

The Impact of Transitional Justice on Colombia's Rule of Law

Craig K. Lang*
Franklin and Marshall College
craig.lang@fandm.edu

Little is known about the effects of transitional justice on the development of the rule of law. The Andean nation of Colombia has used transitional mechanisms for more than a decade, and as part of the 2016 peace accord it is launching a second wave of transitional trials, a truth commission, amnesties, and reparations. Utilizing a case-study design, this article measures the impact of Colombia's first wave, i.e., the Justice and Peace process, across five key rule of law indicators. Despite expectations in published research that domestic trials are the primary causal mechanisms in enhancing the rule of law, this analysis finds that in the case of Colombia restorative elements, namely amnesties and reparations, were drivers of the limited change. More comprehensive reform was blocked by structural flaws within Law 975, the government's ever-changing transitional framework, and the absence of the State in former conflict zones.

Keywords: Justice and Peace; rule of law; transitional justice; Colombia; amnesties; reparations

Introduction

Colombia appears poised to begin a more stable and less violent future following a 2016 peace accord between the government and the FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*). In order to position itself for lasting peace, Colombia needs to strengthen its rule of law, as evidenced by ongoing drug trafficking, endemic corruption, and general lawlessness in departments like Nariño. To that end, under the 2005 Justice and Peace framework, which largely pertained to demobilized paramilitaries, Colombia introduced its first serious attempt at transitional justice.¹ More recently, the 2016 accord reaffirms Colombia's commitment to truth, justice, reparations, and

* Dr. Craig K. Lang is Visiting Assistant Professor of Government. From 2007–2011 he was the Colombia Program Officer within the US Department of State's Bureau of International Narcotics and Law Enforcement Affairs.

¹ Transitional justice is a set of judicial and nonjudicial mechanisms, such as trials, reparations, and amnesties, designed to facilitate a political change while addressing the effects of political violence.

nonrepetition, albeit with some changes. Yet, despite Colombia's need to move forward, little scholarly work has been done to measure State-level effects of the Justice and Peace process.

Consequently, it is fair to ask whether this initial wave of transitional justice made a difference; namely, did it help or deter the development of the rule of law within this conflicted state? Moreover, if there is an effect(s), how and where did change(s) occur? These two questions are the basis of this analysis, and they are important ones considering that Colombia's second wave of transitional justice is underway, and many Colombians, including President Iván Duque, want to modify elements within the new accord.²

Although great strides have been made in ending Colombia's overall conflict, the country is still not fully at peace, as illustrated by continued actions by the ELN guerrillas (*Ejército de Liberación Nacional*) and criminal groups known as *Bandas Criminales*, or BACRIM, that engage in many types of illicit activities. Consequently, one drop of transitional justice is likely insufficient to produce a tidal wave of change. However, in line with the expectations by analysts (Sikkink 2011; Weiffen 2012), some measurable improvements should be observed from the Justice and Peace proceedings.

Unfortunately, this study finds that the ability of transitional justice to deliver improvements in the rule of law was not automatic. Although there were some minor, positive changes linked to reparations and amnesties, more comprehensive reform was stymied by the absence of the State in former conflict regions and by the failure to fully implement what was promised. Moreover, the structure of Colombia's first meaningful attempt at transitional justice was flawed.

Before delving into the analysis, this article begins by situating itself within the analytical literature and identifies how this study begins to help us understand the relationship and causal mechanisms between transitional justice and the rule of law. This section is followed by an explanation of our research methodology and Colombia's transitional justice framework. It then proceeds with the analysis before concluding with several Colombia-specific observations, as well as highlighting areas for further inquiry.

What We Know

Traditionally, scholars have measured the effects of transitional justice on promoting democracy or maintaining peace. For instance, Olsen, Payne, and Reiter (2010) find that a "justice balance," which uses accountability proceedings alongside restorative mechanisms, is positively correlated to improving democracy and human rights. In relation to the rule of law, there is an incomplete, yet emerging, body of scholarship dedicated to understanding the relationship between this element and transitional justice.

² President Duque wants to limit the scope of what are considered political crimes (Weymouth 2018, B3).

Helping construct a theoretical edifice for such a relationship, Stromseth, Wippman, and Brooks (2006) foresee a connection between transitional justice and the rule of law when trials have a demonstration effect. The demonstration effect is powerful because it signals to society that by holding accountable previously “untouchable” individuals, impunity is no longer tolerated. Conversely, if trials are conducted in a manner that demonstrates bias or lack of transparency, transitional justice can have a negative effect. Building upon this framework, a series of more recent empirical studies test these assumptions.

Based upon an examination of law and order scores, Sikkink (2011) finds that the development of the rule of law in several Latin American states went hand in hand with domestic human rights trials. Of the fourteen countries that used these proceedings in Latin America, ten of them had improved law and order scores; therefore: “human rights trials and the construction of the rule of law can be two simultaneous and mutually reinforcing processes” (Sikkink 2012, 34). In another study, Weiffen (2012) discovered that in countries that used these same types of trials, the nations’ mean rule of law scores were higher than in states that did not.³

Although these early studies are important, they do have limitations. For example, since the development of the rule of law is affected by multiple factors, it is possible that the changes identified were caused by other features. Moreover, it is likely that nonjudicial transitional justice mechanisms also helped improve the rule of law.

