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TRANSFORMATION THROUGH JUSTICE FOR SYRIA

LESSONS FROM SOUTH AFRICA, INDONESIA AND COLOMBIA

AUVEEN WOODS, TERI MURPHY AND MARIA CHRISTINA VIBE

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March 2017

The authors would like to thank Paula de Castro of the Barcelona Center for International Affairs for her input, the Center for Civil Society and Democracy in Syria (CCSD) for their initial ideas and feedback, and the Istanbul Policy Center for their support.

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INTRODUCTION

Auveen Woods

The Syrian conflict has become more violent and intractable since civil protests first broke out in March 2012. It degenerated from peaceful grassroots protests in local neighborhoods to provincial uprisings, civil conflict, and a regional proxy war. From the country's pre-war population of 22 million, between 400,000 and 470,000 people are estimated to have been killed.[1] Approximately 7.6 million citizens have been internally displaced. Many have been caught in the crossfire of rival groups, while thousands more have continued to disappear into the regime's detention centers, where torture and abuse are rife. More than 4 million Syrians have fled the country and are registered across the region in Egypt, Iraq, Jordan, Lebanon, and Turkey.[2] Thousands more have risked the dangerous journey to Europe.

The challenges of finding a solution to the multiple conflicts in Syria appear ever more difficult. This is due to both the apparent intractability of the current conflict as well as the scope of the abuses that Syrian communities have suffered, which range in time and scale. Since the beginning of the conflict, there has been growing evidence of atrocities and war crimes committed by all sides including the Assad regime, groups from the Free Syrian Army (FSA), the Kurdish People's Protection Units (YPG), militias, and later, jihadist groups. These acts range from mass murder and ethnic cleansing to torture, rape, and enforced disappearances. There has been evidence of recruitment of child soldiers by jihadists and groups associated with the FSA. As a war tactic, civilian areas have been targeted by almost all conflicting parties. Civilians have been indiscriminately bombed and isolated and starved in their communities. They have been targets of chemical attacks such as sarin gas, and in the case of Daesh (the Arabic acronym for the Islamic State of Iraq and the Levent), they have also been used as human shields. The prevalence of foreign fighters and foreign governments' involvement in the conflict adds another layer of complexity. Foreign states and fighters have supported rival sides in the conflict, contributing to the scale of abuses and undermining peaceful solutions. In response to the growing violence, the population has further fragmented as the different ethnic, linguistic, and religious communities of the country have retreated into their social enclaves for survival.

The daily atrocities of the current conflict follow decades of repression and state-sponsored violence in Syria. For over 30 years Hafez al-Assad ruled the country in an autocratic system fostering a culture of nepotism, corruption, and impunity in which any dissent was brutally suppressed. A permanent state of emergency has been in place since 1963. Thousands of suspected opposition figures were detained or disappeared in the regime's infamous prisons, where torture was routine. This same system continued with the accession of Bashar al-Assad in 2000. Syrians have suffered injustice for decades where the law was selectively applied and there was no meaningful accountability.

This publication highlights one issue that is inextricably linked to establishing sustainable peace and trying to address the litany of human rights abuses in Syria: transitional justice. Transitional justice has become a dominant lens through which any state transitioning from a violent past, whether it be Iraq, Afghanistan, or Nepal, is expected to engage. While there are a number of definitions, transitional justice implies a set of approaches and mechanisms that are aimed at dealing with the legacy of gross human rights abuses and international crimes. The UN definition reads as follows:

> Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights.[3]

1 Ian Black, "Report on Syria conflict finds 11.5% of population killed or injured," *The Guardian*, February 11, 2016, accessed May 5, 2016, http://www.theguardian.com/world/2016/feb/11/report-on-syria-conflict-finds-115-of-population-killed-or-injured.

2 "Syrian Regional Refugee Response: Inter-agency Information Sharing Portal," United Nations High Commissioner on Refugees, March 2016, accessed April 30, 2016, http://data.unhcr.org/syrianrefugees/regional.php.

3 *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice*, The United Nations (New York and Geneva: United Nations, March 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf, 3.

Transitional justice as a field began to emerge and develop just as the Cold War was ending, and many of the repressive regimes that had been supported by either the West or East were falling. It was a euphoric and hopeful time with the belief that liberal democracy and free-market ideals had triumphed. Many of the dominant principles of traditional transitional justice approaches reflect this period with an emphasis on liberal democracy and rule of law approaches to justice. The term "transitional justice" first appeared in 1995 as a result of the publication of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.[4] It has developed to encompass all the initiatives and approaches (both judicial and non-judicial) utilized to try and address past human rights abuses and support a more peaceful and equitable society. A key assumption of transitional justice is that by engaging in these processes it will help sustain peace by addressing past injustices and support democratic society through rule of law.

Many of these principles of transitional justice are based on a legal approach to human rights violations that emerged from the political transitions in Latin America in the 1980s and 1990s. The experiences of Argentina (1980s), Chile (1990), and El Salvador (1992) were particularly influential on the development of transitional justice as a field. Each country attempted to grapple with the truth of what happened under their authoritarian regimes. Out of these experiences, some transitional justice mechanisms began to emerge such as criminal prosecutions, truth commissions, and institutional reforms such as lustration of former regime members and attempts to provide greater transparency in the legal system. The concept and principles of transitional justice were further developed during South Africa's landmark process beginning in 1994. South Africa's Truth and Reconciliation Commission (TRC) was a pioneering effort that continues to inspire similar models globally. It was driven by a desire to implement deep social and political transformation and sought to meld the top-down legal ethos of transitional justice with a more humane, victim-centric approach. Officials looked to the experiences of truth commissions in South America and institutional reforms in Eastern Europe for inspiration. However, ultimately it was the country's culture that framed the justice conceptualization and practices.

South Africa became a standard against which subsequent transitional justice approaches continue to be measured. It was seized upon by practitioners, institutions, and scholars in the burgeoning transitional justice field as a best practice. And yet, it was imperfect. As Mahmood Mamdani's analysis argues, the TRC had a narrow definition of perpetrators and specific violations. These were used as token examples of the system's wider abuses. But this limited scope allowed the much larger groups of apartheid beneficiaries to escape notice or guilt.[5] As such, whether the TRC realized its ultimate mission to enact deep social, political, and even economic transformation is arguable.

Despite these variances, a one-size-fits-all model began to emerge and dominate transitional justice approaches. This model is one defined by specific judicial institutions and mechanisms, such as tribunals and prosecutions, with criminal and international law remaining a central influence. Transitional justice literature has become characterized by a Western, legalistic approach to justice with an emphasis on liberal democratic framework.[6] This trend is embodied in a series of mechanisms that have been favored by transitional justice scholars and practitioners, such as trials, truth commissions, and institutional reforms. A common criticism of transitional justice practices, however, is that they tend to be conceived, discussed, and implemented in a top-down manner, often isolated and disengaged from the affected communities and individuals. This is reflected in the objectives and scope of transitional justice, with a tendency to focus on the role of international actors in providing justice and the nation-state as the central actor through which mechanisms are aimed and implemented. By focusing so much on mechanisms, "justice" becomes measured in outputs such as elections, institutional reforms, and reports. This mechanism-centered approach ignores local cultural justice conceptualizations outside a legal lens or specific mechanisms that may be instead linked to broader issues and needs such as land redistribution, economic inclusion, and the legacies of structural violence.[7] Transitional justice implemented through mechanisms and outputs often has little engagement with affected communities and does not benefit victims or change the wider social, cultural, or political dynamics.

4 Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 1st ed. (Washington, DC: United States Institute for Peace Press, 1995).

5 Mahmood Mamdani, "The Truth According to the Truth and Reconciliation Commission," in *The Politics of Memory: Truth, Healing and Social Justice*, ed. Ifi Amadiume and Abdullahi A. An-Na'im (London: Zed Books, 2000).

6 Stephanie Vieille, "Transitional Justice: A Colonizing Field?" *Amsterdam Law Forum* 4, no. 3 (2012): 58-68.

7 Gaby Oré Aguilar and Felipe Gómez Isa, ed., *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, 1st ed. (Cambridge, UK: Intersentia, 2011); Morten Bergsmo et al., *Distributive Justice in Transition* (Oslo: Torkep Opsahl Academic EPublisher, 2010).

Ultimately, transitional justice processes are effective when they have the support of the general population and are backed by divergent political elites. Over the years, there have been attempts to diversify transitional justice approaches by placing more emphasis on victim-centered mechanisms such as truth telling, reparations, educational and economic reforms, reconciliation initiatives, and commemoration practices. These are aspects of transitional justice that overlap with peacebuilding norms and the repair of social relations. Recent discussions in the area of transitional justice have harkened back to earlier aspirations for social transformation. These discussions have sought to challenge the outputs-based approach of transitional justice by emphasizing processes and the unique context of each country's transition experience. Transformative justice is one such new framework.

Transformative justice at its core seeks to change the pre-conflict structures that led to the violence and oppression in order to make them more inclusive and fair for everyone. This is a framework that builds on the work of Galtung,[8] who argued that if a society's pre-conflict dynamics are not addressed, peace is unsustainable. According to his theory, systemic violence is implicit within the very structures of society and institutions. Its pervasiveness perpetuates inequality and inevitably leads to the oppression of certain groups, condemning them to exclusion and poverty.

As an alternative concept and approach, transformative justice seeks to shift the focus of transitional justice from top-down legal mechanisms and outputs to inclusive bottom-up processes that emphasize local agency, social relations, and outcomes.[9] While transitional justice approaches are often state-centric, a transformative justice framework focuses on process and participation. In transformative justice approaches, for example, victims are not passive recipients of programs. Instead, as knowledgeable individuals, they are empowered to contribute to projects and processes from their inception and all the way through the development and implementation stages. A process-orientated approach, transformative justice emphasizes participation, inclusion, accountability, and empowerment as principles that should guide all judicial and non-judicial mechanisms initiated to address past violations.[10] Transformative justice approaches recognize that violations are symptomatic of underlying dynamics that led to the violence and conflict in question; focus is given to "root" causes instead. For example, a transformative justice approach to gender violence would explore how wider cultural practices and economic structures affected women's and men's experiences before and during the conflict in order to develop sensitive and effective responses to abuses.

Transformative justice is context-driven. Justice conceptualizations are influenced by the cultural, religious, and class values of a society. For example, the emphasis on forgiveness and reconciliation that emerged from the South African process would not work in Colombia, where such terms are associated with impunity. Each social context has its own unique experiences and needs, and therefore, justice approaches must be specific to the country in which they are being implemented. While methods such as individual criminal procedures, reparations that provide some restitution to victims, truth-seeking initiatives, or memorialization aim to address past human rights abuses, they must be implemented in a context-sensitive manner. Because of the unique variability within settings, effective implementation of justice requires significant planning, design, and coordination to meet the specific needs of any given society. Ultimately, successful transformative justice measures promote social and political reconciliation in ways that avoid perpetuating future divisiveness. Instead of the vengeance of "victors," justice is usually equated with a retributive framework. Transformational justice models take into account the local and national context to more successfully address impunity as well as the cycles of violence that served to fuel the conflict.

Following this logic, Syrians are the only people who can lead the design and implementation of a legitimate transformative justice process for their country. This process can take years of work and preparation even before any cessation in the violence or a transition has taken place. Solutions to the complex and increasingly precarious crisis in Syria are unknown. Already, there have been many Syrian activists, journalists, and NGOs working on a number of initiatives that could contribute to transitional justice processes in the future. These include documenting human rights abuses, supporting local political processes, and building up the capacity of civil society associations.

8 Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 167-191.

9 Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (London: Palgrave Macmillan, 2011).

10 Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A new agenda for practice," *The University of York: Center for Applied Human Rights*, June 2014.

The purpose of this research is not to discredit or legitimize one approach to justice and transition over another. Rather, it highlights the evolving changes in transitional justice discourse and the ongoing debates over "ownership" and competing aims within these processes. The case studies utilized in this report reflect these tensions and competing approaches. They illustrate the need for an all-encompassing approach beyond the purview of the elite at the international and national level. Such an approach requires the long-term engagement of diverse stakeholders. This report highlights the role of civil society and communities in engaging with both state and local approaches to justice. Transformation through justice requires the long-term engagement of diverse stakeholders.

CIVIL SOCIETY AND TRANSITIONAL JUSTICE

This publication aims to support the work of civil society organizations striving for a peaceful and just Syria. It is largely based on the premise that civil society can play a crucial role in not only bridging the gap between top-down transitional justice but also in adapting and developing justice norms and approaches to their country-specific context. The role of civil society in transitional justice processes has often been overlooked. This is especially prevalent in the pre-transitional justice period, where the importance of engaging with victims, gathering documentation, and disseminating information is critical to the development of mechanisms and programs that in the future will address abuses.

Civil society is often a contested concept as it has multiple meanings that are perceived and used by people in different ways. For example, Daniel Posner defines civil society as all formal and informal non-state organizations that "can be filled with groups that foster social cooperation and improve people's lives, or with groups that sow distrust and foment violence."[11] For the purpose of this book, civil society refers primarily to local and national civil society organizations, non-governmental organizations, voluntary groups, and activists. This definition is not only limited to human rights organizations but also includes humanitarian aid organizations, professional associations such as lawyers or academics, mental health and medical associations, religious leaders, community activists, and victim and survivor groups.

The term "civil society" is often positively perceived by practitioners in the peacebuilding, transitional justice, and development fields. Civil society groups are recognized as generally acting as intermediaries between the national and international arena and local communities with the ability to broaden participation and buy-in. There is growing research on the effect that civil society organizations have had on transitions and accountability mechanisms. Civil society organizations offer, to name a few, diverse networks of contacts, information, expertise, and knowledge of the status of human rights in their country. Civil society pressure in Uruguay, for example, was one of the key drivers overturning laws that prevented prosecution of crimes committed by the country's military dictatorship (1973–1985).[12] In the absence of democratic transition or state initiatives, civil society groups in Uganda have played a leading role in trying to address transitional justice issues in the country.[13] Civil society groups in Liberia took a central role in all aspects of the country's transitional justice initiatives from conceptualizations to organizing and supporting victims and mechanisms and disseminating information.[14]

There are a number of potential ways in which to classify or analyze civil society engagement with transitional justice. Some researchers, such as David Backer, analyze civil society in terms of service provision and capacity. This can include data collection and monitoring, advocacy, facilitation, consultation, and even alternative authority for transitional justice initiatives.[15] For others, the role of civil society is limited to specific transitional justice measures. Eric Brahm, for example, views civil society as supporting domestic prosecutions through their knowledge of abuses and monitoring of situations.[16] The International Center for Transitional Justice primarily identifies national NGOs as key interlocutors in determining the success of truth commissions.[17] According to the UN Office of

11 Daniel N. Posner, "Civil Society and the Reconstruction of Failed States," in *When States Fail: Causes and Consequences*, ed. Robert I. Rotberg (Princeton: Princeton University Press, 2004), 237.

12 Jo-Maria Burt et al., "Civil Society And The Resurgent Struggle Against Impunity In Uruguay (1986-2012)," *International Journal of Transitional Justice* 7, no. 2 (2013): 306-327.

13 Jackee Budesta Batanda and Andries Du Toit, "The Role Of Civil Society in Advocating For Transitional Justice In Uganda," Institute for Justice and Reconciliation (IJR), 2009.

14 Huma Haider, "Transnational Transitional Justice and Reconciliation: The Participation of Conflict-generated Diaspora in Addressing the Legacy of Mass Violence," *Journal of Refugee Studies* 27, no. 2 (2014).

15 David Backer, "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects," *Journal of Human Rights* 2, no. 3 (2003): 302-305.

16 Eric Brahm, "Transitional Justice, Civil Society, and the Development of the Rule of Law in Post Conflict Societies," *International Journal of Not-for-Profit Law* 9, no. 4 (2007): n.a.

17 "Truth Commissions and NGOs: The Essential Relationship," International Center for Transitional Justice (brief), April 2004.

the High Commissioner for Human Rights' (OHCHR), truth commissions, hybrid commissions, and reparation programs must be established after thorough consultation with civil society organizations and victims' groups.[18]

The growing recognition of the role of civil society has expanded in tandem with developments in conceptualizations and implementations of transitional justice measures. Scholars differ, however, as to the exact nature and timing of civil societies' contributions. According to transitional justice expert Priscilla Hayner, the strength of civil society in terms of numbers and its organizational capacity will help to determine the success or failure of any transitional justice measures. This has been empirically proven in cases studies, claims Hayner:

> Civil society has played an important role in every country that has experienced a successful transitional justice endeavor. National NGOs have helped to initiate, advocate for, and shape some of the strongest and most interesting transitional justice initiatives that have been implemented around the world. In Ghana, Sierra Leone, East Timor, and Peru, for example, national or local organizations played central roles in giving shape to the justice mechanisms put in place to confront past crimes.[19]

While Hayner generally focuses on a top-down implementation, other scholars have highlighted the diverse role of civil society in conceptualizing and formulating transitional justice. David Crocker suggests that civil society's "public deliberation" function as a source of discussion, investigation, advocacy, and liaison with victims allows it to play an "important role in deliberating about, formulating, scheduling, and prioritizing goals and in forging measures to realize them."[20] This perspective highlights the role of civil society as an intermediary between the local level and the national and international agenda. It has become more prominent in recent years as practitioners try to make transitional justice approaches more effective and responsive to the needs of the society.

Other transitional justice scholars have gone further, arguing that the traditional top-down "one-size-fits-all" model undermines the sustainability and success of transitional justice in conflict societies.[21] Scholars such as Diane Orentlicher[22] have argued that to achieve this, civil society organizations should not only act as sources of advocacy or discussion but also be directly included in both the design and implementation process of transitional justice. Naomi Roht-Arriaza, for example, believes that civil society organizations must be included through all phases of transitional justice, from conceptualization to implementation, for the root causes of conflict to be identified.[23] Civil society organizations' proximity to local communities means that they can provide greater insight into local culture and power dynamics and that their role as service providers and advocates also allows such groups to act as intermediate facilitators between local communities and transitional justice initiatives.

There are many ways that civil society organizations can contribute to the transitional justice process. However, there are a number of factors that often limit their engagement with transitional justice. In countries transitioning from conflict and authoritarianism, civil society organizations are often weak, disorganized, and lack the capacity to independently and effectively act.[24] This can be due to the targeting of civil society actors during the conflict, the debilitating restrictions placed on civil society groups during authoritarianism, or simply the plethora of new organizations being established from the transition processes. Transitional justice is also largely based on the position of the incumbent government and demand or pressure for it. Opposition by the state, even in the face of pressure from external sources, is critical in preventing any meaningful transitional justice measures both domestically and internationally.

There are also multiple and competing priorities for countries transitioning from conflict or authoritarianism. This includes ensuring the security of civilians

18 Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions,* The United Nations (New York and Geneva: United Nations, 2006), http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf.

19 Priscilla Hayner, "Responding to a Painful Past: The Role of Civil Society and the International Community," in *Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy*, ed. Mô Bleeker and Jonathan Sisson, KOFF Series Working Paper (Bern: Swiss Peace, 2005), http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/WP2_2004.pdf, 45.

20 David Crocker, "Civil Society and Transitional Justice," in *Civil Society, Democracy, and Civic Renewal*, ed. Robert Fullinwider (Lanham, MD: Rowman and Littlefield, 1999), 381-384.

21 Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice From The Bottom Up," *Journal of Law and Society* 35, no. 2 (2008): 265-292.

22 Diane F. Orentlicher, "Settling Accounts' Revisited: Reconciling Global Norms With Local Agency," *International Journal of Transitional Justice* 1, no. 1 (2007): 10-22.

