to reach these goals. However, it is also true that recognizing victims and fostering civic trust has to be comprehensive to the extent that past grievances and injustices must be addressed not only for civil and political rights, but

⁴⁴ Ibid., 40.

⁴⁵ Ibid., 34.

⁴⁶ Ibid.

also for economic, social and cultural rights if transitional justice is to be *primarily* forward-looking. De Greiff's explanation of societies in transition falls short when discussing what exactly 'justice' means for societies. This is essential and it is also a concept prone to vary, depending on each of the distinct cases. The latter is something that both Teitel and De Greiff fail to incorporate into their theories. I argue that a theory of transitional justice that deals with moral understandings of justice in a generalized one-size-fits-all recipe is incomplete.

There is little consensus on which elements of transitional justice (criminal prosecutions, truth-telling, reparations, institutional reform, and amnesties) are appropriately and morally justified. Murphy intends to make a moral evaluation of the choices transitional communities make when dealing with wrongdoings. She asks whether it is enough to grant amnesty to perpetrators of human rights abuses, or if the establishment of a truth commission would be a better option to achieve justice.⁴⁷ Murphy attempts to identify the appropriate standards of justice when evaluating various legal responses to wrongdoing in transitional contexts. In her view, transitional justice is concerned with the *just* pursuit of societal transformation. However, such transformation comes at a cost, which sees transitional justice as a compromise. Thus, in many cases, justice is taken to be a luxury that communities cannot afford.⁴⁸ A more nuanced examination demonstrates that decisions to adopt responses other than punishment do not necessarily sacrificing justice. But they come with a moral cost.⁴⁹

Those contextual conditions go beyond recognition of victims or regaining civic trust (the way De Greiff defines these concepts). Dealing with structural and institutional reform, Murphy continues, is also intrinsically part of what justice demands in transitions.⁵⁰ This because actions and institutions are labeled just or unjust from a moral point of view, in accord-

⁴⁷ Murphy, 2.

⁴⁸ Ibid., 13.

⁴⁹ Ibid., 14.

⁵⁰ Ibid., 27.

ance with their cultural dispositions and readings of specific circumstances. One of the circumstances in transitional justice that Murphy considers has moral implications in the understanding of justice as “pervasive structural inequality.”⁵¹ It is precisely this pervasive structural inequality that I argue to be central to the need of theorizing transitional justice that is *primarily* forward-looking. This is necessary for a peace to be victim-oriented, and equally balance the civil and political rights up against the economic, social, and cultural rights.

2.2 Transitional justice as structural justice

Analyzing and understanding the importance of structures in post-conflict societies in transition is essential for understanding why the population suffered and how reconciliation can take place. In the previous section I assessed different attempts at theorizing transitional justice and discussing what justice actually means. The general impression is that these attempts are still paying a great deal of attention to retributive and restorative justice. What transitional justice as structural justice does then is to pursue a different kind of justice, “one that is *parallel and complementary* to normal judicial procedures. The recommendation is that the alternative system should be less conventional and vindictive, and more experimental and restorative [emphasis added].”⁵² In such an alternative system, the role that institutions play is essential. This is because when there is a political change, or when a peace agreement is signed, these institutions have a golden opportunity to transform themselves into peacebuilding institutions, while at the same time increasing their legitimacy. At this point, actions such as restoring relations between offenders and victims have the potential to repair and improve the social and institutional fabric.⁵³

⁵¹ Ibid., 34.

⁵² Little, 67.

⁵³ Ibid., 73.

In this sense, transitional justice as structural justice rejects the claim that criminal law must be at the center of societies in transition, and challenges the assumption that economic, social, and cultural rights are not entitlements but aspirations. While being the UN High Commissioner for Human Rights, Louise Arbour, made a powerful call for a significant shift in this sense:

“Without losing its *raison d’être*, I believe that transitional justice is poised to make the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition. Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices.”⁵⁴

Arbour’s call for looking at transitional justice in a more holistic way is the main conceptual driver of transitional justice as structural justice. It is in fact addressing past injustices, including economic, social, and cultural injustices, which again, when properly dealt with, have the power to ensure a more equitable future. It is not sufficient to hold criminal trials to successfully transition between political regimes, or from war to peace. Each conflict is grounded in reasons that can be either economic, social, cultural, political, civil, or a mix of several. Without structurally addressing the main reasons causing the specific conflict at hand, transitional justice will always be an unfinished task, leaving behind a portion of the population feeling disenfranchised.

Nagy builds on Arbour’s work, proposing a need for taking gender into account in transitional justice.⁵⁵ So, the point of structural justice in transitioning societies is to look at

⁵⁴ Arbour, 2-3.

⁵⁵ Nagy, 285-86.

the different injustices that caused the conflict to become ‘business as usual’ when embedded in existing structures. An example is the disproportionate injustice suffered by women and girls during armed conflict. When unfolding layers of gender injustice, it is also clear how multifaceted this situation is. Institutions created in transitional societies, as is the case of truth commissions, are well positioned to address women’s and girls’ marginalization when looking at different patterns of rights’ violations. The point then is not only to consider structures of violence and injustice, but also challenge the way transitional justice has traditionally dealt with gender stereotypes. There is a need to challenge the general practice that “where gender enters the picture, it is fixated on sexual violence against women, neglecting sexual violence against men and *non-sexual violence against women* [emphasis added].⁵⁶ As Nagy argues, an account of transitional justice must also include how women are, for example, overlooked when reparations for violations of economic and social rights are due. It is precisely women, and particularly widows, who suffer this type of violations disproportionately, both during and after armed conflict.⁵⁷

Arbour agrees with the assumption that truth commissions lend themselves particularly well to the investigation and protection of economic, social, and cultural rights.⁵⁸ A good example is the Timor Leste Commission, which dedicated an entire chapter in its report on economic and social rights violations. It stated that “the impact of the conditions in which the people of East Timor lived, while often less remarked on, was equally damaging and possibly more long lasting.⁵⁹ Additionally, including economic, social, and cultural rights in constitutions or in peace agreements contribute to having a more robust structure in place to deal with wrongdoings. For instance, the Guatemala Peace Agreement sets standards and provides spe-

⁵⁶ Ibid., 287.

⁵⁷ Ibid.

⁵⁸ Arbour, 14.

⁵⁹ Commission of Truth and Friendship, "Final Report of the Commission of Truth and Friendship (Ctf) Indonesia - Timor Leste," (2008), supra note 24, at 2.

cific targets for the achievement of various economic, social and cultural rights, including those of indigenous peoples.⁶⁰ Guatemala acknowledged that violations of economic and social rights had represented a source of conflict and instability, and as a consequence, respect for those rights was a precondition for development and peace.⁶¹

The theory of transitional justice as structural justice argues that a pre-existing condition for armed conflict is structural injustices. Young defines structural injustice as:

“Social processes [putting] large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them... structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.”⁶²

By understanding what structural justice is not, it is easier to define what it actually is. Thomason claimed that structural justice would require institutions and systems to work to ensure that large groups of people are not disadvantaged. Different types of disadvantages can be: lack of access to basic goods, denied economic opportunities, or being marginalized from social and cultural life.⁶³ The starting point for transitional justice as structural justice is to evaluate the institutions that have contributed to conflict. This will help determine which institutions need to be reformed, or even abolished, and what type of institutions must be implemented to prevent political, economic or social disenfranchisement.⁶⁴ By doing this, the theory focuses not only on finding facts on the ground on violence and conflict, but on transforming the fabric of the nation itself.⁶⁵ Social positions defined by gender, education, ethnici-

⁶⁰ Arbour, 23-4.

⁶¹ Ibid.

⁶² Young, 52.

⁶³ Thomason, 76.

⁶⁴ Ibid., 72.

⁶⁵ Ibid., 79.

ty, and community membership must be remedied or addressed as the society moves forward.⁶⁶

To sum up, for a theory of transitional justice as structural justice to be sufficiently comprehensive, there are two important issues to consider. First, there is a need to acknowledge that there is no hierarchy of rights. Second, constitutional, legislative, and institutional measures are minimum steps to ensure that these violations will not be perpetuated in the future.⁶⁷

⁶⁶ Ibid.

⁶⁷ Arbour, 26.

3 Armed conflict in Colombia and judicial and extra-judicial institutions

This chapter will be divided into two main sections. In the first section I will contextualize the Colombian armed conflict with a special focus on state institutions. The intention is to examine how institutions have operated throughout the armed conflict. In the second section I will present the institutions to be analyzed in Chapter Five. First, I will examine the ordinary justice system and its role during the armed conflict. To do so, I will use the case of forced displacement and the justice system. Second, I will discuss the Comprehensive System of Truth, Justice, Reparations and Non-Repetition (hereafter Comprehensive System) agreed upon in the 2016 Peace Agreement, to understand how its institutions, namely the Special Jurisdiction, the Truth Commission, and the Special Unit operate. It is important to see how the ordinary and transitional justice systems coordinate and complement each other, given that the transitional justice institutions have a time-bound mandate, after which, the ordinary system will be fully in charge of delivering justice.

This chapter will thus lay down the basis for the case study through which the theoretical framework will be tested. Since the implementation of the Peace Agreement is in its initial stage, I will be specifically interested in analyzing whether the design of the Agreement is contributing to structural justice. I will see if the newly created institutions are addressing the existing structural injustices.

3.1 Colombian armed conflict

Colombia has been in some sort of state of war for more than half a century. Historians disagree on exactly when the war began, but a good bid would be 1946,⁶⁸ the period in which *La Violencia* (The Violence) began. During this time, national politics was divided between two political parties, *Conservadores* (Conservatives) and *Liberales* (Liberals). *La Violencia* was a period ridden with barbaric crimes and exclusion of all other political groups, mainly those formed by farmers which were neither conservative nor liberals. Having two strong opposing parties that excluded great portions of the country from politics was one of the reasons for which the agrarian, workers and popular urban movements felt disenfranchised.

These two political parties also controlled state institutions, routinely using them to their own benefit. The Conservative Government used the police and *Los Pájaros* (The Birds), hired assassins, to fight the Liberals and any other group that went against its ideals. The Liberal party, to defend itself, created guerilla groups, and various so-called communist groups created their own paramilitary forces. This was the beginning of the Colombian armed conflict as it is known today. Over time, the conflict has changed its methods and war strategies, but state institutions have consistently been as responsible of committing crimes as the guerrilla and paramilitary groups.

To put an end to *La Violencia*, and to gain control again over the political system,⁶⁹ the *Frente Nacional* (National Front) was agreed upon between the Liberal and Conservative parties in 1956. It was an agreement to rotate power by four presidential terms between 1958 and 1974.⁷⁰ Far from reaching peace, the *Frente Nacional* ended up being an exclusionist pact, it prolonged the political duopoly and provided little space for political participation by other

⁶⁸ Some take the events of *La Violencia* as the starting point, others take it back to the 1930s or even further back.