Providing one of the most comprehensive examinations of the rule of law in conflict environments, Haggard and Tiede (2014) evaluate a country’s level of rule of law before, during, and after a civil war. Utilizing descriptive and inferential statistics, They find that the rule of law is largely path-dependent, i.e., that there is no difference in the rule of law pre-and post-conflict. While providing an important contribution, namely the need to consider path dependency, these authors did not control for a country’s use of transitional justice. And, while not discussing transitional justice directly, they admit to limitations in their findings, primarily the inability to explain some country variations.⁴

In light of the varying methodologies and conflicting findings, it is apparent that questions and gaps remain. Although this single country case study cannot address all of them, it does test a potentially theory-affirming example. According to two of the aforementioned studies, transitional justice—particularly domestic trials—aid in the development of the rule of law. Colombia’s Justice and Peace process relied heavily upon local courts to dispense truth, justice, and reparations. Therefore, this analysis tests whether the rule of law improved in Colombia because of its use of domestic trials.

³ Colombia is not part of either the Sikkink or Weiffen studies.

⁴ While the majority of countries measured did not have improvements in their rule of law, Haggard and Tiede’s findings indicate that several countries that had “strong” or “modest improvements” did use transitional justice, such as Argentina, Croatia, and Peru.

Research Design

In keeping with the definition of transitional justice in the Introduction, Colombia used domestic trials, truth-telling initiatives, reparations, and amnesties during the period under evaluation.⁵ While defining the theoretical and operational boundaries of transitional justice is relatively straightforward, the dependent variable is more challenging. Like democracy, the rule of law can be operationalized in various ways, namely either through a procedural approach, which focuses on the institutions required to ensure that the law is general and equally applied (Waldron 2011), or, it can be a more maximalist concept, which accepts the procedural requirements and also adds substantive elements (Bedner 2010).

Unfortunately, due to the lack of theorization about the relationship between the rule of law and transitional justice, the literature does not explicitly state how and where transitional justice affects this variable. The lack of clarity is beginning to be addressed, and according to one analysis, the transitional justice literature expects its mechanisms to impact the procedural domain, by promoting equality before the law and strengthening judicial institutions, as well as the substantive realm, by ushering in normative changes (Lang 2017). Consequently, in this case, a comprehensive approach needs to be utilized to capture both the procedural and substantive expectations.

To that end, the impact of transitional justice is measured across five rule of law indicators. These measures encompass both the procedural and substantive domains and include the following: (1) a government subordinate to the law—that is, the government follows prewritten rules; (2) equality of all before the law—no one is above the law/the courts are impartial; (3) law and order exist—protection from fellow citizens; (4) justice is predictable and efficient—the law is clear, known, and enforced in a timely manner; 5) human rights are protected—the State ensures fundamental rights (Kleinfeld 2006).⁶

In terms of measuring each of these, whether the government followed the law and was held accountable for its conflict-related crimes is used to assess indicators (1) and (2). The numbers of kidnappings and conflict-related deaths, along with the level of political violence, serve as proxies for law and order (3), and land restitution along with the pace of judicial and reparation proceedings help us understand whether justice has been predictable and efficient (4). Finally, human rights protection (5) is measured by the State's ability to ensure nonrepetition of conflict-related crimes; more specifically, it evaluates the number of displacements and threats in Colombia's five most conflict-prone departments.

Methodologically, a case study with process tracing was chosen to help isolate the effects of transitional justice by mitigating equifinality (George and Bennett 2005). This qualitative approach is

⁵ Identifying which mechanisms were used was aided by the Transitional Justice Database Project (<http://www.tjdbproject.com>) and this author's own fieldwork.

⁶ While there are many other indicators, the five used here were chosen because of the literature's expectations of a relationship between them and transitional justice. Moreover, these five closely mirror those used by the World Justice Project and Worldwide Governance Rule of Law Indicators.

also well suited to tracing the impact of each mechanism. Here, the case of Colombia is useful because it used four of the primary mechanisms of transitional justice, and, by examining this case over a decade, there are sufficient observations for the analysis.

Data for this study comes from twenty-nine interviews carried out by the author throughout Colombia from February to July 2016 and May through June 2018. Subjects were chosen due to their recognized expertise in either transitional justice or the rule of law, and included Colombian executive, congressional, and judicial officials at both the federal and local levels. In addition, members of civil society were interviewed.⁷

To fill in some of the gaps not covered by the interviews, all twenty semiannual or quarterly reports of the Organization of American States Mission to Support the Peace Process in Colombia (MAPP/OEA, hereafter MAPP) from 2004–2015 were evaluated. These reports provide an impartial, international evaluation of the implementation of transitional justice and the development of the rule of law, and these on-the-ground assessments are particularly useful since they report on the same issues over time.

This analysis limits its evaluation to only those transitional justice mechanisms implemented as part of the Justice and Peace Law, aka Law 975 (2005) and continues up to the Legal Framework for Peace (2012). Therefore, a logical beginning and termination point to evaluate the rule of law is immediately before 2005 through 2015, which is one year before the peace agreement with the FARC was signed and any new transitional justice mechanism began to be implemented.

Transitional Justice Framework

Due to Colombia's long history with internal conflict, this Andean nation is no stranger to peace processes. Before the demobilization of its paramilitaries, Colombia demobilized five guerrilla groups between 1989 and 1994.⁸ While significant, these accords were DDR-centric (disarmament, demobilization, and reintegration) and were usually accompanied by amnesties and pardons for the illegal combatants (Carrillo 2009, 141). Although individual guerrillas and paramilitaries have been tried in the past within regular courts, and modest reparations occasionally given by the State to local communities, Colombia's first meaningful attempt at transitional justice is the Justice and Peace Law (Restrepo 2012, 143–144).