23 Naomi Roht-Arriaza, "Civil Society in Processes of Accountability," in *Post-Conflict Justice*, ed. M. Cherif Bassiouni (Ardsley, NY: Transnational Publishers, 2002).

24 Brahm, "Transitional Justice."

and areas of land, undertaking institutional reform, rebuilding destroyed or weakened infrastructure, and encouraging investment, employment, and economic recovery, to name a few. Addressing injustices or implementing political reforms can seem like a luxury, even to ordinary citizens, in the context of such competing demands and limited resources. If there has been no conflict resolution or democratic transition, civil society organizations must work in often oppressive conditions. In such instances, groups that work within the country are faced with very restrictive space and resources to conduct any advocacy or local transitional justice initiatives, while those acting outside the country have difficulty representing and engaging with those on the ground.

As the transitional justice field has developed, it has increasingly shifted its focus from the traditional top-down implementations to more multifaceted approaches that try to be responsive to local contexts. Civil society organizations have become important actors in these new justice models. Organizations engaged in conflict-affected situations, however, must grapple with multiple contradicting tensions and pressures. These dynamics can particularly weaken and limit the work of domestic civil society groups and their efforts to achieve justice and accountability. Domestic groups may hold critical local and contextual wisdom while external agencies may have greater financial and management structures. Partnership between organizations is therefore necessary to match the capacities and weaknesses of organizations and to expand the diversity of stakeholders.

ABOUT THIS REPORT

Each of the three cases explored in this study sheds unique insight into the different concepts and challenges of transitional justice. Particular attention was given to the steps taken by civil society groups or political parties prior to political and social transition to help them prepare for future accountability and social reconciliation. Of interest to this research was the preparation process itself. Factors such as the historical context of the war, onset of preparations, the unique tensions or concerns that emerged, decision-making processes, evolving dynamics, and external influences are examined. By using a case study approach, comparative lessons are drawn related to how various transitional justice modalities, the supporting theories, and practices for building peace were conceptualized, as well as what cultural, religious, economic, and gender considerations shaped framework priorities.

South Africa, Indonesia, and Colombia were chosen as case studies to demonstrate differences in experiences with multiple paramilitary and resistance sub-groups, state-sponsored violence, religiously and ethnically diverse populations, histories of mass atrocities and repression, and gendered violence in a time of war. By focusing on themes relevant to the Syrian case study, this project hopes to begin the process of :

- identifying the relationship between Track I (international and national state) and Track II/III (non-government and local communities) concepts of "justice" and frameworks, with a particular focus on the use of alternative forms of non-state justice and/or legal pluralism;
- exploring the implications of transitional justice understandings on accountability and reconciliation on the social and political situation;
- drawing comparisons and lessons for these cases in the context of Syria.

Each case study is structured to give a history of the conflict and of the pre-transitional or pre-peace agreement dynamics. This includes an analysis of the conflict, stakeholders, issues, and external influences that affected the pre-transitional process, for example, what civil society organizations lobbied for, what were the needs of the communities, and the priorities of the political parties. The effects of these pre-transitional activities are then analyzed in the context of the peace agreement or transitional justice framework that emerged. In the case of South Africa, this was characterized by the Truth and Reconciliation Commission, while in Indonesia there were a number of laws enacted to try to institutionalize human rights and establish a truth commission. In Colombia, the analysis looks primarily at the peace negotiations between the state and the FARC-EP. The frameworks are analyzed in terms of the concepts of justice that were used; the priorities of the stakeholders, whether that be truth telling, reconciliation, or punishment; and the pragmatic, cultural, or religious values that influenced the processes. The third section analyzes the implementation of the framework and why was it was successfully or unsuccessfully implemented. This is then followed by a final overall analysis of the case study, looking at the concepts and challenges of implementing different justice models.

A final chapter is dedicated to Syria. The atrocities of the war have followed decades of oppression. This chapter analyzes both the dynamics driving the Syrian conflict and the preceding decades of state-sponsored

violence. It also tries to highlight certain parallels to both the successes and failures of conflict transition in the case studies of South Africa, Indonesia, and Colombia, with the hope that this will lead to new ideas and policies to address Syria now and in the future. While the issues that Syria is facing are not individually unique, the sheer scale and combination of these inter-dependent issues combined does pose challenges and create a sense of intractability to the conflict dynamics. As such, four key aspects of the conflict have been highlighted for greater analysis in terms of transitional justice. These are foreign fighters; the Syrian military and paramilitary groups; the Syrian diaspora, refugees, and displaced communities; and gender sensitivity.

The South African case study is written by Dr. Teri Murphy. Dr. Murphy has been a scholar/practitioner for over thirty years. She has been actively involved in community peacebuilding initiatives in South Africa, where she lived, studied, and worked for 12 years; in Sarajevo, Bosnia, through inter-faith dialogues and women's empowerment; and in intercommunal dialogue and reconciliation in Northern Ireland with the Corrymeela Peace Centre. Dr. Murphy completed her doctoral work from the University of Cape Town in Social Psychology with a focus on collective memory, narrative, and social healing.

The Indonesian case study is written by Auveen Woods. Ms. Woods has been a Researcher at the Istanbul Policy Center since 2014. Her work focuses on peacebuilding, justice, and conflict-sensitive development. She has been engaged with a number of international and local civil society organizations working in Somalia, Turkey, and Syria. Ms. Woods has also been researching and developing peacebuilding and conflict-sensitive projects among displaced and refugee communities in Turkey and Somalia.

The Colombian case study is written by Maria Christina Vibe. Ms Vibe is an independent peace and conflict researcher. Currently, she is based in Colombia, where she is researching women's participation in the peace process and working with gender, human rights, and conflict resolution in the Colombian military in the implementation phase. She has consulted with several international and local think tanks and NGOs based in Norway, Turkey, and Colombia on issues relating to peacebuilding processes, gender mainstreaming, ethnic minorities and conflict, and the inclusivity of peace processes.

LESSONS FROM SOUTH AFRICA

Teri Murphy

INTRODUCTION

Within the devastation and incredulity that societies face as they emerge from a violent and bloodstained history sits the bald but formidable question of how to move forward. How do injured states, communities, and individuals make their way into a new dispensation, one in which the past is reckoned with justly and in which healing and social reconciliation emerges? For the past two decades, international legal systems, states, and civil societies have wrestled each other over how to best confront questions of justice and accountability in the aftermath of a civil war, repressive government, or military regime. Evolving transitional justice discourse evinces the ongoing and inherent tensions between these various stakeholders as debates continue to insinuate "ownership" and competing aims within these processes. One of the earlier instigators of this evolutionary process, South Africa, drew from the wisdom of South American and Eastern European paradigms, but ultimately imprinted its own mark on these ensuing conceptualizations and practices. This chapter of the report will examine the South African case study to clarify what happened, offer analysis of the social and political context and tensions, describe the framework of the Truth and Reconciliation Commission (TRC), identify its limitations, and analyze the impact upon the evolving transitional justice discourse.

HISTORY OF THE CONFLICT

South Africa's history of violence and oppression stretches through several centuries as well as multiple nationalities and ethnicities. Although the apartheid regime came into existence during the 20th century, the majority of the South African people had been in continuous servitude for nearly three hundred years under either Dutch or English colonization. However, after the onset of the National Party's apartheid system in 1948, an insidious, sophisticated, and far-reaching racially repressive policy eventually developed into a stranglehold that spanned the next 50 years. Although discrimination had existed long before 1948, the apartheid system was qualitatively different. The "laissez-faire" pattern of white supremacy turned into systematic and legalized racial discrimination. The consequence of legislation such as the Group Areas Act of 1949, the Population Registration Act of 1950, the Prohibition of Mixed Marriages Act, and the 1953 Bantu Education Act contributed to immense suffering, the destruction of family and communal ties, and massive losses of property and income.

Simultaneously, countries throughout the African continent had begun to decolonize and delink from Cold War alliances. The ensuing regional instability, alongside international civil and political rights movements, began to infuse an already conscientized majority population. The internal simmer within South Africa began to boil. By the mid-1980s there was a general state of emergency, thousands of people had been imprisoned, banned opposition groups had militarized, and the State became even more ruthless in its enforcement. Decades of apartheid suppression, alongside armed resistance by the military wing of the African National Congress (ANC) and others, had generated forced displacement, massacres, torture, disappearances, and the lengthy imprisonment of political activists. At the same time, ethnic rivalries had increased, often leveraged by political elites, which only intensified the cruelty and expression of violence.

An additional variable exacerbating the growing conflict was the reinforcing tension between economic insecurity and the anti-apartheid struggle. The macroeconomic environment of South Africa was especially volatile during the 1980s. Because leaders faced a growing national debt burden from the 1970s alongside its international isolation as a result of economic sanctioning, they began to borrow heavily to finance several larger investments. Due to the increasing armed resistance, large amounts of money were also spent on the military and the state-owned munitions industry. This combination of economic and political instability eventually contributed to a debt crisis in 1985, because lenders and external investors became less willing to invest in South Africa. Worldwide anti-apartheid activist campaigns began applying pressure on banks, not only to stop lending to South Africa but also to divest. Between 1984 and 1985, 47 U.S. companies withdrew their monies from the country, and by 1987, 20% of British firms had left.[25] Although strategically and morally arguable, the international community's economic influence on South Africa's

25 Carolyn Jenkins and Elisabath Ardington, "Sanctions, Economic Growth and Change," in *The Political Economy of South Africa*, ed. Nicoli Nattrass and E. Ardington (Cape Town: Oxford University Press, 1990).

political dynamics certainly assisted in the crippling of the country's fiscal viability.

It was the confluence of acutely increased and persistent violence and instability, a weak economy, the State's difficulty in controlling and suppressing uprisings, immense international pressure, and a change of leadership within the National Party's guard that eventually contributed to the possibility of political transition in South Africa. Across the wide spectrum of political leaders, opposition parties, and civil society, a centripetal force around this "ripening" for change from multiple locations emerged. While perspectives on ownership or authorship for this catalyst of political change differs, what seems important to analyze is how these various forces ultimately merged in ways that promoted South Africa's transition to a new constitution and its democratic era. What follows is a finite description of some of the more dominant stakeholders and particularly salient discussion points that eventually contributed to South Africa's unique expression of transitional justice, the Truth and Reconciliation Commission.

PRE-TRANSITIONAL PROCESS

Although President F. W. de Klerk announced that the ANC was unbanned and that political leaders such as Nelson Mandela would be released in 1990, the actual preparation for political transition had been underway for a few years. The Institute for a Democratic Alternative for South Africa (IDASA), a non-governmental organization committed to "negotiation politics," had already held a major conference in 1987 with astutely focused discussions on ways to envision a democratic alternative to apartheid. A wide range of civil society leaders from across the political spectrum and several sectors including government, business, law, labor, media, education, and the Church had met together to analyze institutional reform implications. Afterwards, a representative contingent traveled to Senegal to meet with exiled ANC leaders to discuss various strategies and holistic frameworks. Spearheaded largely by former parliamentary official and religious leader Alex Boraine, IDASA's underlying commitment to a multi-stakeholder process was bolstered by the belief that "legitimate structures of authority, namely the government and those in resistance to it, needed to meet around a table and negotiate a completely new blueprint for the future."[26] This early, and very important, emphasis on process inclusivity and multi-stakeholder discussion seems to be both impetus and strategy for how South Africa ultimately transitioned into its future.

By the time political prisoners were released in 1990, negotiations were well underway between the ANC and the National Party. Leaders from both parties had been secretly meeting since 1984. This was largely due to the increased social unrest of the 1980s, economic tensions, and the shifting geopolitical dynamics. The acute increase in violence and instability during this timeframe unquestionably influenced conceptualizations of transitional justice. Of significant concern was the need to move towards democracy and facilitate peaceful relations between the variant national political parties. In a context of a virtual military stalemate and a history of human rights abuses, the transitional process towards democracy and the rule of law was fraught with challenges. IDASA leaders remained proactive, commencing a fact-finding trip in 1992 to several countries in Europe with the objective to learn firsthand from societies undergoing their own transitions. They met with a wide range of officials and civil society leaders from Germany, Czechoslovakia, and Hungary to analyze how other countries confronted the wounds implicated out of a past of fascism, communism, or extreme authoritarianism. The South African contingent also hoped to ascertain the kinds of unexpected problems and unintended consequences within those transitional justice paradigms. Although each of these countries had their own unique political/social histories, common questions had emerged during their transitions: How can fledgling democracies deal with past human rights violations? What are the ways in which new democratic governments "should" deal with leaders (political, military, religious, etc.) and individuals responsible for either ordering or carrying out gross human rights violations such as disappearances, torture, and death squads? What about those who were banally complicit with the former regime?

Legal philosophy, pragmatism, and the lessons learned from these predecessor countries continued to influence the unfolding transitional justice discourse within South Africa. For example, former Executive Director of Human Rights Watch Aryeh Neier and the Open Society Institute met with South African civil society leadership to strongly encourage the inclusion and incorporation of Latin American transitional justice analysis. In particular they highlighted the experiences of Argentina and Chile, which had both set up investigatory truth commissions that were open to the public. Eventually, by February 1994, a host of international and national experts (including Aryeh Neier, Jose Zalaqueet, Adam Michnik, Lawrence Wechsler, Tina

26 Alex Boraine, *A Country Unmasked* (Oxford: Oxford University Press, 2000).

Rosenberg, Albie Sachs, Michael Lapsley, Andre du Toit, Dumisa Ntsebeza, and Kader Asmal) convened and rigorously debated ways to shape a "correct attitude" towards the ethical and political dimensions of transitional justice considerations.[27] Significant here was the commitment to listen to and learn from a wide array of perspectives, history, and experience in the midst of discerning politically prudent and efficacious scenarios for South Africa's future.

Parallel to these ongoing civil society-driven discussions were equally significant debates between the judiciary, the National Party leadership, the ANC, and various other political factions. After the release of Mandela in February 1990 and the unbanning of political parties, talks initially focused on an indemnity process that would release political prisoners from South African jails and protect returning exiles from being arrested. These talks led to an agreement called the Groote Schuur Minute and the Indemnity Act of 1990, which provided temporary amnesty for mainly ANC members accused of political violence. Negotiations also led to the establishment of a National Peace Accord in 1991, which outlined a framework for dealing with political and communal conflicts. It was signed by more than 40 organizations pledging their commitment to the peace process. The Convention for Democratic South Africa (CODESA), under the chairmanship of judges Michael Corbett, Petrus Shabort, and Ismail Mahomed, convened formal meetings by 1991, gathering representatives from 16 different political parties to bring about an undivided South Africa and to work towards a free and open society based on democratic values (CODESA I – Declaration of Intent). Multiple, intense, and at times stalled negotiations were taking place in an attempt to put legal, political, and civil provisions in place to address the county's long history of repressive rule.

Mandela and de Klerk helped to negotiate a peaceful end to South Africa's apartheid, but the way forward was tenuous. The most contentious issue during multiparty negotiations toward an interim constitution was whether amnesty would be granted to wrongdoers. The prevailing view within the aggrieved ANC was that the past could not and should not be ignored. Accountability was a prerequisite for a human rights culture, and ignoring the past would perpetuate victimhood. If the goal was a peaceful future, dealing directly with gross human rights abuses was inescapable. The party's call for justice, truth, and accountability was overwhelming. International and civil society leaders offered caution; focusing on corrective justice would be a "quixotic quest," and deviation from measured due process could ironically create a victim-perpetrator-victim cycle. While accountability was critical, balancing concerns for justice with the protection of a newly emerging democracy that was also wounded and deeply divided was equally important. The National Party and its military, however, had a different agenda. Prior to any consideration for the peaceful transfer of government, its leaders wanted to secure amnesty for those in their regime who had committed politically motivated crimes. The ANC was vehement in protest, arguing instead for a truth commission that would fully investigate the facts of human rights abuses. They had already held two independent commissions into human rights abuses within their own ranks, investigating allegations of what took place in Angolan training camps.[28] For them, blanket amnesty was unacceptable.

Both sides drew red lines. The National Party was insistent, advocating for a reconciliation commission and voicing particular concern that those who participated in activities sanctioned by the apartheid government receive amnesty. These tensions, alongside the obvious asymmetry in power, became the nexus for what ultimately became a "negotiated settlement" and the only likely way to avoid a protracted future of bloodshed. It was clear that any transitional mechanism was going to be born out of a struggle dominated by national political interests and power politics. The ANC could not expect protection from former National Party security forces (which included the police and military) if actors within those infrastructures feared reprisal. It was not until the eleventh hour of political negotiations that a "sunset" clause was inserted as a postamble to the Interim Constitution draft. With this clause, leaders finally moved through the impasse as it ensured that state and security personnel were protected from purges and promised amnesty for politically motivated crimes. Language within the postamble seemed to appease outgoing political leaders, and without this concession there was simply no way that the National Party would have continued to be part of the negotiation process. Whether it was shrewdness or strategy, the ambiguity about the specific characteristics of amnesty were ostensibly not defined in the provision. This gave the newly inaugurated ANC government, under the leadership of Nelson Mandela, eventual latitude to qualify and differentiate between forms of amnesty. Holding true to their promise, the ANC government would, in fact, offer amnesty—but it

27 Ibid.

28 Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study* (Baltimore, MD: Johns Hopkins University Press, 1994).

would be based upon a set of conditions and not universally guaranteed.

After immense effort and contributions by civil society, international human rights lawyers, and activists, as well as hundreds of hours of hearings, the new Parliament of the Republic of South Africa passed the Promotion of National Unity and Reconciliation Act of 1995. In its Explanatory Memorandum to the Parliamentary Bill, the framers noted that based upon this wide spectrum of input, South Africans had concluded their country would best move forward through an institutionalized process of reconciliation:

> to achieve unity and morally acceptable reconciliation, it (was) necessary that the truth about gross violations of human rights must be established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identity of the planners, perpetrators and victims.[29]

Although not fully elucidated, an accent on truth had been underscored. By July 19, 1995, the Parliament had fulfilled its duty by legislating the Truth and Reconciliation Commission (TRC)—complete with a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation. The TRC was the product of a lengthy process of deliberations between many groups, but it ultimately came to fruition through a democratic legislative act. Within an intention to secure and ensure legitimacy, the transitional justice expression of the TRC sought to capture the process of public deliberation while also retaining sensitivity to the larger political context of negotiation and compromise between former adversaries. Yet once the framework had been established, the ethical and religious commitments of standing leaders Nelson Mandela and Archbishop Desmond Tutu began to set the overtones of reconciliation and forgiveness. This was a vision that distinguished the South Africa commission from previous truth commissions, in which its own history, culture, and expression of *Ubuntu* values were legislated and contextualized.

The Promotion of National Unity and Reconciliation Act of 1995 provided "for the investigation and the establishment of as a complete a picture as possible of the nature, causes and extent of gross violations of human rights" under the auspices of the TRC. The motivation behind this legislative act was to balance the demand for granting amnesty to perpetrators of political crimes with the provision of truth through accounts of what happened to victims. Newly appointed Minister of Justice Dullah Omar made the formal announcement of the TRC in Parliament on May 27, 1994. He offered a general framework for the commission and invited individuals, organizations, and religious bodies to submit their comments and proposals by the end of June. Years of civil society discussion, considerable political stakes, and hours of parliamentary debate had finally come to fruition through the establishment of South Africa's Truth and Reconciliation Commission, and quickly thereafter it assumed a potent role in the allocation of moral blame and in the establishment and official history of past events.