⁶⁹ Military leader Gustavo Rojas Pinilla came to power in a *Coup d'état* in 1953, leaving neither party in power.

⁷⁰ Mario Alexander Lozano-García, "Fórmulas Por Mutuo Acuerdo: Veintiún Años Continuos De Dictaduras Militar Y Bipartidista En Colombia, 1953-1974," *Jurídicas CUC* 10, no. 1 (2014): 80.

groups. Those that were not represented in government by the *Frente Nacional* agreement resorted to establishing guerrilla groups. The two largest guerrilla groups of the past century - Revolutionary Armed Forces of Colombia-People's Army (FARC) and the National Liberation Army (ELN) - were established in 1964. The Popular Liberation Army (EPL) was formed in 1967, and the 19th of April Movement (M-19) in 1970.⁷¹ Responding to this proliferation of new guerrilla groups, the Armed Forces intensified their offensive towards all armed opposition.

A pivotal moment in the surge of these guerrilla groups was a new rural reform introduced by the government during the 1970s. The reform privileged large scale agriculture, by protecting and subsidizing it, provoking even more discontent from the already marginalized groups in society. The introduction of the rural reform triggered an increase of people joining guerrilla groups in armed opposition to the government, including many small-scale farmers from rural municipalities, as they (rightly) felt the government and its institutions were only benefiting the urban power holders. This prompted a way of social unrest⁷² which culminated in the 1977 national civic strike. The strike was crushed by the Armed Forces, and the incident laid ground for what was to come the following decades in Colombia.⁷³ Using similar methods as those used during the time of *La Violencia* when *Los Pájaros* were being hired to carry out the dirty fighting between political rivals, the Armed Forces implemented different counter-guerrilla strategies including training, providing weapons and intelligence to paramilitary groups. The strengthening of armed paramilitary groups to fight guerrilla groups,

⁷¹ These guerrilla groups had their ideological differences, had different territories of influence and their base came from different social groups. For instance, on the one hand, FARC was built as a peasant-supported group fighting for social justice and claiming to espouse a Marxist ideology. On the other hand, ELN was established with a leftist ideology as well, but its ranks were dominated by students, catholic radicals, and left-wing intellectuals hoping to replicate Fidel Castro's communist revolution.

⁷² The strike was importantly promoted by M-19, being a guerrilla with more urban influence than any other guerrilla group.

⁷³ Medófilo Medina, "Dos Décadas De Crisis Política En Colombia, 1977-1997," in *La Crisis Sociopolítica Colombiana: Un Análisis No Coyuntural De La Coyuntura*, ed. Luz Gabriela Arango (Bogotá: Vicepresidencia de Axiología, Fundación Social, 1997), 31-32.

supported by the government, further widened the divide between governmental institutions and hundreds of thousands of civilians in Colombia, especially in rural areas. The scenario playing out was a more deadly war that exponentially increased the numbers of victims of forced displacement, extrajudicial killings, kidnappings, torture, massacres, among other types of crimes.

During the 1980s, Colombia lived through intensified levels of war and an increase in armed groups participating in the conflict. Almost two decades into fighting with limited resources, several of the armed groups were turning to desperate resorts for ensuring income. Discovering the financial wealth that came with controlling drug crops and transportation routes, several guerrilla, and paramilitary groups joined the conflict to get a piece of the money that was in drugs. To address the situation, President Belisario Betancur, breaking with the strong duopolistic political pattern, opted to dialogue with guerrilla groups and offer amnesty for the political crimes of sedition and conspiracy.⁷⁴ Betancur was unsuccessful in brokering a deal with any of the groups during his time in office. Nonetheless, he allowed FARC to create a political party, the *Unión Patriótica* (Patriotic Union), and being granted political participation was an important way for guerrilla groups to see that they had space to participate in democracy and in the political system. But by the turn of the millennium, the *Unión Patriótica* ceased to exist, following the killings of some 3000 out of 5000 members of the party, which has been referred as a ‘political genocide.’⁷⁵

The drafting of the 1991 Constitution, in the midst of high levels of violence, was perceived as the possibility of a new beginning. The two peace agreements reached in with guerrilla groups in 1990, including the demobilization of the M-19 it was signaling a more demo-

⁷⁴ Centro Nacional de Memoria Histórica, "¡Basta Ya! Colombia: Memorias De Guerra Y Dignidad," ed. Grupo de Memoria Histórica (Bogotá 2013), 135.

⁷⁵ Andrei Gomez-Suarez, "Perpetrator Blocs, Genocidal Mentalities and Geographies: The Destruction of the Union Patriótica in Colombia and Its Lessons for Genocide Studies," *Journal of Genocide Research* 9, no. 4 (2007): 637.

cratic turn of events. The new Constitution created a system of decentralized governance, the establishment of a constitutional court, and it was also equipped with a comprehensive set of rights. The Constitution intended to break the political duopoly and strengthen participative democracy by allowing other groups to participate, in this way reinforcing human rights, and recognizing society as diverse, multiethnic, and multicultural as it actually is. Unfortunately, it failed to achieve its goals. Its far-reaching progressive design was a departure from the status quo, combined with persistent high levels of violence, possibly rendered this constitution too unrealistic at the time. Political scandals and polarization, a rigid and corrupt bureaucracy, the war against and between drug cartels, as well as the rapid growth of guerrilla and paramilitary groups were all contributing factors to delegitimize and disrespect the new Constitution in the 1990s. These on-going events also hindered many governmental institutions from being more democratic and able to portray themselves as fair and legitimate. For instance, while the Constitution recognized the country to be diverse, multiethnic, and multicultural, the decentralization of power happened at a very slow pace. This, in effect, further disenfranchised marginal groups in the population that had been promised a new set of rights, but with no institutional tools to uphold or protect them.

When President Alvaro Uribe was elected in 2002, chances of negotiating a peaceful end to the conflict became slimmer. He launched a military offensive utilizing a strong hand against the left. His public promises to fight guerrilla groups made him very popular, during a time where guerrilla groups were powerful and present in large parts of the country. Additionally, guerrilla groups were increasingly conducting kidnappings and attacks in urban centers, which made them lose popularity against large voting bases in the country. Uribe's 'law and order' policy, was based on positioning the military and police to re-claim control over the entire country, at all costs. He termed it a 'democratic security policy'. During Uribe's period in office, the military gained a significant increase of power. In more recent years, it has come

to light that their new position in power came at the cost of committing numerous crimes, such as the infamous ‘false positives’.⁷⁶

During his first term in office, Uribe did negotiate the demobilization of the paramilitary group United Self-Defense Forces of Colombia (AUC), but it appeared to be more of a plea bargain than a peace agreement.⁷⁷ Former combatants were paid salaries for 18 months, and both combatants and leaders were exempted from extradition to the United States.⁷⁸ In 2005, Congress passed the Justice and Peace Law granting amnesty and reduced sentences to those that demobilized. While the government highlighted its efforts to demobilize the AUC, the reality was that thousands of combatants, unable to find jobs and without any sort of reintegration plan in place, resorted to lives of crime, especially in large cities.⁷⁹

After having served Uribe as defense minister, Juan Manuel Santos won elections in 2010. Albeit elected for being from Uribe’s highly popular political party, Santos rapidly distanced himself from Uribe’s hardline conservative politics, despite Uribe’s unprecedented popularity. Santos, who came from a traditional elite political family, was able to lean on his own power base to carry the cost of ‘betraying’ Uribe, and also allowed him to introduce a more pacifist political agenda with the aim of negotiating an end to the conflict with the largest armed opposition group – the FARC.

In 2012, the government formally entered peace talks with FARC. Both the new change in government with Santos, and a visibly debilitated FARC, reeling from Uribe’s hardline tactics, were two main factors that allowed for a new shot at negotiating peace in Colombia. After four years of negotiation, the government and FARC finalized a peace

⁷⁶ It was a policy in which soldiers were getting paid for every guerrilla member killed. This ended up in many soldiers and generals killing innocent people in rural areas.

⁷⁷ Sriram, 175.

⁷⁸ The United States were looking to prosecute those involved in international drug trafficking, which was basically every single armed rebel group, but it was a fate these groups feared tremendously and therefore became a bargaining chip for the Colombian government.

⁷⁹ Sriram, 164.

agreement. In effect, the treaty offered varying levels of amnesty to the FARC soldiers, in order to reintegrate to society. The Colombian people, however, was offered a chance to have their voices heard, and a referendum vote was scheduled for the Peace Agreement on 2 October 2016. 50.2% of the voters voted against accepting the terms of the agreement, which was a major blow to the years of efforts spent negotiating. The agreement was briefly renegotiated with representatives from the No-campaign, and was officially signed and passed as constitutionally binding on 24 November 2016, by being passed in both chambers of Congress.

3.2 Judicial institutions: the ordinary system and the Comprehensive System

3.2.1 The judicial system between 1991 and 2016

To assess the modus operandi of the judicial system in Colombia before 2016, I will look at how the system was handling cases of forced displacements to exemplify the system's capacity and procedural standards during the armed conflict. I chose this crime because Colombia ranks second in the world of countries with most internally displaced people (IDPs) as of 2020, with 5,761,000 cases according to the Internal Displacement Monitoring Centre.⁸⁰ In addition, the crime is closely related to war crimes at the heart of the Colombian conflict, such as enforced disappearances, torture, killings and extrajudicial executions.

The 1991 Constitution became a typical modern constitution that included the protection of a long list of human rights, based on the international human rights system.⁸¹ The 1991 Constitution also accounted for a new important establishment in the judicial system, namely the Constitutional Court. Under this system, Colombia would constitutionally adopt interna-

⁸⁰ See International Displacement Monitoring Centre, "Colombia," <https://www.internal-displacement.org/countries/colombia>. Accessed 10 April 2020.

⁸¹ The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

tional treaties ratified by Congress “that recognize[d] human rights and prohibit[ed] the limitation in states of emergency”,⁸² as stated in Article 93 of the 1991 Constitution. In 1994, Colombia had ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),⁸³ which, *inter alia* bans unlawful forced internal displacement.

Albeit having ratified Protocol II in 1994, it wasn't until 2000 that Colombia incorporated forced displacement as a criminal act into its national legislation, alongside other crimes like torture, enforced disappearances, and genocide.⁸⁴ Nonetheless, even after having incorporated these crimes into national legislation, different courts have proceeded to interpret the crime of forced displacement in different ways. For instance, the Supreme Court of Justice characterizes the crime as a continuing and permanent crime,⁸⁵ and considers displacement by paramilitary groups as either crimes against humanity or war crimes.⁸⁶ However, the Superior Tribunal of the Judicial District of Bogotá, under the Chamber of Justice and Peace, which was the chamber in charge of prosecuting ex-paramilitary forces following their demobilization in 2005, defined forced displacement as a war crime, only when committed by a demobilized paramilitary commander.^{87 88} Dealing with different interpretations of the same crime within the same national justice system, fuels the ambivalence, lack of accountability

⁸² República de Colombia, "Colombia's Constitution of 1991 with Amendments through 2015," (Bogotá1991). (The version used is the one published by Constitute at constituteproject.org) Article 93.

