

Law and Business Review of the Americas

Volume 22

2016

Peace, Economics, and Transitional Justice

Kenneth B. Haesly II
Southern Methodist University

Follow this and additional works at: <http://scholar.smu.edu/lbra>

Recommended Citation

Kenneth B. Haesly II, *Peace, Economics, and Transitional Justice*, 22 *Law & Bus. Rev. Am.* 417 (2016).
Available at: <http://scholar.smu.edu/lbra/vol22/iss4/6>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *Law and Business Review of the Americas* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PEACE, ECONOMICS, AND TRANSITIONAL JUSTICE

A REPORT FOLLOWING THE CONCLUSION OF LATIN AMERICA'S
LONGEST ARMED CONFLICT

Kenneth B. Haesly, II

AFTER fifty-two years of conflict and almost four years of intermittent negotiation, Latin America's longest civil war, between the government of Colombia and the country's largest rebel group, is over.¹ The conflict took the lives of hundreds of thousands of Colombians and displaced millions more.² It hampered the economy of a country rich in natural resources and human capital.³ The Colombian finance minister predicts costs associated with reconstruction may run upwards of thirty billion U.S. dollars.⁴ Economists put the price tag at anywhere from sixty to ninety billion U.S. dollars.⁵ Though Colombia's president, Juan Manuel Santos, and the Revolutionary Armed Forces of Colombia (FARC) leaders reached a formal agreement in August 2016, the compromise also faced a major hurdle: after a national referendum to approve the deal was narrowly defeated in October of 2016, a second referendum was eschewed, and a revised peace deal was brought before Colombia's congress, where it received unanimous approval in both the house and senate.⁶ As an added bonus, President Santos received the

-
1. 'Acuerdo Final Para La Terminación Del Conflictó Y La Construcción De Una Paz Estable Y Duradera', Mesa De Conversaciones (Nov. 24, 2016), *available at*: <https://www.mesadeconversaciones.com.co/comunicados/acuerdo-final-para-la-terminaci%C3%B3n-del-conflicto-y-la-construcci%C3%B3n-de-una-paz-estable-y-1>.
 2. Nick Miroff, 'The staggering toll of Colombia's war with FARC rebels, explained in numbers', THE WASHINGTON POST (ONLINE) (Aug. 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/24/the-staggering-toll-of-colombias-war-with-farc-rebels-explained-in-numbers/?utm_term=.4cb675d13532; *see also* 'Centro Nacional de Memoria Histórica (National Center for Historic Memory), *available at*: <http://www.centrodememoriahistorica.gov.co/>.
 3. Chris Kraul, 'The battles began in 1964: Here's a look at Colombia's war with the FARC rebels', LOS ANGELES TIMES (ONLINE) (Aug. 30, 2106), <http://www.latimes.com/world/mexico-americas/la-fg-colombia-farc-explainer-snap-story.html>.
 4. Alex Vainberg, 'A Time for Peace, A Time for Debt: The Cost of Colombian Reconstruction', USC ECONOMICS REVIEW (Oct. 26, 2016), <https://usceconreview.com/2016/10/26/a-time-for-peace-a-time-for-debt-the-cost-of-colombian-reconstruction/>.
 5. *Id.*
 6. 'Colombia's government formally ratifies revised Farc peace deal', THE GUARDIAN (Dec. 1, 2016), <https://www.theguardian.com/world/2016/dec/01/colombias-government-formally-ratifies-revised-farc-peace-deal>.

Nobel Peace Prize.⁷

While peace anywhere should be celebrated, there has been much criticism of the recently completed peace pact in Colombia for several reasons. A particular sticking point are amnesty provisions and concessions given to members of the FARC rebel group that a majority of voting Colombians, multiple human rights groups, and other international observers have not quite been able to stomach. While Colombians have a right to be upset, the reality is transitional justice following major conflicts is complex. There is a fine balance between making cost-effective and fiscally responsible decisions and seeking justice for those who have suffered during periods of violence and oppression. Unfortunately, Colombians are now facing the reality that there is no easy path to justice after winding down one of the longest armed conflicts in the Western Hemisphere.

