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Just collateral damage? Accountability of economic elites in peacebuilding and transitional justice in Colombia

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Abstract

Analyzing how transitional justice (TJ) mechanisms address the role of economic and political elites in contexts of widespread violence is crucial for understanding their possible transformative impact. The type of challenges faced by TJ instruments when trying to deal with economic elites involved in human rights violations also reflects the extent and degree of these groups' power in a specific transitional context. Looking at the two main transitional justice processes in Colombia, this paper argues that accountability for these privileged actors tends to materialize in cases in which the alliances between different kinds of elites are threatened, or even collapse. However, as this article will show, judicial TJ mechanisms on their own can only have a very limited transformative impact on the accountability of economic elites and their liability for human rights violations in the absence of strong support by state institutions. TJ instruments can provide an exceptional framework to trigger and motivate meaningful transformations. Nonetheless, the concrete realization of these changes far exceeds the possibilities, capacity, and resources of TJ, which in and of itself cannot replace state institutions, especially an ordinary justice system that should continue to make progress on these cases.

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INTRODUCTION

Between 1982 and 2016, at least 61 peace agreements including disarmament, demobilization, and reintegration processes (hereafter DDR)[1] were signed between illegal armed actors and the Colombian state.[2] None of these agreements addressed the role of elites or corporate and political complicity in human rights violations in the conflict. The Colombian case is no exception to many other contexts where peacebuilding and the implementation of transitional justice (hereafter TJ) does not usually include accountability measures to address the role of economic actors during conflict. Though several studies have shown the involvement of economic elites in armed conflicts and authoritarian regimes to be a common phenomenon that is frequently functional to the reproduction of their power and wealth,[3] criminal accountability for these actors remains exceptional, a practically "collateral" or incidental outcome of the TJ process based on various factors, such as the breakdown of elite alliances and international and/or civil society pressure. However, even in such cases, effective prosecution and conviction are very difficult to achieve. This begs the question, are economic elites untouchable actors in TJ settings? If not, what conditions are needed to make them subjects of accountability and to enable more transformative impacts? To answer these questions, this article examines the approach of Colombia's transitional justice processes to the role played by economic elites in the armed conflict, and its challenges. Colombia offers a compelling case study to empirically assess to what extent TJ mechanisms can transform political violence by addressing the responsibility of economic actors in the commission of mass atrocities.

Over the last 2 decades, Colombia has undertaken two large transitional justice processes that exhibit the significant challenges of holding economic elites accountable, as well as of enabling a transformative approach to the causes and actors underlying the continuity of political violence. As laid out below, both processes have similarities as well as significant differences in regard to their approach to and impact on economic elites. The first demobilization process was of the paramilitary group, United Self-Defense Forces of Colombia (Autodefenss Unidas de Colombia—AUC), known as "Justice and Peace," which was carried out between 2003 and 2010. The second process began with the Colombian Peace Agreement signed in 2016 between the FARC guerrilla and Colombian government, which designed a comprehensive TJ system—the *Sistema Integral de Verdad*, *Justicia*, *Reparación y No-repetición* (SIVJRNR)—to put an end to a 60-year-long armed conflict, provide accountability for serious crimes, and redress victims' rights.

In general terms, an understanding of TJ as transformative justice is relatively new; as such, clarity is lacking on how it can be achieved. The key idea is that transitional justice must address the underlying root causes of socioeconomic inequality in societal conflicts if it is to be truly effective in ensuring non-repetition of crimes and achieving peaceable, inclusive democracy.[4] In this regard, various authors point out that neither full prosecutions nor thorough truth commissions can avoid the recurrence of violence if core social, economic, and political grievances are not tackled.[5] A way to achieve this goal, as I will argue here, is to address the judicial inequalities that are a key condition for the reproduction of social, economic, and political injustice. In Latin America, judicial inequalities are reflected in the historically unequal formulation and application of the law in several areas, with serious human rights violations being prime among them. This inequality is reflected both in unequal access to justice (the access of marginalized groups is lesser than that of the upper classes) and in the benefits they receive in civil and criminal courts, including in TJ settings. Inequality before the law, a widespread phenomenon in Latin America, constitutes another form of structural inequality. By focusing on economic elites, this

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paper contends that to have a transformative impact, TJ should also address judicial inequalities; doing so in turn requires accounting for the role and responsibility of those actors who exercise violence by means of their support or financing of it, or from the benefits they obtain therein. This broader approach to transformative justice also means having deeper understanding of the multiplicity of actors involved in human rights violations in armed conflicts, beyond the typical approach centering armed groups.

Thus, if the pursuit of accountability for economic elites in TJ would be crucial for adopting a transformative justice approach that contributes to the construction of a robust and lasting peace, it would be rather naïve to assume that this kind of accountability might succeed without so much as the resistance or backlash of the elites themselves. Some scholars grant elites magnanimous power in their influence on transitional processes generally and peace processes specifically. Di John and Putzel[6] consider that elites "set the constraints for what can and cannot be achieved" in transitional societies. Similarly, Padraig McAuliffe[7] argues that it is impossible to carry out a successful transitional and transformative justice process absent the incorporation of elites and their interests. Though there are real possibilities of cooperation with elites in the case of restorative mechanisms, such as truth commissions and reparation programs, the scenario becomes more contentious when it comes to retributive justice. In this sense, transformative justice often involves the challenge of operating in an existent order that commonly benefits economic elites. As described by McAuliffe, TJ in this way becomes a conflict-ridden process in which numerous and different social actors have inevitable involvement at the domestic level, some of them as promoters and others as resisters to justice projects. The friction and struggles over opposing interests between these actors may condition the transformative potential of TJ, and with it the opportunity for significant and lasting change. Thus, with a focus on the Colombian TJ processes, this paper raises the following questions: Under what conditions may a transformative justice approach to TJ stand a chance when it comes to the accountability of economic elites? What scope, achievements, and constraints exist?