⁷ The Florida International University Office of Research Integrity (December 11, 2015, #104130) and the Franklin & Marshall College Institutional Review Board (April 23, 2018, #R_1KloEjbg5ws44js) both approved the use of human subjects in this research project. Due to the sensitivities of transitional justice in Colombia, and because several of these interviews were conducted during peace negotiations, many interviewees asked to remain anonymous. In keeping with the confidentiality components of the aforementioned IRB protocols, respondents who chose to remain anonymous are identified by the entity or group agency where they worked at that time.

⁸ Movimiento 19 de Abril; Movimiento Armado Quintín Lame; Ejército Popular de Liberación; Partido Revolucionario de los Trabajadores; and Corriente de Renovación Socialista.

According to this law, those demobilized who committed serious crimes are subject to judicial proceedings that lead to alternative prison sentences of five to eight years. For those demobilized who did not commit serious crimes, amnesties were provided. In support of trials, a Fund for the Reparation of Victims was established, which provides monetary reparations to the paramilitaries' victims based upon amounts decided by magistrates in the Special Tribunals for Justice and Peace.

Rounding out this framework was the National Commission for Reparation and Reconciliation (NCRR), whose broad mandate was to ensure victim participation in judicial proceedings, submit a report on the reasons for illegal armed groups, and monitor the delivery of reparations. From these responsibilities, the Historical Memory Group (HMG) produced a culminating report, *Basta YA!*, which catalogs some of the violence and also offers reasons for the emergence of illegally armed actors. After completing their responsibilities, the NCRR and HMG were disbanded, but the Special Tribunals and fund for reparations remain operational, although the former's work is coming to a close.⁹

While Law 975 is the bedrock of this initial wave, other elements were added to it over time. In 2011, the Law on Victims and Land Restitution, Law 1448, was passed, which expanded legal redress for all victims of the conflict. Moreover, the law provides for the restitution of land. In addition to expanding the scope of victims and services, Law 1448 changed how reparations are provided for many. For example, instead of magistrates deciding how much a victim receives, the Victims' Unit dispenses reparations administratively, i.e., the financial amounts are bureaucratically predefined. This key change is discussed later, since it impacted Law 975, but for now, it is important to note that administrative reparations are generally much less than what is judicially decided.

While each of these disparate laws is important, it became apparent that Colombia's multiple transitional justice initiatives needed to be encapsulated into one overarching policy.¹⁰ To aid in the improvement of transitional justice, as well as prepare for negotiations with the FARC, the Santos administration (2010–2018) developed and Congress passed the Legal Framework for Peace in 2012. This framework authorizes the use of nonjudicial mechanisms, such as a truth commission, and calls for the prioritization of cases involving serious crimes, including those committed by the State.¹¹

To review, Colombia's first serious attempt at establishing truth, justice, and reparations is encapsulated in the Justice and Peace Law. Eventually, weaknesses were recognized, and attempts were made to try to alleviate some of these deficiencies through prioritizing criminal cases and modifying the reparations formula. Furthermore, all of the mechanisms described were generated and approved by the Colombian government through democratic processes, which included civil society input, congressional approval, and judicial review.

⁹ The National Center for Historical Memory, which was created under Law 1448 (2011), assisted the HMG in completing its work. While the latter entity no longer exists, the former is still operational.

¹⁰ Colombian Ministry of Justice (hereafter MOJ) and government official, interviews by author, March 2016.

¹¹ According to the MOJ, case prioritization focuses on prosecuting senior paramilitary or guerrilla leaders most responsible for serious crimes, taking into account the macrocriminal environment at the time (Colombia, MOJ 2015, 13–17).

Obviously, these processes did not occur in a vacuum. International pressure was occasionally applied, and international norms were taken into account. Yet, these ideas and mechanisms were not foisted upon Colombian society; domestic actors retained the political space to adapt certain policies to Colombian realities.¹² In light of the comprehensive design and approval process, Colombia should have been on the path to success.

Transitional Justice & the Rule of Law. Government Subordinate to the Law and Equality of All Before the Law¹³

Before Justice and Peace, State impunity for conflict-related crimes was prevalent, despite the International Criminal Court (ICC) having found it reasonable that the State committed crimes against humanity and war crimes since at least 2002 (ICC 2012, 4).¹⁴ Furthermore, from 2002 to 2007, the Colombian military intensified its practice of false positives, which involved killing civilians and presenting them as guerrillas in order to receive rewards and promotions. Additionally, thousands of government officials retained contacts with the paramilitaries, despite their illegality, well after these groups were outlawed in 1989.

Against this backdrop, Colombia's first wave of transitional justice struggled to subject the government to the law. Despite the aforementioned crimes, State agents were not subject to the Special Tribunals or truth-telling processes of Law 975, and this structural flaw impeded transitional justice from making inroads in establishing the equality of all before the law. As discussed in several of the works referenced in the preceding section, President Álvaro Uribe (2002–2010) and his government chose to exclude the State from many of the Justice and Peace mechanisms. In light of the parapolitical scandal, the phenomenon of false positives, and the impunity that ensued, this decision remains problematic.¹⁵ Moreover, it illustrates that the Justice and Peace process was handicapped from the beginning, particularly for combatting State impunity.

Although the government has generally adhered to Law 975—i.e., judicial proceedings have occurred, it has provided millions of dollars in reparations, and memory projects were completed—the State's disregard for several other national and international laws is a signal that the government was still not entirely subject to the law. The lingering challenges of paramilitarism and false positives indicate that the Justice and Peace process had little deterrent effect on the State, since it continued to engage in serious crimes.

