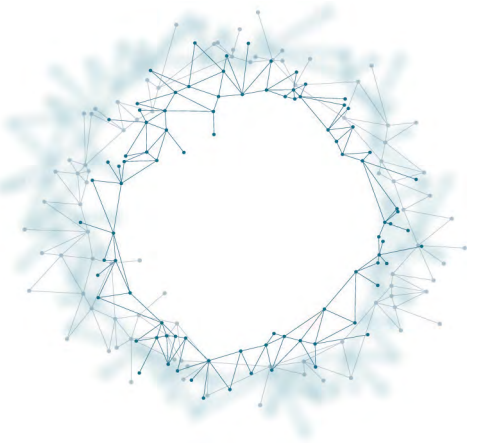
Beyond the Binary

Securing Peace and Promoting Justice after Conflict



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Contents

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Furthermore, the workshop was possible due to the hard work and dedication of Daniel Marín, Kelsey Jost-Creegan, and Silvia Ruiz Mancera, who also handled the final editing of the book and gave us the idea for its title. In the process of reviewing, translating, and editing the chapters, we were able to count on valuable help from Lyndsi Allsop, Sarah Dorman, and Nicolás García. With great dedication and care, Elvia Sáenz, Isabel de Brigard and Ruth Bradley undertook the general editing of the book.

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Introduction: Building and Sustaining the Ecosystem of Transnational Advocacy

Introduction

Discussions on the meaning and scope of concepts such as justice, accountability, and victim satisfaction continue to be fervent topics in specialized circles of what is now known as "the transitional justice field," and in societies suffering from mass violence. Instead of solving the practical and theoretical dilemmas of these interpretative disputes, the experience and knowledge accumulated over the more than three decades since this field has been in existence have served only to deepen the debates and to adapt more of these discussions to new and constantly changing scenarios and contexts.

Contemporary experiences that set out to produce lawful political transitions, therefore, seem to repeat initial discussions in the field, such as the one about the role of criminal law and punishment in a transition policy. But this discussion is far removed from the debates that revolved around this topic three decades ago. Legal and contextual factors create significant differences between the challenges faced by transition processes in the 1990s and current ones. One of these challenges, undoubtedly, is the transformation that international human rights law has undergone, together with the consolidation of international criminal law. Another is the change in contexts: many of the initial discussions on criminal law and punishment took place in different transition scenarios, as most of them were looking for a transition to democracy, not for a transition to peace.

In turn, the discussion is not the same because of academic developments, the experience that has accumulated, and empirical investigations that have been conducted during the last couple of years. Today, not only do we have models to explore, debate, discuss, and criticize, we also have case studies and comparisons that nourish these analyses. However, situations like the ones in Colombia, Nepal, the Philippines or, prospectively, Syria, illustrate the need to continue to

debate, in greater depth, the role that criminal law should play in societies that set out to end armed conflicts by negotiated means.

This discussion is inevitable for an organization like the Center for the Study of Law, Justice and Society—Dejusticia—that works in a country like Colombia, which has embarked on a transition process towards peace that seeks to overcome an armed conflict that has lasted for more than five decades. Stemming from the discussion on the Colombian formula for the transition from war to peace, the coordinators of this publication began to reflect on the multiple challenges faced by societies that set out on this same path, as well as the multiple challenges for the very field of transitional justice, which generates a contemporary application of international normative standards on the fight against impunity.

In the first place, the discussion on form and the definition of procedures and sanctions sparks discussions on the role of contexts in transitional justice interventions. Indeed, a current concern in the literature in this field has been how to interpret the characteristics and necessities of the specific contexts where transition policies are being carried out or promoted (Duthie and Seils 2017). Regarding the specific issue of the role of criminal accountability for atrocities committed, the discussion on contextual differences is presented on several levels: from the controversy over sovereignty and states' margin of discretion to establish their criminal policy to discussions on the acceptance or rejection of traditional ways of confronting crime in different societies.