To analyze these questions, this research used qualitative methods of online interviews with different actors and experts involved in Colombia's current TJ process, including researchers specializing in corporate accountability, advisors, and staff in TJ institutions in Colombia, and members of civil society organizations. In order to preserve the confidentiality of interviewees, the anonymity of their statements is maintained in this article. In addition, the research used secondary sources, such as academic literature on transitional justice and corporate responsibility and court decisions and reports, along with a survey of press data and follow-up to reports prepared by civil society organizations.

For a proper analysis of TJ's approach and the challenges of accountability for economic elites, the article first gives a brief account of TJ scholarship on elites and explores the relationship between elites and the different actors of the armed conflict in Colombia, as well as its patterns of violence. While providing an introduction to the two main TJ tribunals in Colombia—the Justice and Peace Tribunal dealing with paramilitary violence, and the Special Jurisdiction for Peace established by the 2016 peace agreement—this article looks at how legal instances handle the involvement of economic elites in human rights abuses. The last section explores the implications and challenges of TJ when dealing with elites, as well as the need to reinforce articulation with state institutions to implement a transformative justice approach and achieve lasting peace.

THE INVISIBLE ROLE OF ELITES IN THE TRANSITIONAL JUSTICE APPROACH

Although elites are one of the central actors in peacebuilding and transitional settings, they have not received much attention in TJ policies and literature from the beginning. This has been gradually changing over the last few years, however. While the initial JT paradigm in Latin America in the 80s and 90s focused more on the classic binary of "victims and direct perpetrators," in a second moment the focus broadened to the role of other types of actors whose different participation or intervention was nonetheless essential to the crimes committed during dictatorships and armed conflicts, many times to their benefit.[8] Thus emerged the concepts of "bystander complicity" and "beneficiaries" in TJ literature,[9] evidencing that widespread gross human rights violations can only occur while sectors of the population, including some elites, actively or passively support and/or benefit from it. Using this beneficiary concept with reference to the case of Apartheid in South Africa, Mahmood Mamdani was one of the pioneers who claimed that TJ should pay more attention to those actors who accumulated wealth from authoritarian regimes, even without direct involvement.[10] In fact, the inclusion of an analysis of elites in TJ policymaking and literature was a gradual process resulting from broadening the definition of the types of violence it ought to address, shifting from the violations of physical integrity and civil and political rights that dominated the TJ paradigm in early decades to a more structural approach, including socioeconomic rights and inequalities. By expanding the scope of injustices that should be addressed beyond abuses to bodily integrity, TJ also broadened the number and type of actors involved, including elites. While there has been some important work on elites in TJ processes,[11] there is still a long way to go. In fact, McAuliffe claims that there has been no sustained analysis in TJ literature of who elites are, what they do, the divisions between them or the incentives they might have to engage in societal change.[12]

However, the term and identity of "elites" is not easy to define, and their meaning and relevance could vary according to the context and social structures in which they are immersed. In general, the term refers to groups with access to power that enjoy privileged social, political, and economic status despite being among a minority of a given society. Dahl describes them as a "minority of individuals whose preferences regularly prevail in cases of differences on key political issues."[13] In turn, the analysis of elites entails understanding them in their diversity and plurality,[14] including their different actions and interests, which can contradict. The conceptualization of elites as plural actors with power[15] identifies them as those who hold social positions from which they can adopt decisions that have profound consequences on different settings such as politics, the economy, the media, and the judiciary. This notion of elites is not only limited to actors exercising political power, but also includes those having a direct influence on the actions of political elites and thus, on social, political, and economic environments. Over the last 10 years, meaningful research has gradually developed to analyze how the role of elites, including economic actors in Latin America, is addressed by TJ processes and mechanisms.[16] However, further study is still necessary, especially regarding breakthroughs in and concrete consequences of such TJ approaches.

Alliances of violence, legitimation, and impunity

Since elites are not homogenous, nor their coalitions static, in order to be transformative, TJ requires a sophisticated approach that can identify how elite relationships are drawn and re-drawn

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over time through alliances. Different kinds of strategic alliances are one of the key reproduction mechanisms deployed by different types of elites in order to continue accumulating wealth, power, and resources. Certainly not all types of elite alliances are illegal or crime-oriented, though violent tactics against other sectors of the population tend to benefit both legal and illegal practices of the elite, especially in the context of armed conflict. In conflict settings, the alliances of the elite usually involve economic elites and various (illegal and legal) armed actors, as well as political and judicial sectors, united behind different goals such as security services and the repression of potential and real opposition movements. In cases like the Colombian armed conflict, different kinds of alliances between political, economic, and armed elites have been functional to the reproduction of violence and the commission of serious human rights violations. Direct or indirect collaboration with those who carry out violent and/or repressive actions helps elites of all stripes to increase, maintain or protect their position of privilege and wealth. Defense from guerrilla attacks frequently became conflated with the elimination of social and political resistance to their power.

The most researched alliances in Colombia are between economic elites and paramilitary groups and are illegal in nature.[17] Several research studies have revealed the links between paramilitaries and business elites in the appropriation of resources and land dispossession.[18] The relationship between economic elites and paramilitaries has taken various forms over time, including the former's use of the latter's private security services on their farms in the face of guerrilla group attacks, sabotaged infrastructure, the disruption of economic activities, or in response to extortion.[19] Paramilitary action was also enlisted to repress the social protest of trade unionists, activists, community leaders, human rights defenders, or any other individual or group opposed to paramilitary or elite interests. Jacobo Grajales describes in detail how in the 1990s there was a large increase in murders and persecution of trade unionists by paramilitary groups, in parallel to the growth of the banana industry in the regions of Urabá and Magdalena.[20] According to the work of Bernal Bermúdez and Marín López,[21] the periods of most intense relationship between economic actors and paramilitaries were also those of escalated paramilitary violence, as reflected in the number of victims of displacement, land grabbing, dispossession, and homicide, particularly in the first years of the millennium, when the United Self-Defense Forces of Colombia (AUC) expanded following its 1997 creation.