¹² For more detailed analyses surrounding the passage of these laws, see Lang 2017, Carrillo 2009, and Laplante and Theidon (2006).

¹³ Due to their similarity, these two indicators are considered together.

¹⁴ The ICC's jurisdiction in Colombia began in 2002.

¹⁵ There remain questions about the reach of the paramilitaries, including whether it permeated the Uribe presidency. According to testimony given within the Special Tribunals, multiple paramilitaries claimed Uribe collaborated with them while he was governor of Antioquia (Parkinson 2013). While these allegations have not been proven, the arrest and indictment of the former president's brother and cousin for parapolitics only heightens concerns.

For instance, politicians and military officials maintained ties with outlawed paramilitaries. Overall, more than 11,000 individuals were investigated in what became known as the “parapolitical scandal,” which included 900 politicians, 800 members of the military, and 300 other government officials (Stone 2016). Colombia’s *La Procuraduría* (Inspector General’s Office) reported that at the federal level 102 representatives and 97 senators were investigated, and of these, 42 were found guilty of parapolitical crimes. Moreover, from 2006 to 2016, 519 disciplinary proceedings against government officials at various levels were carried out for links to the paramilitaries or BACRIM, which themselves contain former paramilitaries (“El informe” 2016).

Although it needs to be acknowledged that these crimes were eventually exposed, due in part to Justice and Peace proceedings, it is not clear that the offenders have truly been punished or that all official ties to paramilitarism have been severed. For example, in 2015, within Bogota’s La Picota prison, those convicted for ties to the paramilitaries remodeled their cells with showers and televisions, placed their own locks on cell doors, kept refrigerators stocked with liquor, and had a hairdresser and massage parlor (Bargent 2015). Equally disturbing were the results from the 2014 congressional election, in which sixty-nine candidates were elected who allegedly had connections with the paramilitaries or were linked to politicians who did (Cawley 2014).

In addition to parapolitical crimes, elements of the military failed to follow Colombia’s own criminal code and its commitments under the Rome Statute, e.g., prohibitions on crimes against humanity, by engaging in the practice of false positives.¹⁶ According to a 2013 letter from the Fiscalía (Attorney General’s Office), more than 3,800 false positive victims were identified. The Fiscalía noted that these actions began in earnest (more than 100 victims a year) in 2002 and reached their zenith two years after the passage of Law 975 when 1,119 civilians were killed by the military (Parkinson 2013).

Fortunately, the Fiscalía’s records indicate that these actions began to abate in 2008 as these crimes came to light, and by 2012, only fifteen false positive deaths were recorded. However, while the number of victims subsided, impunity was problematic, particularly for those at the top. While the Fiscalía noted in 2017 that 1,414 individuals had been convicted for false positive killings, the first indictment against an active duty general (General Henry William Torres Escalante) for these crimes did not occur until 2016, after years of international monitoring and pressure (US Department of State 2016, 3).

Government involvement in paramilitarism and false positives following the passage of Law 975 indicates that this first wave of transitional justice struggled to counteract decades of official impunity. This failure cannot, however, be laid at the feet of the Special Tribunals and truth-telling proceedings. The Uribe administration and Congress made a political decision in 2005 to exclude State agents from transitional justice, and this structural flaw in the law contributed to preventing

¹⁶ Upon becoming a signatory to the Rome Statute in 2002, Colombia used the Statute’s Article 124 to delay the ICC’s war crimes jurisdiction until 2009.

meaningful change in establishing a government subject to the law and one that ensures the law is equally applied.

Although progress in developing these two indicators was limited during the period under consideration, the Santos administration made noticeable efforts to counteract this pattern of impunity. In 2012, the Legal Framework for Peace acknowledged the need to include the State in any future transitional justice processes, and in fulfillment of this pledge, Chapter Five of the 2016 peace accord requires agents of the State to account judicially for their crimes, as well as contribute to a truth commission. Whether the State will participate in these mechanisms in good faith under President Duque remains to be seen, but the president's initial desire to change accountability elements in the accord is worth monitoring.

Law & Order

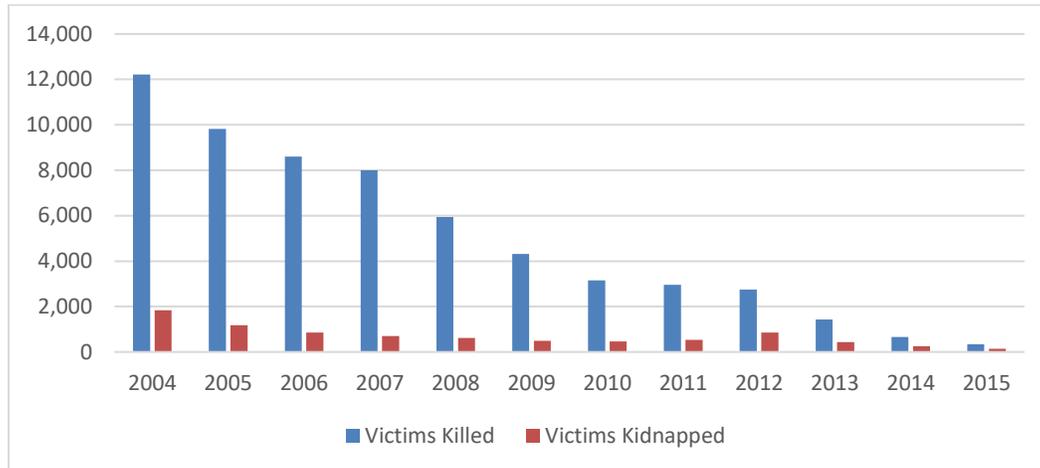
While Justice and Peace did a poor job subordinating the government to the law, Law 975 and its accompanying demobilization and amnesty provisions helped improve law and order. This wave of DDR, closely tied to amnesties for the majority of demobilized, removed more than 50,000 paramilitaries and guerrillas from the general conflict.¹⁷ The absence of these actors led to a noticeable decline in political violence, kidnappings, and civilian deaths.