Take, for example, the process of investigating and prosecuting those responsible for atrocities on both sides of the conflict – Colombia could choose to keep this process domestic, or defer to international organizations, such as the International Criminal Court (ICC) or the United Nations (UN) to undertake investigations and pursue convictions to hold the proper parties accountable. Though keeping prosecutions domestic may lead to perceived leniency for serious human rights violations, they provide more autonomy for Colombians to make ultimate decisions regarding internal issues. But the drawback to this internal approach are basic costs associated with domestic prosecution; though once a rising star in the Latin American economy, Colombia is not sitting nearly as strong fiscally as it has been in the past. Alternatively, turning over prosecution to the ICC or to a special international tribunal under the guidance of the UN would mean Colombians effectively cede control of domestic affairs to international bodies. As of now Colombia has chosen the former route, through what they term the “Special Jurisdiction for Peace” (SJP). This report seeks to investigate Colombia’s current economic situation and the costs of transitional justice following the conflict.

I. ECONOMIC SNAPSHOT

Billed as Latin America’s oldest democracy, Colombia has long benefitted from sound macroeconomic policy and openness to global trade and finance, coupled by strong reforms on regulatory improvement and bolstering the private sector.⁸ In 2014, Colombia overtook Peru to become Latin America’s fastest growing economy.⁹ But, Colombia’s

7. ‘Colombia’s Juan Santos receives Nobel Peace Prize’, *AL JAZEERA* (Dec. 10, 2016), <http://www.aljazeera.com/news/2016/12/colombia-juan-santos-receives-nobel-peace-prize-161210124801819.html>.

8. ‘2017 Index of Economic Freedom – Colombia’, *HERITAGE.ORG*, <http://www.heritage.org/index/country/colombia> (last visited March 8, 2017).

9. ‘Passing the baton’, *THE ECONOMIST* (Aug. 2, 2014), <http://www.economist.com/news/finance-and-economics/21610305-colombia-overtakes-peru-become-regions-fastest-growing-big-economy-passing>.

gross domestic product (GDP) fell in 2015, after averaging a growth rate of 4.8% per year from 2010–2014.¹⁰

The Colombian economy is largely based on commodities. As Latin America's fourth largest oil producer and the world's fourth largest coal exporter, Colombia is especially susceptible to diminishments in global commodities markets.¹¹ But due to sound economic policies and aggressive promotion of free trade agreements, Colombia has recently been able to weather significant global slowdowns, such as the oil crash of 2015.¹²

Despite a strong economic outlook, Colombia continues to face challenges. Drug trafficking and security remain major issues, and while a peace deal has been reached, the impact of a five decade narco-funded guerilla insurgency is not easily erased. Nearly forty-percent of Colombia's coca is contained in eleven FARC dominated municipalities.¹³ While the Colombian government is focused on trying to create alternatives to farming coca (the raw material for cocaine), significant capital will be needed to create the necessary infrastructure, such as roads and technical support, to make the endeavor viable.¹⁴

The achievements of President Santos and his contemporaries, as well as all those involved with the peace negotiations are laudable, but do come with a cost. Elements of peacekeeping such as disarmament, demobilization, and reintegration must now be funded.¹⁵ After disarming under the UN's watch (within thirty days of implementation of the agreement), FARC rebels will receive a government subsidy equal to ninety-percent of Colombia's minimum wage for two years,¹⁶ as well up-front costs of helping hundreds of thousands, if not millions, of displaced people return and resettle homes will require immense funding.¹⁷ Economic studies place the per-year costs for integration of rebel combatants into society at \$2 billion.¹⁸ Subsidies for programs related to victims could cost as much as \$3.5 billion.¹⁹

10. 'The World Factbook, Colombia Profile', CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (last visited March 8, 2017).