FRAMEWORK

Mandate and Framework of the Commission

The full remit of the TRC's work was finalized in the Promotion of National Unity and Reconciliation Act, and it began operating in December 1995 with the broad aims of promoting national unity and reconciliation. The spirit of its mandate was framed in contrast to a history of strife, conflict, and untold suffering. Instead, the vision of South Africa's transition towards democracy was a future founded on the recognition of the rights and peaceful co-existence for all its peoples, irrespective of race, class, belief, or gender.[30]

Its fundamental foundation was infused with a remarkable and unprecedented conciliatory spirit. Undergirding assumptions and beliefs of the TRC were set out from the beginning and include the following:

- "...it is necessary to establish truth in relation to past events as well as motives for and circumstances in which gross human rights have occurred... to prevent a repetition of such acts in the future;
- "... the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
- "....there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimization."[31]

29 Statues of the Republic of South Africa, Promotion of National Unity and Reconciliation Act 34 of 1995, Justice and Constitutional Department of the Republic of South Africa, July 19, 1995, http://www.justice.gov.za/legislation/acts/1995-034.pdf.

30 Ibid.

31 Ibid.

The TRC was tasked with a broad mandate to investigate gross human rights violations and establish as complete a picture as possible of the nature, causes, and extent of gross human rights violations committed within or outside South Africa in the period of 1960-1994. Comprised of three arms, the Human Rights Violations Committee, the Reparation and Rehabilitation Committee, and the Amnesty Committee, the commission would:

- find out the fate or whereabouts of victims,
- grant amnesty to persons who make full disclosure of relevant facts related to acts associated with a political objective,
- afford victims opportunity to relate the violations they suffered,
- take measures aimed at granting reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights,
- report to the State about such violations and victims, and
- make recommendations aimed at the prevention of the commission of gross human rights violations in the future.[32]

Aspirations woven into the design of this unique transitional process included an attempt to hold the tensions of truth telling, limited amnesty, and reparation in ways that would assist the new fledgling State's efforts to promote national unity and reconciliation.

Following a public nomination and selection process, President Mandela appointed seventeen commissioners, with Archbishop Desmond Tutu as Chair and Alex Boraine as Vice Chair. This initial configuration of the commission was inaugurated in December 1995 and began its first hearings just a few months later. Over the course of the next two and a half years, staffed with over three hundred workers, four offices around the country, and an annual budget of 18 million USD, South Africa's TRC would go on to eclipse the scope of all preceding truth commissions.[33]

Conceptualizations

Throughout the transitioning governance period of 1990-1994 and well into the actual operationalization of the TRC, concepts such as truth, justice, reconciliation, and reparative priorities were rigorously debated by political party leaders, legal prudence experts, and a wide range of civil society activists. While all of these conceptualizations are important within most transitional justice processes, inevitably some of them will become elevated over others. Of primary concern to Chairperson Tutu were social healing, forgiveness, and reconciliation. He envisioned a national process wherein the dignity and personhood of those who had historically been silenced and marginalized would be affirmed and rehabilitated through public hearings and official acknowledgement of their narratives. As a companion to social healing, justice was conceptualized as restorative rather than retributive, with recognition for the need to repair harm. While Tutu and other proponents of restorative processes believed that violations had consequences and that crimes may necessitate legal punishment, more emphasis was placed on collective healing as the best way to ultimately promote national reconciliation.

Of central concern for Tutu was "redressing of imbalances, the restoration of broken relationships, (and) seeking to rehabilitate both the victim and the perpetrator."[34] Theological, spiritual, and psychological beliefs served as the foundation for this restorative approach, and much weight was given to the need for catharsis and healing. Inter-subjectivity between a victim and perpetrator was believed to hold immense potential with space for moral truth to emerge between traumatized individuals/communities, bystanders, and even for those who committed ghastly deeds. Regardless of whether or not a victim chose to personally testify, through the public testament of others, they could locate their experiences within the larger political landscape. For Tutu, justice was indeed important—but a specific expression of justice, alongside the breaking of silence in the form of truth telling, would be the beginning of a more honest national narrative, one that could encourage social healing and restoration.

Notions of justice serve several different purposes. Theoretically, justice can promote punishment, retribution, deterrence, redistribution, reparations, and rehabilitation. The implementation of justice, however, is limited and bound by law, culpability, privacy, proportionality, and liberty; it can be sought through a wide

32 Ibid.

33 Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002).

34 Desmond Tutu, *No Future Without Forgiveness* (New York: Double Day, 1999), 30.

continuum of approaches—from blanket amnesty to international tribunals. Transitional justice processes are applied through a variety of means that are generally dependent upon the goals of justice. In the case of South Africa, a restorative justice frame embodied a process in which social healing and national unity were encouraged. Although individualized accounts were highlighted in both the Human Rights Violation Committee and the Amnesty Committee, a major task of the Commission was to fit these wrongdoings into a larger collective narrative. Heralded as a victim-friendly or victim-sensitive process, the TRC's goal was ultimately "the promotion of national unity"—not individual healing, per se.[35] The nuance of this difference was an inherent tension between the TRC's vision and, in particular, the Human Rights Violation Committee's mandate.

Wrangling and protests over definitions, terminology, and priorities persisted throughout the TRC process. Alongside notions of justice, the concept of truth continued to be pulled and tugged, even though the feasibility of establishing forensic truth had been examined well before the Commission commenced. Although incoming State officials had a number of transitional justice goals, which included responding to past abuses, punishing perpetrators, and establishing truth—they understood that criminal trial proceedings required that evidence produced in a case pass the most rigorous scrutiny to satisfying the criterion of "beyond reasonable doubt." The prospect of finding that quality of evidence was dim because in some instances the only witnesses alive were perpetrators. Additionally, as the two governments were passing the baton, the outgoing State had used considerable resources to destroy evidence and cover up their crimes. Even the judicial system had colluded with police over the years. The truth had been manufactured or concealed, files were not accessible, and witnesses to cases had been blotted from records. Charged with the duty to obtain facts, the TRC was also expected to work towards overcoming community ignorance and government denial or secrecy; the limitations of evidentiary truth finding were going to be a formidable obstacle to these goals. As so eloquently written in the Final Report:

> The story of apartheid is, amongst other things, the story of the systematic elimination of thousands of voices that should have been part of the nation's memory. The elimination of memory took place through censorship, confiscation of materials, bans, incarceration, assassination and a range of related actions. Any attempt to reconstruct the past must involve the recovery of this memory – much of it contained in countless documentary records. The tragedy is that the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitize the history of oppressive rule.[36]

The concept and veracity of "truth" in the context of the TRC remained widely debated and became a source of legal contention. The realism of scant, if not dubious, forensic evidence was a certain consideration for the framers of South Africa's transitional justice paradigm. However, Justice Albie Sachs reminded those in the Constitutional Committee and the National Executive of the ANC that truth had many faces, which were not necessarily mutually exclusive. While forensic or evidentiary truth offered factual, verifiable, and documentable evidence, there was also social truth, personal truth, the aforementioned moral truth, and even the truth of wounded memories. Given the heinous nature of many of the crimes, and the shroud of secrecy and lies within the apartheid system, there was unflappable adamancy to lift "the veil of denial" about widely known but unspoken truths. The TRC offered opportunity for a "dialogic truth" to emerge: a kind of truth grounded and established through vigorous interaction, discussion, and debate.[37] Tutu's healing truth relied heavily on the moral truth that would result from these interactions. By breaking silences, acknowledging the past, and bearing public witness, then, and only then, could the dignity and narratives of South Africa and its victims be restored and reclaimed.

Moral truth was also meant to dispel, clarify, and illuminate broader institutional forces. Instead of focusing on verifiable facts, this expression of truth sought to analyze and reflect upon ethical or moral implications. ANC parliamentarian and human rights expert Kader Asmal, for example, maintained that confronting the roots of systemic violence was mandatory; establishing moral truth was a non-negotiable. If the former National Party system was not clearly seen and recognized as morally illegitimate, he asserted, its structures of government and social institutions would simply accommodate themselves into the "new South Africa," and their life force and underlying assumptions would remain. He states, "to preside over

35 Statues of the Republic of South Africa, Promotion of National Unity and Reconciliation Act 34 of 1995.

36 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1998), 201.

37 Ibid., 113.

justice in a transitional era is almost always a moral and political poisoned chalice," and warns that while morality may seem a luxury in *realpolitik* negotiations, certain compromises simply must not be made.[38] Not only would neglecting history kindle resentment from the majority of South Africans, it could essentially act as a veneer that covered up a "panoply" of the State's power through secret crimes and services. He called for a revival of moral conscience through truth telling, because without it, the diversity within South Africa's common citizenship would never emerge into a national consciousness. Finding and establishing the "truth" about institutionalized and structural violence was paramount.[39]

Social reconciliation, justice, and truth were three bulwark principles that remained ambiguously affixed to the guiding vision of the TRC. While these same conceptualizations also appear in many other transitional models, what remains unique to South Africa's framework is the spiritual notion of *Ubuntu*. In the epilogue of the interim constitution,[40] this concept shapes the premise and need for a Truth and Reconciliation Commission, with a call for healing instead of further retaliation and victimization. Whether as ethos, cultural value, or spiritual practice, to define and translate *Ubuntu* is difficult. As Tutu attempts to explain, *Ubuntu* connotes the essence of being human. Humans are inextricably bound together, belonging to a bundle of life: "A person is a person through other persons,"[41] not an island unto themselves. In fact, Tutu claims, "we are all diminished and humiliated when others are tortured or oppressed or treated as if they are less than who they are."[42] Those participating in the TRC who aspired to *Ubuntu* believed in a delicate network of human interdependence. Essentially, by drawing together victims and perpetrators, wholeness and life might be given back to both of them. Confessing, truth telling, sitting in the presence of the Other, being held accountable, forgiving—these were the fundamental steps toward healing and regaining humanity. For victims whose humanity had been disgraced and violated, public acknowledgment and being able to confront perpetrators reaffirmed their human dignity. And for perpetrators, whose humanity had been disgraced and violated in the process of doing horrific deeds, public accountability, and at times being able to sit with their victims, invited them back to their own human dignity.

Because the TRC was such a public process, it was not realistic to expect that all the varied stakeholders would agree to definitions of terms or their necessary prioritizations. Even though these terms were widely debated prior to the commencement of the TRC and remained controversial throughout its tenure, it was largely up to the commissioners themselves to personally resolve the inherent tensions. Tutu, in his role as Chair, certainly cast the vision of the TRC through his own religious and moral understandings. But as the commission waned on, the concepts of truth, justice, reconciliation, and *Ubuntu* continued to shift in shape and seemed to remain resilient to any formalized or agreed upon understanding. Regardless of the disagreement and agitation about these core concepts, they became mainstays within South Africa's transition to a democratic future.

FRAMEWORK OPERATIONALIZED

Three committees, vested with different mandates and operating out of unique modalities, constituted South Africa's commission. *The Human Rights Violations Committee* (HRVC) was charged with collecting statements from victims and witnesses and recording the extent of gross human rights violations. The scope of the HRVC's mandate was expansive if not near impossible. These commissioners believed that the TRC should travel to where the people were rather than expect witnesses to come to a central venue in Pretoria or Cape Town. From the onset of their tenure, they set out to fling the net of their efforts far and wide. To better manage the breadth of their mandate, the HRVC chose to cover the vast distances within the country by decentralizing outreach and offices. The office located in Cape Town served as both their administrative and regional hub. With offices in four other strategic locations, the TRC was able to collect many more testimonies than would have been possible. Additionally, they reached into several of the invisible and marginalized communities that could have easily remained unnoticed and unacknowledged.

Administrative details under the committee's prevue included the following: the safety of all participants and services; the representation of victims appearing at public hearings; prudence in selecting the choice of public testimony and the site of hearings; simultaneous translation services; establishing the format of hearings; determining the length of victims' testimonies; the provision of legal assistance for victims; psycho-

38 Kader Asmal, "Truth, Reconciliation and Justice: The South Africa Experience in Perspective," *The Modern Law Review* 63, no. 1 (2000): 1-24.

39 Kader Asmal, "Victims, Survivors and Citizens – Human Rights, Reparations and Reconciliation," *South African Journal on Human Rights* 8 (1992): 491-511.

40 Constitution of the Republic of South Africa Act 200, 1993.

41 Tutu, *No Future Without Forgiveness*, 35.

42 Ibid., 31.

logical and spiritual support for families who testified; and determining a policy of cross examination by alleged perpetrators. To meet these various tasks, sub committees for a witness protection program, security, and media liaison were appointed to focus specifically on these concerns. But, the efficacy of these tasks also rested largely on the support of civil society leaders throughout the country. In the early and formative stages of the HRVC, these leaders aided in identifying and encouraging statements by people within their communities—as well as setting up sites where testimonies could be safely and confidentially given.

Victim statements were secured by trained "designated statement takers" from NGOs, community-based organizations (CBOs), faith-based organizations (FBOs), and civil organizations in three general ways. Some statement takers were based in the four regional offices; through the media and other community portals, victims were invited to come and offer their accounts. Statement takers additionally travelled throughout the country and recorded accounts in various public settings. International donors also funded a program in which statement takers were employed full-time. The role of the statement takers was to gather information from victims of gross human rights violations and to establish public record. Emphasis was also placed on the therapeutic purpose of offering victims opportunity to speak, and statement takers were encouraged to sympathize and acknowledge the pain of those coming forward. Once statements were made, they were registered in a database, photocopies and originals were secured, and these individual accounts became part of the country's permanent record. By the end of the TRC's tenure, approximately 21,297 statements had been taken, including 38,000 allegations of gross human rights violations, of which 10,000 were killings. These statements came overwhelmingly from the African population (19,144), with only 231 of the statements made by white South Africans.[43]

To engage the public in the national reconciliation process, a central strategy of the TRC was to hold nearly 80 community hearings around the country. Approximately 2,000 victims were able to give their accounts of what happened in these formal venues, which were often covered extensively by the media. As the first phase of the commission's efforts, victim testimonies were exceptionally emotional, which inevitably shaped the image of the TRC's work and set the stage for subsequent investigations and amnesty hearings. In preparation for statement taking and public hearings, a small team would meet with various local political leaders, explain the vision of the TRC, and elicit their support. Statement takers would follow, collecting testimony from victims at publically advertised venues. Once statements were taken, the TRC would select particular cases—representative of political or ethnic sides, illustrative of a range of abuse, and occurring throughout the timeframe of 1960-1994. If there was an especially significant or galvanizing case in the history of the community, it would be spotlighted.

Special hearings were also conducted in which patterns of abuse experienced by individuals and groups were identified. These groupings focused on children and youth, women, and compulsory national service. Additionally, institutional hearings took place in which examination was given to various professions, institutions, and organizations and the role they had played in participating in, countering, or facilitating human rights abuses. These hearings were highly charged and often elicited considerable debate, but at the same time they served as a catalyst for introspection and transformation within some of the professional fields. The types of institutions under review included media, business, legal, medical, prison, and faith communities. Although political parties were also given an opportunity to offer account of their participation in historical conflicts and responsibility for gross human rights violations, resistance was high and fraught with controversy. Many of the hearings proved to be disappointing, but convening them gave the Commission opportunity to ask more specific questions, which inevitably helped it to formulate stronger policy and legislation recommendations to help prevent future human rights abuses.

The Amnesty Committee

Holding 2,000 public victim hearings in the course of two years may appear to be a formidable feat, but the inability of the TRC to hear more firsthand victim accounts remained a source of contention. Many victims wanted the same opportunity to be publicly heard, validated, and acknowledged within their own communities. Also, because the HRVC hearings came before the Amnesty Committee, victims could only declare what they knew or describe their experiences. They were not yet able to fully engage the reconciliation process because many still did not know what had happened to their loved ones. Some of them may have been willing to forgive, but they did not know who to forgive. Even though this gap in sequence was uncomfortable for the victims, the timing and sequence for the onset of the three committees was strategic. As more victims came forward to publicly share their experi-

43 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*.

ences, perpetrators were increasingly identified. Being named and the fear of exposure eventually drew some of the perpetrators who had been hedging their bets out of the shadows. In fact, so sharp was the increase in amnesty applications prior to the initial cut-off date that President Mandela made a concession and extended the deadline by several months.

The spirit and mandate of the Amnesty Committee was qualifiedly distinct from the HRVC. Not only were the aims of these two committees diametrically different, so too were the commissioners. The types of professionals working on behalf of the HRVC tended to be counselors, clergy, nurses, or human rights advocates. Because the focus of the victims' hearings was healing, the tone established was one of warmth, compassion, sensitivity, and care. In the beginning, it was not uncommon to see commissioners cry while victims offered their testimonies. The same cannot be said of the Amnesty Committee. Of the initial five members appointed, inclusion of a judge from the Supreme Court was required. Due to a heavy caseload, the committee grew to nineteen members, including six High Court judges, eight advocates, and five attorneys. The tone of inquiry was often similar to that of a traditional court case, whereby lawyers and commissioners argued, interrupted, questioned, and interrogated those applying for amnesty. Conciliation was largely absent from these venues.

Unique to South Africa's Truth and Reconciliation Commission, and perhaps equally controversial, was that the Amnesty Committee had been vested to grant conditional amnesty. As amnesty was not "blanket," each perpetrator had to make their own application, which was reviewed by an independent panel. Because of the significant legal consequences, this became one of the most hotly contested criticisms of the TRC. Once amnesty was granted, any pending legal proceeding was terminated, those serving a sentence were immediately released, and their criminal record expunged. Being granted amnesty also meant immunity against any future criminal or civil liability unless in the future the committee discovered that the applicant had failed to fully disclose information. The names of those who were granted amnesty were also made public in the TRC's final report.

Amnesty applicants had to meet a very specific set of criteria before being granted their pardon. Only crimes committed between May 1, 1960 and May 10, 1994 would be considered. The original deadline for application was September 30, 1997, approximately 16 months after the onset of the HRVC. Stipulations for receiving amnesty included that the applicant must (a) make full disclosure of their involvement, (b) show that the crime was politically motivated, and (c) demonstrate proportionality between the act and the political objective being pursued. If the crime fit within the definition of a gross human rights violation, the applicant was required to appear in a public hearing to answer questions from the commission, legal counsel of victims and/or their families, and victims themselves. Other applications were considered in chambers. Of the approximately 7,000 applications for amnesty, only 2,000 classified as gross human rights violations.

The commission considered several factors when determining whether an applicant met the criteria for amnesty:

- motive;
- context in which the act, omission, or offense took place;
- the objective of the act, omission, or offense;
- whether the act was primarily directed at a political opponent or State property or personnel, or against private property or individuals;
- whether it was carried out as an order or with an organization, institution, or liberation movement in which the person was a member, agent or supporter;
- the relationship between the act, omission, or offense and the political objective pursued;
- and in particular, whether there was disproportionality between the act and the political objective pursued. [44]

Four types of responsibility were also examined: those who committed the act of gross human rights violations; those in command who gave the orders; those who created a climate in which gross human rights violations could occur; and those who failed to hold violators responsible and who were therefore culpable for the sanctioning of official tolerance.