At the end of the twentieth century and beginning of the twenty-first law and order was generally absent throughout Colombia. The number of individuals killed as part of the conflict began to increase noticeably in 1996, and conflict-related deaths did not return to pre-1996 levels until a decade later. At the height, more than 19,000 people were killed in 2002 alone (Victims' Unit). Kidnappings were commonplace, with 3,727 individuals reported as were abducted in 2002 (Victims' Unit). Describing this era, the HMG notes that there was "an explosive tendency between 1996 and 2002, when the armed conflict reached its most critical level as guerrilla groups gained military strength, paramilitary groups expanded across the country . . . and drugs-trafficking [sic] was reshaped to the conditions of the armed conflict" (Historical Memory Group 2016, 39).

Yet, after 2005, kidnappings declined to under 1,000/year, and the number of conflict-related killings fell dramatically as well. By 2010, fewer than 3,200 individuals were killed as a result of conflict violence, and by 2015 the total was only 341 (Victims' Unit). Figure 1 outlines the overall trends in both conflict-related kidnappings and deaths, 2004–2015.

¹⁷ Approximately 56,000 illegal combatants demobilized under the Justice and Peace framework, including a little more than 24,000 guerrillas (Colombia, MOJ 2015, 3). The exact number of paramilitaries before demobilization began is unclear, since criminals also demobilized with paramilitary units to take advantage of the provisions of the Justice and Peace process. Nevertheless, in its Eighth Quarterly Report, the MAPP cited 31,689 former paramilitaries demobilized under Justice and Peace (2007, 3). While an exact figure is unknown of how many former paramilitaries are part of the BACRIM, the MAPP noted that of the 11,524 BACRIM the Colombian government had captured between 2006 and February 2012, only a little more than 14 percent were former demobilized paramilitaries (MAPP Sixteenth Quarterly Report 2012, 10).

Figure 1: Number of Yearly Conflict-Related Kidnappings and Homicides



Political violence also subsided in parallel to the overall decline in active combatants. According to the Political Terror Scale, which rates the level of political violence in a country on a scale of 1 (the best) to 5 (the worst), from 1996 to 2004, Colombia was at level 5, meaning that political terror was prevalent throughout the entire country. After the demobilization and provision of amnesties for approximately 31,000 paramilitaries and more than 20,000 guerrillas, Colombia improved to a 4 from 2005 to 2010, and since 2011, it has remained at a 3, except in 2013 when it temporarily slid back to a 4 (Gibney et al. 2016).¹⁸

Although far from being the most stable environment, there is a clear relationship between the improvement in Colombia's law and order and the reduction in overall conflict through the demobilization and amnesties offered as part of the Justice and Peace process.¹⁹ Since only a little over 5,000 of the demobilized were initially subject to accountability proceedings, the amnesties offered to the majority of former combatants served as a strong incentive to abandon the conflict, thereby enhancing civilian protections, decreasing kidnappings, and reducing political terror.

Predictable & Efficient Justice

One indicator of whether justice is predictable and efficient is the enforcement of property rights. According to The Heritage Foundation Index of Economic Freedom, the protection of

¹⁸ The Political Terror Scale uses three scores, one each from the US Department of State, Amnesty International, and Human Rights Watch. This analysis uses the State Department score, since it is available for all years.

¹⁹ Law and order also arguably improved due to enhanced security policies under President Uribe, as well as the launch of Plan Colombia (2001), which improved the size and strength of Colombia's military and police. Yet, since these policies did not contain transitional justice, they are outside the scope of this analysis.

property rights in Colombia from 2004 to 2009 was woeful (or, in its terminology, “repressed”), garnering a score of 30 out of 100. Following the Victims’ Law, which initiated a judicial process for the restoration of property illegally confiscated during the conflict, Colombia improved to a 50 (“mostly unfree”), and during 2017–2018, reached a “moderately free” status (The Heritage Foundation 2018).

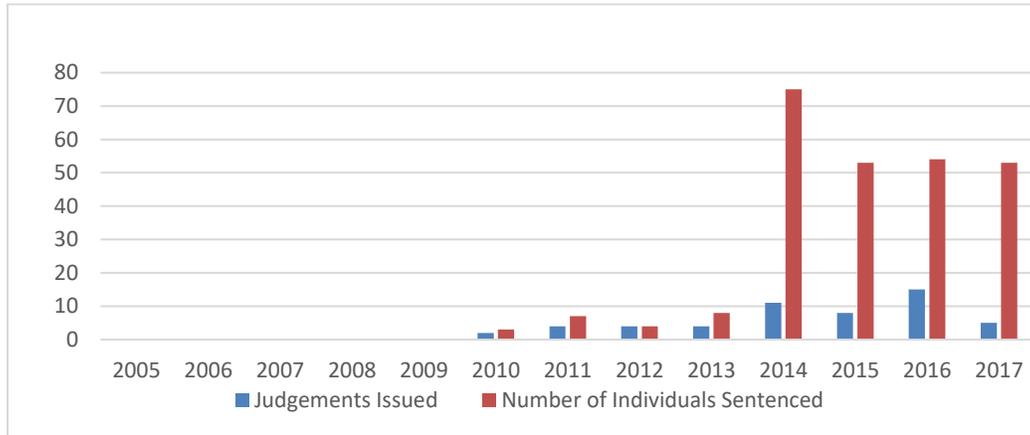
Although far from perfect, Colombia’s improvement can be tied, in part, to this law’s mandate to return dispossessed land.²⁰ For example, since the process began in 2011, more than 82,000 individuals have filed requests for land restitution, and the courts have issued orders of restitution for 6,845 properties, covering more than 42,000 individuals and 944,570 acres (Unit for the Restitution of Land 2017). While there remain more claims to process, restitution is underway, and it is moving more rapidly than the judicial and reparation proceedings under Law 975.