⁸³ República of Colombia, "Law No. 171," (16 December 1994).

⁸⁴ Federico Andreu-Guzmán, "Criminal Justice and Forced Displacement in Colombia," *International Center for Transitional Justice* (2012): 8.

⁸⁵ See for instance, Supreme Court of Justice, "Case No. 31582," (Decision of May 22, 2009).

⁸⁶ Andreu-Guzmán, 9.

⁸⁷ The Justice and Peace law passed in 2005 was the transitional justice mechanism created after the demobilization of the paramilitary group AUC in 2003. However, the process was impressively inefficient, which made many demobilized individuals join illegal groups and cartels.

⁸⁸ Superior Tribunal of the Judicial District of Bogotá, Chamber of Justice and Peace, Case No. 2006 80201, Case of Jorge Iván Laverde Zapata alias “El Iguano,” Judgment of December 2, 2010, Magistrate Rapporteur Uldi Teresa Jiménez López, para. 197. Taken from: Andreu-Guzmán, 9.

and stability, in a country already suffering from conflict and high levels of inequality. It also allows for the possibility of revictimizing victims.

Adding to the obstacles in Colombia of effectively punishing and accounting for the crime of forced displacements, the ordinary judicial system has been remarkably slow in delivering sentences specific to this crime. One can look to several reasons for this inefficiency. Investigating the crime has often been poorly approached, due to unclear boundaries and responsibilities among the plethora of mechanisms that exist in the judicial system, and their mandates to investigate crimes. For instance, first it was the responsibility of the National Unit on Human Rights and International Humanitarian Law, part of the Office of the Attorney General, to conduct investigations on this specific crime. Then, the National Unit of Justice and Peace was created in 2005, also given responsibility to investigate the same crime, following the demobilization of the AUC. In 2010, the Office of the Attorney General, under Resolution 2596 on 3 November created the National Unit of Prosecutors for Crimes of Forced Disappearance and Forced Displacement, which became yet another mechanism mandated to investigate any case of forced displacement.⁸⁹

The continuous creation of new mechanisms, without accounting for a reconstruction or review of those already in place, has made the judicial system both costly and inefficient. In addition to having carried out very few investigations, there have been considerable delays in each process, which continues to fuel the wish for creating yet more new mechanisms, which keep being poorly equipped, in addition to further blurring the lines of division and responsibilities across units and offices in a growing web of what is Colombia's judicial system. Another consequence of having a multitude of poorly equipped mechanisms, is that they have been unable to be deployed to the places where they are most urgently needed, and it

⁸⁹Andreu-Guzmán, 10.

also ends up being an arduous labyrinth for victims to navigate, instead of effectively protecting them.

The crime of forced displacement has also commonly been given less importance than other war-related crimes, including massacres, enforced disappearances, and extra-judicial killings. This has resulted in a number of cases of forced displacement being investigated and tried as merely a consequence of one of the other aforementioned crimes, considering forced displacement as a natural consequence and not a trial-worthy crime of its own. The lack of approach to the crime as a crime of its own has been pointed out by the Supreme Court of Justice, the Constitutional Court, and the Office in Colombia of the UN High Commissioner for Human Rights (OC-HCHR).⁹⁰ A consequence is that few perpetrators have been convicted for forced displacements, and reparations granted to internally displaced people have been an even bigger rarity. In its most recent report, the OC-HCHR found that the Office of the Attorney General “continues to experience difficulties in extending its activities to rural areas, which affects its investigative capacities and undermines the ability of rural populations to secure effective access to justice”.⁹¹ Thus, two decades after the crime of forced displacement was included in legislation in Colombia, neither the ordinary judicial institutions nor the institutions of the Justice and Peace Law have been able to properly investigate and prosecute the crime.

Following a modification in the 1991 Constitution in 2002, two different Codes of Criminal Procedures are now being applied, depending on the date of the committing of the crime, creating an additional layer of complication to an already ineffective justice system.

⁹⁰ United Nations Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia (a/Hrc/10/032)," (2008), Para. 54.

⁹¹ "Situation of Human Rights in Colombia - Report of the United Nations High Commissioner for Human Rights (a/Hrc/43/3/Add.3) (Advance Edited Version)," (2020), Para. 57.

The Codes have differences when it comes to the procedural status of victims and their relatives in criminal proceedings. According to Andreu-Guzmán,

“[t]he existence of two sets of rules governing the criminal proceedings, and in particular their variation regarding the participation of victims and their relatives, has created a discriminatory regime concerning the right to an effective remedy, which is incompatible with the right to equal protection under the law and the courts.”⁹²

This situation has deepened the public’s frustration towards their justice system, in addition to further jeopardizing the legitimacy of the system, as it demonstrates how difficult it is for victims to navigate such a complex and confusing system.

The inefficiency of the judicial system described above has severely undermined the trust that society-at-large, especially poor rural Colombians, have in the system. For instance, of the 31,671 paramilitary members that the government reported to be demobilized at the end of 2009 – a group which had largely been operating and fighting in rural areas, making civilians there the biggest group of victims- only 3,635 were prosecuted under the Justice and Peace Jurisdiction, meaning that the rest benefited from a de facto blanket amnesty.⁹³ In addition, the Office of the Comptroller General (*Contraloría General de la República*) stressed in 2005 that extinction of property rights was only declared for 5% of dispossessed land, making it close to impossible for displaced persons to ever return to their lands after forced displacements.⁹⁴ The lack of response towards victims has made the judicial system an institution that effectively re-victimizes victims. Moreover, victims have had to sit by and watch how perpetrators are offered amnesties without contributing to truth, accountability, or reparations.

⁹² Andreu-Guzmán, 10.

⁹³ Ibid., 11.

⁹⁴ Ibid., 16.

3.3 Comprehensive System of Truth Justice Reparation and Non- Repetition

The Peace Agreement between the Colombian government and FARC entered into force on 30 November 2016 after its approval by Congress.⁹⁵ The indissoluble agreement is comprised

Accords comprising the 2016 Colombian Peace Agreement	
Accord 1	Towards a New Colombian Countryside: Comprehensive Rural Reform ⁹⁶
Accord 2	Political Participation: A Democratic Opportunity to Build Peace ⁹⁷
Accord 3	End of the Conflict ⁹⁸
Accord 4	Solution to the Illicit Drugs Problem ⁹⁹
Accord 5	Agreement Regarding the Victims of the Conflict: “Comprehensive System for Truth, Justice, Reparations and Non-Recurrence”, Including the Special Jurisdiction for Peace; and Commitment on Human Rights ¹⁰⁰
Accord 6	Implementation, Verification, and Public Endorsement ¹⁰¹

of six interconnected accords portrayed in Table 1:

Table 1: Accords comprising the 2016 Colombian Peace Agreement.

⁹⁵ Gobierno de Colombia, Acuerdo Final, 6.

⁹⁶ Ibid., 10.

⁹⁷ Ibid., 34.

⁹⁸ Ibid., 57.

⁹⁹ Ibid., 104.

¹⁰⁰ Ibid., 131.

¹⁰¹ Ibid., 203.

The Peace Agreement became part of the Constitution through Law Number 1820 in 2016 on Amnesty, Pardon and Special Treatment.¹⁰² A few months later, on 4 April 2017, Legislative Act 01 of that year was approved. This Act governs the different mechanisms that are part of accord number five: the Comprehensive System, including the Truth Commission, the Special Unit for Finding Missing Persons (hereafter Special Unit), the Special Jurisdiction for Peace (hereafter Special Jurisdiction), and other measures concerning reparations of victims.¹⁰³ Together, these two laws prepared the ground for the creation and the implementation of the judicial and extrajudicial mechanisms of the Peace Agreement that I will be analyzing.

The fifth accord of the Peace Agreement is victim-centered, and emphasizes the Colombian government's obligations to respect, protect and fulfill human rights and international humanitarian law (IHL). The fifth accord is tasked with (1) bringing to justice those most responsible for committing grave human rights violations and breaches of IHL, and providing alternative penalties for those contributing to truth through the Special Jurisdiction; (2) finding the truth of what actually happened through the Truth Commission; and (3) finding the hundreds of thousands of people that were disappeared during the conflict through the Special Unit.

3.3.1 The Special Jurisdiction for Peace

The Peace Agreement created the Special Jurisdiction as a judicial mechanism to offer individuals having committed crimes amounting to gross human rights violations and grave breaches of IHL during the armed conflict an opportunity of full disclosure and accepting liability, in exchange for a more moderate sentencing.¹⁰⁴ When an accused individual discloses the truth and accepts liability, during trial and prior to the issuance of the judgement, he or

¹⁰² República de Colombia, "Law 1820 " (30 December 2016).

¹⁰³ "Legislative Act No.01," (4 April 2017).

¹⁰⁴ Such as genocide, crimes against humanity and serious war crimes.

she is entitled to an alternative penalty of five to eight years of imprisonment.¹⁰⁵ It is thus within the Special Jurisdiction's mandate to receive the full disclosures and acceptance of liability offered by individuals on trial, and conduct criminal investigations and prosecutions to grant amnesties and pardons.¹⁰⁶

The Special Jurisdiction as a court has material jurisdiction over two main groups of crimes. First, those crimes which Law 1820 can grant amnesty and pardon to. The main crimes here include political crimes such as rebellion, sedition, conspiracy and illegal retention of command.¹⁰⁷ The second group of crimes are those considered serious breaches of IHL or grave human rights violations.¹⁰⁸ The temporal jurisdiction of the Court applies to crimes committed prior to 30 November 2016.¹⁰⁹ One question raised during the peace negotiations was when the conflict did begin. Since there was no consensus, the government and FARC decided to instead leave it open to "acts committed prior to its entry into force."¹¹⁰ The territorial jurisdiction was extended not only to acts committed within Colombian territory, but also crimes committed outside the country which were linked to the armed conflict in Colombia.¹¹¹ As for personal jurisdiction, it applied on the one hand to those accused, and who are applicable for amnesties according to Law,¹¹² and those accused of gross violations of human rights and IHL on the other.¹¹³ Law 1820 and the Peace Agreement also allows for the jurisdiction to try both Colombian and foreign nationals.¹¹⁴

¹⁰⁵ Gobierno de Colombia, Acuerdo Final, 185.

¹⁰⁶ Ibid., 158-62.

¹⁰⁷ Law 1820 (2016)

¹⁰⁸ Gobierno de Colombia, Acuerdo Final, 154.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Hector Olasolo and Joel M.F. Ramirez Mendoza, "The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition," *Journal of International Criminal Justice* 15 (2017): 1025.

¹¹² Law 1820 (2016), Art. 17.

¹¹³ Olasolo and Mendoza, 1025.

¹¹⁴ Gobierno de Colombia, Acuerdo Final, 310.; Law 1820 (2016), Art. 29.

