

The Search for Truth and the Dignity of Victims: Analysis of the Colombian Peace Accord

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The Colombian *Integrated System for Truth, Justice, Reparation and Non-Repitition* (hereinafter “Integrated System”),¹ is an ambitious program for transitional justice, aimed at facilitating the end of a protracted internal conflict, while (allegedly) upholding the rights of millions of victims and maintaining accountability for violations of human rights. It is included under the “Victims” Chapter of the peace accord between the Colombian Government and FARC-EP, the largest armed guerrilla in the country.

Critics of this agreement see the Integrated System as the product of a rotten compromise that forsook justice for the sake of peace. They often claim that the only way to respect victims’ rights and dignity is by holding perpetrators accountable to ordinary criminal justice, and have argued that the measures contemplated in the accord tend, rather, to promote impunity.² Here I will argue that, while these measures are, to some extent, the result of a pragmatic compromise, they also create institutions that in some ways are better suited to uphold the dignity of victims than ordinary retributive justice.

¹ See Editorial, *Una nueva justicia para la paz*, EL TIEMPO (Mar. 15, 2017, 12:00 AM), <http://www.eltiempo.com/opinion/editorial/una-nueva-justicia-para-la-paz-15-03-2017-67740>

² See, e.g., Justicia, *‘Acuerdo con Farc es un pacto de impunidad’*: Procurador a la CPI, EL TIEMPO (Jan. 19, 2016, 5:28 AM), <http://www.eltiempo.com/archivo/documento/CMS-16485333>; Alejandro Ordóñez, *Mínimos Penales Para Máximos Responsables*, 68 (2015), <https://www.procuraduria.gov.co/portal/media/file/200815DOCUMENTO.pdf>; Álvaro Uribe Vélez, *Narco-Terror Is Being Rewarded in Colombia*, Wall Street J. (July 17, 2016, 7:03 PM), <https://www.wsj.com/articles/narco-terror-is-being-rewarded-in-colombia-1467932606>.

I.

Over the course of five decades, more than 8.5 million³ Colombians have been the victims of targeted murders, massacres, kidnapping, terrorism, sexual violence, extortion, and forced displacement.⁴ Besides the actions of illegal armed groups, some attribute the pervasiveness and endurance of these abuses to structural problems that have rendered a large segment of the population vulnerable to violence and destitution. These include the precariousness of law enforcement, and the consequent (legal and illegal) privatization of civil security services; the inoperativeness of institutions; the lack of appropriate infrastructure; a highly informal and unequal land tenure system; *inter alia*.⁵ State agents have oftentimes been suspected of complicity, by collaboration with illegal armed agents, and failure to enforce citizens' rights.⁶ Likewise, victims' access to the judicial system is severely breached.⁷

The peace accord with FARC aims to mark the beginning of a peace-building process that corrects the shortcomings that initiated the conflict and enabled its persistence. The state is required to create institutions with the capability of revealing such flaws. The search for truth thus serves the instrumental role of facilitating a process of peace-building that targets the deep structural causes of the conflict. The Integrated System is meant to further this end and, as I will argue below, to uphold the dignity of victims by securing institutional accountability.

³ *Basta Ya! Colombia: Memorias de Guerra y Dignidad*, GRUPO DE MEMORIA HISTÓRICA 42 (2013)

<http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf>

⁴ GOBIERNO NACIONAL DE COLOMBIA, *Registro único de Víctimas Agosto 1, 2017* (Aug. 31, 2017, 5:00 AM) <https://rni.unidadvictimas.gov.co/RUV>

⁵ "Informe Comisión Histórica del Conflicto y sus Víctimas." *La Habana*, 59 (2015), at:

http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/Informe%20Comisi_n%20Hist_rica%20del%20Conflicto%20y%20sus%20V_ctimas.%20La%20Habana%2C%20Febrero%20de%202015.pdf