Several studies show that, on repeated occasions, a partnership not only between economic actors and paramilitary groups but also state security forces, was a key mechanism of maintaining or increasing the profits of economic elites at the cost of the dispossession of entire communities and populations through different violent means. The Colombian Truth Commission registered 258 economic actors, including individuals and national and international companies, allegedly involved in the Colombian armed conflict through the sponsorship, tolerance, facilitation, instigation, or command of the violation of human rights for profit, with the most pronounced involvement hailing from the oil, palm oil, agricultural, mining-energy, and livestock industries.[22] Many Indigenous and Afro-Colombian communities have been subject to displacement, homicides, disappearances, and dispossession, while their land has been grabbed and used for intensive deforestation, agroindustry, and livestock activities.[23]

These alliances, however, would be ineffective without the participation, implicit endorsement or active omission of different legislators and state institutions such as the security forces, the judicial system, and local governments. Indeed, especially in the 1990s, the growth of paramilitary groups was fostered by legislation that favored armed security. In 1994, in response to the landowner lobby's claims, namely those of the Federation of Cattle Ranchers (FEDEGAN), the administration of then-President César Gaviria Trujillo authorized security companies operating

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in rural areas the use of weapons, as well as to have their members trained by the army.[24] This measure permitted paramilitary groups to become legally established firms, thus enabling companies and individuals paying for their "security services" to do so legally. The underlying premise behind the Convivir (literally, "Coexistence")—as these rural security companies were known—is that they would function as a means of public regulation of paramilitary forces.[25] However, the role of the state was not limited to this type of measure aimed at forging ties between paramilitaries and economic elites. In Grajales's analysis of the responsibility of paramilitaries in land grabbing in Colombia, he analyzes, for example, how these groups counted on the support of large bureaucratic and political networks of mayors, governors, and public servants who aided the legalization of profits and property rights obtained by agribusiness elites through violence.[26] These alliances including state institutions and actors were mutually advantageous. They provided the paramilitaries with political and bureaucratic access to resources, enabling them to legalize some of their assets, while facilitating private benefits and institutional influence for business elites, politicians, and public officials.[27] Grajales thus argues that armed violence becomes institutional violence when public institutions become complicit in violent dynamics of expropriation, expulsion, and displacement by legalizing property titles for new tenants. State institutions then play a significant role as a driver of social exclusion[28] and an ally of the business elites benefitting from criminal action.

However, this is not the only institutional practice that legitimizes violent actions to the benefit of economic elites. High levels of impunity of serious crimes conducted with the support or funding of elites is a clear mechanism for the reproduction of elites' illegal actions, and consequent benefit from it. In his analysis of how unequal power relations affect the application of the law in Latin America, Guillermo O'Donnell argues that the law is frequently applied with discretion and rigorous severity to marginalized sectors of society, while being permissive with elites.[29] Privileged sectors exempt themselves from abiding by the law, either directly or through their connections. In his words: "To be powerful is to have impunity."[30] Against this backdrop, state violence and the elites who permeate and influence the state are often not subject to criminal prosecution in the same way as are other citizens, and when such cases do go to court, they tend to be extremely bureaucratic, slow, and deficient in evidence. Very few result in convictions. The judicial system thus plays a key role in the perpetuation of violence, much of which benefits certain elites, and cements socioeconomic inequalities over time.

The widespread impunity of elites is also true of TJ processes. The actors involved in repressive regimes or armed conflicts are not always prosecuted or punished in the same way or on the same scale. While the security forces and illegal armed groups are the main actors facing charges, the role of companies and their cooperation in the perpetration of gross human rights violations remains one of the most critical challenges for criminal TJ in Latin America. Still, while obtaining justice in most cases of human rights violations involving economic elites is often the exception rather than the rule, criminal prosecution of such cases is not entirely impossible, as several cases show.[31]

This paper argues that accountability of these privileged actors tends to occur (not only but especially) in cases where the aforementioned alliances between different kinds of elites collapse in one way or another. Considering that the strategic alliances of elites are driven by self-interest and mutual advantage, if one party ceases to receive benefit or worse, is harmed or betrayed by a faction of the group, a breakdown is inevitable, with potentially serious consequences for all members of the alliance. As discussed below, in some cases and under certain conditions, TJ can operate as a disruptive mechanism, contributing to the breakdown of alliances between elites and promoting a process of truth and justice with great transformative potential. However, as the

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Colombian experience shows, these clashes tend to be less the product of rational, top-down TJ design than the outcome of broken loyalties among elites and lost benefits that materialize once TJ mechanisms are in place. The potentiality of clashes between elite interests and alliances is significant in transitional processes, at times making prosecution and sanctions become feasible realities.

TRANSITIONAL JUSTICE AND ELITES IN COLOMBIA

None of the peace agreements signed in Colombia until 2016 attempted to deal with the role of economic elites' human rights violations in the conflict.[32] In them, a militarist or minimalist approach was adopted to the conflict[33] in which the responsibility of political and economic elites was relegated and deprioritized. This approach should not be surprising considering that many of the very elites involved in human rights violations either have been involved in the design of peace processes or have actively boycotted them, especially in the case of negotiations with guerrillas. For instance, the Belisario Betancourt administration (1982–1986), which engaged in a comprehensive peace effort to find a negotiated solution to the armed conflict with four guerrillas groups, faced harsh opposition by both military elites and rural elites, particularly landowners, who felt their interests threatened by the possible adoption of some of the rebels' demands, particularly those affecting land distribution.[34] Such stumbling blocks and reactionary opposition from different elites repeatedly contributed not only to the hampering of various peace efforts, but also to the perception until well into the 2000s that a political solution to the conflict merely meant the demobilization of illegal armed actors, without examining the root causes underlying violence, civil interests or reparation measures for victims. However, this approach was gradually changed over time with the introduction of different transitional justice mechanisms from the early 2000s until the present day.