The Special Jurisdiction is composed of three Justice Chambers, the Tribunal for Peace, the Investigation and Prosecution Unit, and the Executive Secretariat. The three Chambers are the Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts, the Judicial Panel for Amnesty and Pardon, and the Judicial Panel for Determination of Legal Situations.¹¹⁵ The Tribunal for Peace has a First Instance Chamber in Cases of Acknowledgement of Truth and Responsibility, which will hand down rulings. It has another First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, where cases are heard, and rulings handed down, either acquitting or convicting the person. In this case, the corresponding ordinary or alternative sanctions will be imposed. It has a Review Chamber, with the task of reviewing rulings handed down by the justice system. Finally, it has an Appeals Chamber to decide on objections to rulings passed by either of the First Instance Chambers.¹¹⁶

There is also an Investigation and Indictments Unit which is responsible for realizing the victims' right to justice when there is no collective or individual acknowledgement of responsibility.¹¹⁷ Finally, an Executive Secretariat was established to be responsible for the administration, management and use of resources of the Special Jurisdiction for Peace, under the guidance of its Presidency.¹¹⁸

The structure created for the Special Jurisdiction thus intends to be as wide as possible as to ensure there are no perpetrators who can escape punishment. As the armed conflict has a lengthy and complicated nature, it consequently has a long list of perpetrators. Law 1820 provides amnesties and alternative penalties for political crimes, making it appealing for all the different actors of the armed conflict. However, in accordance with different international and

¹¹⁵ Ibid., 162.

¹¹⁶ Ibid., 170.

¹¹⁷ Ibid., 161.

¹¹⁸ Ibid., 156.

regional systems, as is the case of the International Criminal Court (ICC) and the Inter-American Court of Human Rights (IACtHR), those that committed gross human rights violations and crimes ruled in IHL such as crimes against humanity, genocide and war crimes will be prosecuted regardless. These crimes will nevertheless have reduced sentences with maximum eight years of imprisonment, unlike the practices of the ICC and other international tribunals in sentencing for those types of crimes.

3.3.2 The Truth Commission

The Truth, Coexistence and Non-Recurrence Commission is an extrajudicial mechanism created by the Comprehensive System. It has three main goals. First, it should help uncover the truth of past events and offer an extensive explanation of the complexity of the conflict. The main purpose of this is to promote a shared understanding and account of events within the society, and in particular the least known aspects of the conflict, such as the impact of the conflict on children and adolescents, and gender-based violence, among others.¹¹⁹ Second, the Commission should work towards the recognition of victims as citizens whose rights were infringed and as political subjects who are vital for the transformation of the country. It should also provide for voluntary acknowledgment of individual and collective responsibility by those who took part in the armed conflict.¹²⁰ Finally, the Commission is to promote coexistence across the country, aiming to create an opportunity for change by facilitating peaceful resolutions to the conflict, and cultivating a culture of tolerance and respect for democracy. To achieve this, the Commission will foster an environment of dialogue, by for example establishing forums to restore the dignity of the victims.¹²¹

¹¹⁹ Ibid., 140.

¹²⁰ Ibid.

¹²¹ Ibid.

The participation in the Truth Commission by those individuals involved in the armed conflict, to provide full disclosure of their crimes, is a requisite for them to obtain and maintain amnesty, pardon or special treatment provided for in Law 1820.¹²² Furthermore, the Commission has guiding criteria for carrying out its work, out of which it is important to highlight the following:

- The efforts of the Commission shall be focused on guaranteeing participation of victims, ensuring the restoration of their dignity, and contributing to the realization of their right to truth;
- The Commission will operate for a limited period of three years, as to enable its recommendations to effectively contribute towards building a stable peace;
- The Commission ought to have a broad, pluralistic, and balanced participatory process where different voices and views will be heard;
- The approach of the Commission is territorially based, in order to achieve a better understanding of the regional dynamics of the conflict; and
- Its mandate and functions have a gender-based approach, in which a special attention will be afforded to victimization suffered by women.¹²³

The structure and guiding principles of the Truth Commission in Colombia are detailed and explicit compared to previous truth commissions in other Latin American countries. For instance, while the Commission does listen to versions of the truth by people participating directly or indirectly in the conflict, it does not have the power to receive, nor decide on, applications for amnesty, pardon and special treatment.¹²⁴ This is the task of the Chamber on Amnesty and Pardon, as well as the Chamber on the Definition of Legal Status within the Special Jurisdiction. This can increase participation and give the Truth Commission better

¹²² Law No. 1820 (2016), Arts. 13, 32.

¹²³ Gobierno de Colombia, Acuerdo Final, 141-42.

¹²⁴ Olasolo and Mendoza, 1041.

possibilities to portray a general pattern of atrocities, as well as identifying indirect perpetrators with control over crimes.¹²⁵ Moreover, the information received by the Truth Commission may not be handed over to the judicial authorities for the purposes of attributing liability in judicial processes, and it has no probative value.¹²⁶ It is thus possible that more stakeholders to the armed conflict are willing to contribute to the truth through the Truth Commission.

3.3.3 Special Unit for Finding Missing Persons

The Special Unit is an extrajudicial institution created to coordinate humanitarian actions aimed at searching for and finding persons considered missing but believed to be still alive, and identifying the remnants of those who are dead.¹²⁷ The Special Unit must in each case provide relatives an official report of the information obtained of the fate of the person considered missing. One important characteristic of the Special Unit is the involvement of victims. Its mandate requires victims and human rights organizations to participate in the design, implementation, and operation of the Special Unit's work.¹²⁸ The Peace Agreement even names several leading civil society organizations and human rights networks which should play an important role in contributing and collecting humanitarian information.¹²⁹

The Special Unit's search for remains do not prevent the Special Jurisdiction or other relevant bodies to undertake investigations they deem necessary, for example to clarify the circumstances and responsibilities in specific cases.¹³⁰ Both technical forensic reports and material elements associated with a found body, might be requested by the Special Jurisdic-

¹²⁵ Ibid.

¹²⁶ Gobierno de Colombia, Acuerdo Final, 143.

¹²⁷ Ibid., 149.

¹²⁸ Ibid.

¹²⁹ Ibid., 152.

¹³⁰ Ibid., 151.

tion, in addition to other relevant bodies.¹³¹ This does not mean however that the Special Jurisdiction can request any type of information from the Special Unit. Information regarding finding a body is the only exception for when the Special Unit must share information gathered with other institutions.

¹³¹ Ibid.

4 El Salvador and the reform of the National Civil Police

Extreme inequality and government-sponsored violence against rebel groups seeking social, economic, and political change has characterized much of El Salvador's history. In opposition to the government, several rebel groups unified to form the Faribundo Martí National Liberation Front (FMLN)¹³² in 1980.¹³³ From that moment and until the FMLN and the state signed a UN brokered peace agreement in 1992, El Salvador lived through a brutal war where death squads became a central element of the state's repressive apparatus. Extrajudicial executions became the norm rather than the exception as thousands of union leaders, activists, students, and teachers suspected of sympathizing with the rebel groups to the political left, were killed.¹³⁴

The Peace Agreement for El Salvador, signed on 15 January 1992 between President Alfredo Cristiani's government and the FMLN in Chapultepec, Mexico, put an end to the war and facilitated a transition to democracy. The Peace Agreement also sought to demobilize and demilitarize the country. The signing parties agreed to create a National Civil Police (PNC) to replace the three previously security forces with policing functions (National Police, National Guard, and the Treasury Guard). The main goal of the Peace Agreement was to put an end to the violent political war and strengthen democracy. Creating a new police force was then considered essential to this process. The creation of the PNC was meant to overcome previous practices and becoming a police force that worked to prevent crime, in addition to being closer to the civilian population and respectful of human rights.

The full restructuring of the PNC was further linked up with a need to separate the military from the police force, as well as demilitarizing a state which had been under military-control up until the Peace Agreement. During the war, the judiciary, executive and legislative

¹³² The groups forming the FMLN had used methods such as extortions and kidnappings even from the years before the war officially started.

¹³³ Burt, 44.

¹³⁴ Ibid.

branches of government had been infiltrated and intimidated by the military to such an extent that virtually nothing could be done (or undone) without the approval of the military. The idea was then that to enable society to transition from a state of war to a state of peace, it would be necessary to completely transform the institutions that had caused widespread suffering and which had been involved in excessive violence during the war.

In its final report, the Truth Commission underlined this by stating that it was the military “[...] who wielded the real power of the State, expressed in the most primitive terms, while the executive, legislative and judicial branches were unable to play any real role as branches of government.”¹³⁵ It then recommended the disqualification from holding public office of those individuals who the Truth Commission investigated, and who were implicated in the perpetration of the acts of violence described in its report.¹³⁶ The premise was that it was not enough to build new institutions, it was equally important that individuals involved in egregious crimes and other human rights violations were banned from the new institutions.

The report presented by the Truth Commission was sharply criticized and ignored by the government of President Cristiani, who insisted that for the country to move forward, it had to “erase, eliminate, and forget the past in its entirety”.¹³⁷ The refusal of responsibility and acknowledgement had repercussions on the implementation of the Peace Agreement. For instance, an amnesty law was passed shortly after the signing of the Peace Agreement, in effect shielding those facing the possibility of trial for crimes committed during the war. As for the PNC, the incomplete implementation of the Peace Agreement allowed for practices common to previous police bodies during the war to be re-adapted by the PNC in the following years, despite measures to dismantle them. The enactment of governmental policies and legislation opened for the possibility of old practices to reappear in the new police institution.

¹³⁵ Salvador, Recommendations, General Conclusions.

¹³⁶ Ibid.

¹³⁷ Cited in Burt, 46.

4.1 Policies and laws determining the course of the PNC

Throughout its existence, the PNC has had to operate with the continuous pressure of high levels of violence in the country. This spurred a rapid and disorganized growth which was more focused on fulfilling quantitative rather than qualitative needs, affecting the possibility of evolving into a professional police force.¹³⁸ It was the first years of the PNC that could be considered the best in terms of how it operated as a police force, serving to protect the community through a preventive rather than repressive approach.

At the turn of the millennium, the PNC was the most trusted institution in El Salvador after the Human Rights Prosecutor and the Catholic Church.¹³⁹ Some of the underlining reasons that gave the PNC a relatively good level of trust was precisely the components that created the new institution. For example, the PNC had a separate independent institution that was in charge of training and recruiting personnel, the National Academy of Public Security (ANSP). At the same time, the PNC was ascribed to the Ministry of Interior, which separated it structurally from the military which belonged under the Ministry of Defense. Additionally, the Constitution had been amended to include the mandate of the PNC under Article 159. This mandate outlined its functions as those of guaranteeing order, security, and public tranquility, collaborating with criminal investigations, all in accordance with the law and respect for human rights.¹⁴⁰

After the Peace Agreement was signed and the PNC was established, a political agreement was developed to determine a quota system for drafting the police forces. 20% of the PNC were to be members of the previous police forces, 20% were to be former members

¹³⁸ Edgardo A. Amaya Cobar, "Quince Años De Reforma Policial En El Salvador: Avances Y Desafíos," *Revista Latinoamericana de Seguridad Ciudadana* 2 (2007): 132.