⁶ See e.g.: *id* at 21; *San Carlos: Memorias del Éxodo en la Guerra*, GRUPO DE MEMORIA HISTÓRICA (2011) (Aug. 31, 2017, 9:00 PM) <http://www.centrodememoriahistorica.gov.co/informes/informes-2011/san-carlos>; *Trujillo: Una Tragedia que no Cesa*, GRUPO DE MEMORIA HISTÓRICA (2008) (Aug. 31, 2017, 9:00 PM)

https://www.centrodememoriahistorica.gov.co/descargas/informes2008/informe_trujillo.pdf

⁷ *El Derecho a la Justicia Como Garantía de No repetición: Volumen II Las víctimas y las antesalas de la justicia*

Conclusiones y Recomendaciones, CENTRO NACIONAL DE MEMORIA HISTÓRICA 476 (2016) (Aug. 31, 2017, 9:00 PM)

<http://centrodememoriahistorica.gov.co/descargas/informes2016/derecho-justicia/el-derecho-de-justicia-como-garantia-de-no-repeticion-tomo-2.pdf>

The Integrated System encompasses five different components, but for present purposes I will focus on two. *The Commission for the Clarification of Truth, Coexistence and Non-Repetition* (hereinafter “the Commission”) is a non-judicial body responsible for investigating, clarifying, and promoting the recognition of: patterns of human rights violations during the conflict; the collective responsibility of the Colombian state, the FARC-EP, and other national or international organizations; the human, social and political impact of the conflict; the structural conditions that facilitated the persistence of the conflict; *inter alia*. The Commission is tasked with creating local, regional and national hearings, which grant victims the opportunity to deliver testimony of the harms they suffered. By the end of a three-year period, it must draft a public report of its findings, and produce a set of recommendations for the Colombian state.

The *Special Jurisdiction for Peace* (hereinafter “SJP”) is an autonomous judicial body tasked with processing cases related to the conflict. Its guiding paradigm of restorative justice “attends primarily to the needs and dignity of the victims and is applied with an integral focus that guarantees justice, truth and non-repetition.”⁸ The SJP has the power to grant pardons and amnesties for all political, and connected, crimes. These pardons and amnesties do not exempt rebels from their duty to the clarification of truth, nor do they extinguish victims’ right to reparations.

Perpetrators of crimes against humanity and crimes deemed unpardonable or non-amniable under the Rome Statute, committed within the jurisdiction of the SJP,⁹ will be granted the opportunity to render their version of the facts and acknowledge their responsibility. Those who

⁸ “[A]tiende prioritariamente las necesidades y la dignidad de las víctimas y se aplica con un enfoque integral que garantiza la justicia, la verdad y la no repetición de lo ocurrido.” *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, GOBIERNO NACIONAL DE COLOMBIA, 144 (2016), <https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030.11-1480106030.2016nuevoacuerdofinal-1480106030.pdf> (trans. by author).

⁹ The SJP covers all serious violations of human rights and serious violations of international human rights perpetrated in connection with, or with the occasion of, the armed conflict: that is, crimes for which the existence of the conflict is the cause of their commission or played a substantive role in the perpetrator’s motifs, capacities, decision-making, or method. *See id.* at 145.

do so will get restorative and reparative sentences,¹⁰ in addition to the restrictions of freedom and movement that are required for the proper execution of these. Those who fail to contribute to the truth or fail to recognize their responsibility will get retributive sentences, the strictness of which is conditional on the extent of their collaboration in latter stages of the SJP. Those who fail to acknowledge the truth or recognize their responsibility in these crimes will be punished in accordance with ordinary criminal justice.

II.

One of the stated mandates of the Integrated System is to dignify the victims of the conflict¹¹ and uphold their rights to truth, justice, and non-repetition.¹² Critics of the Colombian peace accord would likely dismiss this statement as mere sugar coating for a bald political compromise that undermines victims' dignity by promoting impunity, and violating their right to justice.¹³ Since "dignity" is a vague concept, this may seem like a purely terminological dispute.¹⁴ In what follows, I

¹⁰ In the agreement, these sentences include restorative and reparative projects for the communities that were affected by the conflict, which ought to be executed with the authorization of these communities.