Justice for elites as a matter of collateral damage: accountability in the justice and peace process

Colombia has undertaken two large transitional justice projects linked to DDR processes. The first one began in 2003, during the administration of then-President Álvaro Uribe, with the demobilization of AUC paramilitary groups and the so-called "Justice and Peace Process" implemented within the framework of Law No. 975 of 2005. This special legal framework involved the establishment of an extraordinary criminal tribunal that envisaged reduced sentences of between 5 and 8 years for demobilized paramilitaries who had committed crimes against humanity, in exchange for full confessions of crimes, restitution of illegally obtained assets, and reparations for victims of paramilitary violence. This was the first TJ process in the country in which illegal armed groups were not granted full amnesty as in past DDRs processes.

The Justice and Peace Process was not designed to identify and prosecute the role of economic actors in the commission of crimes, only the crimes of paramilitary groups during the armed conflict. However, within the context of confessions by paramilitary commanders known as "free statements" ("versiones libres"),[35] an unexpected rupture of pre-existing alliances took place. In what I call "collateral damage," the names of companies, businesspeople and politicians linked to paramilitary operations and crimes began to emerge. This allowed for a significant amount of information to be gathered about how those groups were created, operated, and expanded

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their territorial power, as well as about the strategies they used to gain political and economic power through alliances with different legal actors.[36] In their confessions, the ex-members of the AUC referred to public figures and companies such as Drummond, Chiquita Brands, Postobón, Ecopetrol, and the National Federation of Livestock Farmers.[37] Thus, within the framework of the TJ process, once unbreakable alliances between paramilitary chiefs and elites began to crumble. The reasons for the broken silence could be attributed, on the one hand, to the requirements of the Justice and Peace Tribunal to tell the whole truth but, on the other hand, and as pointed out by several interviewees, to the need to justify and provide political and economic explanations for paramilitary crimes. As stated by one of the interviewees in this research, a Colombian professor with many years expertise on the topic of paramilitary formation and development in Colombia, the alliance between paramilitary and civil elites was broken in an attempt to keep certain legitimacy:

> I think that they [the paramilitaries] broke their silence precisely because they were the only ones held responsible...I think that certain links between them and elites began to break down. And then they started to say, "well, ok, I did it, but I was not alone, there were others." And it's not fair that the people in government or those out there benefiting from all this are not implicated.... The armed actors wanted to prove that they were not acting alone.... Let's say that the question of legitimate action was different if they had been a group of fighters wanting to kill the enemy, than if they had been fighters with social support, an important social base in very high places.[38]

This broken silence had different impacts and unexpected reactions both from paramilitary leaders and some of the civil sectors involved, especially politicians. On the one hand, in an effort to stop confessions that could link the names of renowned businessmen and politicians to paramilitary crimes, the Colombian government ordered the extradition of 14 of the most important former paramilitary leaders who were being tried under the Justice and Peace Law, even though a condition of the negotiations between paramilitaries and the government had been a promise of nonextradition to the United States on drug trafficking charges.[39] Critics decried that the extradition of paramilitary leaders took away one of the main sources of information for both the victims and the judicial authorities.[40] In fact, the haste with which the extraditions were decided by the Colombian government—effectively silencing the paramilitary leaders—did nothing more than reveal an open secret, as highlighted by the above-mentioned interviewee:

> [In the Peace and Justice courts] we started to see that many of the paramilitaries were intricately linked to the political and economic elite.... And they basically began to speak about...who else took part [in their crimes]; so much so, that several of them were extradited when they started to say too much.... That is how the narrative came into public light about that link between them [the paramilitaries] and political and economic elites.[41]

According to different interviewees, these extraditions were orchestrated by the government in retaliation, as a reaction to the declarations of well-known paramilitary chiefs, such as Salvatore Mancuso and Sal Fredy Rendón Herrera (alias "the German"), linking important politicians and companies to their crimes. As affirmed in an interview by a judge on these cases, such extraditions were effective both in terms of obstructing access to truth, and of imposing an effective sentence:

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> I think that the extraditions haven't allowed for even half of the truth to be disclosed. The contributions to the truth have been significantly handicapped. We haven't seen any paramilitary leaders serve a full conviction for paramilitarism. They all went to the US or died. And that hampered the disclosure of the truth about the influence of elites, in particular economic ones, on the paramilitaries.[42]

Extradition therefore operated as a disciplining and retaliatory mechanism by some civilian elites against the paramilitaries who dared to speak and break their joint pact of silence. Here we can see how TJ is unable to escape the power dynamics intrinsic to the context in which it is applied. TJ is not an isolated construct, but rather is intertwined with the political and economic context in which it takes place. Against the initial transformative impulse that could have been galvanized by the confessions of paramilitaries in special courts, the disciplinary use of extradition was an expression of the prevailing power relations that TJ seemed unable to overcome. Relatedly, the lack of effective cooperation with the ordinary justice system reduced the transformative impact TJ could have in regard to the accountability of economic elites.

In the 35 rulings handed down by the Justice and Peace courts between 2011 and 2015, 439 business actors were mentioned.[43] However, since under the terms of Law No. 975 the information provided could only be applied to the prosecution of members of illegal armed groups—but could not be used to open investigations into civilians within the framework of the TJ criminal process—whenever the information provided in the free statements involved other type of actors, it was referred to another unit of the Prosecutor's Office to start a new criminal investigation in the ordinary justice system. This process was known as "compulsa de copias," or remittance of certified copies. The Attorney General's Office then had to open new investigations into the civilians mentioned in the paramilitaries' statements and apply ordinary criminal legislation. The results of the investigations in the ordinary justice system have had different impacts on political and economic elites. Circa 470 politicians (including civil servants, municipal council people, mayors, deputies, and governors) were involved in criminal investigations.[44] Of them, more than 60 congressmen and seven governors have been convicted for their links to paramilitary groups as part of what is known as the "parapolitics scandal."[45]

The impact on economic elites was, however, less prominent. In late 2015, having made little progress in the ordinary justice system, a special group of prosecutors was set up in the ordinary justice system and tasked with conducting 50 investigations into the financers of paramilitaries. As of 2018, there were 15,291 pending requests before the Attorney General's Office, of which only 10% were formally investigated.[46] Bringing these cases to justice has proven to be slow and bureaucratic. In addition to a lack of judicial willingness and political support to investigate, there are also certain evidentiary hurdles. As explained by Bernal Bermúdez and Marín López,[47] in cases involving the participation of civilians, evidence that can prove the direct or indirect link of businesspeople to the armed conflict is hard to come by.