Due to the flood of last-minute applications, challenges within the investigative process, tedious legal proceedings, and the various court injunctions attempting to stop amnesty proceedings by both victims and perpetrators, it was necessary for this arm of the commission to extend its timeframe. As a result, when the TRC's

44 Hayner, *Unspeakable Truths*.

Final Report was presented to President Mandela on October 29, 1998, only partial findings from the Amnesty Committee were presented. The committee did not finish their hearings until May 31, 2001, having received 7,127 petitions for pardons for crimes committed under apartheid. Statistical records vary slightly, but amnesty was granted to roughly 913 cases; it was refused in 5,456 cases, while other applications were withdrawn.[45]

The Committee on Reparations and Rehabilitation

As South Africa began to draw testimony from victims and launch formal inquiries into its history of political violence, the Committee on Reparations and Rehabilitation (CRR) began its efforts to address instrumental repair. As stated in the Final Report of the Commission, the Preamble of National Unity and Reconciliation Act of 1995 stipulated that an objective of the Commission was to provide for measures aimed at the "granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights." Serving as the third arm of the TRC, this committee was tasked with considering matters referred to it from the HRVC and the Amnesty Committee. It was also responsible for gathering further evidence about the nature and extent of harm incurred, and to make recommendations to the president on appropriate reparative measures. Embedded within each of the regional offices, CRR commissioners worked through a wide range of groups and community structures to provide information, develop policy, and network with psycho-social support programs. Additionally, international agencies and academics enriched their efforts by offering input on program design and policy development. The faith community, particularly the South African Council of Churches, also offered significant assistance through its well-established infrastructure within rural and urban communities.

From the onset, it was clear that the Reparation and Rehabilitation Committee would need to rely on the assistance of non-governmental organizations and other civic-based efforts. A preponderance of individuals and communities had been traumatized, and the efforts of the TRC had admittedly opened up "old wounds." As a result, significant focus was then given to the treatment of trauma, with recognition that these services would continue well after the TRC had completed its mandate. Psycho-social agencies offered substantial support and services before, during, and after hearings, not only to victims and their families but also to all of the volunteers and staff members who were taking part in the Commission's efforts. Eventually trauma counseling and training manuals were developed, with special workshops offered to psychologists and social workers throughout the country.

Although CRR briefers and statement takers worked throughout the HRVC to assess the needs of victims, post-hearing follow-up became critical. In some venues, testimony given in hearings dumped a buried past squarely back into the public arena in ways that threatened community stability. In and of itself, the HRVC was clearly incapable of encapsulating full-scale reconciliation, so the CRR attempted to augment this need with a post-hearing follow-up plan to re-engage with communities, devise strategies to promote reconciliation within those neighborhoods, and eventually elicit grassroots ownership of the process. It is within this dynamic crux that the top-down versus bottom-up approach to social reconciliation seemed to be at greatest odds in the South African context, with all sectors of society aiming strong criticism specifically at this tension. The TRC was, indeed, a state-driven approach to transitional justice. While it did attempt to elicit support from community leaders throughout the process, in the end, only a miniscule amount of cases were publically heard, placing the bulk of "social reconciliation" efforts back into communities near void of infrastructure and resources.

As the CRR was working in tandem with the HRVC, the Amnesty Commission, and various community efforts, it maintained a consistent and formal relationship with the government through an inter-ministerial committee at the Cabinet level. Serving as a bridge between the micro-level of individual need, meso-level community efforts, and a macro-wide state response, the CRR was destined for immense obstacles and challenges. The committee's purview included both economic and symbolic acts of reparations such as social services, exhumations, tombstones, memorializations, commemorations, changing of street names, education bursaries, monetary payments, and policy recommendations—all with the sole purpose of repairing and restoring justice and dignity. Emphasis was placed on finding reparative ways to regenerate social connections and peace throughout society and to encourage capacity within individuals or communities.

Commissioners were not naïve. The dilemmas they faced had no easy answers, and there were always going to be significant limitations to their efforts. For many victims, monetary reparations could never replace non-

45 *Peace Accords Matrix*, Kroc Institute for International Peace Studies, University of Notre Dame, accessed February 1, 2015.

monetary harms such as the loss of a family member, torture, or humiliation. And for those who needed the assistance of monetary funds, the loss in livelihood through the death of a spouse or child, could not be adequately met. Official policies such as changing the names of cities, streets, and schools, though important and symbolic in their own right, did not bring back limbs or loved ones. The guiding vision of the CRR was not to repair the irreparable but to encourage victims and communities through some tangible or intangible expression to acknowledge apartheid's impact upon their lives. Subsumed with the Sisyphean realities of South Africa's violent past, however, the CRR's efficacy was largely dependent upon the State heeding its recommendations. Ultimately, the certain and gallant attempts of these Commissioners to offer constructive reparation in ways that generated social reconciliation were often misunderstood by the public or undermined by the government.

In 1998, the CRR handed over their report and policy recommendations to President Mbeki. Although amounts varied based upon the number of dependents involved, the committee endorsed giving each victim a maximum of 23,023 ZAR per annum (3,830 USD), payable for six years; funds were to be administrated through the President's Fund. According to their findings, of the 21,298 victim applications, 16,837 qualified as potential reparation beneficiaries. It was the TRC's estimation that it would cost the country 2.9 billion ZAR (477 million USD) for reparations. After a four-year delay that fueled widespread public debate, the government finally elected to offer victims a one-time payment totaling between 30,000 to 40,000 ZAR (5,833 USD). At the very least, all parties, including TRC commissions, staff members, and survivors felt betrayed, if not infuriated, by the ANC's decision.[46]

ANALYSIS

South Africa can serve as a model and offer considerations for societies transitioning from post-authoritarian regimes. Several lessons may be drawn from its pioneering efforts. Although the TRC occurred almost two decades ago, its unique mandate continues to shape evolving processes around the world. As a framework, South Africa's model was never intended to be fully imported to other contexts, nor is it easily replicated. The expression of South Africa's transitional period is contextually anchored, and the agenda of the TRC was born out of history, cultural and spiritual values, and pragmatism. There are still aspects of its model, however, that can be extrapolated and applied across different cultures and political systems. For the purposes of this report, two lessons are highlighted. First, countries moving through transition will face competing demands related to justice, the rule of law, and social reconciliation. To balance those claims, they must utilize multiple expressions of justice. Second, the purview of a transitional justice framework must be comprehensive and inclusive of international, national, and customary norms that operate within judicial and non-judicial forums.

The question of trying to address the perpetration of past human rights abuses while there is an ideological shift and transfer of power is complex. The demands of justice, truth, reconciliation, and amnesty overlap and compete during political transitions and pose difficult dilemmas for governments and civil society. Architects of transitional justice frameworks must balance these tensions within several other considerations. These include analysis of the root causes of conflict, types of violations, political will to address past abuses, economic and infrastructure limitations, and how the transition came about.[47] In the case of South Africa, its history of colonialism, systematic/systemic oppression, widespread human rights abuses, and an acute increase in state-sponsored violence, all contributed to a change in regime. Additionally, there was no clear victor. Apartheid did not collapse because of a military defeat, political overthrow, or gradual political opening. The National Party and ANC leaders faced each other across an impasse. All of these issues factored heavily into multi-party discussions and contributed to the eventual outcome of their negotiated peace agreement.

During governmental transition, a rigorous pursuit of justice may become tempered by the recognition of political realities. Establishing, protecting, and adhering to the rule of law should never be compromised, but the veracity of political predicaments may make this difficult. In the case of South Africa, for example, large-scale prosecutions were impossible. The demand for political amnesty was a red line for the National Party. Leaders would have walked away from the table had the "sunset" clause not be included in the Interim Constitution. Instead of being an extension of the judicial process, the law became a useful tool as a bargaining chip. The ANC did not have sufficient negotiating leverage to ensure that perpetrators would face prosecution, so they settled for a compromise instead.

46 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, Vol. 5.

47 Jose Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in *Transitional Justice*, ed. Neil J. Kritz, 3-31 (Washington, DC: United States Institute of Peace Press, 1995).

They would demand truth in exchange for amnesty. This decision was expedient, arguably prudent, and economically realistic, yet the Commission was ultimately criticized for not offering more rigorous enforcement of law. Some even maintained that it did little to end the culture of impunity.

Critiques of earlier transitional processes in Chile and Argentina also stood accused of impunity; justice was not evenhanded, nor was it served. The rule of law, which is a political expression of justice, is foundational to order, justice, security, and a liberal society. It is a governing principle in which all people, and the State, are held accountable; no one is above the law. In the wake of gross human rights violations, it is not simply a legal requirement but a moral obligation to hold perpetrators to account. Some maintain that without full accountability through international tribunals or state trials, the rule of law is weakened and will be undermined in the future regime. Without punitive consequences, there will be no deterrent for future abuse in the security and military apparatus, nor will a "culture of democracy" be inculcated if there was widespread and less-than-full accountability.[48] To maintain accountability is critical, yet at the same time, there are limits to law—and this was the case in South Africa. There were 38,000 documented cases of gross human rights violations. It would have been impossible to bring to trial and prosecute every alleged perpetrator.[49] This same challenge has been faced in other transitioning states such as Rwanda and Liberia. Societies facing widespread transgressions against the law will tangle with how to mete out justice in ways that are moral, fair, and far-reaching, yet also viable. Because of the limitations within the criminal justice system, additional instruments or models are needed to assure rule of law and that the demands of justice are met.

When the scope and severity of human rights violations is widespread, when there are multiple warring parties and political factions, and when a bedraggled society is bound to the same physical space and future, alternative and non-judicial forms of justice must be in place. South Africa's "negotiated settlement" was a symbol of its shared future. And while it was reviled by some as "selling out," peace would have remained elusive had leaders not forged some sort of accord or envisioned a way to collectively move through their transitions. Leaders also recognized that their future was directly linked to a very painful and sordid past; truth telling, acknowledgement, acceptance of responsibility, building a common narrative, and healing were equally important demands and essential for social reconciliation. Criminal trials do not restore the rights of those who were deprived in the past, and in the case of South Africa, this meant that justice must include notions of restoration, reparations, redistribution, and social justice. Restorative justice was not seen as a contradiction to criminal justice but as a compliment to it. Rather than detracting from the rule of law, it offered a richer and broader vision of justice that addressed the needs of victims, confronted perpetrators, and encouraged the process of reconciliation and social transformation. What this case study illustrates are the difficulties of pleasing all of these demands alongside the prevailing norms of international law. A lesson to extrapolate, therefore, is that a good transitional justice framework must be holistic and expansive in scope—observant to the rule of law, sensitive to practices that will promote social reconciliation, and realistic about what political and economic demands it necessitates.

Finally, the efficacy of transitional justice is largely dependent upon a strategically sequenced hybrid approach that is inclusive of top-down judicial mechanisms and bottom-up customary non-judicial application. South Africa started its process with a broadly inclusive pre-transitional process and by integrating local values such as *Ubuntu* into the very foundation of the Truth and Reconciliation Commission. However, the scope of the South African process was limited. At the end of the Commission's mandate, communities—bereft of alternative resources—were largely left without support. Questioning how policies may strengthen or debilitate broad civil engagement in the peacebuilding process is critical. International and national mechanisms are generally confined to specific time periods, narrow in focus, and maintain a distance from social reconciliation efforts. The burden of learning to live together and to rebuild the social infrastructure of society lies squarely on the shoulder of ordinary citizens through their daily interactions. A sound framework demands moving beyond the simplistic notion that retributive responses (international tribunals and national trials) constitute an effective and moral response to war crimes and crimes against humanity, while restorative practices are second-rate compromises. Mass atrocity, especially those perpetuated within a context of religious and ethnic conflict, expose deep social divides that will be resistant to a singular solution. The militarization of

48 Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal* 43 (August 1992): 6-16.

49 Brandon Hamber, and Steve Kibble, "From Truth to Transformation: The Truth and Reconciliation Commission in South Africa Report," Catholic Institute for International Relations Report, 1999.

everyday social life, as well as the deep traumatization of communities, is among the gravest legacies in post-war societies. The very process wherein peace is "built" is directly linked to the efficacy of its intended outcome. Using an internal hybrid approach that is inclusive not only of top-down judicial mechanisms but also of civil society platforms and traditional practices can offer a more sophisticated, multi-faceted, and well-integrated response.

Cultures have long held traditions of gathering and discussing breeches in social contract such as the *Palava Hut* system in Liberia, *jirgas* in Afghanistan, or *adat* in Indonesia. Efforts must be made to affirm the principle of local ownership and practice of peace-building and to make this a non-negotiable arm of the process. An essential logic in any process is that for peace to be sustained it must make sense to and serve the interests of the people directly involved. Tapping into local knowledge, non-judicial practices, and peace capacities will serve long-term sustainability while also empowering communities and strengthening their natural resilience to move forward with their lives. It is expedient, therefore, to weigh this aspect of the transitional justice framework with as much, if not more, support through education and technical assistance, for example, than international and national judicial practices. A significant consideration that this case study offers is the importance of building and coordinating a hybrid and multi-sectoral response to justice and peacebuilding. What it also highlights is the essentiality of traditional practices and the imperative of broad-based civic participation if social reconciliation and a sustained peace are ever to be realized.

LESSONS FROM INDONESIA

Auveen Woods

INTRODUCTION

Indonesia is often hailed as a model for democratic transition, especially for Muslim states. It just completed its third consecutive peaceful transfer of power with the election of President Joko Widodo or "Jokowi" in 2014. With a multi-ethnic, linguistic, and religious population estimated in 2015 at 257.6 million,[50] Indonesia is the largest majority Muslim nation and the third largest democracy in the world. However, it is also a country deeply riddled with endemic and pervasive legacies of conflict, ranging from colonialism under the Dutch and briefly the Japanese to General Suharto's New Order regime and the political transition of the *Reformasi* period since his fall in 1998. The scope of the conflicts ranges in both time and scale, from the anti-Communist massacres that killed more than 500,000 in 1965 and 1966 to the secessionist conflict in Aceh (1975-2004), terrorist attacks such as in Bali in 2002, instances of state repression like the 1984 Tanjung Priok riots, and ongoing communal violence as recently seen in Tolikara in Papua in 2015.

Indonesia's experience with reconciliation, justice, and democratization can lend insight into other countries in post-conflict transition. Reconciliation at a national and local level is an ongoing process in Indonesia. Two transitional justice mechanisms initially adopted by the country, an ad hoc human rights court (2000) and a truth and reconciliation commission (2004), have come to nothing. The state-led reconciliation process has stagnated. In the absence of national tools for reconciliation, Indonesian civil society has sought alternative ways to build peace at the community level. This has included using religious and traditional customs (*adat*), particularly in promoting intercommunal and local reconciliation. Indonesian NGOs have continued to pursue reconciliation efforts with some of the most positive contributions being made in the area of truth-seeking through documentation, and the sharing of victims' testimonies that challenge the state narrative and identity.

50 "Indonesia Country Profile," World Bank, http://www.worldbank.org/en/country/indonesia.

HISTORY OF THE CONFLICT

The Republic of Indonesia is a country in transition that still bears the scars of its past conflicts and the ongoing violence in parts of its territory. This includes the militarized suppression under General Suharto's New Order dictatorship, organized violence (in Java), terrorist attacks (in Bali), and communal clashes (in Moluccas and Sulawesi) in the post-New Order or *Reformasi* period.[51] In addition, Indonesia has witnessed two of the longest-running conflicts in the world in the provinces of Papua and Aceh. As a majority Muslim state with significant minority groups, Indonesia has attempted to take a syncretic and tolerant approach to its minority groups based on religious affiliation. This religious toleration is evident in the use of the word *Tuhan*, not Allah, as the official Indonesian term for God and the constitutionally enshrined *pancasila* (five principles) or philosophical foundations of the Indonesian state.[52] While this has allowed space for many Indonesians to create a shared national and political identity based on a common history of anti-colonial struggles and a national language (*Bahasa Indonesia*), it has not stemmed the flow of violence along religious and ethnic lines. At the heart of this violence are conflicts over resources, particularly control of land and the state apparatus. These conflicts are based primarily along ethnic and religious divisions stemming from colonial times and the divisive rule of the Dutch. The militarized centralization under the New Order further undermined local conflict resolution solutions with ongoing violence and military suppression. The process of democratization and decentralization of governance following the fall of the New Order in 1998 failed to usher in a new plurality of peace. Instead, the democratization process has been characterized by the failure of political leaders to address the legacies left by human rights abuses and violations, as well as sporadic communal and religious conflict often sparked by competition over local governance and land.

51 Birgit Bräuchler, "Introduction: Reconciling," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 3-33.

52 Annette Hornbacher, "Global conflict in cosmocentric perspective: A Balinese approach to reconciliation," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 34-53.

The relationship between state and land, particularly the access to production such as agriculture, is particularly apparent in the anti-Communist purges of 1965-66: a defining moment in Indonesian national identity. In the 1960s, Indonesia was a deeply divided and polarized country with a vibrant and strong civil society that reflected and exacerbated this division. There were numerous women's groups, labor organizations, and Islamic foundations, all officially or unofficially associated with political parties. In Indonesia these strong networks between local and national parties flourished largely due to the weakness of the state, which was divided among these political groups. The Communists were the only group that did not have a position in the state apparatus. They were quickly expanding with locally affiliated groups organizing poor peasants in the seizing of land owned by landlords. Class and control of production resources such as land were at the root of the conflict. But it began to take religious overtones with many of the more prosperous peasants or landlords being orthodox Muslims and associated with Islamic groups such as the NU (Nahdlatul Ulama). These clashes over land continued to escalate throughout the 1960s.[53] In October 1965, a failed coup by a group of soldiers ignited a bloody power struggle. President Sukarno was replaced by General Suharto, and a campaign was initiated to eradicate the communist threat. Even though the violence may have originally been driven by conflict over land and the state, many religious organizations and civilians participated in mass murders under the direction of the military.[54] An estimated 500,000-1,000,000 alleged communist sympathizers died between 1965 and 1966. Another estimated 1.5 million were detained as political prisoners, *tapol*, for decades.[55] With the rise of Suharto, failure to profess a recognized religion risked persecution as a possible Communist, placing them on equal footing with Dutch colonialists as the "enemy" of the Indonesian state. As such, the mass killings of 1965-66 became the founding narrative of Indonesian national identity. The myth that the Indonesian army saved the nation from the communist terror was subsequently used to justify the military's role in politics.

The dual role of the military in both defense and politics, which had been developing since independence in 1945, was expanded under Suharto's rule. A number of laws from 1969 to 1999 regulated the representation of the military in government offices and institutions, with numbers ranging a maximum of 100 out of 550 members in the House of Representatives in 1985, to only 35 in 1999.[56] The Indonesian Armed Forces became integrated under the control of General Suharto and, together with his *Golkar* (Functional Group) Party, became one of the two pillars of his power.[57] The dual role of the military allowed it to set agendas and perpetrate violence without civilian oversight. The use of force was a strategy that the Suharto regime employed against perceived threats to the New Order, whether it was religious riots such as the Tanjung Priok massacre in 1984 or secessionist conflicts in Papua and Aceh. This use of force is particularly evident in Aceh, a culturally and ethnically distinct resource-rich area in the north of Sumatra Island. Its incorporation into the newly independent Republic of Indonesia incited the Acehnese Rebellion in the 1950s. The military response to this initial rebellion, however, was relatively accommodating and conciliatory compared to the violent military operations launched from the 1970s to 1990s. Under the New Order, civilians as well as combatants in Aceh were the target of attacks by the Indonesian Armed Forces. People "disappeared" without legal process while rape, sexual abuse, and other forms of torture frequently occurred. In addition other social restrictions such as curfews, intimidation, and beatings were regularly enforced. The Indonesian Armed Forces became a symbol of colonialism and invasion to the Acehnese.[58]

At the same time ethnic and religious tensions were also provoked across Indonesia by the transmigration policies initiated by the Suharto government. This often meant moving Muslim Javanese into areas where other ethnic groups, particularly indigenous populations, lived. These transmigration programs were facilitated by development policies that focused on extraction of natural resources such as mining and logging. This change in local demographics increased competition

53 Edward Aspinall, "Indonesia: Civil Society and Democratic Breakthrough," in *Civil Society and Political Change in Asia: Expanding and Contracting Democratic Space*, ed. Muthiah Alagappa (Stanford: Stanford University Press, 2004), 61-96.