¹¹ This statement echoes the idea—voiced by the drafters of other transitional justice frameworks, academics, and mainstream media—that institutions of transitional justice serve to restore the dignity of victims. Most prominently among these, the Final Report of the South African Truth and Reconciliation Commission claims that one of the functions of the TRC was to "restor[e] the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them." *Truth and Reconciliation Commission of South Africa Report*, TRUTH & RECONCILIATION COMMISSION 55 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>. See also Gustavo Salazar Arbeláez, *Aportes y desafíos del "Marco jurídico para la paz"* INT'L CENTER FOR TRANSITIONAL JUST. (Aug. 22, 2012), <https://www.ictj.org/es/news/aportes-y-desafios-del-marco-jur%C3%ADdico-para-la-paz>; *Reparaciones: Una Oportunidad para Transformar Vidas*, MINISTERIO DE JUSTICIA Y DEL DERECHO (COLOMBIA), <http://www.justiciatransicional.gov.co/Justicia-Transicional/Reparaciones>, (last visited Apr. 18, 2017); Sergio Jaramillo, *El Tiempo de las Víctimas*, ALTO COMISIONADO PARA LA PAZ, (2014), http://www.altocomisionadopalapaz.gov.co/Prensa/Discursos/Documents/el_tiempo_de_las_victimas.pdf.

¹² *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, GOBIERNO NACIONAL DE COLOMBIA, 126, 131 (2016)

¹³ Furthermore, a welfare system is offered for demobilized ex-combatants. These monetary incentives offered to demobilized ex-combatants may be seen as rewards for criminality.

¹⁴ Defenders of truth commissions often remark that a platform for the deliverance of testimony can dignify victims, due to its therapeutic value. Being able to publicly relate accounts of human rights violations at an official setting, and to a sympathetic audience, can help to restore victims' sense of self-worth and dignity. Others claim that the victims of Apartheid in South Africa underwent a moral transformation in the act of foregoing normal routes of judicial redress. In this act, their status as citizens and bearers of rights was vindicated, and along with it, their dignity was restored. While I do not deny that these views account for important features of truth commissions, their operative notion of *dignity* seems to differ from their opponents'. Some use a psychological notion, and others use the idea of a higher moral ground that is acquired

will show that it is not. I will first describe the conceptual framework that best grounds the aforementioned objection. Within this framework I will argue that, despite blocking regular channels for redress, the Colombian Integrated System is better suited than ordinary justice to uphold and restore the dignity of victims of the conflict.

The framework I adopt builds on the work of moral and legal philosophers, and defines dignity as a moral standing that is constituted by reciprocal relations of authority and accountability between individuals.¹⁵ This reciprocity entails that *x* has normative authority to demand certain treatment of *y*, if and only if *y* is accountable to *x* for failing to comply with those demands.¹⁶ Authority and accountability are two faces of the same coin, and both are equally constitutive of an individual's dignity.

For a state to uphold the dignity of a citizen, it ought to act in ways that are consistent with the recognition of her human and civil rights.¹⁷ Such recognition is embodied in the creation of liabilities. These ground her legal standing to press claims against others when her rights are violated,¹⁸ and thus renders these enforceable. When the state disables victims to demand the punishment of perpetrators, it breaks this normative arc of authority and accountability. Laws that

in the act of foregoing one's legal entitlements for the sake of the common good. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); André du Toit, *The Moral Foundations of the South-African TRC: Truth as Acknowledgment and Justice as Recognition*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 122 (Robert I. Rothberg and Dennis Thompson, eds. 2000); Popkin, Roth-Arriaza, *Truth as Justice*, in: Kritz, N. (1995). *Transitional Justice: How emerging democracies reckon with former regimes* (1995); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 73 (Robert I. Rothberg and Dennis Thompson, eds. 2000); BARBARA HERMAN, *MORAL LITERACY* (2007).

¹⁵ See STEPHEN L. DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 146 (2006).