Elites in the special jurisdiction for peace

The second TJ process was implemented within the framework of the Peace Agreement between the Juan Manuel Santos administration (2010–2018) and the FARC-EP. After 4 years of negotiations in Havana, in November 2016 the parties signed the so-called "Peace Agreement to End the Armed Conflict and Build a Stable and Lasting Peace." The Agreement not only included the adoption of a set of policies allowing the FARC's transition to political life, but also

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contemplated the implementation of a TJ approach known as the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (Sistema integral de Verdad, Justicia, Reparación y No-Repetición- SIVJRNR) to build peace, access to truth and justice, and to provide reparations for the victims of mass atrocities and guarantees of non-repetition. Within the SIVJRNR, the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz- JEP) is the judicial body tasked with investigating, prosecuting, and punishing those involved in the armed conflict. In doing so, the JEP applies a restorative approach with special rules that offer perpetrators benefits such as reduced sentences[48] in return for their contribution to truth, reparations, and non-repetition.

One of the most novel and significant aspects of both the Peace Agreement and the SIVJRNR was the inclusion of not only combatants but also so-called “civilian third parties,” in an attempt to go a step further toward accountability and to bring the civilian actors involved in the war to justice.[49] The concept of civilian third parties is broad and encompasses two types of actors. On the one hand, it refers to individuals who, without being members of armed groups, contributed directly or indirectly to the commission of crimes in the context of the armed conflict—whether businesspeople, landowners, livestock ranchers, peasants, etc.—and, on the other hand, state agents not belonging to the security forces who, through the services offered by territorially decentralized entities, were involved in the design or execution of criminal conduct related to the armed conflict. It is worth noting that the concept of civilian third parties cannot be equated with elites, as the former encompasses the latter but also other types of civilian actors with scarce political and economic power whose actions nevertheless contributed to the commission of crimes in the conflict. This is the case, for instance, of civilian recruiters of young victims that were killed extrajudicially by the army in cases known as “false positives.”[50] In other words, the term “civilian” encompasses the entire chain of collaborators and beneficiaries ranging from elites to the lowest links. Hence, while the possibility exists of bringing elites to justice in the system, the prosecution of civilians is not tantamount to trying elites.

As a consequence, the JEP was initially vested with powers to prosecute not only the crimes committed by guerrilla members or members of the security forces but also the actions of those financing and collaborating with paramilitary groups or with any other actor in the armed conflict. What is more, pursuant to the Agreement, the Attorney General's Office had to forward the investigation requests it opened in the Justice and Peace process involving businesspeople to the JEP.[51] This broader approach including civilians provided the JEP with a huge transformative potential for many sectors of society. It especially created great expectations among victims and civil society that not only legal cases against business elites, which had been dragging on in ordinary courts, could finally move forward in the JEP, but also new cases against more economic actors involved in violence. This was a crucial expectation considering that, far from a matter of the past, many of these economic actors continue to be behind various dynamics of violence in different regions of Colombia. Thus, the possibility of these actors being tried in the JEP implied a promise of achieving real peace for many of the communities that continued to be victims of violence, even after the signing of the Peace Agreement.

In spite of the Peace Agreement and the broad TJ and transformative accountability model it sought to implement, significant hurdles largely supported by groups of elites hindered the possibility of meaningful change. The first such obstacle was the victory of the “No” vote in a plebiscite carried out in October 2016 to consult the population on its approval or disapproval of the Peace Agreement. 6,430,170 “no” votes were cast (50.22%), opposite 6,371,911 “yes” votes (49.77%).[52] The reasons for the result are manifold, including a strong political campaign carried out by the most conservative sectors and economic groups, which took advantage of the complexities of the Agreement to spread false rumors about its measures and incite

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fear. Some of these false rumors referred to supposed changes that would take place if the Agreement were signed to the detriment of elites and conservative sectors of the population. One example was a rumor that former maximum leader of the FARC, Timochenko, would become the next president of Colombia if the Peace Agreement were signed.[53] Others claimed the Agreement permitted land expropriation and total impunity for the crimes against humanity of demobilizing guerrillas.[54] According to several studies, the "No" campaign counted on a strong emotional component. In this regard, Gómez Suárez explains that the pro-Uribe and conservative sectors voting "No" used rhetorical and discursive strategies, what he describes as an "arsenal of rhetorical devices" linking the dissemination of rumors and misinformation with emotional appeals to fear of the threat of what could happen if the Agreement were approved.[55]

Though the "No" campaign intentionally misled people about the content of the accord, it would be inaccurate to claim that the "No" vote was the result of false information alone. It was also a reaction to the inclusive and progressive character of the Agreement. Although the peace accord did not provide a singular definition of peace,[56] it clearly aimed to build more inclusive and plural peace by addressing historical social and economic inequalities, as well as a differential, gender and non-discriminatory approach giving voice and space for the demands of many marginalized and victimized groups, such as women, the LGBTQI community, Indigenous and Afro-descendent communities, and small-scale farmers. Indeed, the accord was groundbreaking and potentially transformative not only in its inclusion of measures for land restitution, the prosecution of ex-combatants as well as civilians involved in crimes against humanity, but also in that it incorporated and recognized an intersectional and even regional approach. As Valenzuela stresses, the accord makes explicit and "repetitive references to the need to create and promote tolerance, peaceful coexistence, solidarity, respect for differences, peaceful conflict resolution, democratic culture, equality, nondiscrimination, social justice, reconciliation, non-stigmatisation, pluralism, the outlawing of the use of arms, respect for human rights and gender equality."[57] The highly inclusive and progressive nature of the Agreement, including the recognition and advancement of LGBTQI rights, generated opposition from various conservative sectors of Colombian society, including the lackluster support, if not outright rejection, of evangelical and Catholic churches. The conservative sectors used this to argue there was "gender ideology"[58] in the accord that went against "family values,"[59] going so far as to claim that the accord tried to impose "homosexual dictatorship."[60] Conservative perspectives, many of them right-wing, were also mirrored by the "No" vote.