Overall, the administration of individual accountability and the dispersion of monetary reparations under Justice and Peace have been anything but predictable and efficient. Judicial proceedings have been tragically slow, and policies designed to improve reparations are confusing. Moreover, initial promises by the government have not been met, thereby dashing victims’ expectations and feeding perceptions of impunity. The causes of these inefficiencies do not, however, appear willfully malicious; as in most conflict and postconflict states, resources and institutional capacity are scarce commodities in Colombia. The country’s judicial system has been particularly prone to these institutional deficiencies, but this reality is beginning to improve due to case prioritization and administrative reparations, both of which carry their own challenges.

Following demobilization, the Fiscalía had 5,003 excombatants it intended to process through the Special Tribunals (Colombia, MOJ 2015, 3). Yet, by the end of 2015, only 150 had been judicially sanctioned through 33 rulings. Moreover, the pace of terminating cases did not accelerate until after prioritization, as illustrated in Figure 2. From 2005 to 2012, only 14 demobilized were sentenced through 10 court judgments. In the years since (2013–October 2017), an additional 43 rulings have covered 243 individuals (Rama Judicial).

²⁰ The protection of property rights also requires law and order. In accordance with the Victims’ Law, personal property is returned only when the security situation allows.

Figure 2: Justice and Peace Judicial Proceedings by Year*



Data source: Rama Judicial (Colombia's Judicial Branch) 2017.

*Figures for 2017 are as of October of that year.

Furthermore, as part of Justice and Peace, the Fiscalía recorded 370,954 crimes involving 487,634 victims (Colombia, MOJ 2015, 3). The sentences handed down between 2005 and 2015 accounted for only approximately five percent of the overall number of victims, and by 2017 only a little more than seven percent of the crimes had been addressed (Colombia MOJ 2015; Rama Judicial). Compound this with the implementation of the prioritization strategy, which removed more than 600 demobilized from the list of serious criminals, and the government clearly failed to fulfill its initial prosecutorial pledge.²¹

The effects of the lethargic pace of judicial proceedings and switching prosecutorial strategies mid-stream have been deleterious. Officials in both the Procuraduría and other government agencies reported that after case prioritization many victims abandoned the Justice and Peace process because they were disillusioned with it and had lost faith in the justice system altogether.²² These sentiments were confirmed by the MAPP in its twenty-first quarterly report. Evaluating the effects of the changes caused by prioritization, this mission informed its secretariat that victims were now more frustrated and surprised by this policy change (2016, 9).

The repercussions of initially promising hundreds of thousands of victims an opportunity to confront their perpetrators in a court of law only to reverse that promise is particularly damaging in a transitional setting like Colombia. Many of the more than 400,000 Justice and Peace victims live in remote regions of the country where the State is usually absent. Yet, when they experience the State for the first time through transitional justice, the government fails to deliver on its promises.

²¹ By mid-2015, the MOJ noted that of the 5,003 excombatants designated for prosecution, 2,147 were taken off of the list because they either failed to comply with the process or had died (Colombia, MOJ 2015, 4). Subtract the additional 600 removed because of prioritization with the 257 sentenced, and as of late-2017, 1,999 individuals still had not been judicially processed. Figures for 2018 were not available at the time of this article.

²² Procuraduría official and other government officials, interviews by author, February 2016 and March 2016.

In addition to not producing timely verdicts, Colombia was also unprepared to provide judicial reparations. According to Article 37.3 of the Justice and Peace Law, victims are entitled to “prompt and comprehensive” reparations. Yet, since reparations under Law 975 are determined at the end of the judicial process, which lasts anywhere from five to seven years, determinations of who receives reparations and how much must wait until this lengthy process concludes.

Consequently, the first judicial award was not given until 2011.²³ Moreover, out of the more than 400,000 victims, only 3,136 had received judicial reparations by mid-2015 (Colombia, MOJ 2015, 27). While the failure to recognize the majority of victims is being reconciled through the Victims' Law, which provides administrative reparations, using two procedures simultaneously is not without problems.

While paramilitary victims may still petition for judicial reparations, other conflict victims must go through the Victims' Unit. Here, a decision regarding eligibility is normally given within ninety days of application, but the amount awarded is less. For example, if a family petitions for reparations based upon the murder of a loved one, under judicial proceedings, victims of homicides typically receive roughly \$274,000, while for the same crime, a victim under the administrative track receives \$8,000 (Colombia, MOJ 2015, 29). While the Santos government decided to provide reparations for the majority of conflict victims through a more efficient and cheaper administrative process, it created a confusing double standard.²⁴

Although some may argue that the judicial and reparation results are due to a lack of political will, the evidence does not seem to support this explanation. In 2012, the ICC noted that delays in Justice and Peace were not politically motivated. In fact, the ICC's prosecutor explained that the pace of Justice and Peace proceedings was due in large part to the complexity of these cases, and in order to help, a prioritization plan should be implemented (ICC 2012, 5, 62). When interviewed, a Colombian magistrate in one of the Special Tribunals agreed with the ICC's assessment, and encouraged skeptics to compare the pace of Colombia's transitional courts to those in other countries.²⁵