54 Grace Leksana, "Reconciliation through history education: Reconstructing the social memory of the 1965–66 violence in Indonesia," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 176-191.

55 Jiwon Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia," (electronic thesis or dissertation, Ohio State University, 2012), https://etd.ohiolink.edu/.

56 Ikrar N. Bhakti, Sri Yanuarti, and Mochamad Nurhasim, *Military Politics, Ethnicity and Conflict in Indonesia*, (Centre for Research on Inequality, Human Security and Ethnicity (CRISE) Working Paper No. 62, January 2009), http://r4d.dfid.gov.uk/PDF/Outputs/Inequality/wp62.pdf.

57 Marcus Mietzner, *The Politics of Military Reform in Post-Suharto Indonesia: Elite Conflict, Nationalism, and Institutional Resistance* (Washington, DC: East-West Center, 2006), 1-86.

58 Edward Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh* (Geneva, Switzerland: The Center for Humanitarian Dialogue Report, April 2008), http://www.hdcentre.org/uploads/tx_news/56JusticeAcehfinalrevJUNE08.pdf.

for land, jobs, power, and other resources. Traditional conflict resolution methods to address local problems were further undermined not only by this demographic change but also by the laws governing local leaders. In 1974, a change in the law severely weakened traditional village heads, reducing them to the lowest level of the local administration system.[59] Once conflict broke out, these traditional peacemakers no longer had the authority or power to influence their followers. The resentment by local and indigenous groups of these government policies was further heightened by the actions of the Indonesian Armed Forces, whose business interests were often tied around these development policies. In Papua, many instances of military violence against locals have been related to their strategic business interests such as logging, land deals, and protection rackets.[60] Such violence often played on ethno-religious relations and class differences.

The New Order's repressive, development-led rule not only expanded the Indonesian economy but also triggered new forms of civil society actions in the 1980s and 1990s. These movements were based around issues of land equality across the archipelago and garnered national coverage. It is from these movements that many NGOs developed, leading to the emergence of a human rights discourse in Indonesia.[61] Although these campaigns challenged the regime's legitimacy and its ideological foundations, they were largely reactive and did not lobby for its downfall. Ultimately, it was the effects of the 1997 Asian financial crisis that devastated the Indonesian economy and led directly to the end of the New Order regime and the beginning of the *Reformasi* period.

The first years of the *Reformasi* period involved the decentralization of political and fiscal power to regional and local bodies. This process was accompanied by a revival of *adat* (customary law) and traditions that had been destroyed by the centralization policies of the New Order regime. However, this decentralization resulted in heightened ethnic and religious discrimination and corruption across the archipelago. This includes the conflict in Aceh, which escalated again in 2000. A negotiated settlement was only made possible after the 2004 tsunami that devastated the region.[62] This increase in corruption and ethnic and religious tensions is in part a result of the conditions created by the rapid decentralization to local authorities, which was accompanied by comparatively slow democratization and weak governance. Local elites have often manipulated identity to try and increase their own power and access to resources. In the cases of the communal conflicts in Poso, in Central Sulawesi, the military and police actually segregated themselves along their religious lines, becoming part of the violence.[63] The reform of the military and its separation from a civilian police force further weakened the security forces' ability to address these situations. Despite reforms constitutionally removing the military from political positions, its businesses have remained unscathed and continue to exert considerable power over local areas and have contributed to these local conflict dynamics.

In Indonesia national debates on reconciliation centering on human rights, justice, and law enforcement have been influenced primarily by national NGOs and international institutions such as the UN and the International Criminal Court.[64] Despite some progress, the institutionalization of human rights and practices is still difficult. The failure of successive Indonesian governments to address these issues can be explained in part by the number of Suharto-era politicians and military figures still in government who are unwilling to rake over past abuses. However, sources of conflict such as access to resources and transmigration continue to fuel violence across Indonesia.

PRE-TRANSITIONAL PROCESS

Over the years, international attention and pressure has resulted in the Indonesian government implementing transitional justice mechanisms as a preemptive measure against more robust international interference. This can be seen in the release of political prisoners in the 1970s, as well as the establishment of Komnas-HAM (National Commission of Human Rights) in 1993, Komnas Perempuan (National Commission on Violence Against Women) in 1998, the Law on Human Rights (No. 39/1999), the Law on Human Rights Court (No. 26/2000), and the Law on Truth and Reconciliation (No. 27/2004). National NGOs and civil society groups have played an important

59 Sidney Jones, "Lessons learned from Indonesia's conflicts: Aceh, Poso and Papua," *Herb Feith Annual Memorial Lecture*, ed. transcript of lecture in Monash University, Melbourne, Australia, August 20, 2014, http://www.insideindonesia.org/current-edition/lessons-learned-from-indonesia-s-conflicts-aceh-poso-and-papua.

60 Bhakti et al., *Military Politics, Ethnicity and Conflict in Indonesia*.

61 Aspinall, "Indonesia: Civil Society and Democratic Breakthrough."

62 Jones, "Lessons learned from Indonesia's conflicts: Aceh, Poso and Papua."

63 Tri Y. Subagya, "Women's agencies for peacebuilding and reconciliation: Voices from Poso, Sulawesi," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 155-172.

64 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

role in lobbying for these mechanisms and institutions. In turn, Komnas-HAM and Komnas Perempuan have supported alternative transitional justice measures outside state-led initiatives. The effect of all these different transitional justice paths will be particularly highlighted in two very difference cases; the 1965-1966 mass killings of suspected Communists and the conflict in Aceh. The 1965-66 Communist purges occurred throughout the Indonesian archipelago, with neighbors sometimes turning on each other. In contrast, the violence in Aceh was territorially specific and is very fresh, having recently ended in 2005. While abuses were committed by the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM), in general the lines between perpetrator and victim were more ethnically drawn between the Acehnese and the "Javanese" of Indonesia.[65] Both these case studies offer contrasting experiences of the processes of transitional justice and the mechanisms deployed to address them.

Beginning in the 1970s, international pressure on the Indonesian government had resulted in reparations in cases of human rights abuse. At the time the most prominent human rights issue in Indonesia was the *tapol* (*tahanan politik*), political prisoners who had been detained in prison without trial since the 1965-66 Communist purges. There was little domestic pressure to release the *tapol* out of both fear of being labeled a Communist and the remaining hostility towards them. Human rights group LPHAM (Institute for the Defense of Human Rights) was one of the few organizations that challenged the government on this issue. The campaign to release these prisoners, of which an estimated 40,000 remained in prisons or penal colonies across the archipelago, was an international initiative. International human rights groups such as Amnesty International began to publish information on the *tapol*, lobbying the UN and the Dutch government. Crucial changes in aid conditionality, which became linked to human rights from both the Dutch and U.S. governments, directly impacted the situation in Indonesia. The combination of international pressure and the potential end in development assistance at a time of economic deterioration in the country lead the Suharto government to begin releasing *tapol* in 1975. By 1979 all the remaining political prisoners had been released.[66]

The lack of Indonesian initiatives to advocate for human rights issues such as the release of the *tapol* was due not just to the "fear of Communists" but also the central role the state played in directing and controlling civil society groups. The exceptions to this were NGOs that worked in the area of legal reform, environmental protection, and community development such as the Legal Aid Institute (LBH). Lawyers and students were the most prominent actors lobbying in these areas.[67] Students and NGOs visited villages and began to collect information, for example, on forced relocation and land development. Students also organized seminars and protests on campuses and supported demonstrations by local organizations in the city. The growth in civil society activity was driven by both internal and external influences. Under the New Order state-led "repressive-developmentalist" rule,[68] the Indonesian economy quickly expanded, causing social disruption. The urban middle class became more prosperous while the rural communities suffered as their farmland was suddenly and often forcibly taken for development projects. In contrast to the polarized international environment in the 1960s, the late 1980s brought more support for Indonesian civil society and human rights defenders, including foreign funding for NGOs to become more professional.

With the outbreak of violence in East Timor in the 1990s international attention was once again the catalyst for human rights movements and an enduring transitional justice institution. Following a protest against extrajudicial killings in November 1991, an estimated 250 East Timorese were killed by Indonesian military forces in front of international journalists. Pictures and videos of the event were broadcast across the world prompting condemnation. Ambassadors were recalled, and the Netherlands, Canada, and Britain all announced the suspension of their aid. International awareness of human rights abuses across Indonesia also increased.[69] At the same time there was a growth of political opposition in Indonesia. Student groups in parts of the country held demonstrations against human rights abuses, and NGOs such as LPHAM established relationships with East Timorese rights groups. It was in this context that Komnas-HAM was established by President Suharto in 1993. In the first two years of the Commission's work, it investigated human rights abuses stemming from land disputes, labor disputes, and violence by members of the state apparatus such as soldiers and police. Komnas-HAM proved willing to challenge the state and the military.[70]

65 Bhakti et al., *Military Politics, Ethnicity and Conflict in Indonesia.*

66 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

67 Jeff Herbert, "The Legal Framework of Human Rights in Indonesia," in *Indonesia: Law and Society*, ed. T. Lindsey (New South Wales: The Federation Press, 2008).

68 Edward Aspinall, "Indonesia: Civil Society and Democratic Breakthrough," 76.

69 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

70 J. Herbert, "The Legal Framework of Human Rights in Indonesia."

For example, the commission investigated extrajudicial detentions of prisoners in Aceh, and implicated senior members of the military in crimes against humanity in East Timor and domestic cases of state violence such as the Tanjung Priok massacre, where an estimated 50-100 people were killed.[71]

Public pressure from families and human rights organizations began to grow in the years leading up to Suharto's resignation in 1998. These included families of those who disappeared from leftist political parties and the families of *tapol*, who publicly demonstrated for their release. During these years human rights NGOs organized their work around a number of measures that can be identified as transitional justice mechanisms. These included truth-seeking, such as documentation and collection of victims' testimonies, advocating for reparations and legal advocacy for victims' rights, and lobbying for policy reforms.[72] Among the NGOs involved in these activities were LBH, KontraS (Commission for the Disappeared and Victims of Violence), and ELSAM (Institute for Policy Research and Advocacy) among others.[73] KontraS and ELSAM were the most influential human rights NGOs at the time, both promoting two different interpretations of transitional justice. While ELSAM chose the South African system, KontraS chose the Argentine model.

KontraS emerged in 1998 from a network of NGOs originally called KIPP-HAM (Independent Monitoring Commission for Human Rights Violations), which collected data on human rights abuses. As the disappearances of political activists were reported to NGOs in 1998, KIPP-HAM changed its name to KontraS. More NGOs and student organizations joined the Commission, which was relaunched as a working group rather than an NGO.[74] The high profile kidnapping of 14 activists in 1998 was the focus of much of KontraS's initial activism. However, the campaigning of NGOs such as KontraS was largely reactive and limited to publicizing the arbitrary torture and disappearance of political activists in Jakarta. The majority of enforced disappearances in Indonesia were in East Timor and Aceh. KontraS took two specific elements from the Argentine model and formulated them into one. This included the official truth commission, CONDAEP (National Commission on the Disappearance of Persons), and the Mothers of the Plaza de Mayo, a voluntary association of families. As a commission, people came to KontraS to report their children missing rather than to an NGO. KontraS also began to expand its activities beyond the 14 high-profile disappeared activists. It began to look at more historical cases such as the Tanjung Priok massacre (1984) and the Talangsari tragedy (1989). They also looked at some specific disappearances in the 1965-66 Communist purges and reinterpreted them as part of enforced disappearance.[75]

KontraS encouraged victims' families to participate in human rights campaigns, particularly for enforced disappearances, thereby relying on the Mothers de Plaza Mayo model. To this day families carrying black umbrellas and pictures of their missing loved ones stand in front of the state palace every Thursday demanding answers for the whereabouts of the missing and that human rights abuses are addressed.[76] Like the Mothers de Mayo, KontraS also refuses to term the disappeared people as dead, similarly arguing that they were presumed alive until a body was produced. In 2011, following a campaign between KontraS and IKOHI (Indonesian Association of Families of the Disappeared), Komnas-HAM granted certificates of forced disappearance to the families of 1997-1998 victims: a practice that originated in Argentina in 1994.[77]

With the outbreak of violence in East Timor in September 1999 following the independence referendum, the need for a human rights court became imperative to assuage the international pressure and potential International Criminal Court investigations. International attention, including the United Nations High Commissioner for Refugees (UNHCR) investigation and an International Commission of Inquiry on East Timor placed significant pressure on the Indonesian government. NGO activists successfully played on this renewed international attention to ensure the establishment of two new transitional justice institutions: the Law on Human Rights (No. 39/1999) and the Law on Human Rights Courts (No. 26/2000). The Law on Human Rights Courts allowed for ad hoc human

71 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto* (ICTJ and KontraS Joint Report, August 2011), http://www.ictj.org/.

72 Fadjar Thufail, "The Social Life of Reconciliation: religion and the struggle for social justice in post-new order Indonesia," *Max Planck Institute for Social Working Paper* No:127 (2010): 1-22, http://www.eth.mpg.de/pubs/wps/pdf/mpi-eth-working-paper-0127.pdf.

73 Herbert, "The Legal Framework of Human Rights in Indonesia."

74 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

75 Sri Lestari Wahyuningroem, "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia," *Journal of Current Southeast Asian Affairs* 32, no. 3 (2013): 115-142, http://journals.sub.uni-hamburg.de/giga/files/journals/4/articles/710/public/710-735-1-PB.pdf.

76 "Media urged to help uncover past human rights abuses," *The Jakarta Post*, April 29, 2013, http://www.thejakartapost.com/news/2013/04/29/media-urged-help-uncover-past-human-rights-abuses.html.

77 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

rights courts or tribunals, separate from the Indonesian judicial system, to be established on the recommendation of Komnas-HAM on a case-by-case basis and accepted by the government[78]; lobbying ensured that historical human rights abuses during the New Order could be included. Human rights NGOs such as KontraS and ELSAM kept pressure on the government for a permanent human rights court in Indonesia. ELSAM, a policy advocacy NGO, played a key role in ensuring the inclusion of international legal norms into the Law on Human Rights Court. Although Indonesia is not a signatory to the International Criminal Court, strong pressure from ESLAM ensured that the Law on Human Rights Court imitated the Rome Statute.[79] There were some differences in the translation of the Rome Statute, such as the definition of genocide. These were eventually negotiated through lobbying by NGOs such as ELSAM, KontraS, and the British group Tapol. Similarly, persistent lobbying by NGOs ensured the inclusion of the retrospective principle so that historical cases prior to the establishment of the legislation would still come under its jurisdiction.[80]

Among other things, the Law on Human Rights Court stipulated that a truth and reconciliation commission could be established to settle past human rights abuses. ELSAM is a policy advocacy NGO who actively promoted this form of transitional justice using the South African model. Its decision to do this was influenced by direct contact with key figures involved in the South African process. Delegates from Indonesia were sent over to South Africa to study their model.[81] From 1999 to 2003, ELSAM was the lead organization promoting a Truth and Reconciliation Commission, or "national dialogue" as it was referred to by some, tailored to the specific characteristics of the Indonesian context. This included the fact that the main political actors, the Golkar Party of General Suharto and the military, still had a significant presence in the political system. ELSAM, therefore, argued that if a Truth and Reconciliation Commission was suggested without an amnesty clause included for those who acknowledge crimes, it would not be established or produce anything while such people in government faced potential prosecution. Extensive hearings on the Law on the Truth and Reconciliation Commission included NGOs, historians, and experts. There was strong debate within civil society on the role of truth and justice and the possibility that amnesty in the commission would replace a trial in the human rights court. Key transitional justice advocates KontraS and ELSAM were at loggerheads with many victims' families opposing the commission, fearing it would be a whitewash. Most human rights activists felt that prosecutions were the best way to address cases of abuses. Only one group, representing victims of the 1965 massacre, supported the bill in the House of Representatives. Many victims and their families visited party headquarters to lobby them to oppose the bill.[82] Even ELSAM criticized the problematic clauses in the bill, but it still supported the establishment of a commission. Members of the Golkar Party, the Indonesian military, and others welcomed the Truth and Reconciliation Commission as the alternative to prosecution. The strategy of proponents such as ELSAM that amnesty would ensure the participation of potential perpetrators was correct. The Law on the Truth and Reconciliation Commission was passed in 2004.

When the conflict ended in Aceh in 2004, these national transitional justice measures were already in place, ready to be used. As such the conflict in Aceh offers an interesting case study into the dynamics and implementation of existing transitional justice measures. In contrast to other cases such as the 1965-66 mass killings or Tanjung Priok riots, the last phase of the Aceh conflict occurred in the post-authoritarian period; within a democratic system, new justice institutions intended to prevent further human rights abuses. Second, Aceh's experience of transitional justice offers particular insights into the strengths and weaknesses of local and state-led measures.

Aceh is a culturally distinct and resource-rich area with its own language in the northern tip of Sumatra Island. It is an ethnically and religiously homogeneous area that has a clear geographical delineation. There was only one insurgency group in the conflict, GAM, and it had a unified leadership.[83] Aceh experienced one of the longest conflicts in the world, starting in the 1950s with almost continual conflict from 1975 to August 2005 and ending with the signing of the Memorandum of Understanding (MoU) by the Indonesian government

78 Thufail, "The Social Life of Reconciliation."

79 *Time to face the past: Justice for past abuses in Indonesia's Aceh Province* (New York: Amnesty International Report, April 18, 2013), http://www.amnestyusa.org/research/reports/indonesia-time-to-face-the-past-justice-for-past-abuses-in-indonesia-s-aceh-province.

80 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

81 Herbert, "The Legal Framework of Human Rights in Indonesia."

82 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

83 Jones, "Lessons learned from Indonesia's conflicts: Aceh, Poso and Papua."

and GAM. The level of trauma among civilians in Aceh is comparable to Afghanistan or Bosnia.[84]

The fall of the Suharto government in May 1998 changed the context of violence in Aceh. In the several months of peace that followed, new local and national civil society groups began to organize. A number of human rights NGOs had been formed to varying success in Aceh earlier in the 1990s, but it was not until the opening up of the *Reformasi* period that national and international attention on the human rights abuses in Aceh was finally exposed and discussed.[85] Fifteen NGOs in Aceh created a collaborative association (FP-HAM) and began to collect data from victims. KontraS Aceh was founded in May 1998. In the same year students went to rural villages and also collected data on human rights abuses. Acehnese activists accompanied widows whose husbands had been killed by the Indonesian military to Jakarta to file complaints with Komnas-HAM.[86] Both the Indonesian House of Representatives (DPR) and Komnas-HAM sent teams to the conflict-ridden areas. Victims, NGOs, and individuals all emerged to testify to the teams. Komnas-Ham witnessed the excavation of mass graves. After these preliminary investigations from DPR representatives and Komnas-HAM, both groups made a number of recommendations that adhered to traditional justice measures. These included further investigating abuses; putting perpetrators, including decision-makers, on trial; providing compensation or aid to victims and their families; granting amnesty to political prisoners; and redistributing revenue from natural resources in the area.