Second, the theme returns to contemporary discussions on the need to differentiate between paradigmatic transitional contexts (ones that represented the change from authoritarian governments to democratic regimes) and ones that evoke new interests and challenges, such as transitions from armed conflicts to peace (Bell 2016). Violence, generally vertical and in some cases concentrated, as against more horizontal and multi-casual in others, gives rise to differences in the motives, patterns, and repertoires of violence, and this should, in turn, lead us to reflect on whether the criminal response strategy should be different.

Third, the discussion about a post-conflict criminal policy strategy must address the debates on victim participation in transitional processes in general, and justice mechanisms in particular. In contexts of mass violence combined with weak public institutions that lack legitimacy (Waldorf 2017), the challenge of how to guarantee effective, equitable, and non-revictimizing participation by those who were victims in the decision-making process on a global justice strategy is great, especially because the heterogeneous and mass nature of the victims can lead to institutional designs where broad intervention of these interests

may lead to processes failing to progress or conclude, as recent experiences have shown.

Fourth, very little empirical information is still being used to corroborate or reject many of the theoretical assumptions in the field when many of these decisions are being made on how to establish the role of criminal justice and punishment in a transition from conflict to peace by negotiated means. For example, international jurisprudence continues to insist on the idea that a severe sanction is one of the most effective ways to prevent mass atrocities, but very little empirical information exists to determine the real scope of this postulate.

A fifth challenge that arises from the discussion on criminal accountability in negotiated transitions is that of concretely articulating the different and dissimilar objectives that are today attributed to transitional justice. The current hegemonic and holistic vision of the subject has caught the attention and led to much enthusiasm, since it offers a more comprehensive approach to the multiple tasks necessary for social reconstruction after mass atrocities. However, very little information exists about how these objectives are to be achieved by a particular society. For example, how far should social and institutional efforts go for each of these objectives when the model acknowledges that it is practically impossible to achieve every one of them? One of the central questions here regarding the role of criminal action is what state and social efforts should be directed towards judicially clarifying each individual case of human rights violations in contexts of mass violence.

While these questions are important for analyzing the Colombian case, the coordinators of this book consider them to be issues that go beyond the specific needs of this transition and hence common to other cases. This is why we decided, in mid-2015, to invite a group of experts of different nationalities and from different regions to discuss the topic.[1] Our intentions with this discussion were twofold. On the one hand, we believed that hearing perspectives from other latitudes would give our own ideas a breath of fresh air. And on the other hand, we wanted to open up the discussion on these issues to colleagues from other countries, especially the Global South, so as to generate more exchanges and broader analyses of these issues, rather than ones based on a concrete case.

1 The workshop was held on August 13 and 14, 2015, in Bogotá, Colombia. In addition to the coordinators of this book, contributions to the discussions were made by César Rodríguez (Colombia), Tatiana Rincón (Colombia), Howard Varney (South Africa), Andrew Songa (Kenya), Claudio Nash (Chile), Marjana Papa (Albania), Iván Orozco (Colombia), Juan Papier (Argentina), Oscar Parra (Colombia), Meghan Morris (United States), Barney Afako (Uganda), and Kamarulzaman Askandar (Malaysia).

To promote dialogue, the coordinators of this book wrote a paper that would act as a stimulus for exchanging ideas and engaging in debate. That text, which was discussed at our event in 2015, forms the central article of this book. Many of the guests invited to our conference presented written responses to the text, and these are presented as subsequent chapters in this compilation.

The central purpose of the text that we have presented for discussion, both at the conference and in this book, is to initiate a conversation on how to solve difficult dilemmas. We appreciate that some of the proposals may come across as controversial, but what we are looking for is, precisely, to open up the possibility of thinking in an innovative way about how to confront these challenges.