11. *Id.*

12. *Id.*

13. 'A chance to clean up', THE ECONOMIST (Oct. 1, 2016), <http://www.economist.com/news/briefing/21707921-all-its-imperfections-and-complexities-agreement-between-government-and-farc>.

14. *Id.*

15. Vanda Felbab-Brown, 'Who pays for peace in Colombia?', BROOKINGS (Sep. 29, 2016), <https://www.brookings.edu/research/who-pays-for-peace-in-colombia/>.

16. *Supra.*

17. Alan Fleischmann & Ian Solomon, 'What It Really Costs for Colombia to Strike a Peace Deal', FORTUNE (Oct. 6, 2016), <http://fortune.com/2016/10/06/colombia-farc-peace-deal/>.

18. Alex Vainberg, 'A Time for Peace, A Time for Debt: The Cost of Colombian Reconstruction', USC ECONOMICS REVIEW (Oct. 26, 2016), <https://usceconreview.com/2016/10/26/a-time-for-peace-a-time-for-debt-the-cost-of-colombian-reconstruction/>.

19. *Id.*

Nevertheless, President Santos and his government have conveyed that peace will yield both social and economic dividends by offsetting short-term losses in the long run by reducing costs related to security and logistical risks of business operations in the future.²⁰ Macroeconomic studies predict a more middling result, with peace between government and guerrilla forces providing a boost to the Colombian economy's medium-term outlook.²¹

II. TRANSITIONAL JUSTICE

Most at issue in the peace agreement, and a large reason why it was defeated in the national referendum, are concessions given to FARC rebels, including certain amnesty provisions that allow those who confess to crimes to avoid prison sentences and instead be subject to "repatriation."²² Those in opposition to the peace deal, led by former President Alvaro Uribe, expressed reservations that those who have committed crimes will be given lenient sentences amounting to impunity for their actions, and are "getting away with murder," and international groups such as Human Rights Watch have suggested the SJP legal framework constitutes a "surrender of justice."²³

In 2015, negotiators representing the government and rebels formulated the idea of the SJPs in order to handle what negotiators termed "grave violations of human rights and humanitarian law" committed by FARC guerillas.²⁴ At the time, groups such as Human Rights Watch questioned whether the standards used by these tribunals could sync with Colombia's binding obligations under international law to ensure accountability for crimes against humanity and war crimes.²⁵ Following the events of this year, legal human-rights questions still persist in the justice component of the peace agreement. For example, under the deal, those who confessed to their crimes may be sentenced to community service and "restricted movement" to avoid prison, and military commanders can escape "command responsibility" for crimes committed by their troops.²⁶

The Colombian SJP will seek justice for what is referred to most often as "war crimes," but which are more concretely described under international law as genocide, torture, forced displacement, and sexual vio-

20. Martin De Angelis, 'Financing peace: The Colombian economy after the FARC', *GLOBAL RISK INSIGHTS* (Oct. 12, 2015), <http://globalriskinsights.com/2015/10/financing-peace-the-colombian-economy-after-the-farc/>.

21. 'Colombia: Peace deal will improve medium-term outlook', *CAPITAL ECONOMICS* (July 14, 2016), available at: <https://www.capitaleconomics.com/publications/latin-america-economics/latin-america-watch/colombia-peace-deal-will-improve-medium-term-outlook/>.

22. 'Colombia peace deal: What are the most contentious points?', *BBC* (Sept. 28, 2016), <http://www.bbc.com/news/world-latin-america-37457860>.

23. *Id.*

24. *Supra* note 13.