One of the most ambitious truth-seeking initiatives on human rights abuses at this time was the Independent Commission for the Investigations of Violence in Aceh (*Komisi Independen Pengusutan Tindak Kekerasan di Aceh,* KPTKA), an ad hoc measure established by presidential decree in July 1999.[87] This initiative was a preemptive measure to assuage pressure for an independence referendum for Aceh and prevent international involvement in the area. The commission consisted of 27 members and had a six-month mandate to complete its work. The commission collected information on 5,000 cases of human rights violations over a ten-year period including torture, rape, killing, and disappearances.[88] With mounting pressure from protests in Aceh, KPTKA announced its findings and recommendations within three months. Acknowledging that human rights had been abused, five strategic cases were chosen to be prosecuted by the Attorney General. These cases included a 1996 rape case in Pidie, torture and disappearances from 1997 to 1998, the unlawful killing of civilians in February and May 1999, and the unlawful killing of a Muslim cleric and his followers in July 1999.[89] But only one case, the killing of a Muslim cleric and 50 of his followers in West Aceh, was convened. While the commanding officer absconded from the trial, a major and four soldiers were sentenced to six and seven years, respectively. However, the army provided no information on their detention and dismissal from the army.[90] Amid decreasing government interest, public pressure for a human rights court and demonstrations by Acehnese for an independence referendum, KPTKA was abandoned in November 1999. Although it was highly criticized at the time, it is now viewed by some as a "dramatic achievement that gave rise to hopes for an end to the longstanding impunity."[91]

Violence reemerged in 1999 with a series of revenge killings by GAM against those suspected of having acted as spies for the Indonesian government in the preceding two decades. By 2000, human rights had fallen off the radar of the government's agenda in Aceh. Three years later in the midst of growing insurgency in the area, the Indonesian government launched the country's largest military campaign.[92] Most of the violence in Aceh had been confined to the Northeast, but after 1999 the conflict spread across the province.[93] The majority of the victims were civilians. An estimated 2,000 people were killed in less than a year with atrocities committed on both sides.

One transitional justice measure that was initiated during the height of the conflict and extended through the peace process was *diyat*. *Diyat* (blood money) is rooted in the Islamic principle of *qisas* (equality) as an alternative to the death penalty in the Quran.[94] *Diyat* is

84 Leena Avonius, "Reconciliation and human rights in post-conflict Aceh," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 121-137.

85 Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh*.

86 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

87 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto*, ICTJ and KontraS.

88 *Time to face the past: Justice for past abuses in Indonesia's Aceh Province*, Amnesty International.

89 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

90 *Time to face the past: Justice for past abuses in Indonesia's Aceh Province*, Amnesty International.

91 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto*, ICTJ and KonstraS, 2.

92 Mietzner, *The Politics of Military Reform in Post-Suharto Indonesia*.

93 Avonius, "Reconciliation and human rights in post-conflict Aceh."

94 A. Niaz Shah, "The Principle of 'qisas'," Dawn, November 1, 2013, http://www.dawn.com/news/1053308.

a form of conflict resolution in which a victim's family forgives the perpetrator and accepts compensation. In 2002, a *diyat* program was started by then Vice-Governor of Aceh, Azwar Abubakar. Between 200-300 USD was given in *diyat* to 20,000 widows.[95] It was felt that much of the violence in Aceh revolved around revenge killings, which political leaders hoped to stem with the provision of *diyat*.[96] However, the money was not accompanied by an identification of the perpetrator, acknowledgment of guilt, or any apology.

Aceh is a relatively small area, consisting of less than two percent of Indonesia's population as a whole. As such Indonesian's political leaders viewed Aceh's conflict as only one of many emerging across the archipelago during the difficulties of transition. In late 2004 Aceh was devastated by the Indian Ocean Tsunami, which killed more than 200,000 people in the area.[97] It was this natural disaster and the decimation of GAM forces that finally cajoled the warring parties to the negotiation table. Human rights abuses in Aceh had become the major political issue after the fall of Suharto in May 1998. Given the publicity surrounding human rights abuses since this time and the humanitarian crisis from the Tsunami, the Indonesian government was also eager to retain the country's territorial integrity and to avoid international interference in the conflict. Their endeavors to pursue negotiations with GAM were further strengthened by the weakened opposition of the Indonesian army through legislated reforms. The international community, unwilling to actively intervene in such an inconsequential conflict with such an important regional partner, was supportive of a political settlement. Negotiations between GAM and the Republic of Indonesia took place from January to July 2005 with Martti Ahtisaari, the former president of Finland, acting as the mediator. Important financial and political support was provided by the Finnish government and the EU.[98] During the negotiations, GAM eventually relinquished its long-held goal of independence in exchange for regional autonomy and amnesty for its members. Human rights organizations and civil society groups, which were so prominent and active in the area of human rights and transitional justice, had no influence on the proceedings. Negotiations were essentially between the two parties.[99] With the signing of the Memorandum of Understanding (MoU) in August 2005, over 50 years of war came to an end. An Aceh Monitoring Mission (AMM) sponsored by the EU was immediately created to oversee the implementation of the agreement with monitors from Norway, Switzerland, and five Association of Southeast Asian Nations (ASEAN) participating.[100]

FRAMEWORK

The word "reconciliation" is not part of the local vocabulary in Indonesia. It has largely been imported from outside forces through NGOs. The norms underlying this word, however, are present in many local *adat* peacemaking practices.[101] The health of the community as a unit is emphasized in Indonesian culture, particularly at the local level. Communal harmony is the primary focus of *adat* conflict-resolution and reconciliation methods. In addition, the concept of shame (*malu*) and bringing shame (*memalukan*) are important in Indonesia, where the mainstream culture emphasizes the importance of social reputation.[102] *Adat* is acknowledged as a part of Indonesia's judicial system and has been referred to by judges at times. This can leave little space for individuals and narratives that may cause shame on the victim or alleged perpetrator. At the national level "the Indonesian way of reconciliation" is presented by political elites as "maintaining harmony and deciding to move on with life."[103] As such there have been reservations in both sectors of society and political circles of the "truth" side of transitional justice mechanisms.[104] This has resulted in the compromised conceptualization and implementation of national transitional justice mechanisms that emphasize reparation without acknowledgement, prosecution without justice, and reconciliation without truth.

There have been a number of institutions in Indonesia that promote different transitional justice mechanisms. The oldest, Komnas-HAM, pursues truth-seeking and documentation at the national and regional level. The Indonesian government, like civil society organizations, initially pursued a prosecution framework for human rights abuses through the Law on Human Rights and the Law on Human Rights Court. Both of these laws were introduced during the early years of the political transition under President

95 Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh.*

96 Ibid.

97 Galuh Wandita, "Lessons from Aceh for Mindanao: Notes from the Field in Moving Beyond: Towards Transitional Justice in the Bangsamoro Peace Process," *Forum ZFD Philippines*, Davao City, Philippines, 2014.

98 Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh.*

99 Ibid.

100 Avonius, "Reconciliation and human rights in post-conflict Aceh."

101 Bräuchler, "Introduction: Reconciling."

102 Thufail, "The Social Life of Reconciliation."

103 Wahyuningroem, "Seducing for Truth and Justice."

104 Leksana, "Reconciliation through history education: Reconstructing the social memory of the 1965–66 violence in Indonesia."

Habibie (1998-1999) and President Abdurrahman Wahid (1999-2001). Finally, the Law on the Truth and Reconciliation Commission (No. 27/2004) represented the first national truth and reconciliation initiative by the Indonesian government.

The Law on Human Rights largely adopted the UN Universal Declaration of Human Rights. It lists the human rights that must be protected under the state with a section equating the rights of women as human rights in addition to other special considerations. It included all of the rights and freedoms that Indonesian human rights NGOs had been lobbying for in the preceding decade.[105] Article 7(2) automatically aligns national law to every human rights treaty that Indonesia ratifies without the need for new legislation.[106] This considerably eases the ability of Indonesia's courts to import human rights treaties into Indonesian law. While the law briefly alludes to a human rights court, it is implicit that human rights violations will be addressed in normal Indonesian courts. Of particular importance is Chapter VII, which addresses the scope and structure of Komnas-HAM, substantially expanding the powers of the commission to include investigatory, publishing, and advocacy functions. It raises Komnas-HAM to a statutory body of equal status to other state institutions and places its budget under the House of the Representatives, thereby freeing it from the politics of the government cabinet.[107]

The Law on Human Rights Court established four regional ad hoc human rights courts. Its definition of genocide and crimes against humanity corresponds to that of the Rome Statue of the International Criminal Court. However, it does not include the additional definitions of genocide such as direct and public incitement to commit and complicity in genocide.[108] It further strengthened the powers of Komnas-HAM to conduct inquiries and decide if crimes against humanity or genocide had been committed, recommend further investigations, and send cases for prosecution to the Attorney General. Reconciliation is not mentioned in the law.[109] Crucially, with the establishment of the human rights court system, the Indonesian government chose to incorporate international criminal justice on top of the existing system rather than reforming and strengthening it. This means that principles such as crimes against humanity are only applicable to this specific category of court cases and not incorporated into the whole Indonesian judicial system.[110]

Articles 43 and 44 of the Law on Human Rights Court legally bound the Indonesian government to establish a truth commission, which was finally achieved in 2004 after years of arguments. This marked the first national truth-seeking initiative. The Law on the Truth and Reconciliation Commission outlined the establishment of a national commission to receive complaints, investigated mass human rights violations, and recommended compensation or rehabilitation for victims. The state's draft of the Law on the Truth and Reconciliation Commission suggested that a commission could *substitute* for a human rights trial.[111]

Finally the Helsinki Memorandum of Understanding for Aceh (2005) guaranteed autonomy for the region allowing political leaders to create separate laws. It also provided three transitional justice mechanisms: reparations with reintegration programs for former combatants, political prisoners, and victims; the ad hoc Human Rights Court; and the Truth and Reconciliation Commission. Both of these institutions were already established in Indonesia (Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005). Amnesty was one of the key clauses of the MoU for all GAM fighters and other combatants. There was no amnesty for Indonesian state agents. The absence of an amnesty can be explained by the controversy that would have occurred if amnesty had been granted and the fact that it would have been made redundant with the expected establishment of an Aceh Truth and Reconciliation Commission. In addition to these transitional justice measures, the MoU also provides autonomous powers for the region and the reform of legal institutions. Crucially, the Helsinki MoU did not include specific provisions for women's issues despite wide-scale sexual violence being perpetrated against them.

105 Interview, January 19, 2015.

106 Graham Greenleaf, *Asian Data Privacy Laws: Trade & Human Rights Perspectives* (Oxford: Oxford University Press, 2014).

107 Herbert, "The Legal Framework of Human Rights in Indonesia."

108 *Indonesia: Amnesty International's comments on the Law on Human Right Courts* (Law No. 26/2000), Amnesty International, February 9, 2001, ASA 21/005/2001, http://www.refworld.org/docid/3c29def1a.html.

109 Thufail, "The Social Life of Reconciliation."

110 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

111 Thufail, "The Social Life of Reconciliation."

FRAMEWORK OPERATIONALIZED

The Law on Human Rights Court established a permanent Human Rights Court to prosecute human rights abuses on the request of Komnas-HAM following an inquiry. However, only abuses that occurred after November 2000 can be tried in the Human Rights Court. Abuses that occurred prior to this can be sent to an ad hoc human rights court, established by the President on the recommendation of the Indonesian House of Representatives. Only two human rights tribunals have ever been established in Indonesia: in 1999 the East Timor tribunal in response to the referendum violence of the same year and in 2000 the tribunal for Tanjung Priok where Muslim protesters were killed by security forces in 1984.[112] The verdicts from both these trials were disappointing. The conviction of Eurico Guterres in East Timor is the only case out of several that were not overturned.[113] Komnas Perempuan conducted a number of investigations into systematic rape and other violations committed against women in conflict areas in 1998 and after 2000, such as the communal violence in Sulawesi and Maluku.[114] Despite strong evidence that government and military officials had been complicit in some of these conflicts, not a single case of rape has been brought before the human rights court. Komnas-HAM no longer recommends cases of human rights violations because of the unwillingness of the Attorney General's Office and the government to prosecute cases in the human rights courts. The 2000 Law on Human Rights stipulated that Komnas-HAM recommend cases for prosecution to the Attorney General's Office. However, many high profile cases have been rejected or ignored such as the Trisakti-Semanggi I-Semanggi II, Wasior Wamena (in Papua), the May 1998 violence, and the enforced disappearance of activists from 1997 to 1998.[115] This has led Komnas-HAM to be more hesitant to recommend human rights tribunals for massive violations, fearing the political sensitivity of such paths. This is compounded by the fact that the members of its board are chosen by the Indonesian government.[116]

In 2006, as the Ministry of Law and Human Rights finally chose candidates to sit on the Truth and Reconciliation commission, almost all human rights NGOs contested the validity of its law. They highlighted articles 19 and 27, dealing with amnesty and compensation, and article 44, which excluded cases in the commission from being tried in a human rights court, as particularly troublesome.[117] There was much publicity surrounding the case, with human rights lawyers and international experts called to give evidence. On December 7, 2006, the Constitutional Court of Indonesia annulled the Law on the Truth and Reconciliation Commission, finding that it was in contravention of the constitution and international human rights principles.[118] The verdict took many by surprise. It had been expected that the law would be amended, not annulled. There was great anxiety among many victims, in particular those related to the 1965 mass killing, which the commission had been expected to handle.[119] A new draft of the Law on the Truth and Reconciliation Commission has been developed by the Ministry of Law and Human Rights and was submitted for discussion to the Parliament for the 2010 to 2014 term.[120] This new draft amended the controversial articles on amnesty, excluding their automatic provision. However, the draft was removed from the legislative agenda in 2013 by President Yudhoyono.

The failure of many of these national transitional justice initiatives was particularly challenging in the aftermath of the newly signed peace agreement in Aceh. The Law on the Truth and Reconciliation Commission was annulled by the Constitutional Court of Indonesia only a year after the Helsinki MoU was signed in 2005. Only 13 of the 71 articles of the Helsinki MoU have not been implemented. These 13 articles are related to the institutions of a Human Rights Court and the Truth and Reconciliation Commission for Aceh.[121] The difficulty related to both mechanisms is a general desire by both former GAM members and the Indonesian government to sweep the abuses under the rug. Both delegations were aware of abuses on each side, which a public exhibit like a trial would only further highlight. During the negotiations, human rights became a secondary concern to political issues. Human rights measures such as the human rights court and the truth

112 Priyambudi Sulistiyanto and Rumekso Setyadi, "Civil society and grassroots reconciliation in Central Java Reconciling Indonesia," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 192-213.

113 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto*, ICTJ and KonstraS.

114 Subagya, "Women's agencies for peacebuilding and reconciliation: Voices from Poso, Sulawesi."

115 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto*, ICTJ and KonstraS.

116 Telephone interview in discussion with the author, Indonesian scholar, Australia, January 19, 2015.

117 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

118 Sulistiyanto and Setyadi, "Civil society and grassroots reconciliation in Central Java Reconciling Indonesia."

119 Leksana, "Reconciliation through history education: Reconstructing the social memory of the 1965–66 violence in Indonesia."

120 Wahyuningroem, "Seducing for Truth and Justice."

121 Leena Avonius, "Reintegration: BRA's roles in the past and its future visions," *Crisis Management Initiative,* http://www.acehpeaceprocess.net/images/stories/publications/avonius.pdf.

and conciliation commission were used in negotiations to trump other less wanted proposals.[122]

The Helsinki Agreement was enshrined in the Law on the Governing of Aceh (LoGA) in 2006 with only two areas differing from the MoU: the human rights court and the truth commission. First, the scope of the Human Rights Court for Aceh, which has jurisdiction over crimes against humanity and genocide, was limited to future violations. This excluded the mass human rights violations committed from 1975 to 1998 and 2002 to 2004. Second, Article 229 in the LoGA states that the Truth and Reconciliation Commission for Aceh is part of the national truth commission.[123] With the annulment of the Law on Truth and Reconciliation Commission, officials claim that the Aceh commission was made void. The response to this quandary split into two camps: those supporting a truth commission as part of the national institution and those supporting an independent commission in Aceh.

After eight years of lobbying from civil society groups and the victims and their families, the Aceh House of People's Representatives passed the Aceh Truth and Reconciliation *qanun* (bylaw) on December 27, 2013.[124] The bylaw had input from civil society and human rights activists who had explored truth commission models in South Africa, East Timor, and Morocco.[125] Two years later, the process of establishing the Aceh Truth and Reconciliation Commission was underway. On November 21, 2015, the Aceh provincial parliament announced the appointment of a five-member selection team of two men and three women, most of who are prominent human rights activists, to help nominate 21 candidates as commissioners.[126] From this group the Aceh parliament will select the seven commissioners. The Aceh TRC is expected to operate between the end of 2016 and 2021. However, there have been some criticisms of the bylaw under which the Commission was established. The Commission's mandate is limited to those rights in the 1999 Law on Human Rights. In addition, its definition of "serious human rights abuses" includes genocide, war crimes, and crimes against humanity. Human rights activists claim some of the bylaw's provisions fall short of international laws as it does not include other crimes such as torture or enforced disappearances. Similarly, it excludes other criminal offenses such as rape and murder that happened in the context of the conflict but not necessarily as a concerted policy or by direct orders.

Reconciliation in Aceh through amnesty and economic integration had been the aim of the Indonesian government from the beginning. Amnesty was among the clauses of the MoU that were fully fulfilled. An estimated 500 prisoners were released in August 2005, and more than 1,400 were pardoned.[127] The remaining disputed cases were adjudicated by a Swedish judge appointed by AMM. In terms of economic integration and reparations, significant progress has been made. The BRA (Aceh Reintegration Agency) is the government agency responsible for collecting data on the conflict victims and providing them with economic assistance. The BRA programs are in the area of housing, economic empowerment, *diyat*, scholarships, and medical assistance. Assistance is targeted at three groups: former combatants, political prisoners, and civilian conflict victims. Progress has been made in the categories of housing and economic empowerment such as farming land and employment provisions. As of 2010, 26,025 houses had been built, and 58,926 people had received economic empowerment assistance, with former GAM combatants receiving 25 million IDR (est. 2,000 USD) per person and other candidates receiving 10 million IDR (est. 800 USD).[128] However, there have been problems with the reintegration program. A lack of clarity about the aim and scope of this financial support and difficulty in collecting data on assistance has impeded its full and equitable implementation. For example, in contrast to many former combatants and political prisoners, economic assistance has not been successfully delivered to affected civilians. This is because the Helsinki MoU emphasized the reintegration of former combatants over that of civilians and victims.[129] Although victims of physical violence have been included in the civilian category, some claim that victims of sexual violence have had difficulty in attaining compensation. Acehnese women were particularly vulnerable to sexual violence. However, the absence of specific provisions for female civilians or victims in the Helsinki MoU has made it difficult to provide reparations and support to them as they are not considered part of the categories as victims or former insurgents.

122 Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia."

123 Wandita, "Lessons from Aceh for Mindanao: Notes from the Field in Moving Beyond."

124 *Indonesia: Aceh parliament passes truth commission by law*, Amnesty International, January 8, 2014, http://www.amnesty.org.au/news/comments/33684/.

125 Paula Zeccola, "A heroine for humanity," *Inside Indonesia* 90 (October-December 2007), http://www.insideindonesia.org/a-heroine-for-humanity.

126 *Indonesia: Appointment of Aceh truth commission selection team a step closer to truth and reparation for victims,* Amnesty International, November 30, 2015, file:///D:/Users/SUUSER/Downloads/ASA2129762015ENGLISH.pdf.