In addition, the "No" campaign was dominated by arguments of fierce opposition to the government of Santos, as the Agreement was regarded as an "existential" threat, particularly by certain economic elites such as the agricultural guilds representing landholders and conservative political sectors, especially those belonging to the political party of former president Álvaro Uribe, the Democratic Center.[61] In fact, the "No" campaign was partially funded by economic groups whose majority were supporters of Uribe.[62] In this regard, an interviewee, a researcher and advisor to the Colombian Truth Commission on the issue of corporate responsibility, stated that the inclusion of civilian third parties as actors subject to the jurisdiction of the JEP was one of the underlying reasons for business sector support of the "No" vote, in particular those hailing from the agro-industrial sector:

> They said that this stigmatized businesspeople and created an anti-corporation bias.... [They] had an idea that they must position themselves as victims rather than as victimizers.[63]

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While armed conflicts tend to reproduce and exacerbate existing inequalities in society, peace agreements and TJ have the potential to contribute to their reduction, and to new possibilities for building more inclusive and democratic societies. However, as the Colombian case shows, peace processes are not isolated from the power alliances and struggles that underlie social exclusion and inequities of various stripes, whether political, economic, gender- or ethnic-based. According to Sara Koopman, the "No" vote in Colombia was shaped by and resulted from the very inequalities and social hierarchies that the accord aimed to address.[64] The close result of the plebiscite on October 2, 2016, made evident the deep and significant social and political polarization sweeping the country. The existence of "two Colombias" was reflected in the vote, according to the words of former president Santos.[65] Indeed, a socio-regional analysis of the results of the plebiscite[66] reveals that the "Yes" vote won in the poorest and most unequal regions in the country, which are also the hardest hit by conflict-related violence. Conversely, the "No" vote was prevalent in urban centers that have not directly suffered violence, and among the most privileged sectors, whose interests would be the most severely affected by the implementation of the Agreement.

The plebiscite result necessitated the adoption of an emergency negotiation strategy, including constitutional amendments taking into account the "No" voters, in an attempt to re-legitimize the Agreement.[67] The objective of prosecuting civilian third parties in the JEP was maintained, but not for long. The Peace Agreement's aspiration to bring to justice all those responsible for the commission of serious crimes was truncated by the Constitutional Court in November 2017 when it declared the inadmissibility of Provisional Article 16 of the Political Constitution, meant to open the way for the appearance of civilian third parties before the JEP. The court argued that since civilian third parties were not included in the negotiations between the government and the FARC that led to the Peace Agreement and the creation of the JEP, they could not be subject to the peace tribunal's scrutiny, but rather the jurisdiction of ordinary courts. As such, civilian third parties could appear before the JEP only on a voluntary basis.[68] The decision that politicians, economic groups, and other third-party actors will not be compelled to appear and confess their involvement in serious crimes to the JEP meant that they will continue to be prosecuted in the ordinary justice system, where existing proceedings progress at a slow pace.[69] The reasons underlying the court's decision were presented on purely legal grounds. However, the decision had a strong political character and significant impact on the TJ process, particularly for the JEP; from that moment on, the participation of businesses or political elites in the jurisdiction would be made voluntarily, and be contingent on their capacity to provide truth, reparations, and guarantees of non-repetition.[70] Consequently, only those already facing prosecution and/or those against whom a judicial decision had been issued in ordinary justice might submit themselves to the JEP to obtain benefits, such as exemption from prison in exchange for contributing information that will contribute to the truth or provide reparations for victims.

Along these lines, several human rights organizations challenged the decision of the Constitutional Court limiting the jurisdiction of the JEP to investigate the responsibility of civilian third parties in the armed conflict, though without much success.[71] Unsurprisingly, a limited number of civilians have applied to participate in the JEP in order to obtain potential benefits, most of whom are in prison on convictions, including extradited and incarcerated paramilitary chiefs in the United States such as Salvatore Mancuso and Rodrigo Tovar, known as "Jorge 40." Until August 2022,[72] only 166 civilians (1.2% of the total of appearing parties) had shown interest in appearing voluntarily before the JEP, a low percentage compared to the number of politicians and economic actors reported in the Truth Commission's final report: 258 economic actors, including individuals and companies, and 470 politicians.[73] The decision of the Constitutional

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Court completely changed the potential impact of the JEP and the peace process and greatly disappointed many sectors of society. As headlined in some newspapers "With its judgment, the Court has shielded businesspeople from the JEP."[74]

VIOLENCE, IMPUNITY, AND DEREGULATION: CURRENT IMPACTS AND STRUCTURAL CHALLENGES

As discussed above, alliances between different types of elites and armed actors as well as their reconfiguration are pervasive to TJ processes, undermining their transformative potential to produce meaningful change, especially regarding the guarantee of non-repetition of violence for victims. Indeed, shielding civilians—and among them, economic elites—from prosecution is one of the reasons enabling the continuity of what several interviewees have called the "strategic business and military project" in reference to the alliances of local and national elites with armed groups to maintain and deepen political and economic benefits. The continuity of these alliances and of their territorial social control in several regions in Colombia translates into constant harassment and fear about what is said, done, and called into question, especially among all those who dare to speak out about them in either the JEP or ordinary justice system. In fact, since the signing of the Peace Agreement in 2016, there has been a clear and serious increase in violence against critical actors, such as social leaders, environmental activists, land claimant communities, human rights defenders, and trade unionists.[75]

Thus, while the JEP has made some significant progress, especially in connection with the recognition of egregious crimes committed both by the FARC and security forces, its symbolic effect does not translate into a tangible transformation in the daily lives of most of the victimized population. In turn, the JEP at times suffers from the bureaucracy and slowness affecting the Colombian judicial system as a whole. The JEP is part and parcel of the system, including its most challenging aspects. It might be argued that, in part due to all the publicity and support it needed to withstand the attacks of conservative elite sectors (who paradoxically are virtually exempt as subjects to its jurisdiction), that inflated expectations were created about its role and true scope.