¹³⁹ Orlando J. Pérez, "Democratic Legitimacy and Public Insecurity: Crime and Democracy in El Salvador and Guatemala," *Political Science Quarterly* 118, no. 4 (2003/2004): 634.

¹⁴⁰ República de El Salvador, "Constitution of El Salvador with Amendments through 2014," (San Salvador 1983), Art. 159.

of the FMLN, and the remaining 60% were to be recruited from civilians not involved in the armed conflict.¹⁴¹ This composition was necessary for gaining political acceptance, but nonetheless, it was also one of the reasons that made it possible for the PNC to eventually re-adapt unlawful methods similar to those applied by the previous police forces. For a new institution to operate in a substantially different way than its predecessors, when under pressure and under stressful situations, it was difficult not to adopt old habits when 40% of its force had participated in the armed conflict.

In the early 2000s, the number of homicides were growing steadily in El Salvador. Between 2002 and 2007, the rate increased from 30.8 to 64.7 homicides per 100,000 people.¹⁴² Growing violence between gangs (so-called *Maras* or *Pandillas*) was the main attributing factor to these rising statistics. During this period, several laws were enacted which allowed the PNC to fight the *Maras* in manners that increased levels of repression. This turned out to be a rapid transition of applied methods by the PNC, when key positions tended to be reserved for those in which the government ‘trusted’. For instance, in 2003, the Antimaras Law gave the PNC authority to take into custody individuals who appeared to have physical characteristics resembling those typical of gang members. Examples where having tattoos and certain haircuts or styles of dressing. By 2004, the PNC had captured 19,275 people, out of which 95% were set free when finding that they had not violated any constitutional law.¹⁴³

This repressive way of policing was normalized and justified by the government, and even supported by sizeable portions of the population who believe that killing gang members is the only right way to address the problem. At the same time, this made it easier for the PNC to adopt and internalizing old and ‘popular’ practices. The way of addressing the increasing levels of violence in effect meant violating the civil rights of many citizens as the right to lib-

¹⁴¹ Cobar, 129-30.

¹⁴² María Eugenia Bonilla Ovallos, "Las Políticas De Seguridad Y La Policía Nacional Civil En El Salvador," *Revista Mexicana de Análisis Político y Administración Pública* 4, no. 1 (2015): 67.

¹⁴³ Cobar, 138.

erty and due process. To broaden the measures allowing for criminalization of the *Maras* or *Pandillas*, the government passed a law to fight terrorism in 2006.¹⁴⁴ Albeit internationally accepted elements of acts of terrorism would hardly fit the *modus operandi* of the gangs in El Salvador, the new law defined acts of terrorism in a way that made it easy to arrest the gangs. The crime of terrorism was defined as “groups with a structure with stable and permanent links, hierarchical, with discipline and ideological means which through violent or inhumane acts pretend to instill terror, insecurity or alarm within the population.”¹⁴⁵

While it is true that there still is a lack of international consensus on one definition of terrorism, there are several characteristics of acts of terrorism which this definition ignores. For instance, according to the Appeals Chamber of the Special Tribunal for Lebanon, in what has so far been the closest attempt a court has come to defining ‘acts of terrorism’, some elements of acts of terrorism do exist under customary international law (CIL). These are (1) the perpetration of a criminal act; (2) the intent to spread fear among the population; and (3) directly or indirectly coerce a national or international authority to take a specific action, or to refrain from taking it.¹⁴⁶ The definition included in the El Salvadorian law does not specify the intent of causing terror (*mens rea*), and instead frames the law to fit the description of the group dynamics of the *Maras* or *Pandillas*, instead of what they are actually doing (or not). Additionally, nor does El Salvadorian definition specifies that the given act of terrorism intends to coerce an authority. Hence, the definition as it stands can be used to criminalize acts committed by gangs, that internationally would not count as acts of terrorism.

¹⁴⁴ The law is the Special Law Against Terrorist Acts.

¹⁴⁵ Asamblea Legislativa de El Salvador, "Decreto No. 108: Ley Especial Contra Actos De Terrorismo," (2006), 2. The author translated the definition.

¹⁴⁶ Michael P. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation," *American Society of International Law* 15, no. 6 (2011).

To make the situation even worse, in 2007 Decree 118 was passed, which empowered the military to conduct operatives of citizen security jointly with the PNC.¹⁴⁷ This was considered necessary by the conservative government to address the increasing levels of violence. The problem was that joint operations between the PNC and the military were defeating the point of separating the two institutions, as intended by the Peace Agreement.

The example of the PNC shows that just changing and restructuring an institution is not sufficient for it to be legitimate during transitional justice. Changing the personnel and old practices are also vital components to better ensure a more lasting change. The new set of laws and governmental policies post-Peace Agreement in El Salvador, as discussed above, added to the high levels of violence, undermined the PNC's possibilities of remaining a peacebuilding institution. 15 years after its creation, the PNC was suffering from structural problems like corrupt selection procedures, less efficient training, and control mechanisms, as well as a growing distance and mistrust between the PNC and society-at-large.¹⁴⁸

4.2 Change of discourse: human rights approach 'in theory'

The erosion of the PNCs independence vis-à-vis the government, and the use of repressive operation strategies were addressed by FMLN President Funes' human rights discourse. 18 years after the signing of the Peace Agreement, his government¹⁴⁹ officially acknowledged that state agents, including the armed forces and other public security forces, as well as paramilitary organizations, were actually committing grave violations of human rights and abuse of power.¹⁵⁰ Consequently, the government enacted a zero-tolerance policy of human rights violations committed by the PNC in its operation, and links between the police and gangs and

¹⁴⁷ Programa de Naciones Unidas para el Desarrollo, "Informe Sobre Desarrollo Humano Para America Central 2009-2010: Abrir Espacios a La Seguridad Ciudadana Y El Desarrollo Humano," (Colombia2009), 198.

¹⁴⁸ Cobar, 141.

¹⁴⁹ Mauricio Funes from the FMLN was the first elected president from the party since the Peace Agreement was signed.

¹⁵⁰ Burt, 49.

drug dealers were to be strictly punished. It insisted that the PNC should work to get closer to the community, and operate with a preventive approach rather than the repressive approach that it had adapted during the previous decade.¹⁵¹ To allow for the PNC to get ‘back on track’ as it was thought to be immediately post-Peace Treaty, the Funes government presented a National Policy of Justice, Public Security and Coexistence.¹⁵² The policy was inspired by the principle that security should be done in accordance with guarantees of Articles 1, 2 and 68 of the Constitution, articles which specified that the state must secure the enjoyment of liberty, health, culture, economic well-being, social justice, and the right to physical and moral integrity.¹⁵³ By sharing the responsibility of securing the right to physical and moral integrity with the state, the police thus was to become the duty-bearer to incentivize the establishment of peaceful relations with society to improve its institutional image.

However, the human rights discourse from the government was to a large extent only realized in theory. In practice, the PNC continued to act in a repressive way. The police brutality escalated further with additions to the ‘Antimaras’ legislation. At the same time as policies were being discussed for monitoring behavior and operation methods of the police forces, additional legislation targeting the *Maras* was being passed.¹⁵⁴ This law was tailored to the gangs and gave the PNC the power to act as it had done under the previous governments. The law specifically listed a group of gangs, which could potentially give the authority to the PNC to detain individuals. This way of policing has similarities with the practices of the institutions it sought to replace, which resulted in gross human rights violations during the war.

¹⁵¹ Ovallos, 75.

¹⁵² The translation was made by the author.

¹⁵³ Ovallos, 76-7.

¹⁵⁴ See for instance: Asamblea Legislativa de El Salvador, "Decreto No. 450: Ley De Proscripción De Maras, Pandillas, Agrupaciones, Asociaciones Y Organizaciones De Naturaleza Criminal," (2010), 3.

4.3 Risk of new institutions with old practices

Throughout its existence, the PNC has gone through several ordeals, but the institution has managed to survive. At least in the first few years after its establishment, it also had a better reputation than its predecessors. The impact of being ascribed to a different Ministry than the military gave it at the onset an important degree of independence. But with high levels of violence and a series of new laws, the PNC was ensnared in ways that slowly but surely prompted the institution to fall back into the old practices of its predecessors.

In addition to undermining its legitimacy and allowing for old practices, these laws also gave the military authority to carry out civil security tasks. This put at risk the PNC's independence and paved the way for appropriating the repressive practices. An additional problem was that the National Academy of Public Security, in charge of training the police force and controlling promotions, lost its independence and found itself being overruled by the Ministry of Public Security. This hindered it from accomplishing its mandate of training the police forces and taking care of the promotions within the PNC. The Ministry obstructed this process by keeping trusted individuals in leadership and other key positions.¹⁵⁵ This also jeopardized the transparency and fairness perception of its own members as the principle of merits was not being respected.

In July 2016, the Constitutional Chamber of El Salvador's Supreme Court ruled that the 1993 Amnesty Law was unconstitutional.¹⁵⁶ A few cases against military commanders and others responsible for carrying out massacres during the war have been opened or reopened. This can also work as a deterrent for members of the PNC to continue operating by the law, given the judiciary mechanisms are becoming more active in investigating violations committed by the military and the police. Precisely this type of interinstitutional restructuring can more properly address structural injustices in societies in transition.

¹⁵⁵ Cobar, 132.

¹⁵⁶ Burt, 52.

5 Transitional justice as structural justice: Colombian institutions

In this chapter I will analyze different components of my case study of Colombia. In order to operationalize the theory of transitional justice as structural justice, I will compare the experience of the Colombian Peace Agreement to that of El Salvador. To do so, I will first go through the components of the transitional justice as structural justice theory to analyze the institutions of the Comprehensive System in Colombia. This will allow me to determine whether the Peace Agreement in Colombia attempted to go further than what traditional approaches to transitional justice would consider necessary, and also if it took into consideration the existing structural injustices in society at that time.

Second, I will look at the case of El Salvador to investigate to what extent the reforms of the PNC achieved the initial goal of creating a police force with respect for human rights and rule of law. I will also analyze the dynamics of the new police force and discuss how its intended practices were obstructed by resorting to old police habits, which in turn deteriorated its legitimacy.

Third, I will analyze the consequences of a system that gives no voice to the victims of the conflict, as is the case of the ordinary justice system in Colombia, can have when new institutions, as the ones of the Comprehensive System, are to complement its work. As the design of the Comprehensive System in Colombia put victims at the center, arguably as a response to what did not work during the war, I will be diving deeper to analyze concrete consequences of the previous justice system's inability to protect and properly account for the conflict's victims.