127 Avonius, "Reintegration: BRA's roles in the past and its future visions."

128 Avonius, "Reintegration: BRA's roles in the past and its future visions."

129 Telephone interview in a discussion with the author, Indonesian scholar, Australia, January 19, 2015.

ALTERNATIVE TRANSITIONAL JUSTICE MEASURES

State-led reconciliation efforts are a difficult process in Indonesia. Even when they were operationalized, they were implemented in a top-down manner and imbedded in political, legal, and social issues. In 2010 and 2011, a series of meetings were held with NGOs, researchers, legal experts, and families of the 1965-66 mass killings to discuss addressing past human rights abuses and possibly an apology to victims.[130] But there was vehement opposition from NU members and other elites. Any talk of an apology has also been ruled out for the moment by President Yudhoyono's successor, President Widodo.[131] Due to the absence of transitional justice measures at the national level, regional and local initiatives have been focusing on truth, identity, and reconciliation. *Adat* practices in Indonesia usually focus on identity and communal reconciliation. In Bali, in the aftermath of the 2002 terrorist bombing, local *adat* practices were used to restore cosmic balance through purification rituals and symbolic dramas.[132] After communal violence between Christians and Muslims in the Moluccas, *adat* alliances that emphasized identity between groups were used as both protection from the violence and as a means of social reconciliation.[133] Other regional initiatives range from theater performances of the 1965-66 mass killings to films and book publications.[134]

Autonomous state institutions have been more receptive to transitional justice steps than the national government, especially from civil society organizations and victims groups. Both Komnas-HAM and Komnas Perempuan have engaged with civil society initiatives in truth-seeking and documentation. Komnas Perempuan has initiated advocacy campaigns and established crisis centers for women across the country that focus on daily abuses as well as historic atrocities. It produces publications such as a book on the mass rape of Chinese women and children in the May 1998 riots, reports on the standards of care for female survivors of violence, and the abuse of migrants abroad.[135] It also runs workshops and dialogues on a range of women's issues and has developed networks between NGOs in order to strengthen their campaigns and lobbying capacity towards the government. One of its most significant works has been in the area of truth-seeking and documentation. In 2007, Komnas Perempuan published a national report that documented the testimonies and experiences of female victims of the 1965-66 violent anti-Communist purges.[136] This was the first time a state institution had addressed the atrocities, and it was the first time that women's rights frameworks were adopted and focused on their experiences.

Komnas-HAM has initiated a number of projects focused on transitional justice and truth-seeking that challenged the national narrative. After four years of investigations, it published a report in 2012 on the 1965-66 mass killings, citing widespread abuse and gross violations of human rights. It was the first state institution to do this. The reaction by the government was wholly negative, with the Attorney General rejecting the case, citing lack of evidence. The Minister for Legal, Political, and Security Affairs also refuted the report's findings, repeating the national discourse that the killings protected the country from communism.[137] Komnas-HAM has worked with the Victims and Witness Protection Agency (LPSK), a state body, to provide reparations for victims and their families, including those from the 1965-66 killings. Currently, however, little has been achieved in terms of reparations to victims, aside from Aceh. The implementation of the 2006 law to protect witnesses and victims is hampered by the failure to establish a human rights court to investigate past crimes.[138] In April 2016, Komnas-HAM organized a two-day symposium on the 1965 killings that was backed by the Widodo government. It brought together academics, human rights activists, former military generals, victims, and families of victims from various provinces of Indonesia. While President Widodo has ruled out a criminal investigation into the events of 1965, despite Komnas-HAM's lobbying, his government announced that they may start gathering information about mass graves.[139]

130 Wahyuningroem, "Seducing for Truth and Justice."

131 Joe Cochrane, "Indonesia Rules out Criminal Inquiry of Anti-Communist Purges," *The New York Times*, April 18, 2016, accessed May 6, 2016, http://www.nytimes.com/2016/04/19/world/asia/indonesia-anti-communist-purge-symposium.html.

132 Hornbacher, "Global conflict in cosmocentric perspective: A Balinese approach to reconciliation."

133 Birgit Bräuchler, "Mobilizing culture and tradition for peace: Reconciliation in the Moluccas," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 97-118.

134 Barbara Hatley, "Social reconciliation and community integration through theater," in *Reconciling Indonesia: Grassroots agency for peace,* ed. Birgit Bräuchler (New York: Routledge, 2009), 78-96.

135 *Komnas Perempuan*, http://www.komnasperempuan.or.id/.

136 Wahyuningroem, "Seducing for Truth and Justice."

137 Ibid.

138 *Derailed: Transitional Justice in Indonesia since the fall of Soeharto*, ICTJ and KonstraS.

139 Jeffrey Hutton, "Indonesia Moves to Investigate Anti-Communists Atrocities," *The New York Times*, April 26, 2016, accessed May 6, 2016, http://www.nytimes.com/2016/04/27/world/asia/indonesia-1965-massacre-graves.html?_r=0.

Komnas-HAM has also worked with civil society organizations such as Syarikat on truth-seeking and reconciliation projects. Syarikat is a human rights NGO based in Central Java that is connected with NU, the largest Islamic organization in Indonesia. In particular, it has worked on the mass killings of 1965-66, publishing reports and books, showing documentaries, and organizing exhibitions and reconciliation workshops between victims and perpetrators.[140] In 2003, Syrikat, with support from Komnas-HAM, organized a reconciliation and rehabilitation workshop between Banser members (military youth wing of NU) and victims of the 1965-66 killings in which participants shared their accounts of the events. Representatives of Komnas-HAM indicated that such workshops must be placed in the context of democratization in Indonesia and that the truth of such events must be explored to prevent a repeat of history.[141]

Alternative justice measures have also been present in Aceh from civil society initiatives to *adat* practices. The people in Aceh often use *adat*-based reconciliation methods after a conflict or dispute has been settled, though they recognize the limitations of these methods.[142] *Diyat* is one such method and has been one of the most comprehensive programs of reparation administered by BRA, with 206 million IDR paid as of 2010. However, BRA intended to end the program in 2011.[143] Data on victims is collected by village leaders, the lowest level of the Indonesian bureaucracy, and verified by the police.[144] However, the perpetrator's identity is not recorded. There has been mixed reaction to *diyat* in Aceh, where it is not necessarily accepted as an alternative Islamic conflict resolution mechanism. *Diyat* involves acknowledgment of responsibility from the perpetrator as an alternative to other persecutions. In the case of Aceh, this might refer to judicial justice. For some, like former GAM members in BRA, *diyat* is simply war compensation. For human rights NGOs and workers, the scheme is not reparation because it lacks political or legal acknowledgment. Many still see real reparations as only able to come from a truth and reconciliation commission.[145] The *diyat* program as implemented in Aceh does not give space for the narrative of victims or information on the number of damages that traditional *diyat* practices do.

Peusijuek is a post-conflict settlement ritual that has been used at the local level in Aceh for over a hundred years and was used at an early stage of the peace process. It was part of a traditional dispute settlement mechanism called *adat meulangga* that is only used for minor crimes such as stealing.[146] Usually after a solution is found, in which the perpetrator may apologize and pay compensation, a *peusijuek* ceremony is organized to represent that harmony has been returned to a community and to signify that the situation has been "cooled." This *adat* mechanism of reconciliation was suggested by a local army commander after the Paya Bakong incident: a violent confrontation between an Indonesian military force in Keude village and locals in July 2006.[147] Although the suggestion was positively received by AMM, it was rejected by locals. The family of the young man killed in the confrontation wanted to see justice served (i.e. brought to trial). In proposing *peusijuek*, the military commander had bypassed the dispute settlement process without which *peusijuek* is meaningless. This case illustrates the limitations of *adat* as such practices are only effective between members of the community who subscribe to these values. For those outside the community, Acehnese demand justice through the formal judicial process. Tensions between the military and locals remain high. Although the MoU stipulated that all non-organic troops must leave Aceh, the Indonesian military responded by simply moving their barracks in the area.

ANALYSIS

In its 2004 report the Office of the United Nations Secretary-General defined transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[148] These can range from judicial procedures and reparations to truth-seeking initiatives and memorialization with the goal of addressing past human rights abuses and the formation of a new identity. Successful transitional justice measures take into account the local and national context to more successfully address the impunity and cycles of violence that had fuelled the conflict.

Political transition and transitional justice are paradoxical processes. Political transition from a dictatorship to

140 Bräuchler, "Introduction: Reconciling."

141 Sulistiyanto and Setyadi, "Civil society and grassroots reconciliation in Central Java Reconciling Indonesia."

142 Avonius, "Reconciliation and human rights in post-conflict Aceh."

143 Avonius, "Reintegration: BRA's roles in the past and its future visions."

144 Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh.*

145 Wandita, "Lessons from Aceh for Mindanao: Notes from the Field in Moving Beyond."

146 Avonius, "Reconciliation and human rights in post-conflict Aceh."

147 Ibid.

148 Wahyuningroem, "Seducing for Truth and Justice."

a democracy is conceived as expanding citizens' access to state institutions, for example, through elections. In Indonesia decentralization was a crucial part of this, expanding regional institutions and making them more accessible to local leaders. Transitional justice, in contrast, can be an exclusionary process that can pursue the lustration of state institutions. Transitional justice measures such as tribunals, truth commissions, and reports that challenge the past narratives can be destabilizing forces. This destabilization can be exacerbated during the period of political transition; an inherently unstable process in itself. Also, political change does not always invoke reconciliation or make people want to reconcile. This is influenced by the type of transition and whether it is a new regime or a recomposition of the old. Political regimes in transition often create investigative commissions, yet these bodies do not necessarily result in greater respect for human rights and freedom. Instead, they can become ways of legitimizing the rule of old power brokers and assuaging international pressure through the manipulation of perceptions. Such transitional justice mechanisms have little truth or justice in them. The most famous example is the commissions set up to investigate "missing people" in Uganda in 1974 by President Idi Amin even as he simultaneously increased violent repression.[149] In Indonesia truth-seeking initiatives even through commissions or investigations continue to elicit more resistance from state officials, security apparatuses, and nationalist groups than the idea of "reconciliation."[150]

Resistance to transitional justice mechanisms is why their timing is so essential. As discussed above, transitional justice can be a tactic or concession to address international and domestic pressure. Traditional scholars such as Hayner advocate that transitional justice initiatives are best implemented when a transitional government or president has been elected. This reflects a top-down focus on transitional justice. More recent analysis from Sikkink and Booth-Walling have identified a more gradual approach to transitional justice practices, with states initiating trials and truth commissions, for example, a few years after transition and structural changes to institutions have occurred. Others such as Clarke advocate a local approach that starts from the grassroots up and can begin prior to and after transition from conflict or dictatorship.

In the case of Indonesia, the space for transitional justice was open during the early years of the transition (1998-2001) because the political elites needed legitimacy to distinguish themselves from the old regime. This is evident by some of President Habibie's progressive and innovative policies, including the Law on Human Rights and Komnas Perempuan. Komnas Perempuan was set up after direct lobbying from women's activists in reaction to the mass rape of Chinese women during the riots that accompanied the fall of Suharto in May 1998.[151] There was also considerable flexibility with his successor, President Abdurrahman Wahid, who, in 2000, offered an apology to former detainees of the 1965 events. This was provided without reference to the military's role or a possible investigation. The apology was significant because of his dual role as head of the country and head of the NU, whose youth wing had assisted the military in the 1965 killings.[152] There were significant differences in response to the apology, with some survivors appreciating the step towards acknowledgement while others criticized that it was not enough. However, the absence of any transitional justice agendas prior to the political transition in 1998 meant that most of the organizations and victims were reactive to such actions and state policies instead of leading it. There was no blueprint. Civil society groups were just lobbying for transitional justice as they learned about it.[153] This self-analysis and learning took valuable time away from successfully lobbying the government and political elite. In the early 1990s, most of the organizations avoided working with the government and instead focused on building networks with local organizations and victims. However, this reduced the effectiveness of the groups' lobbying and calls for reform as they had a weak relationship to the government.[154] Many NGOs that now engage with the government on the topic of historic human rights abuses must vie for attention against other groups lobbying on more contemporary issues such as social and economic rights.

There is a lot of tension surrounding human rights violations and transitional justice measures from political elites, civil society organizations, and human rights and victims groups. The political transition in Indonesia was heavily compromised as old elements of the New Order regime, including the military, occupied significant positions in the government. The emphasis on national unity that has been promoted since the start of Suharto's

149 Hayner, *Unspeakable Truths*.

150 Thufail, "The Social Life of Reconciliation."

151 Elwi Gito, "The May 1998 Tragedy and the Birth of the National Commission on Violence against Women," *Newsletter Berita Komnas Perempuan*, June 13, 2014, http://www.komnasperempuan.or.id/en/2014/09/newsletter-berita-komnas-perempuan-edition-13-2014/#more-6109, 11.

152 Thufail, "The Social Life of Reconciliation."

153 Telephone interview in a discussion with the author, Indonesian scholar, Australia, January 19, 2015.

154 Wahyuningroem, "Seducing for Truth and Justice."

rule in 1965 is used to discourage people from looking into the past under the guise that it may disrupt the best interests of the nation. Civil society is not a neutral force; it contains victims, advocates, and perpetrators. Members of some civil society groups such as NU are reluctant to support transitional justice steps that might publicly acknowledge their role in past atrocities. The mood of Indonesia's political elite (especially but not exclusively the security establishment) is extremely hostile to any hint of international involvement in these issues. There are also tensions surrounding transitional justice mechanisms from human rights and victims groups largely because of Indonesia's ineffective judicial institutions, which are poorly equipped to deal with human rights abuses.[155] Ineffective institutions and their failure to address the sources of conflicts is a problem in itself. Outbreaks of violence at the local level, for example, continue to be exacerbated due to poor governance and policing, corruption, and the legacy of previous unaddressed conflicts.

In the absence of national transitional justice initiatives to support victims and rebuild society, alternatives have sprung up.[156] The decentralization of state institutions has been accompanied by a revival of *adat* practices. The revival of traditional practices across Indonesia has been complimented by growing international awareness of the need for local contextualization, ownership, and leadership of reconciliation processes.[157] Culture is often used as a mobilization for conflict, yet it is also "the greatest resource for sustaining peace in the long term."[158] In particular, because religious, ethnic, and communal conflicts are often related to identity, local culture must be incorporated into the reconciliation framework. Since reconciliation is a continuous relationship-building process, it is wise to place particular emphasis on the local level for people to become the leaders in their reconciliation efforts and not the passive recipients of others' decisions. When there is political instability after regime or conflict transition and little trust or capacity in the security apparatus, local customs such as *adat* can be a means of reconciling broken relationships. They can also start the foundational work of daily reconciliation in the interim as national initiatives such as a truth commission can take years to produce and do not necessarily address tensions at the micro-level.

155 Aspinall, *Peace without Justice? The Helsinki Peace Process in Aceh.*

156 Bräuchler, "Introduction: Reconciling," 21.

157 Phil Clark, "All Justice is Local," *The New York Times*, June 11, 2014, http://www.nytimes.com/2014/06/12/opinion/all-justice-is-local.html?_r=0.

158 John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, DC: United States Institute of Peace, 1997).

It is important, however, to understand the local context of when it is appropriate to use *adat* as a peace agent.[159] Local customs should not reinforce religious distinctions, and there are limits to their use as traditional justice mechanisms. In Indonesia *adat* rituals have unified people after communal conflicts, but they have also formed divided memories to legitimize the violence, potentially creating the conditions for further outbreak.[160] This is the contradictory nature of *adat* as a mechanism of social reconciliation and conflict where it emphasizes religious identity. In Indonesia, culture has been politicized through the incorporation of *adat* into the judicial system and the revival of traditional lifestyle in some areas. There are a number of issues that can also prevent reconciliation through local customs. These include the instrumentalization of tradition by leaders to gain access to resources; outside initiated communal reconciliation that individuals not associated with the community use to remain immune from judicial prosecution; questions over power and hierarchy; difficulties in bringing perpetrators and victims together; and the failure to involve the larger society.

Another challenge of traditional reconciliation practices is that they are often male-dominated affairs, which leave little room for women to participate in as victims, perpetrators, and activists. In conflict frameworks women are often described as passive victims. This does not reflect the important role they often play such as providing logistical support or looking after children. They are often overlooked as perpetrators and as victims. They are often encouraged to "forgive and forget" due to the public and retributive nature of judicial systems and the sense of shame that accompanies violence against women, particularly of a sexual nature.[161] As such, at a local level the families of female victims often pursue compensation through customary laws, in which the victim herself is generally excluded from the negotiations. These result in compensation that is neither reflective of the woman's needs nor intended to be used for her. At the national and international level, women's issues are similarly often overlooked in the pursuit of conflict resolution and peace. Women were excluded from the Helsinki negotiations for Aceh, with only one woman acting as an assistant to the male negotiators. This resulted in no specific provisions for women being included in the agreement despite the wide-scale sexual violence

159 Bräuchler, "Introduction: Reconciling."

160 Bräuchler, "Mobilizing culture and tradition for peace: Reconciliation in the Moluccas."

161 Subagya, "Women's agencies for peacebuilding and reconciliation: Voices from Poso, Sulawesi."

perpetrated against them.[162] For example, as female rape victims were not specified in the mandate, it was very hard for BRA Aceh to justify reparations to them, which instead emphasizes the rehabilitation of former combatants into society.[163] As a result of the patriarchal nature of both local customs and the judicial system, there is often a silencing of women's experiences with little national acknowledgment or justice. Local truth-seeking initiatives have been organized to try and challenge this gendered silence. In Aceh, while waiting for an official truth commission, victims groups started a civil society truth commission. Female victims were invited to give testimonies in a safe environment, hosted by local groups and women's NGOs. Participants made a public memorial. Stories of detention centers where rapes and sexual violence were conducted were brought to the public's attention.[164] These activities and direct lobbying by civil society, and victims and their families led to the eventual establishment of the Aceh Truth and Reconciliation Commission by the Aceh Parliament, which will run from 2016 to 2021.

Since the political transition, decentralization of governance in Indonesia has provided some space for the regional and local governments to implement their own policies. In terms of truth seeking and narrative, local authorities in a few areas have started implementing transitional justice measures with some success. For example, on Sulawesi Island the mayor of Palu acknowledged what happened in the 1965 mass violence, and he gave a formal apology.[165] He even drafted a bylaw to provide reparations for victims.[166] Yet, as a result of these local initiatives, the truth becomes localized. Only the local people know what happened. The violence perpetrated by the Indonesian military and GAM in Aceh is not nationally acknowledged, and it is uncertain how the findings of the Aceh Truth and Reconciliation Commission will challenge this. In the case of the 1965 mass killings, if only local places like Palu admit the violence, it is difficult to connect to the national level and the larger narrative of the violence. There are movements at the local level, but they cannot easily be shared at the national level given the scantiness of initiatives there.

State institutions such as Komnas Perempuan and Komnas-HAM have played a crucial role in bridging the local to the national level in Indonesia. They have a unique position as they receive their funding from the parliament but can act independently. However, the commissions' power and activism is also dependent on the members of the commissions themselves, who are nominated by the government, thus weakening their efficiency at times. Some members of the Indonesian government view these commissions as NGOs rather than state institutions.[167] This has provided them the power to work directly with the government but with the flexibility to also engage with civil society and victims at the grassroots level. On the other side, the difficulty with this position is that the commissions are often stuck duplicating multiple functions. If a report is due from, for example, the Indonesian Women's Ministry, Komnas Perempuan will help them write it. They will also help NGOs draft their shadow report, and in the end the Commission will publish its own report.[168] There is a duplication of efforts that cannot be addressed because of the structural differences in all the actors working in the transitional justice area.