In the interviews conducted, it became clear that the expectations surrounding TJ and especially the JEP, as well as their transformative potential, were far greater than what they can actually achieve. However, the reason for these expectations was not totally unfounded: They were generated because of the Tribunal of Justice and Peace, the unexpected "collateral damage" of which was a door opened for the accountability of economic and political actors responsible for serious crimes. It was thanks to that first TJ process that shed light on the heretofore invisible responsibility of economic actors that expectations were awakened as to what the Peace Agreement and the new transnational justice process with the JEP could achieve. However, the momentum and initial advances obtained by a TJ mechanism and framework need the support and enforcement of other state institutions in the judiciary for profound changes to materialize that can lead to lasting peace. Therefore, it would be unfair and mistaken to assign all responsibility for the continuity of violence and the impunity of economic elites and other civilian actors for crimes against humanity to TJ instruments, including the JEP. While to a great extent the opportunity for these mechanisms to foster fundamental changes has been lost, they are not the only source of the problem. There are deeper structural roots ranging from unequal distribution and use of land to the lack of appropriate state oversight and regulation mechanisms beyond TJ processes.

As explained by one of the TJ experts interviewed in connection with the lack of prosecution of economic actors:

> I think it is a more systemic phenomenon. This is not only about TJ, state economic regulations are also quite deficient. For instance, we have the Ombudsperson's Office, which should be 'the' national human rights institution that could achieve business accountability, but in fact it does not have the teeth to do so. The Attorney General's Office has very high levels of impunity. What one sees is that, rather than a phenomenon of impunity, which does exist, there is a structural phenomenon of an accountability deficit.... It is more of a structural problem, there are no governmental instances or even market institutions that create incentives for companies to behave responsibly.[76]

As mentioned by the interviewee, the lack of regulation by the state and of oversight mechanisms—both judicial and non-judicial—is another key factor that contributes to the reproduction of dynamics of violence that serves dominant political and economic interests and leads to social exclusion.

CONCLUDING REFLECTIONS: TRANSITIONAL JUSTICE IS NOT ENOUGH

An analysis of the challenges of TJ to address the role of economic elites in contexts of widespread violence also means examining the unequal power relations that prevail in these contexts. TJ is not an impervious construct, isolated from the context or social forces in which it unfolds. To the contrary, in many cases it operates as a mirror of prevailing power relations. Thus, the limited scope of TJ to provide accountability for economic elites' wrongdoings is partly founded in their continued power in the current political and legal frameworks in which processes of TJ and peacebuilding take place. This power is reflected in their key decision-making positions in political, judicial, and economic settings, and in the impunity that they often enjoy for involvement in both past and present human rights violations. As discussed in this article, there have been some slivers of hope in the Colombian case indicating that the pursuit of the accountability for economic elites in TJ is possible (and with it, the adoption of a transformative approach to building a robust and lasting peace). However, the Colombian TJ approaches have so far been mainly characterized by its focus on military elites and combatants and a minimalist and indirect approach to the role of civilians in general and economic elites in particular. This overwhelmingly militaristic perspective of the conflict often makes it difficult to identify many of the promoters and responsible parties involved in violence or to further address the political and economic causes and interests underlying the continuity of violence.

Transitional justice's contribution to the construction of a substantial peace is to offer—through its instruments, mandates, and narratives—an official interpretation of the reasons and patterns behind violence during an armed conflict. A focus mainly on the actions of armed groups to the detriment of the relevance of other fundamental actors in the replication of the conflict hinders deeper understanding, reducing conflict to simple acts of violence divorced from the political and economic system and privileged actors for whom the armed conflict is practical, if not beneficial. This dissociation contributes, on the one hand, to the absence of measures to deal with these actors and, as a result, to the continuity of their actions

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over time. From there arises the question of the extent to which a TJ model can be constructed in Latin America that includes a broader understanding of armed conflicts and violence, allowing for the implementation of transformative measures, and greater independence from the influence of elites.

However, it should be noted that TJ is not enough. Even if TJ policies could provide significant impetus for addressing the role of economic and political elites, it would still fall short, since TJ deals with past violent practices and has a temporary ad hoc mandate. In other words, while TJ policies can hold room and motivate significant changes, they are not sufficient to effect long-term meaningful transformations. TJ cannot—and should not—be the only tool for the accountability of economic elites in armed conflict. Effective mechanisms and coordination are needed between TJ and state institutions like the judicial apparatus, which can transparently ensure increased oversight, regulation, investigation, and sanction, not only in the case of ordinary citizens but also of elites having direct or indirect involvement in human rights violations. While TJ is in part the result of the inefficacy of ordinary state institutions, its role is complementary to that of state institutions and should not be seen as a replacement with respect to their functions or obligations. Shifting demands that ought to be addressed by the state to ad hoc temporary instruments only conceals its responsibility. If the state shields itself behind TJ in order to shirk its regulatory and accountability duties, both are doomed to suboptimal effectiveness, legitimacy, and credibility. The complementary nature of TJ and its coordination with the state are essential for the attainment of a transformative approach to the relations of inequality and privilege. In addition, reforms in the ordinary institutions of the state are needed to bring about long-term, meaningful changes that can contribute to a more egalitarian application of the law that also has bearing on the powerful, thus making the guarantee of non-repetition a concrete reality.

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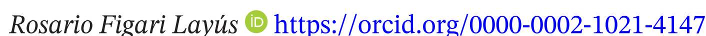

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ENDNOTES

[1] Nina Chaparro González and Margarita Martínez Osorio, *Negociando desde los márgenes*, (Bogotá: Dejusticia, 2018), 11.