¹⁶ See MICHAEL THOMPSON, *What is it to wrong someone? A puzzle about justice*, in *REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ* 335, 344 (R. Jay Wallace ed., 2004)

¹⁷ Zylberman argues in favor of a relational account of human rights, that mirrors this bipolar structure. In his view, "x has a set of rights against y, if and only if y has a correlative set of directed duties towards x". See ARIEL ZYLBERMAN, *Why Human Rights? Because of You*, 24(3) *J. POL. PHIL.*, 321, 324 (2015).

¹⁸ See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 124 (rev. ed.2012).

hinder accountability also deny the victims' authority to demand redress, thus compromising their dignity.

This notion grounds the critics' retributivist objection against the Colombian peace accord. In their view, amnesties and reduced sentences interfere with the enforceability of rights. Hence, in adopting the Integrated System, the Colombian state fails to act in accordance with the recognition of victims' rights, and thus undermines their dignity.¹⁹

This argument presupposes, however, that victims' rights were recognized and enforced before the peace accord took place and were compromised as a result thereof. But this is far from obvious. Protracted conflicts, like the Colombian conflict, are often accompanied by structural and institutional flaws that enable mass violence to begin and endure. Structural flaws draw out the difference between regular criminality and the sort of systematic abuses that characterize conflicts of this kind. That such abuses are allowed in the first-place signals that victims' rights were not fully enforceable, nor their dignity fully upheld.

As suggested in Section I, there are other good reasons to think that, prior to the peace accord, the dignity of Colombian victims was compromised on two accounts: through perpetrators' actions *and* through the structural flaws that enabled systematic patterns of violence to develop and persist over time. Hence, in order to uphold victims' dignity, it is not just important to ensure the accountability of perpetrators, but also to create the accountability of the state and the public institutions that, by action or by omission, enabled these patterns of victimization. The latter form

¹⁹ In this paper, I am only addressing retributivist arguments in favor of ordinary justice. Critics of the peace accord could also adopt a utilitarian framework, and argue that only the punishment of perpetrators can uphold the dignity of victims, insofar as it is the only effective means to deter people from committing similar crimes in the future. I will not argue directly against this view. Briefly, a defender of the Integrated System could argue that these institutions are the only ones that can help us understand and correct the flaws in the legal system by virtue of which past harms were enabled. Absent a correction mechanism for such flaws, deterrence is highly unlikely.

of accountability can *restore* victims' dignity by establishing the appropriate conditions for the recognition and enforcement of their rights.²⁰

The simplest means to this end is the extension of rights and protections to the individuals who were formerly oppressed and marginalized.²¹ However, even a forward-looking transition of this sort must be based on an understanding of patterns of past marginalization and oppression. This is why past wrongs ought to also be addressed. Ordinary retributive justice could, in theory, fulfill such a backward-looking role for individual acts and abuses, but it cannot do so in the face of large-scale violations of human rights.

First, it faces pragmatic barriers. Even assuming that peace could be reinstated without foregoing prosecution, the cumbersomeness of judicial procedures makes it unlikely that full retributive justice would be achieved. If all victims pressed their claims and all perpetrators were prosecuted, a clogging of the judiciary would likely impair the entire process.

Ordinary retributive justice also faces serious epistemic obstacles. Due to their stringent standards of evidence, trials cannot provide a full picture of the structural problems that enabled the conflict: "the rigorous demands of a court of law and the nature of trials may reveal some hard facts, but trials do not lead to a full accounting of the past. They do not elucidate the causes of conflict, patterns of violence, and consequences for victims."²²

Finally, there are normative considerations that weigh in favor of transitional justice institutions. Because the state failed to enforce victims' rights, it should be held accountable to them, both as an institutional body and as a collective of citizens. Truth commissions promote this kind of

²⁰ Even if this point was granted, it remains true that not all the victims of the conflict are also victims of structural injustice. How could the Integrated System uphold the dignity of these victims? The answer is that it cannot. However, I will suggest later that even retributive justice cannot address the claims of all victims. Hence, prioritizing some claims over others seems to some extent inevitable.