Finally, I will evaluate the opportunities and challenges of the Comprehensive System after three years of work. This includes exploring if and how the system is working towards victims, as well as whether victims perceive the system as fair and protective over them, in

addition to the possibility of exploring if transitional justice as structural justice in Colombia is headed in the right direction or not.

5.1 Transitional justice as structural justice through the Comprehensive System

To determine if and how the Colombian Peace Agreement, through the structure of the Comprehensive System, is achieving its goal of establishing a constructive and lasting peace, it will be fruitful to keep in mind some components of transitional justice as structural justice. As we remember from Chapter Two, Thomason based her transitional justice theory on the premise that societies in transition suffer from structural injustice.¹⁵⁷ The central premise of her theory is to consider the complex set of structures that give rise to violence as an extreme form of structural injustice, beyond seeing victims and perpetrators only, which is the approach that retributive and restorative justice have. The Comprehensive System through the work of its institutions - the Truth Commission in particular - is mandated to promote a shared understanding of the conflict in mainstream society, and especially the least known aspects of the conflict, such as the impact of the conflict on the most vulnerable groups.¹⁵⁸ The Truth Commission's purpose is thus to go beyond acknowledging victims and perpetrators, to looking at the whole system as a multilayered set of overlapping and unjust social forces, including laws and policies, rather than just focusing on people or groups that are unjust.¹⁵⁹ If the Commission succeeds in presenting this holistic understanding of the conflict, within its three year mandate, it could serve as a diagnosis that the state can use to guide its policies, including reformation of institutions that were principally problematic during the conflict.

¹⁵⁷ Thomason, 74-6.

¹⁵⁸ Colombia, 140.

¹⁵⁹ Thomason, 75-6.

The Truth Commission has the mandate to go further than ‘just’ identifying patterns and structural injustices in the system, and is indeed instructed to look at the effects the conflict has had on children and adolescents, gender-based violence¹⁶⁰, and other especially vulnerable groups. This is an exercise that Thomason considered important to do for overcoming structural injustices. In her theory, she considers it essential to not only focus the fact-finding process on the violence or conflict, but also on the fabric of the nation itself.¹⁶¹ She also underlines this process, from the very beginning, has to be tailored to each individual society. The Truth Commission in Colombia was given the resources, the mandate, and the structure to offer a report that guides the country in its attempt at rebuilding the fabric of the nation. In Decree 588 of 2017, outlining the Truth Commission’s mandate, one specific task is to clarify and acknowledge processes of the rebuilding of the social fabric in the local communities, as well as looking at the individual and collective experiences of resilience.¹⁶²

A critical component in the process of transitional justice as structural justice is that institutions must be made physically accessible to the public. The decentralization of the mechanisms of the Comprehensive System is of utmost importance. This means, in effect, that offices and representation of the institutions in the Comprehensive System should be accessible to people all over Colombia. The Truth Commission, given its short duration mandate, has been the institution to reach across the country the fastest. By the end of 2019, 22 out of the total 28 *Casas de la Verdad* (Truth Houses) had opened up, covering a large part of the country.¹⁶³ The Special Jurisdiction has opened 10 offices thus far, in different municipali-

¹⁶⁰ Nagy insisted on the need to ‘engender transitional justice,’ to go beyond sexual violence against women, and acknowledging sexual violence against men and non-sexual violence against women. Nagy, 285-87.

¹⁶¹ Thomason, 79.

¹⁶² Presidencia de la República de Colombia, "Decreto No. 588," (2017), Point 12.

¹⁶³ Comisión de la Verdad, "Informe De Gestion: Enero-Diciembre 2019," (Bogotá2020).

ties.¹⁶⁴ Given the difference in mandate between these two institutions, it is reasonable that the Truth Commission will hold a larger presence throughout the country. In the case of the Special Unit, by the end of 2019, it had 17 technical teams deployed across the country.¹⁶⁵ The locations were chosen after assessing needs based on information received by state institutions, civil society organizations and victims. While the Special Unit has a longer mandate (20 years), it has been successful in extending its work throughout the country and work closely with civil society and victims, two conditions that are essential for societies in transition.

Structural justice requires that institutions and systems work to ensure that large groups of people are not put at a disadvantage. One of the ways people can suffer this is if they are marginalized from public life.¹⁶⁶ By working closely with civil society and victims, the three institutions constituting the Comprehensive System are better equipped to prevent sizeable portions of the population feeling left out, as was the case with the ordinary judicial system before the Peace Agreement. Moreover, the Comprehensive System has the potential to stop revictimization of victims, and their marginalization vis-à-vis governmental institutions. It is important to stress, however, that simply having physical presence is not sufficient but working for and close to victims is essential in the process of achieving structural justice.

5.2 Lessons from El Salvador and the PNC

Institutions in El Salvador, as in Colombia, have been guilty of structural injustices. During the war, the then three police forces in El Salvador, much like the ordinary judicial system in

¹⁶⁴ Jurisdicción Especial para la Paz, "Despliegue Nacional De La Jep," <https://www.jep.gov.co/Paginas/Servicio-al-Ciudadano/enlaces-territoriales.aspx>. Accessed 02 May 2020.

¹⁶⁵ Unidad de Búsqueda de Personas dadas por Desaparecidas, "La Ubdp Inicia Su Despliegue Territorial En Diez Ciudades De Colombia," <https://www.ubpdbusquedadesaparecidos.co/actualidad/la-ubpd-inicia-su-despliegue-territorial-en-diez-ciudades-de-colombia/>. Accessed 02 May 2020.

¹⁶⁶ Thomason, 76.

Colombia, contributed substantially to the continuity of these injustices. The institutions – originally designed to protect its citizens - worked in a way so that large groups of people became deprived of their rights. The police forces in El Salvador worked closely with the military and controlled all state branches, reducing democracy and respect for rule of law to a minimum. In Colombia, the accessibility of the justice system was structurally only available to those living in big cities, and with access to lawyers, connections, and resources. It is clear how both the police force in El Salvador and the judicial system in Colombia only benefitted a select group of people, during the respective conflicts.

During the peace process in El Salvador, one of the most important restructurings deemed necessary to curb the structural injustice was to abolish the existing police institutions and create the PNC, which was to be independent from the military. At first, the new structure seemed to be robust, including members of the previous police forces and from the FMLN in a quota system, in addition to other civilians. To ensure the new police force's independence from the military it was also ascribed to a separate ministry, in addition to creating an independent body controlling the internal promotions to avoid clientelist practices. This restructuring made the PNC the third most trusted institution in El Salvador by 2003, which was an achievement of its own.¹⁶⁷

Even if the basis of transitional justice as structural justice entails evaluating and potentially reforming or abolishing unjust institutions in a post-war scenario, the simple creation of new institutions is not enough. The new institutions must be well funded and endorsed by the government. If these two conditions are not met, malpractice and falling back to old habits is possible, and perhaps also likely. In the case of El Salvador, it was the latter condition that ultimately affected its reputation and legitimacy. Several post-war governments enacted laws giving the PNC power to operate using similar strategies to those of the previous police force.

¹⁶⁷ Pérez, 634.

Examples like arresting individuals based on their appearances, formulating a definition of terrorism to target the *maras*, or closely cooperating with the military in its fight against the *maras*, affected the PNC's autonomy and ability to operate as a police force working for the community.

While it is still premature to effectively assess the case of Colombia's Comprehensive System, the lessons from El Salvador are worth taking note of. Although the Peace Agreement was signed between two parties, the state and FARC, the success of it depends largely on the willingness of future governments to properly fund and support the implementation. Over the course of the past three years since the implementation process began, the Peace Agreement in Colombia has been suffering opposing policies since President Ivan Duque came to power in August 2018. Nonetheless, thus far, the mechanisms of the Comprehensive System have been able to work in an autonomous manner.

As Thomason reminds us, changing or restructuring some institutions but not others is not sufficient to bring about structural justice. An example is the Amnesty Law passed in El Salvador, which removed a main building block in the Agreement, namely accountability, hindering the reform of the police forces. The law prevented the judicial system from prosecuting crimes committed during the war, meaning that those involved in committing even grave crimes and massacres, most of them committed by the military, were to have blanket amnesties. This had repercussions for the state, especially from civil society, regional courts¹⁶⁸, and international organizations. The IACtHR sentenced against El Salvador in 2005, in the case of Ernestina and Erlinda Serrano Cruz, to conduct a national search for the hun-

¹⁶⁸ See Inter-American Court of Human Rights, " Case of the Massacres of El Mozote and Nearby Places V. El Salvador, (Merits, Reparations and Costs)," (Judgment of October 25, 2012), Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf.

dreds of children reported missing during the conflict years.¹⁶⁹ Strategic litigation is difficult to achieve, but it can be an external source of pressure to a government and judicial system failing to uphold respect for human rights. For instance, in 2013 a group of local human rights organizations filed a lawsuit before the Constitutional Chamber of the Supreme Court of Justice in El Salvador, requesting that the Court reexamine the constitutionality of the 1993 Amnesty Law.¹⁷⁰ In 2016, the Constitutional Chamber ruled that the 1993 Amnesty Law was unconstitutional and asked the legislative assembly to elaborate a new law.¹⁷¹

These type of events gives hope to a society which almost 30 years into a ‘post-war’ era, still suffers from tremendous structural injustices. It is not possible to predict whether the judicial system in El Salvador might at some point in the future be able to prosecute crimes committed 30+ years back in time, but doing so would be essential for the realization of the rights of victims. Even if transitional justice as structural justice attempts to level economic, social, and cultural rights at the same level as civil and political rights, it also recognizes that retributive and restorative justice are vital in any transitional justice process. Time will tell if prosecution of previous gross human rights violations committed by state units, like the military, in national courts, will function as an inducement for the PNC to better its policing methods. It is only when the whole system changes that individual institutions have a real opportunity at contributing to structural justice.

¹⁶⁹ "Case of the Serrano-Cruz Sisters V. El Salvador," (Judgment of March 1, 2005), Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf.

¹⁷⁰ Burt, 52.

¹⁷¹ As of May 2020, the parties in the Parliament have not been able to do this.

5.3 The Comprehensive System after three years of implementation: strengths and challenges

It has been clear through this institutional analysis of the Colombian Peace Agreement how the Comprehensive System was carefully planned to be victim-oriented and with a solid human rights approach. It builds on lessons learned from previous peace agreements and largely lives up to the expectations of the international community and the United Nations on how transitional justice ought to be. It also goes further than most peace agreements, by recognizing that the redressing of economic, social, and cultural rights is essential for achieving sustainable peace. However, the theoretical baseline of transitional justice as structural justice is more than ‘just’ agreeing to change institutions. The case of the police force in El Salvador shows that even a thorough institutional reform is not sufficient to ensure sustainable structural justice. Continuous independence of institutions and governmental support are also necessary conditions for newly reformed or created institutions to contribute to lasting peace.