Unfortunately, when compared to Bosnia and Herzegovina (BiH), a country that also had hundreds of thousands of victims due to its own internal conflict, Colombia's Justice and Peace Special Tribunals fall short of the pace within BiH's War Crimes Chamber. For instance, BiH's national transitional court adjudicated 270 cases covering 506 defendants in 2004–2015 (Organization for Security and Cooperation in Europe 2015, 1). In Colombia, 33 judgements were issued for 150 individuals for the decade of 2005–2015. Moreover, in BiH cases are adjudicated in one to two years

²³ The courts awarded reparations to 1,444 victims as a result of the events in Mampuján, where hundreds of people were forcibly displaced and many others killed by paramilitaries in March 2000.

²⁴ Since 2005, Colombia experimented with four different reparation schemes. Paramilitary victims were initially promised judicial reparations, but with Law 1592, all victims were placed under an administrative allocation. The Constitutional Court ruled this provision unconstitutional, and power was returned to the magistrates. Now, victims under Law 975 receive reparations under a mixed formula that may draw from either judicial or administrative accounts (Colombia, MOJ 2015, 29–30).

²⁵ A Magistrate in a special tribunal, interview by author, February 2016.

compared to five to seven years in Colombia (Organization for Security and Cooperation in Europe 2011, 56).

Why, then, have Colombia's transitional courts been less efficient, at least when compared to BiH? Here, the utility of a hybrid tribunal might be a factor. BiH benefited from almost two decades of international judicial assistance and training, which included a hybrid war crimes tribunal from 2005 to 2012. While donors provided some financial and technical assistance to Colombia's Justice and Peace process, its already fragile domestic judicial system has relied solely upon a limited number of Colombian investigators, prosecutors, and judges.

In 2007 the Fiscalía reported that in addition to the 23 prosecutors and 150 investigators in its Justice and Peace Unit, it needed 1,235 more if it was to adequately handle the caseload. Three years later, this unit had 159 prosecutors and 1,000 investigators, but this was still not enough as each prosecutor had 240 incidents to investigate (MAPP Tenth Quarterly Report 2007, 8; MAPP Fourteenth Quarterly Report 2010, 7). Generating sufficient legal support for the victims was equally problematic. Despite almost half a million victims, the *Defensoría del Pueblo* (a sort of Ombudsman's Office) was only able to muster one representative for every 400 victims (MAPP Thirteenth Quarterly Report 2009, 4).

Consequently, aside from improvements in property rights, the Justice and Peace process has been painfully slow and lacking in transparency due to ever-changing regulations and resource limitations. Moreover, while proceedings improved after prioritizing cases, the efficiency came almost a decade after the process began, and by that time, credibility was already lost and expectations dashed. To compound these inefficiencies, victims are being revictimized despite government pledges of nonrepetition, and many more remain vulnerable.

Human Rights

The enforcement of human rights has been problematic throughout Colombia's recent history. In 2002 more than 19,000 people were killed as a result of the turmoil, and overall, more than 930,000 conflict-related crimes occurred that year (Victims' Unit). This violence, couple with phenomena like false positives, make it clear that the protection of most individuals' fundamental rights has been a struggle.

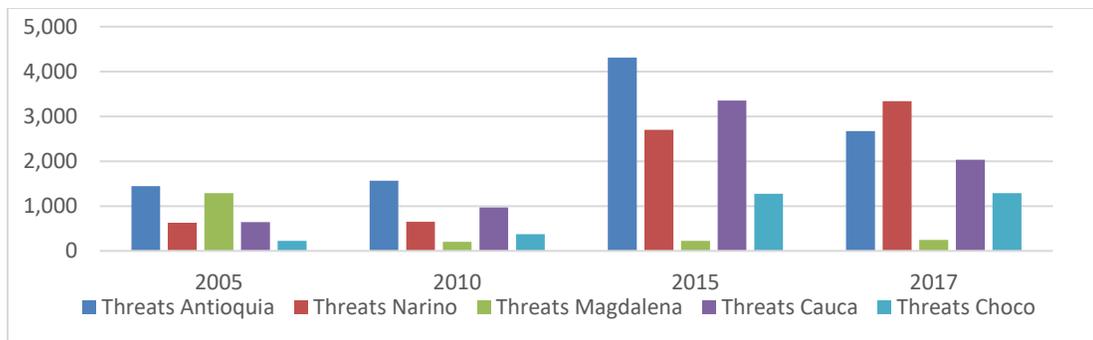
The ability of transitional justice to deter human rights violations and establish new norms vis-à-vis the treatment of others is suspect, largely because victims continue to be revictimized, and new victims continue to emerge. The absence of the State and the persistence of criminality in former regions of conflict contribute to these enduring challenges. Moreover, the unending victimization calls

into question the ability of the government to fulfill its pledge of nonrepetition, which is clearly spelled out in Articles 8 and 48 of Law 975.²⁶

Each year, dozens of victims and their representatives are killed, and many more are displaced. The BACRIM and other illegally armed groups have created a dangerous environment for the most vulnerable. In 2007, the MAPP reported that residents in departments such as Nariño and Chocó, which have been heavily affected by the conflict, perceived no improvements in security because of the persistence of illegal actors (MAPP Ninth Quarterly Report 2007, 12).