²¹ André du Toit describes these as "forward looking" measures. See André du Toit, *The Moral Foundations of the South-African TRC: Truth as Acknowledgment and Justice as Recognition*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 122 (Robert I. Rothberg and Dennis Thompson, eds. 2000).

²² RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 100 (2002).

accountability, by enabling victims to give testimony of harm. The institutional setting of the truth commission, which includes a presumption of credibility and a particular audience,²³ transforms victims' words from being acts of insurrection, or mere complaints, to having the force of testimony. In a truth commission, the collective body of the state (both *qua* official audience and *qua* nationwide audience) puts itself at the receiving end of an address that both states the facts about past harms and demands reparation for them.

By thus enabling victims' voices to become testimonies of structural injustices, the state holds *itself* accountable to the victims, thereby restoring the moral arc of authority that is constitutive of their dignity. Ordinary retributive justice, on the other hand, risks enforcing accountability only for a limited number of individual perpetrators, as opposed to recognizing and acknowledging collective responsibility for systematic injustices, and creating corrective mechanisms. It appears, then, that in the present case there is no compromise of justice merely for the sake of peace. The compromise involved in the creation of these institutions amounts to the prioritization of some forms of accountability over others and, in this sense, it is not a rotten compromise.

Whether this undermines accountability *tout court* will ultimately depend on details of the implementation, which are still unclear. It is unsure, for instance, to what extent the Commission's hearings will be open to the public. Extreme positions could bring along serious downfalls: Private hearings run the risk of not reaching a sufficiently wide audience, hence sacrificing their symbolic value and the creation of accountability relations between victims and the wider community.²⁴ Public hearings risk creating the impression "that it is all as 'façade'—the state in its theatrical register, orchestrating a transition that does not reach beyond the flat shiny surface of the television screen."²⁵

²³ POPKIN, ROTH-ARRIAZA, *supra* note 9, at 275; KISS, *supra* note 9, at 73; MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING*. New York: Oxford University Press (2007)

²⁴ PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 183 (2nd ed. 2011).

²⁵ KIMBERLY THEIDON, *Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia*. 1 Int'l J. of Transitional Just. 66, 88 (2007).

As it is currently drafted, the accord raises at least four concerns. First, there is no specific funding allocated for the Commission. Second, the Commission's period of operation is meant to be at most three years. While a great deal of work has already been done,²⁶ it is at best doubtful that the Commission will be capable of fully elucidating the structural causes of the conflict in that period of time. Third, there is no explicit commitment by the Colombian state to address the problems diagnosed by the Commission. Fourth, the extent to which the SJP can maintain accountability and ensure that victims receive appropriate reparations will depend *inter alia* on the government's capacity to enforce the rule of law in remote areas of the country, and its capability to distribute resources to the victims.²⁷ There are good reasons to maintain skepticism on this point.²⁸

Accountability in post-conflict Colombia hangs on the proper execution and implementation of the peace accord. The institution of truth commissions can uphold victims' rights insofar as it can establish the accountability relations between them and the public institutions that allowed them to be harmed. Hence, even though it blocks regular channels for redress, the peace accord does not entirely undermine accountability. If it is flawed, it may be so in practice but not in principle.

²⁶ See, e.g. "Informe Comisión Histórica del Conflicto y sus Víctimas." La Habana, Febrero de 2015. At: http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/Informe%20Comisi_n%20Hist_rica%20del%20Conflicto%20y%20sus%20V_ctimas.%20La%20Habana%2C%20Febrero%20de%202015.pdf; *Basta Ya! Colombia: Memorias de Guerra y Dignidad*, GRUPO DE MEMORIA HISTÓRICA (2013) <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf>; <http://www.verdadabierta.com> (last visited Apr. 16, 2017) (compiling several reports).

²⁷ MANI, *supra* note 17, Chapter 6.

²⁸ JAMES A. ROBINSON, *Colombia: Another 100 years of solitude?* CURRENT HISTORY 112(751): 43-48 (2013)