So far, the institutions of the Comprehensive System, even with some opposition from the current government, have been mostly properly funded. On the one hand, the Truth Commission and the Special Jurisdiction have so far been relatively well funded and, as explained above, have also had a fairly successful deployment of offices and representatives nationwide. The Special Unit, on the other hand, has been the one having most funding problems. In March 2019, the president of the Special Unit, Luz Marina Monzón, claimed that the Ministry of Finance had only allotted 59% of the total budget.¹⁷² The rest of the budget was comprised of international funding, which is not what was outlined in the Peace Agreement. One possible explanation for the budgetary problems of the Special Unit could be linked to its longer

¹⁷² Colombia en Transición, "En 17 Territorios Empieza La Búsqueda De Los Desaparecidos Del Conflicto," *El Espectador* 21 March 2019, Accessed 24 April 2020, <https://www.elespectador.com/colombia20/justicia/jep/en-17-territorios-empieza-la-busqueda-de-los-desaparecidos-del-conflicto-articulo-857785>.

mandate, namely 20 years. Nonetheless, if this financing gap is not addressed soon, the opportunities for operating properly will diminish, and possibly re-victimize the hundreds of thousands of families that are still looking for their family members.¹⁷³

Working close with and in support of victims is indispensable in transitional justice as structural justice. Thomason considers it a prerequisite for societies' ability to move forward. But to achieve this, the disadvantaged social sectors need to be addressed.¹⁷⁴ The Comprehensive System in Colombia has an enormous role to play on this front, and has been doing it so far by working closely with groups of victims that have suffered the most and previously been disregarded by the system.¹⁷⁵ The Truth Commission has created technical spaces through different approaches and cross-cutting strategies for discussing the impact of the conflict on children, the elderly, indigenous people, victims of gender-based violence, the disabled, and others.¹⁷⁶

The Special Jurisdiction has also been successfully working to address the rights of victims in the most vulnerable groups. For instance, the *Recognition, Responsibility, and Determination of Facts and Conducts Court* has incorporated a gender policy in the prioritization of opening cases, as well as in the protocol for reporting, in addition to its decision to highlight gender-based violence and sexual violence in some of its macro cases.¹⁷⁷ It has also started to create jurisprudence in this direction. The ruling of the *Amnesty and Pardoning Court* on June 16, 2019, denying amnesty to a former FARC soldier, based on his guilt in

¹⁷³ Thomason insists that if institutions in transitional justice contexts cannot deliver to victims, they might feel wronged by the perpetrators of violence and then feel wronged a second time when their concerns are ignored by transitional justice institutions. See Thomason, 72.

¹⁷⁴ Ibid., 79.

¹⁷⁵ Colombia en Transición, "Así Va El Acuerdo De Paz: Tras La Verdad Y La Reparación De Las Víctimas Del Conflicto," *El Espectador* 2020. <https://www.elespectador.com/colombia2020/pais/asi-va-el-acuerdo-de-paz-tras-la-verdad-y-la-reparacion-de-las-victimas-del-conflicto-articulo-918832>, Accessed 15 May 2020

¹⁷⁶ Comisión de la Verdad, 116.

¹⁷⁷ Kroc Institute for International Peace Studies, "Gender Equality for Sustainable Peace: Second Report on the Monitoring of the Gender Perspective in the Implementation of the Colombian Peace Accord," (Bogotá2019), 61.

sexually abusing a girl from the Wayúu tribe in 2014¹⁷⁸ is a clear sign of the commitment to work for protecting the rights of particularly vulnerable groups.

Finally, in the case of the Special Unit, progress has been slower, albeit it has elaborated documents with a gender-based approach, including discussions of accompaniment, as well as specific gender and psychosocial approaches.¹⁷⁹ Additionally, the mandate of the Special Unit includes active participation from civil society organizations, and their participation in this has helped it to be considered an institution working closely with victims, because these organizations often advocate victims' rights and human rights in general. The institutions that make up the Comprehensive System have so far worked closely with victims, as is an important premise in Thomason's theory for structural justice and sustainable peace, giving the society-at-large ownership over the process and trust in its institutions.¹⁸⁰

After three full years of implementation, the institutions of the Comprehensive System have been able to work relatively successfully with high degree of independence and (mostly) proper funding. However, there are some challenges that must be addressed to curb the existing structural inequality. The ordinary judicial system, as outlined above, has a worrying record from the past which needs to be addressed for the society to fully transition to peace. It is important to underline that the Comprehensive System does not and cannot replace the ordinary judicial system, but is instead designed to work hand-in-hand with existing judicial institutions to catalyze transition to peace. Only when its mandate is completed, can the ordinary justice system again be the only institution responsible of delivering justice in Colombia.

Colombia can learn from the case of El Salvador, in which even a reformed PNC resorted to adopt the old habits of the previous police forces, which undermined its legitimacy and ability to respect, protect and promote human rights. Structural injustices that allow for

¹⁷⁸ Ibid.

¹⁷⁹ Ibid., 67.

¹⁸⁰ Thomason, 72.

old practices are precisely what transitional justice as structural justice addresses; these must be removed for institutions to become true peacebuilders. The success of the work of the Comprehensive System will also depend on the ability of the ordinary judicial system to improve its efficiency, avoid the revictimization of victims, and retain its independence from the other branches of government. If these objectives are not achieved, the risk of the judicial system falling back to old practices is high, as was the case of the PNC in El Salvador, and the Comprehensive System's efforts for transitional justice will not be sufficient to address the structural injustices.

One additional challenge at this point in time, for the case of Colombia, is the alternative penalty system adopted by the Special Jurisdiction. Sentences for those committing gross human rights violations and crimes defined by IHL are set between five and eight years in prison. This is inconsistent with the principles of the ICC, the IACtHR and other international and regional mechanisms. Colombia's Constitution compels the country to adopt ratified international treaties within the national legislation, meaning that the alternative penalty system in effect violates Colombia's constitutional obligations under international law.¹⁸¹ In the case of El Salvador, it was precisely its violation of international obligations with the Amnesty Law, that incentivized civil society, regional courts and international organizations to pressure the state to rectify this. We will have to wait and see if the alternative penalty system in Colombia will be perceived as just, or if this too will trigger pressure from civil society and regional and international actors.

Nevertheless, even if this is the case, Thomason's account of transitional justice proclaims it indispensable that the process is deemed to be just locally. The risk of sticking to standard rule-of-law systems in post-war societies transitioning to peace, is the feeling of al-

¹⁸¹ Colombia, Article 93.

ienation by a population not experiencing that institutions are in fact accomplishing justice.¹⁸² This has been echoed by Murphy's moral evaluation of societies in transition. She contended that transitional justice is concerned with the just pursuit of societal transformation. However, such transformation comes at a cost, which in effect makes transitional justice a compromise. Often in post-war countries, or countries with ongoing conflict, justice is considered a luxury that either most communities cannot afford, or they think they are a special case to which international law does not fit.¹⁸³ Time will tell if the approach taken by Colombia, even when this turns out to be at the cost of its international obligations, will end up offering true justice and reconciliation for victims and sufficiently address structural injustices.

¹⁸² Thomason, 72.

¹⁸³ Murphy, 13.

6 Conclusion

Throughout this thesis, I have focused on analyzing how public institutions have contributed to conflict, and also what their role must be for successful peacebuilding. In doing so, I applied the theory of transitional justice as structural justice to the case study of the 2016 Peace Agreement in Colombia. A comparison with the implementation of the 1992 Peace Agreement in El Salvador has pointed to both challenges and necessary conditions for the peacebuilding role of institutions in a society in transition. I have based the discussion on four assumptions which I will reiterate below to conclude to what extent these affect the case of Colombia.

Addressing structural injustices, whether by reforming or abolishing and creating new institutions, is a necessary pre-condition for reconciliation in transitional contexts. Both Colombia and El Salvador considered this, but the depth of the reform has varied substantially between the two countries. In El Salvador, the wartime police forces were completely abolished and the PNC was created from scratch. Meanwhile in Colombia, the Comprehensive System was built to complement and improve the work of the existing ordinary judicial system. After having accomplished their mandates, the institutions of the Comprehensive System will cease to exist, and the ordinary judicial system will once again be fully in charge of delivering justice. Albeit the two cases developed different design and depths of reform, they were both aiming at addressing structural injustices. In El Salvador, a main structural injustice was a police force operating repressively, and in Colombia an ineffective judicial system was a similar structural obstacle. Addressing these structural injustices was a first priority for both cases.

Furthermore, any long-term prospect of peace and democracy will depend upon a state's institutional capacity to address injustices that could fuel future conflicts, such as the continued violations of civil, political, economic, social, and cultural rights. So far, the Spe-

cial Jurisdiction, the Truth Commission and the Special Unit in Colombia have been doing important work to address the challenge of many Colombians being out of reach from governmental institutions by decentralizing their offices and representatives. Now these institutions are much closer to victims, both in design and geographically. Yet what became clear by the case of El Salvador, is how a robust institutional design is not enough for institutions to properly carry out their work. True independence and continuous governmental support are also necessary conditions. The latter has become a challenge in Colombia, ever since right-winged President Iván Duque took office in August 2018. Duque's government has not been supportive of the Peace Agreement which is exemplified in the sudden cut of funds to the Special Unit, just a few months into his presidency.

Continued violence in a post-war era will also detrimentally affect the legitimacy of government institutions. This was the case in El Salvador, which continued to suffer high levels of violence since the end of the war, but especially since the turn of the millennium. A consequence for the PNC was that it could not properly train its officers, but instead had to focus on having sufficient number of policemen in the streets. The focus on the quantity of police officers in the PNC came at the cost of the quality in the police force.¹⁸⁴ The high level of violence was also used as grounds for different governments to pass laws effectively granting the PNC power to operate like the previous police forces. As I have discussed throughout the analysis, bringing old habits from abolished institutions into newly created institutions is a major obstacle for effectively and successfully addressing structural injustices.

The level of violence in Colombia since the 2016 Peace Agreement is also worrying. According the UN High Commissioner for Human Rights, 108 human rights defenders were

¹⁸⁴ Cobar, 132.

killed in 2018, almost doubled the numbers of the year before.¹⁸⁵ NGO *Indepaz* reported in that up until 18 May 2020, 128 human rights defenders and ex-FARC combatants had been killed in 2020.¹⁸⁶ These levels of violence are affecting the implementation of the Peace Agreement. By not effectively protecting human rights defenders and ex-FARC combatants, the state and its institutions face critical challenges. The capacity of the Comprehensive System to effectively carry out its work and address structural injustices is limited with the presence of organized crime, paramilitaries, and guerrilla groups who keep fighting for controlling illegal sources of income. Additionally, the military continue to do illegal surveillance and profiling of journalists, human rights defenders, labor union leaders and politicians.¹⁸⁷ As previously discussed, another premise for transitional justice as structural justice is a scenario where all entities of governmental institutions work together to achieve the goal. Having only some individual institutions committed to working for it, will not be sufficient for true and lasting change. With the current levels of violence added to a lack of reform of institutions like the military and the ordinary judicial system, prospects for the Comprehensive System's success in addressing structural injustices in society remains limited.