Colombia's five most conflict-prone departments, as measured by the number of conflict-related crimes occurring there since 1985, continue to experience high levels of displacement and personal threats.²⁷ In Nariño, the number of people displaced rose from a little more than 17,000 in 2005 to 26,089 in 2015. In Chocó, more than 17,000 people were counted as displaced in both 2005 and 2015 (Victims' Unit). Consistent with high rates of displacement, the number of individuals threatened by illegally armed actors is rising as well, as illustrated in Figure 3.

Figure 3: Number of Individuals Threatened by Department & Year



Data source: Victims' Unit.

Attempting to explain the persistence, and in some cases, the rise in violence, the United Nations High Commissioner for Human Rights noted: "Diverse local interests and groups that oppose changes that are promoted by the peace process are now using violence and intimidation to protect their interests, without a sufficient and effective answer by the State" (2016, 7).²⁸ Consequently, not only did the demobilization of the paramilitaries and formation of the BACRIM contribute to enduring human rights challenges, but with the demobilization of the FARC a decade later, attacks against the most vulnerable persist because the State still has not addressed its absence in several key regions. For instance, 64 percent of the murders of the 121 social and community leaders killed in Colombia in 2017, occurred in former conflict zones vacated by the FARC (United Nations High Commissioner for Human Rights 2018, 3).

²⁶ Article 48.7 identifies "preventing human rights violations" as one measure in the State's commitment to nonrepetition.

²⁷ The top five departments are Antioquia, Nariño, Magdalena, Cauca, and Chocó.

²⁸ My translation.

While it needs to be acknowledged that the overall number of conflict-related homicides has dramatically declined in Colombia, including in the top five conflict zones, the increasing number of attacks against human rights defenders, along with the persistence of displacement and personal threats, demonstrate that a seismic shift in Colombia's human rights culture has yet to occur. This, however, is not to be blamed on transitional justice mechanisms. Although most of these crimes are carried out by illegally armed actors, the failure of the State to fulfill its pledge of nonrepetition counteracts much of the potential positive effects emanating from transitional trials and memory projects. Until the state prioritizes establishing a comprehensive governing presence throughout all of its territory, transitional justice will be limited in its ability to induce lasting change.

Conclusion

Did transitional justice help develop the rule of law in Colombia? Overall, yes, but not in the manner the literature expected, and not to the extent anticipated. Earlier studies identified domestic trials as a primary causal mechanism in improving this element of society. Yet, due to structural flaws, i.e., that State agents were excluded and there was initially no prioritization plan, accountability elements within Justice and Peace did not create an environment of equality before the law nor was the law more predictable and efficient.

Additionally, these tribunals did not improve human rights or law and order. The phenomena of false positives, along with the continued victimization of the most vulnerable, illustrate that these courts had little to no deterrent effect in preventing serious crimes. However, it is highly likely that the lack of a State presence in former conflict zones, and not accountability proceedings, is responsible for allowing this level of continued criminality.

Nevertheless, this analysis does not negate the Sikkink (2011 and 2012) and Weiffen (2012) findings, although it does demonstrate that the effects of trials are not automatic. Domestic human rights trials may still be important transitional components as related to the rule of law, but they are not as effective when done in an institutional or State vacuum.

While the latter is rather intuitive, this analysis also finds that restorative mechanisms can help improve the rule of law, which is something the literature has not previously acknowledged. Amnesties did significantly help law and order, and efforts to return property assisted in establishing a more predictable system of law. Again, these changes did not produce the ideal security or property environments, but their effects are noteworthy. Subsequently, it appears that a "justice balance" is also important for the rule of law, although this requires more empirical analysis.

While it is recognized that the first wave of transitional justice occurred within a conflict, Colombia's 2016 peace accord offers new opportunities. Although it is too early to draw any conclusions about the new policies and their impact on the rule of law, the Justice and Peace process provides important lessons for Colombia's second wave. To Colombia's credit, agents of the State are now subject to a new tribunal, a truth commission has been established with a mandate to consider

all sides, and the government scaled back its promises of justice and reparations to more adequately reflect the country's institutional realities. If done correctly, these changes should help subject the State to the law as well as establish a more predictable and efficient system of justice.

Unfortunately, the effects of transitional justice will still be limited if the State remains absent in many former conflict areas. Although consolidating State governance throughout a large, mountainous country with a jungle is admittedly difficult and resource-intensive, Colombian Senator Antonio Navarro Wolff and others contend that the State also lacks an appropriate concern for the well-being of those in rural, conflict zones.²⁹ Senator Wolff and other congressional members proposed in 2016 a plan to enhance the presence of the State in 172 municipalities over a ten-year period, but the proposal was never adopted by the Santos administration.

If transitional justice is to have a truly transformative effect, the government, as well as Colombia's allies and donors, must muster the political determination and dedicate the necessary resources to establish an enduring presence in areas traditionally neglected. Without this, the rule of law will not be experienced by those victimized, their reparations will be spent without prospects for sustainable subsistence, and other powerful actors will fill the governing vacuum, perpetuating the cycle of violence and victimization.

In terms of a way forward vis-à-vis the study of transitional justice and the rule of law, much remains to be done. For example, several comparative, qualitative analyses would help illuminate other cases and assist in determining if amnesties and reparations improved the rule of law in other countries. Moreover, scholars and practitioners should begin to contemplate how transitional justice can be used to build State capacity. If configured correctly, it is conceivable that transitional justice could help increase State presence while simultaneously delivering truth, justice, and reparations.

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²⁹ Senator Antonio Navarro Wolff and a Procuraduría official, interviews by author, February and March 2016.

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