The main objective of our text is to place on record the need to formulate answers to the question of the role that criminal action and punishment should play in negotiated political transitions from war to peace. There are two reasons for our making this observation. On one hand, given the institutional, legal, and political challenges facing societies that nowadays attempt to take this step, there is a need for the issue to be analyzed. On the other hand, the conclusion reached from an initial analysis is that the academic and the practical seem to be trapped in a polarizing discussion between those who defend a legal interpretation of the duty to investigate, prosecute, and punish—which appears to threaten the possibility of achieving negotiated transitions—and those who, in order to prevent that risk, deny or resent the existence or consolidation of such a principle.

Faced with this situation, our proposal seeks to encourage a dialogue on the subject that includes legal discussion, empirical research, and philosophical debate. To initiate this dialogue, we present our contribution to a possible solution. We commence this task with a legal review of the content and scope of the duty to investigate, prosecute, and punish, from the perspective of international law. In this analysis, we present both the points on which we believe there is a legal consensus and also those where, in our opinion, there are gaps or issues that can be interpreted in different ways. We conclude from this exercise that there are strong legal bases for preventing a staggered debate at both ends. Hence, our proposal searches for an intermediate point: we begin by recognizing that the state's duty to investigate, prosecute, and punish is an obligation that has been consolidated internationally as an *ius cogens* norm, but we maintain that this is not an absolute duty and that any concrete implementation of it must be mediated by conducting a balancing of interests exercised in contexts where application of

this duty may conflict with other legitimate interests of a society, such as peace.

In order to carry out this second step, namely the concrete balancing of interests, we turn to considerations based on philosophical debate about the role of transitional justice and criminal justice, and the relationship between these two in contexts of negotiated transitions from conflict to peace. Furthermore, we make use of available empirical research to aid consideration of the arguments. Based on these two steps, we conclude by presenting what we consider serve as guidelines for ascertaining the role of criminal law and punishment in contexts like these.

The papers form the contributors to this book in response to our chapter met our expectations, as coordinators, in terms of what we set out to achieve. Each of them aims to present, from a specific perspective, a reflection on the central text by putting forward a contrary or complementary view. Several of the papers, for example, emphasize legal or strategic disagreements with our proposal. Others, meanwhile, mention points that do not necessarily lead to disagreement, but which are considered to have not been sufficiently addressed in our text. Other papers clearly focus on the legal aspect, while others reflect on the legal proposal, based on experience gained from other contexts, and, finally, some others are oriented more towards the dialogue between the legal and other social sciences. On various occasions, meanwhile, the papers make specific references to the Colombian case, and their considerations and conclusions reflect the needs, expectations, and limitations of societies that are on the way to bringing armed conflicts to an end through negotiation.

Two of the papers present eminently legal responses and, based on their legal analysis, tend to disagree with certain elements of our proposal. In the first one, entitled "International Human Rights Standards in the Context of Transitional Justice," Tatiana Rincón-Covelli draws up a comprehensive inventory of decisions made by international human rights bodies in order to evaluate the possibility of resorting to criminal prosecution strategies such as case selection in transition contexts. In her legal study of decisions made by the United Nations Human Rights Committee and various other decisions by the Inter-American Court of Human Rights, Rincón-Covelli maintains that transitional justice reaffirms the fact that states have a duty to meet their international obligations on human rights, especially the obligation to impart justice. This obligation, the author remarks, must be examined from three perspectives: (i) the nature of the crimes investigated; (ii)

the obligation to guarantee the right to equality before the law; and (iii) satisfaction of the right to justice. She therefore considers that any interpretation of those standards which limits the interpretation of international agreements is wrongful. Consequently, she considers that the challenge, in the case of armed conflicts in negotiated transition scenarios, lies in "build[ing] new standards, not in undermin[ing] those already in place, but complementing them."