[2] Many of these agreements were undertaken by different administrations during the decades of the 1980s and 1990s with different guerrilla groups such as the 19th of April Movement (Movimiento 19 de Abril) or M-19, the FARC, the Popular Liberation Army (Ejército Popular de Liberación) or EPL, and the Workers' Self-Defense (Movimiento de Autodefensa Obrera) or ADO.

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[5]Rosario Figari Layús, "Transitional Justice in Latin America: Toward What Kind of Justice?," in Dealing with the Past in Latin America, Southern Africa and Germany, ed. Tatjana, Luois, Mokgadi Molope & Stefan Peters (Baden-Baden: Nomos, 2021):37; Matthew Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice." *Journal of Human Rights* 15, no. 1 (2016): 1–20; Lars Waldorf, "Anticipating the past: Transitional justice and socioeconomic wrongs." *Social and Legal Studies* 21, no. 2 (2012): 171–186.

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[8]McAuliffe, "The Problem of Elites," 77.

[9]Tristan Anne Borer, "A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa." *Human Rights Quarterly* 25, no. 4 (2003): 1107.

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[15]Charles Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956).

[16]Naomi Roht-Arriaza, "¿Por qué la dimensión económica estuvo ausente tanto tiempo en la justicia transicional? Un ensayo exploratorio," in *Cuentas Pendientes. Los cómplices económicos de la dictadura*, eds. Horacio Verbitsky and Juan Pablo Bohoslavsky, J.P. (Buenos Aires: Siglo XXI Editores, 2013), 31–43; Leigh Payne, Gabriel Pereira & Laura Bernal Bermúudez, *Transitional Justice and Corporate Accountability from Below. Deploying Archimedes' Lever* (Cambridge University Press, 2020).

[17]Legal alliances should not either be excluded, especially between economic elites and security forces, which have contributed to violent practices and fueled the conflict. See Commission for the Clarification of Truth, Coexistence, and Non-repetition (CEV), *Hasta la guerra tiene límites* (Bogota. CEV, 2022), 950–951.

[18]Jacobo Grajales, "The rifle and the title: Paramilitary violence, land grab and land control in Colombia," *The Journal of Peasant Studies* 38, no. 4 (2011): 771–792; Jennifer Morales Correa, "Complicidad Empresarial con grupos paramilitares: un análisis al caso colombiano." *Razón Crítica* no 9 (2020): 43–67.

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[20]Jacobo Grajales, "The rifle and the title...," 781.

[21]Laura Bernal Bermúdez and Daniel Marín López, "Los Empresarios en la guerra: elementos de la verdad judicial sobre la complicidad empresarial en Colombia," in *Cuentas claras*: *El papel de la Comisión de la Verdad en la develación de la responsabilidad de las empresas en el conflicto colombiano*, eds. Camilo Sanchez, Leigh Payne, Gabriel Pereira, Laura Bernal Bermúdez, Daniel Marín López et al. (Bogotá: De Justicia: 2018): 51.

[22]Commission for the Clarification of Truth, *Hasta la guerra tiene límites*, 945.

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[25]Fernán González González, *Poder y violencia en Colombia* (Bogotá: Odecofi- CINEP, 2014).

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[31] See for example, Leigh Payne & Gabriel Pereira, “Corporate complicity in international human rights violations.” *Annual Review of Law and Social Sciences* 12 (1) (2016): 1–22.

[32] Bernal Bermúdez & Marín López, “Los Empresarios en la guerra…”, 40.

[33] Daniel Marín López, “*Justicia transicional* fragmentada. Entender la complicidad corporativa con actores armados desde la construcción judicial en *Colombia*,” in *Justicia Transicional en Colombia*, *Una mirada retrospectiva*., eds. Juana Ines Acosta & Maria del Rosario Acosta (Bogotá: Ariel, 2023).

[34] Mauricio Romero, *Paramilitares y Autodefensas 1982–2003*. (Bogota: Planeta, 2003).

[35] The free statements were court proceedings in which the prosecutors of the Justice and Peace process required the confessions of paramilitaries in order to access the agreed benefits.

[36] National Center of Historical Memory (Centro Nacional de Memoria Histórica-CNMH) & International Organization for Migration, *Justicia y Paz*: *tierras y territorios en las versiones de los paramilitares* (Bogota: CNMH 2012).

[37] Verdad Abierta, “Así investigan a financiadores del paramilitarismo,” *Verdad Abierta*, 7 May (2016).

[38] Interview 1. See the list at the end for the description of the interviewee's profiles (Table 1).

[39] Rosario Figari Layús, *The Role of Transitional Justice in the Midst of Ongoing Armed Conflicts*: *The Case of Colombia*. Potsdamer Studien zu Staat, Recht und Politik 5 (Potsdam University, 2010), 82.

[40] Ibidem, 42; Human Rights Watch, *Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia*. Human Rights Watch (2008), 82.

[41] Interview 1.

[42] Interview 2.

[43] Commission for the Clarification of Truth, *Hasta la guerra tiene límites*, 946.

[44] Ibidem, 970.

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[47] Laura Bernal Bermúdez and Daniel Marín López, “Los Empresarios en la guerra,…,” 42.

[48] These may include non-custodial deprivation of liberty for 8 years in the most serious cases, the waiver of criminal investigations in the rest of cases, the review of criminal convictions or prior disciplinary, administrative, or prosecutorial sanctions.

TABLE 1 List of Interviews.

No of interview	Date of the interview	Brief description of interviewees
1	01/12/2021	Law professor and expert on the involvement of economic actors in patterns of violence, Universidad Javeriana, Bogotá
2	07/12/2021	Member of NGO in Bogotá litigating before the JEP
3	16/12/2021	Researcher at the Colombian Truth Commission

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[49] The Peace Agreement stressed the importance of the acknowledgement of responsibility "by all those who took part, either directly or indirectly, in the conflict and were involved in one way or another in serious human rights violations and serious breaches of international humanitarian law" (Final Agreement for the End of the Conflict and the Construction of a Stable and Lasting Peace (12 November 2016). Paragraph 5.1.)

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