25. *Id.*

26. Jose Miguel Vivanco, 'Peace and Justice in Colombia', *HUMAN RIGHTS WATCH* (Oct. 14, 2016), <https://www.hrw.org/news/2016/10/14/peace-and-justice-colombia>.

lence.²⁷ The form of justice, or rather, the form of *punishment* for these crimes is what is most at issue with the Colombian public.²⁸ Those who take responsibility and give full disclosure for crimes that have been committed will face a “restriction of liberties” for five to eight years.²⁹ It is unclear at this time what that restriction will entail, but it is implicit in the agreement that it will not be prison. But those who do not cooperate, or do not offer full disclosure, will be subject to prison time between five to twenty years.³⁰ The same penalties will apply for actions that took place in the conflict extend to members of the armed forces, and not just the rebels, *e.g.*, “false positive” killings of civilians who were disguised post-mortem to look like combatants routinely took place in the early 2000s in order to boost body counts to make it seem as if the Colombian army was making progress in the war against the rebels.³¹ There are several benefits of the SJP transitional justice system under the final peace agreement: Colombian judges (as opposed to foreign jurists) will exclusively hear cases; the tribunal will consider new cases during its first two years; the tribunal will seek to conclude its work within ten years; and only the Colombia Constitutional Court (the country’s highest appellate court) will have the authority to review tribunal decisions.³²

Strong reactions opposing the perceived “impunity” for grave violations of humanitarian law are not misguided, especially for those who lived through the conflict and witnessed the violence firsthand, *e.g.* for example, leader of the “no” campaign and former Colombian president, Alvaro Uribe, whose father was murdered by FARC rebels. But these reactions conflate—or perhaps fail to see—the positives that can come from non-custodial punishment and truth seeking initiatives. When winding down a conflict of this complexity, concessions must be made. The Colombian government, by seeking full confessions from an estimated 7,000 guerillas, 24,000 state officials, and 12,000 civilians, is seeking to move on from the conflict by documenting and acknowledging that human rights

27. Grace Brown, ‘Colombia’s peace deals in depth: Transitional justice’, *COLOMBIA REPORTS* (Sep. 23, 2015), <http://colombiareports.com/colombias-peace-deals-in-depth-transitional-justice/>.

28. ‘Unlearning war’, *THE ECONOMIST* (ONLINE) (Aug. 27, 2016), <http://www.economist.com/news/americas/21705851-chance-become-normal-country-unlearning-war>.

29. *Id.*; see also ‘Acuerdo Final Para La Terminación Del Conflicto Y La Construcción De Una Paz Estable Y Duradera’, Mesa De Conversaciones (Nov. 24, 2016), available at: <https://www.mesadeconversaciones.com.co/comunicados/acuerdo-final-para-la-terminacion%C3%B3n-del-conflicto-y-la-construccion%C3%B3n-de-una-paz-estable-y-1>

30. *Id.*; see also ‘Acuerdo Final Para La Terminación Del Conflicto Y La Construcción De Una Paz Estable Y Duradera’, Mesa De Conversaciones (Nov. 24, 2016), available at: <https://www.mesadeconversaciones.com.co/comunicados/acuerdo-final-para-la-terminacion%C3%B3n-del-conflicto-y-la-construccion%C3%B3n-de-una-paz-estable-y-1>

31. ‘On Their Watch’, *HUMAN RIGHTS WATCH* (June 24, 2015), <https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings>.

32. ‘Colombia’s Revised Peace Accord’, *THE NEW YORK TIMES* (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/opinion/colombias-revised-peace-accord.html?_r=0.

violations occurred.³³ Victims and survivors of conflict have a right to know about violations that have occurred and those responsible. Such memory initiatives can play a powerful role in contributing public understanding and facilitate healing as a country.³⁴