Lastly, although the theory of transitional justice as structural justice continues to build on the traditional basis of transitional justice, the traditional basis remains fundamental to achieve peace and strengthen democracy. This means that restorative and retributive justice remain indispensable for societies in transition. The case of El Salvador, in which the Constitutional Chamber of the Supreme Court of Justice determined in 2016 that the 1993 Amnesty

¹⁸⁵ Council, "Situation of Human Rights in Colombia - Report of the United Nations High Commissioner for Human Rights (a/Hrc/43/3/Add.3) (Advance Edited Version)," 5.

¹⁸⁶ *Indepaz*, "Líderes Sociales Y Defensores De Derechos Humanos Asesinados En 2020." <http://www.indepaz.org.co/paz-al-liderazgo-social/>. Accessed 19 May 2020.

¹⁸⁷ A new scandal from the Armed Forces was uncovered by *Revista Semana* in January 2020. By May 2020 the Defense Minister addressed the nation confirming that the military had been gathering information and profiling civilians. <https://www.semana.com/nacion/articulo/espionaje-del-ejercito-nacional-las-carpetas-secretas-investigacion-semana/667616>.

Law was unconstitutional, is an example of the need of victims to access this type of justice. Blanket amnesties that were common in societies transitioning from dictatorships to democracies are no longer accepted in international law. In Colombia's case, it means that for victims to trust the institutions of the Comprehensive System, these need to contribute to retributive and restorative justice too. The most relevant institution for this is the Special Jurisdiction, which is responsible for delivering justice in cases directly related to the armed conflict. It is also important that the Special Jurisdiction cooperates closely with the ordinary judicial system in doing so, and that this system reconstructs itself to become more efficient and accessible to society.

Structural justice should be the end goal of transitional justice for achieve lasting peace in a post-war society. This can better be realized when placing victims of the conflict at the center of the process, as well as effectively addressing underlying causes and effects of the conflict on society-at-large. It is time that processes of transitional justice systematically consider economic, social, and cultural rights on the same level as civil and political rights, to properly address any existing structural injustices in society. The Peace Agreement in Colombia was innovative in its intention to address violations of all different sets of rights. One of its innovative feature was having new institutions addressing precisely the absence of the state for victims and decentralizing these new institutions. Time will tell if the work of these institutions will be sufficient. So far, the implementation phase is lagging behind its proposed timeframe and the reality of making peace is still far from becoming a reality.

Table of reference

- Andreu-Guzmán, Federico. "Criminal Justice and Forced Displacement in Colombia." *International Center for Transitional Justice* (2012): 1-22.
- Arbour, Louise. "Economic and Social Justice for Societies in Transition." *New York University Journal of International Law and Politics* 40, no. 1 (2007): 1-28
- Asamblea Legislativa de El Salvador. "Decreto No. 108: Ley Especial Contra Actos De Terrorismo." 2006.
- . "Decreto No. 450: Ley De Proscripción De Maras, Pandillas, Agrupaciones, Asociaciones Y Organizaciones De Naturaleza Criminal." 2010.
- BBC Mundo. "Colombia: Ganó El "No" En El Plebiscito Por Los Acuerdo De Paz Con Las Farc." 2 October 2016.
- Burt, Jo-Marie. *Transitional Justice in the Aftermath of Civil Conflict: Lessons from Peru, Guatemala and El Salvador*. Washington, D.C.: Due Process of Law Foundation,, 2018.
- Centro Nacional de Memoria Histórica. "¡Basta Ya! Colombia: Memorias De Guerra Y Dignidad." edited by Grupo de Memoria Histórica. Bogotá 2013.
- Cóbar, Edgardo A. Amaya. "Quince Años De Reforma Policial En El Salvador: Avances Y Desafíos." *Revista Latinoamericana de Seguridad Ciudadana* 2 (2007): 127-44.
- Colombia en Transición. "Así Va El Acuerdo De Paz: Tras La Verdad Y La Reparación De Las Víctimas Del Conflicto." *El Espectador*, 2020.
- . "En 17 Territorios Empieza La Búsqueda De Los Desaparecidos Del Conflicto." *El Espectador*, 21 March 2019.
- Comisión de la Verdad. "Informe De Gestion: Enero-Diciembre 2019." Bogotá, 2020.
- Commission of Truth and Friendship. "Final Report of the Commission of Truth and Friendship (Ctf) Indonesia - Timor Leste." 2008.

Corte Suprema de Justicia de El Salvador. "Sala Constitucional, Expediente 44-2013ac."
 Sentencia de 13 de Julio de 2016.

Ekern, Stener. "Building a Better World by Establishing a Truth Commission: Incomplete Healing in El Salvador." *CMI Working Paper, CHR Michelsen Institute* 7 (2018).

Elster, Jon. "The Possibility of Rational Politics." In *Political Theory Today*, edited by David Held. Cambridge: Polity Press, 1991.

Felter, Claire, and Danielle Renwick. "Colombia's Civil Conflict." Council on Foreign Relations, 2017.

Gobierno de Colombia. "Acuerdo Final Para La Terminación Del Conflicto Y La Construcción De Una Paz Estable Y Duradera (Version Translated to English)." Bogotá 2016.

Gomez-Suarez, Andrei. "Perpetrator Blocs, Genocidal Mentalities and Geographies: The Destruction of the Union Patriótica in Colombia and Its Lessons for Genocide Studies." *Journal of Genocide Research* 9, no. 4 (2007): 637-60.

Greiff, Pablo De. "Theorizing Transitional Justice." *American Society for Political and Legal Philosophy* 51 (2012): 31-77.

Indepaz. "Líderes Sociales Y Defensores De Derechos Humanos Asesinados En 2020."

Inter-American Court of Human Rights. "Case of the Massacres of El Mozote and Nearby Places V. El Salvador, (Merits, Reparations and Costs)." Judgment of October 25, 2012.

———. "Case of the Serrano-Cruz Sisters V. El Salvador." Judgment of March 1, 2005.

International Displacement Monitoring Centre. "Colombia." <https://www.internal-displacement.org/countries/colombia>.

Jurisdicción Especial para la Paz. "Despliegue Nacional De La Jep."
<https://www.jep.gov.co/Paginas/Servicio-al-Ciudadano/enlaces-territoriales.aspx>.

- Krasner, Stephen. "Approaches to the State: Alternative Conceptions and Historical Dynamics." *Comparative Politics* 16, no. 2 (1984): 223-46.
- Kroc Institute for International Peace Studies. "Gender Equality for Sustainable Peace: Second Report on the Monitoring of the Gender Perspective in the Implementation of the Colombian Peace Accord." Bogotá, 2019.
- Levi, Margaret. "A Logic of Institutional Change." In *The Limits of Rationality*, edited by Karen Schweers Cook and Margaret Levi. Chicago: Chicago University Press, 1990.
- Little, David. "A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies." *Ethics & International Affairs* 13 (1999): 65-80.
- Lozano-García, Mario Alexander. "Fórmulas Por Mutuo Acuerdo: Veintiún Años Continuos De Dictaduras Militar Y Bipartidista En Colombia, 1953-1974." *Jurídicas CUC* 10, no. 1 (2014): 77-93.
- Medina, Medófilo. "Dos Décadas De Crisis Política En Colombia, 1977-1997." In *La Crisis Sociopolítica Colombiana: Un Análisis No Coyuntural De La Coyuntura*, edited by Luz Gabriela Arango, 27-62. Bogotá: Vicepresidencia de Axiología, Fundación Social, 1997.
- Murphy, Colleen. *The Conceptual Foundations of Transitional Justice*. Cambridge: Cambridge University Press, 2017. doi:doi:10.1017/9781316084229.
- Nagy, Rosemary. "Transitional Justice as Global Project: Critical Reflections." *Third World Quarterly*, 29, no. 2 (2008): 275-89.
- Olasolo, Hector, and Joel M.F. Ramirez Mendoza. "The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition." *Journal of International Criminal Justice* 15 (2017): 1011-47.

- Ovallos, María Eugenia Bonilla. "Las Políticas De Seguridad Y La Policía Nacional Civil En El Salvador." *Revista Mexicana de Análisis Político y Administración Pública* 4, no. 1 (2015): 63-84.
- Pérez, Orlando J. "Democratic Legitimacy and Public Insecurity: Crime and Democracy in El Salvador and Guatemala." *Political Science Quarterly* 118, no. 4 (2003/2004): 627-44.
- Presidencia de la República de Colombia. "Decreto No. 588." 2017.
- Programa de Naciones Unidas para el Desarrollo. "Informe Sobre Desarrollo Humano Para America Central 2009-2010: Abrir Espacios a La Seguridad Ciudadana Y El Desarrollo Humano." Colombia, 2009.
- República de Colombia. "Colombia's Constitution of 1991 with Amendments through 2015." Bogotá, 1991.
- . "Law 1820 ", 30 December 2016.
- . "Law No. 171." 16 December 1994.
- . "Legislative Act No.01." 4 April 2017.
- República de El Salvador. "Constitution of El Salvador with Amendments through 2014." San Salvador, 1983.
- Rothstein, Bo. "Political Institutions: An Overview." In *A New Handbook of Political Science*, edited by Robert E. Goodin and Hans-Dieter Klingemann. Oxford: Oxford University Press, 1998.
- Scharf, Michael P. "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation." *American Society of International Law* 15, no. 6 (2011): 73-86.
- Sriram, Chandra Lekha. *Peace as Governance: Power-Sharing, Armed Groups and Contemporary Peace Negotiations*. Hampshire; New York: Palgrave Macmillan, 2008.

- Supreme Court of Justice of Colombia. "Case No. 31582." Decision of May 22, 2009.
- Teitel, Ruti G. *Transitional Justice*. New York: Oxford University Press, 2000.
- . "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16 (2003): 69-94.
- The Commission on the Truth for El Salvador. "From Madness to Hope: The 12-Year War in El Salvador." 1993.
- Thomason, Krista K., ed. *Transitional Justice as Structural Justice*. Edited by Claudio Corradeti, Nir Eisikovits and Jack Volpe Rotondi, *Theorizing Transitional Justice*. Burlington: Ashgate Publishing Company, 2015.
- Unidad de Búsqueda de Personas dadas por Desaparecidas. "La Ubpd Inicia Su Despliegue Territorial En Diez Ciudades De Colombia."
<https://www.ubpdbusquedadesaparecidos.co/actualidad/la-ubpd-inicia-su-despliegue-territorial-en-diez-ciudades-de-colombia/>.
- United Nations Human Rights Council. "Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia (a/Hrc/10/032)." 2008.
- . "Situation of Human Rights in Colombia - Report of the United Nations High Commissioner for Human Rights (a/Hrc/43/3/Add.3) (Advance Edited Version)." 2020.
- United Nations Secretary-General. "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies." 2004.
- Young, Iris Marion. *Responsibility for Justice*. New York: Oxford University Press, 2011.