The article entitled "Transitional Justice and the Limits of the Punishable: Reflections from the Latin-American Perspective," by Claudio Nash, is in a similar vein. However, there are certain differences between the two texts in terms of their approach and response to dilemmas. Nash starts from the question of how much impunity a society in conflict needs in order to secure the peace process. He aims to determine the viability of conditional amnesties that do not affect progress in a peace process. While he is of the opinion that every answer should take into account the sociopolitical context of the country in which the transition process takes place, he turns to analyzing the lessons from previous transitional justice processes carried out in Latin America in order to word his response. He therefore concludes that, given inter-American normative standards, an amnesty law, even if it were to be approved by a democratic regime and ratified by its citizens, is not necessarily legitimate in the eyes of international law.

Nash also approaches the matter from a criminal policy perspective. In this regard, he concludes that a possible lack of criminal response by the state to these types of violations may lead to "chronic impunity," which would foment crime in the near future, instead of preventing it. The author puts forward an additional normative argument to complement his thesis, namely the legal culture that exists in Latin-American society. According to Nash, given the developments of both the Inter-American Court and national courts, the region has created a generalized legal culture that would reject a formula for impunity or for alternative measures that was less exhaustive than that required under current inter-American standards. But this does not mean, in Nash's view, that an alternative which aims to balance the interests of justice against those of peace does not exist. His proposal is not to turn to figures such as amnesty or selection, but rather to have alternatives consisting of different punishments, with clemency and mercy measures for the peace process, with the criminal response of jail being reserved as punishment for the most serious crimes.

The contribution by Howard Varney and Michael Schwarz, entitled "The Pitfalls of Post-Conflict Justice: Framing the Duty to Prosecute in the Aftermath of Violence," follows this line of analyzing legal

standards with relevant regional practice. Unlike the previous articles, which focus on international human rights law, Varney and Schwarz analyze international criminal law, especially the Rome Statute. In their legal analysis of these standards, the authors conclude that "penal consequences of serious crimes that do not involve incarceration are not necessarily offensive to the Rome Statute, provided they are seriously implemented and are not intended to circumnavigate a country's obligations." To reach this conclusion, the text is based on an analysis of the provisions established in the Rome Statute, and on three case studies: Sierra Leone, Timor-Leste, and South Africa. Based on the positive and negative aspects of these conflicts, the authors state that "in the aftermath of conflict and oppression, criminal proceedings ought to be seen as part of a larger set of measures, such as truth seeking, reparations, and institutional reforms."

The following text by Tara Van Ho—while showing some support for the idea that under certain circumstances states are justified in not punishing criminals completely since certain interpretations of international law are required—concentrates on dealing with what the author considers to be an aspect yet to be addressed by the central text, namely the role of victims in these processes. Throughout the text, she explores and reflects on the difference between "good victims" and "bad victims" and what role victims should play in peace negotiations. The article investigates how relationships between state and criminal and between state and victim can affect the victim–criminal relationship, concluding that it is of little importance, and it likewise proposes a relationship structure where victims are more relevant—giving the victim a more central role—claiming that prosecution is not necessarily for punitive purposes, but rather is intended to protect victims and provide reparation for the damages they have suffered.

Finally, the book closes with a text by Oscar Parra entitled "Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges." In his fascinating article, the author sets out to expand on some of the problems identified in the initial article, especially with reference to Inter-American Court practice and jurisprudence, in order to question how an international court should develop jurisprudence that takes into account the challenges posed by international contexts. He reviews the extensive jurisprudence on the subject, and points to two important factors for evaluating the role of this type of court: (i) litigation strategies and procedural steps in a case, and (ii) studying the context when it comes to evaluating an institutional design for transition. His reflections not only illustrate a critical but constructive view of how the Inter-American Court

could deal with these cases, they also serve as a guide that any court with similar characteristics can refer to and reflect on.

As coordinators of this book, we hope that the central text and the articles in response pave the way to dialogue on this subject. All our theses and arguments are up for debate. We admit that they are complex dilemmas and that our positions can be contested. If this is where the book leads to, our objective will have been achieved.

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1. The Challenges of Negotiated Transitions in the Era of International Criminal Law

Nelson Camilo Sánchez and
Rodrigo Uprimny