II. TRANSITIONAL JUSTICE: COSTS AND ALTERNATIVES

Transitional justice bears significant costs. For example, Colombia may not have the proper capacity and resources to pursue lengthy investigations and trials, much less provide just compensation for all of the victims of such a drawn out conflict; elements of peacekeeping such as disarmament, demobilization, and reintegration must be funded.³⁵ Deep restructuring of rural areas is predicted to come at a large monetary cost.³⁶ Some experts suggest total costs could be large as \$44 billion over a ten-year period.³⁷ Since that number reflects a significant percentage of Colombia's entire GDP (fifteen-percent of Colombia's 2015 GDP), it is unlikely that Colombia will even be able finance the peace endeavor without the help of international financial institutions.³⁸ Domestic austerity measures and tax reforms are likely as well. And, while Colombian officials may expect new investments to funnel into the country, this is by no means guaranteed.³⁹ Since commodity prices have slowed down around the globe, so too has foreign direct investment in Colombia's commodity rich economy.⁴⁰

Alternatives to the SJP include turning over prosecution to the ICC or to a special international tribunal under the guidance of the UN. The ICC is a permanent international court that prosecutes perpetrators of serious crimes against humanity.⁴¹ It was established by the Rome Statute of the International Criminal Court (Rome Statute), and has been adopted by 120 States, including Colombia.⁴² In fact, the situation in Colombia has been under "preliminary examination" by the ICC since June

33. Adriaan Alsema, 'Colombia congress approves transitional war crimes court', *COLOMBIA REPORTS* (March 14, 2017), <http://colombiareports.com/colombia-congress-approves-transitional-war-crimes-courts/>.

34. 'Truth and Memory', ICTJ.ORG, available at: <https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (last visited March 15, 2017).

35. Vanda Felbab-Brown, 'Who pays for peace in Colombia?', *BROOKINGS* (Sep. 29, 2016), <https://www.brookings.edu/research/who-pays-for-peace-in-colombia/>.

36. *Id.*

37. Alan Fleischmann & Ian Solomon, 'What It Really Costs for Colombia to Strike a Peace Deal', *FORTUNE* (Oct. 6, 2016), <http://fortune.com/2016/10/06/colombia-farc-peace-deal/>.

38. 'Martin De Angelis, 'Financing Peace: The Colombian economy after the FARC', *GLOBAL RISK INSIGHTS* (Oct. 12, 2015), <http://globalriskinsights.com/2015/10/financing-peace-the-colombian-economy-after-the-farc/>.

39. *Id.*

40. *Supra* note 35.

41. 'Understanding the International Criminal Court', *Cour Penale Internationale* (International Criminal Court), <https://www.icc-cpi.int/iccdocs/pids/publications/uic-ceng.pdf> (last visited March 8, 2017).

42. 'Preliminary examination - Colombia', *INTERNATIONAL CRIMINAL COURT* (online), <https://www.icc-cpi.int/colombia> (last visited March 8, 2017).

of 2004.⁴³ The ICC has jurisdiction over Rome Statute crimes committed on the territory of Colombia or by its nationals from 2002 onwards and war crimes committed since November of 2009.⁴⁴ The Office of the Prosecutor (OTP) for the ICC has noted the creation of the SJP, and has stated that, once established, the SJP “would have jurisdiction to investigate and prosecute those most responsible for the most serious conflict-related crimes, including cases against members of the [FARC], members of the armed forces and those who, directly or indirectly participated in the internal armed conflict.”⁴⁵

The UN has also established international criminal courts to prosecute perpetrators of serious crimes against humanity and to bring justice to victims of international crimes. Most notably, the Security Council established ad hoc tribunals in the territory of the former Yugoslavia⁴⁶ and in Rwanda.⁴⁷ Both tribunals are mandated to bring to justice those responsible for serious violations of international humanitarian law committed in their respective regions, thus contributing to the restoration and maintenance of peace in both areas.⁴⁸ Though these tribunals have concurrent jurisdiction with national courts over serious violations of international humanitarian law, they can take over national investigations and proceedings at any stage if it proves to be in the “interest of international justice.”⁴⁹ It is important to note, however, that while the UN continues to be involved in transitional justice issues around the world, the ICC largely fulfills the role of those ad hoc criminal tribunals.⁵⁰ Yet since its inception fifteen years ago, the ICC has faced criticism as being yet another costly international institution that is too inefficient to justify. With a budget of 139.5 million Euros and a staff of over eight hundred, it is not difficult to see why, especially considering that in all of its history the ICC has only seen twenty-three cases and issued only six verdicts.⁵¹ Likewise, the special tribunals established by the UN have run budgets toppling \$1 billion in ten plus years of operation.⁵² These alternatives to national transitional justice courts are costly, and perhaps not as efficient as in-

43. *Supra* note 35.

44. ‘Report on Preliminary Examination Activities 2016’, INTERNATIONAL CRIMINAL COURT – OFFICE OF THE PROSECUTOR (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (at para. 233).

45. *Id.* at para. 253.

46. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/827\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/827(1993))

47. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/955\(1994\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/955(1994)).

48. ‘Mandate and Crimes under ICTY Jurisdiction’, ICTY.ORG, available at: <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction> (last visited March 15, 2017).

49. *Id.*

50. ‘UN Documentation: International Law’, UN.ORG, available at: <http://research.un.org/en/docs/law/courts> (last visited March 15, 2017).

51. ‘Facts and Figures’, International Criminal Court, ICC-CPI.INT, <https://www.icc-cpi.int/about> (last visited March 15, 2017).

52. Rupert Skilbeck, ‘Funding Justice: The Price of War Crimes Trials’, DIGITAL COMMONS (2008), available at: <https://www.wcl.american.edu/hrbrief/15/3skilbeck.pdf>

tended when they were first created. But, while costs of operating international courts may run high, they could provide some financial breathing room for Colombia, since funding for both the ICC or ad hoc tribunals such as the ICTY and ICTR are spread out among member states of the UN and parties to the Rome Statute.⁵³ Were Colombia to shift from the domestic SJP measures to the ICC, it could present a major opportunity to defray costs associated with investigating and prosecuting serious crimes perpetrated during the conflict.

III. CONCLUSION

Following the end of Latin America's longest running armed conflict, Colombians must now focus efforts on transitional justice. The form this justice should take has been subject to much debate. The path Colombia has chosen is in the form of national prosecutions that focus on truth and public understanding, rather than custodial incarceration.⁵⁴ While this may rub some Colombians (and international observers) the wrong way, it is a strategic and efficient way to attempt to close the book on this terrible conflict. But, serious economic questions remain as to whether Colombia can shoulder the entire burden of prosecuting serious violations of humanitarian law. A snapshot of the current Colombian economy shows that GDP growth has slowed, commodity prices are down, and expensive reconstruction plans and programs are likely to create a tremendous burden on the Colombian government, as well as tax payers.⁵⁵ In addition, seeking justice comes with associated costs: investigating and prosecuting thousands of cases will be time consuming and expensive. However, there are benefits to this form of domestic transitional justice, such as maintaining autonomy and control over Colombian issues. Alternatives to the current form of transitional justice, such as turning to the ICC or UN, may be worth considering. Hopefully, with time Colombians can heal and move forward. The path may not be easy, but in the end, finding peace after so long will certainly prove its worth.

53. Claire Calzonette, 'Frequently Asked Questions about the International Criminal Court', COUNCIL ON FOREIGN RELATIONS (July 23, 2012), <http://www.cfr.org/courts-and-tribunals/frequently-asked-questions-international-criminal-court/p8981>.

54. 'ABC: Special Jurisdiction for Peace', OFICINA DEL ALTO COMISIONADO PARA LA PAZ, *available at*: <https://law.yale.edu/system/files/abc-special-jurisdiction-for-peace.pdf> (last visited March 15, 2017).

55. 'How high is the cost of peace for Colombia?', THE CITY PAPER BOGOTA (Aug. 12, 2016), <https://thecitypaperbogota.com/news/how-high-the-cost-of-peace-for-colombia/13968>.