Transitional justice is an ongoing project in Indonesia. Like other countries, national initiatives in Indonesia have focused on the legal aspects of transitional justice, which are easily expressed in laws and institutions, encouraging transitional justice that is implemented in a top-down manner. This is problematic as truth is subjective and cannot be enforced in a singular narrative if peace is to be sustainable. Allowing space for other accounts is an essential part of reconciliation. This begins at the local level, where the diversity of experiences, narratives, and trauma of violence is felt most with the individual and the communities. Effective transitional justice models engage with individuals, groups, and institutions at every level of society. Like conflict, transitional justice does not operate in a vacuum, and the role of international actors in the violence and atrocities is something that should be considered in peacemaking measures. However, transitional justice as a concept and set of practices is still a new and evolving field. In particular, reconciliation has become a catchall phrase that still needs to be further explored, especially in different cultural understandings of justice. Alternatives to national transitional justice such as local customs provide some steps toward healing and recovering, but they are not useful if they cannot connect to the national arena. Without truth and accountability at the national level, the state is vulnerable to repeat past actions.

162 Wandita, "Lessons from Aceh for Mindanao: Notes from the Field in Moving Beyond."

163 Telephone interview in discussion with the author, Indonesian scholar, Australia, January 19, 2015.

164 Ibid.

165 Wahyuningroem, "Seducing for Truth and Justice."

166 Telephone interview in discussion with the author, Indonesian scholar, Australia, January 19, 2015.

167 Ibid.

168 Ibid.

LESSONS FROM COLOMBIA

Maria Christina Vibe

INTRODUCTION

Civil war in Colombia has lasted over 60 years, evolving into a complicated web of sub-conflicts between a myriad of actors. The armed conflict, fought on multiple fronts by leftist guerillas, right-wing paramilitary groups, drug lords, and the Colombian army, has left more than seven million victims.[169] A history of violence has also generated institutional fragmentation and the entrenchment of crime. Despite previous peace process efforts, no comprehensive agreement has yet been implemented. In 2010, secret negotiations recommenced with the leftist *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and eventually became a formalized peace process in 2012. More discrete talks, however, have also been taking place between another guerilla group, *Ejército de Liberación Nacional* (ELN), and the Colombian government since 2012.[170]

On September 26, 2016, in the city of Cartagena, Colombia, Colombian government officials and the FARC-EP signed a historic peace agreement to end decades of hostility and violence. However, when Colombians were finally called to cast their ballot during the referendum on October 2, 2016, they did not give their support to the peace agreement. Since then, the national government has initiated a process of consultation with the political parties and civil society organizations that were against the peace agreement and the FARC-EP in Havana, Cuba. The result of these discussions was the renegotiation of the peace agreement and the signature of the "New Agreement for the termination of the conflict and building a stable and lasting peace" in November 2016.[171]

The many rounds of failed peace talks and violence have made the Colombian population weary of both war and peace bargains. Attempts at peace processes have galvanized a strong and organized civil society sector committed to a peaceful resolution. Regardless of the continued and rampant violence, political and societal attempts have stayed consistent in their efforts to ensure that a peaceful transition occurs. Because Colombia's citizens have witnessed and endured terrifying crimes, torture, massacres, and other atrocities, civil society has a significant stake in how the country will transition from a past of mass atrocities to a culture of human rights. However, with the potential demobilization and reintegration of over 58,161 members of disparate armed groups being reinserted back into local communities, security, justice, and peace remain volatile.[172] It is, therefore, important for political and social actors—from Track 1 efforts to grassroots initiatives—to collectively push for measures of transitional justice that include truth telling, accountability, and reparations.

This case study provides background on Colombia's armed conflict by describing the country's historical and political context, key players, and transitional justice conceptualizations. It offers insight into the many attempts at peace processes over the course of several decades, lessons learned from these efforts, and how the outcomes of earlier negotiations have shaped the talks with the FARC-EP and the ELN guerrillas. Particular attention is given to the demobilization and transitional justice processes, because they have been major obstacles in the course of Colombia's pursuit of peace. Additionally, the peace process with the FARC-EP could offer a model of conflict resolution that could be adapted to other international conflicts, such as a future peace agreement in Syria. Moreover, the Colombian case offers insight into the inherent

169 As of October 14, 2016, the Victims Unit records 7,900,102 victims of the conflict categorized as follows: land dispossessions (10,587), terrorist acts/combats/harassment (91,702), threats (317,468), crimes against freedom and sexual integrity (16,238), forced disappearances (164,238), displacement (6,937,205), homicides (978,906), landmines/explosive devices (11,062), loss of personal property (107,460), kidnapping (33,511), torture (10,029), and recruitment of children and adolescents (7,980). For more information please visit: Unidad de Víctimas, Registro único de víctimas (RUV), 2016, http://rni.unidadvictimas.gov.co/RUV.

170 Vicenç Fisas Armengol, *A Possible Peace Process with ELN in Colombia* (Oslo: NOREF, August 2013), http://www.peacebuilding.no/Regions/Latin-America-and-the-Caribbean/Colombia/Publications/A-possible-peace-process-with-the-ELN-in-Colombia.

171 Oficina del Alto Comisionado para la Paz, "Nuevo Acuerdo para la terminación del conflicto y la construcción de una paz estable y duradera," 2016, http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf.

172 *Over 3,300 Demobilized Colombians Complete Reintegration Process,* Briefing Note (Geneva: International Organization for Migration, January 14, 2014), http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2014/pbn-listing/over-3300-demobilized-colombians.html. For more information about the number of demobilized armed individuals and groups, please visit: Agencia Colombiana para la reintegración, Cuadro 1: Histórico de personas desmovilizadas, http://www.reintegracion.gov.co/es/la-reintegracion/_layouts/15/xlviewer.aspx?id=/es/la-reintegracion/Cifras/Cuadro%201%20Hist%C3%B3rico%20de%20Personas%20Desmovilizadas.xlsx&Source=http%3A%2F%2Fwww%2Ereintegracion%2Egov%2Eco%2Fes%2Fla-reintegracion%2FPaginas%2Fcifras%2Easpx.

tensions within multi-party peace pursuits and the unique challenges of crafting a shared agenda.

HISTORY OF THE CONFLICT

Colombia has a turbulent and bloody history of violence. The onset of the contemporary struggle can be traced to 1948 when President Jorge Eliécer Gaitán was assassinated. Gaitán's death is largely attributed to his political agenda, which, among other things, promised assistance through land reform policy for peasant farmers. Historically, Colombia's political struggle had been a binary expression between conservatives and liberals. Generally, conservatives sought a strong centralized government, whereas liberals sought decentralization and broad suffrage. As was true for most Andean States, territory had been concentrated into the hands of a small group of land-owning elite. Institutionalized privileges and economic disparity, or class conflict, had become the root of escalating tensions. The assassination of Gaitán was deeply symbolic of these struggles, sparking the *Bogotazo*, a violent riot in the capital of Bogotá. This, in turn, triggered a period called *La Violencia* (the violence) in which over 200,000 people died between 1948 and 1953. *La Violencia* marked the beginning of what has since turned into six decades of armed conflict in Colombia.

Various parties that clashed during *La Violencia* included non-state armed groups aligned with conservative and liberal parties. Socialists, peasants, organizations, criminal groups, and the private armed security of landlords were also involved. Under General Gustavo Rojas Pinilla, who took power through the 1953 coup, general amnesty was eventually given in order to demobilize and reintegrate participating armed groups. Political stability remained turbulent, and power alternated between the two main political parties in what is known as the *Frente Nacional* (National Front) until a new military coup ousted Pinilla in 1957.[173] Turmoil continued through the 1960s and 1970s. In response armed leftist guerilla groups emerged such as *Movimiento 19 de Abril* (19 of April Movement/M-19), *Ejército Popular de Liberación* (Popular Liberation Army/EPL), *Ejército Popular Revolucionario (EPR), Movimiento Quintin Lame*, the ELN, and most famously, *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP). Many of these were inspired by Marxist guerilla groups who had emerged after the 1959 Cuban revolution and were actively engaged in armed struggles throughout Latin America. They shared a belief that rebelling was a right and that an armed struggle would ensure the equal redistribution of land along with increased social and political rights and opportunities for the poor and disenfranchised. While some of these groups later demobilized to become political parties, other factions such as the ELN and FARC-EP continued to operate as armed groups in violent opposition to the Colombian state.

Illicit criminal networks and an international drug trade are additional dynamics that have shaped and transformed Colombia's longstanding conflict and contributed to the fragmentation of armed groups. In the late 1970s, large landowners, multinational organizations, and drug dealers began financing private paramilitary groups such as *Muerte a Secuestradores* (Death to Kidnappers/MAS) to fight against the guerillas. Although some of these groups began as a reaction to attacks and kidnappings perpetrated by guerrilla forces, factionalism, shifting alliances, and criminal behavior emerged. Some paramilitaries began targeting union members, human rights workers, judges, and community leaders, which created terror throughout urban and rural communities. At the same time, geopolitical dynamics in the region were beginning to shift. Communist regimes sympathetic to leftist causes were losing their hold in Central America and the Andes region and were no longer able to finance FARC-EP and ELN. In the resulting financial vacuum, the lucrative drug trade began to permeate, gaining influence across a wide spectrum of armed actors, including segments in the government, local authorities, and the army, as well.

Persistent fragmentation, violence, and increased criminality resulted in pushback from Colombia's state apparatus. During the 1980s, two parallel wars were waged. There was the "official" war between the Colombian state and the leftist guerillas and drug traffickers; and there was the "dirty war." Leftist activists, representatives of social movements, union workers, peasants, and academics became targets of death squads. A rash of kidnappings and extortion followed, leading to alliances between drug traffickers, emerald smugglers, large landowners, and multinational corporations. This dynamic was further aggravated by their infiltration into the state security apparatus, the economy, and local administrations. A turning point came when the United States became involved, after a plane bombing resulted in the death of two American citizens in 1989. The United States began to see the drug trade as a direct threat against its vital interests.

173 The National Front (1958-1974) is the period in which conservative and liberal parties agreed to alternate control of the government for periods of four years.

President George H.W. Bush took a hard line against drug trafficking by directing American military intelligence operations under the U.S. Army Intelligence Support Activity (USAISA) to assist the Colombian government's fight against drug networks.

Acute violence continued to plague Colombia throughout the 1980s and accelerated well into the 1990s. During this decade, *Autodefensas Unidas de Colombia* (United Self Defense Forces/AUC), a right-wing paramilitary group, began a FARC-EP onslaught. Their collective aim was not politically—or ideologically—driven. Socio-political dynamics created both a "push" to protect against continued kidnappings from leftist guerilla organizations and a lucrative "pull" toward drug trade participation. These paramilitaries cooperated with the Medellin drug cartel but were also said to hold close ties to the Colombian army. The lines only continued to blur. Police officers and military personnel were targeted by the Medellin cartel, further exacerbating violence and increasingly affecting civilians in urban centers. In response, vigilante groups such as *Los Pepes* (short for "People Persecuted by Pablo Escobar") emerged, waging a small-scale war against the cartel and leaving civil society caught in the crosshairs of multiple armed groups yet again. Lawlessness was rampant, and the government's ability to protect its citizens was ineffectual.

In April 1993, Escobar and his associates set off a large bomb in Bogotá in retaliation for his family being prevented from leaving Colombia. This event marked the beginning of several months of continuous terror in which several bombs were detonated in urban centers, killing hundreds of civilians. The eventual capture and death of Escobar by Colombia's National Police significantly weakened the Medellin cartel. Subsequent infighting loosened their social grip and quelled much of the violence. By this time, segments of FARC-EP and the ELN had gained links to the drug trade and were using it to finance their activities. Although the two insurgent groups were different in terms of territorial reach, through their increased involvement in the drug trade, they were able to levy taxes on coca harvesters and step into a direct and controlling role in the drug supply chain. In particular, FARC-EP was known for its international contacts and relationships with transnational organized crime and even some state actors.[174]

As "America's backyard," Colombia had long been of strategic importance to the United States. Although the United States had been engaged in its "war on drugs" in Latin America since the 1970s, its assistance had primarily consisted of training and equipment to strengthen counter-narcotic law enforcement capacity. By the 1990s, however, international drug trafficking—particularly drugs sourced in Latin America—had emerged as a national security priority. Strategic focus was given to lawless or ungoverned territories in Colombia. Unveiled in 1999 by Pastrana, "Plan Colombia" was "designed as a comprehensive strategy to strengthen democratic institutions; combat drug trafficking and terrorism; promote human rights and the rule of law; and foster economic development."[175] Additional objectives included reducing cultivation and processing and interrupting the distribution of illicit drugs by 50% within six years. The next year, an additional multi-year assistance package from the U.S. Congress called the Andean Counterdrug Initiative was passed. Its aim was expanded to include institutional capacity building and supporting civilian and military institutions. The post 9/11 environment significantly altered the objectives and framing of the Colombian conflict. FARC-EP was labeled as a terrorist organization, and anyone suspected of involvement in the drug trade was accused of supporting terrorism. When Álvaro Uribe Vélez came into political power in 2002, the agenda of "Plan Colombia" was used to reinforce his administration's strategy of *Seguridad Democrática* (Democratic Security), a policy that prioritized the role of armed forces all over the country and promoted the participation of society, with a particular focus on confronting armed groups and strengthening public security and safety[176]:

> ... (A)s a result, during President Uribe's first term, the vision for Plan Colombia shifted from a counternarcotic strategy linked to counterinsurgency efforts, to embracing the idea that terrorism and drug trafficking constitute a single criminal enterprise. With that strategy, military forces will have the mission to carry out shock operations where concentrations of illicit crops and illegal armed groups persist.[177]

174 June S. Beittel, "Peace talks in Colombia," Congressional Research Service, March 31, 2015.

175 Clare Ribando Seelke et.al, "Latin America and the Caribbean: Illicit Drug Trafficking and U.S. Counterdrug Programs," Congressional Research Service, May 12, 2011, accessed January 5, 2015, https://www.fas.org/sgp/crs/row/R41215.pdf, 12.

176 For more information about President Álvaro Uribe Vélez's vision of democratic security policy, please visit: Álvaro Uribe Vélez, "Página Oficial Álvaro Uribe Vélez," Seguridad Democrática, 2014, accessed October 18, 2016, http://www.alvarouribevelez.com.co/es/content/seguridad-democratica.

177 Ricardo Vargas Meza, "USAID's alternative development policy in Colombia," *Transitional Institute: Drug Policy Briefing Nr. 28,* October 2011, https://www.tni.org/files/download/brief38.pdf.

In 2000, then President Clinton delivered 1.3 billion USD in aid to fund combat helicopters and training for the Colombian military. What had initially been dubbed as a humanitarian effort generated a serious imbalance between the intense use of force and the weak provision of livelihood alternatives for the communities—a dynamic that significantly fed the persistence of Colombia's war economy.

While FARC-EP and ELN were seen as the primary threats to the Colombian state, paramilitary groups, once used as apparatuses by the government and military to fight the guerillas, were equally formidable. For example, paramilitaries that did not join the demobilization process of President Uribe in 2003 were called *Grupos Armados Organizados* (organized armed groups) by the Colombian government, or as they are commonly known, *Bandas Criminales Emergentes* (criminal gangs, BACRIM). These groups developed a presence in several parts of the territory and became well known for practices such as illegal mining, extortion, kidnapping, and intimidation of civil society.

In the early 2000s, the focus of Colombia's internal conflict became largely characterized by disputes over territory. Guerillas, particularly FARC-EP and ELN, and the Colombian military, with support from paramilitary groups, had strongholds in various land areas. This tendency to claim geography could also be seen on a small scale in urban areas wherein paramilitaries, demobilized groups, and/or gangs wrested control of neighborhoods. In rural areas, contestations between main actors typically emerged when alliances shifted between drug networks and large landowners. Another trend was that the ideological foundation of Colombia's conflict had decreased, and new paramilitary groups or guerilla factions were no longer emerging. This was, no doubt, partly related to demobilization policies and the "opening" of the political process. The remaining disputes (which are not related to the peace process, per se) are less political and more focused on money, criminality, power, military confrontation, and political recognition. Additional factionalism within respective armed groups and variant government responses has caused some groups to break off and pursue alternative goals or priorities in their armed struggle. But it seems the consolidation of forces has narrowed, and the demarcation around major conflict stakeholders has become more specific and clear.

The issues at the heart of Colombia's conflict have created a complex and interactive web. Certainly, a main driver of the conflict has been rivalry between a wide array of armed groups, paramilitary organizations, and the Colombian state—all vying for territory, power, and control of different regions of the country. The armed groups, in particular FARC-EP and paramilitaries, stand accused of employing child soldiers in their struggle. These children have grown up and entered adult life as comrades in arms. Identity has been affixed to social membership, ideology, or both. The influence of illegal networks, especially the drug trade, has fed all sides and contributed significantly to the escalation of violence. For example, in the 1990s, when drug trafficking was at its peak, Colombia topped international murder rate indices. This could have only happened through a significant tie between the drug trade and politics, as well as the alliance of regional leaders with paramilitaries and drug gangs. This web of networks also had support from the entrepreneurial class. Generations of civil society have witnessed and experienced violence; entire communities have been held captive by one group or another, generating geographies of terror. The implications of involvement and impact reach far and wide.

The complexity and severity of these conflict dynamics suggest that one of the core roots of the Colombian conflict lies within the traditional unequal tenure of productive land and, "the lack of a strong state presence, especially in peripheral rural areas; lack of an elite class with the leadership or the desire to build an inclusive nation; exclusion of civil society in decision making processes and a fragmented geography that impedes the presence of the state in all regions."[178] Accordingly, this has brought about the manifestation of multiple forms of violence (political, human rights, organized crime, domestic, youth gangs); multiple causes of violence (poverty, lack of political participation, human rights abuses, social exclusion); and a myriad of actors (guerilla, paramilitaries, military, organized crime, victims, and NGOs).[179] Human activists, farmers, Afro-Colombian communities, unionists, and women face constant threats to their security. Those who live in rural communities have been terrorized by guerillas and paramilitaries alike. They face untenable choices such as supporting one of the armed groups for protection or fleeing to the relative safety of urban areas where the high majority of *desplazados* (displaced persons) remain unemployed or underemployed. Violence, an everyday reality of people's lives, has left 6.9 million Colombians internally displaced

178 Maria Lucia Zapata Cancelado, "Hybridity and Grassroots Peacebuilding in Colombia" (Paper presented at the Conference: New Frontiers for Peacebuilding, Manchester, UK, September 13-14, 2012), 6.

179 Ibid.

since 1985.[180] The concentration of rural IDPs in urban centers like the capital, Bogotá, has generated new tensions within cities. Not only are infrastructures unable to adequately sustain mass migrations of people, violent patterns of conflict have entered these spaces that had otherwise been far from armed group influence. Kidnappings, extortions, disappearances, murders, and sexual violence that have long been part of guerilla and paramilitary group tactics are now impacting security and stability in heavily populated urban areas, too. This spread of violence is creating an even larger pool of victims and perpetrators from all sides and adding to the perpetual cycle of social conflict.

Finally, although previous peace attempts have generated some small successes along the way, failed attempts have also increased mistrust between the parties. For example, in the 1990s, guerilla groups demobilized in order to enter the political arena. This is a similar "carrot" strategy that was being championed in the peace process with the FARC-EP since 2012. During the late 1980s and early 1990s, however, 4,000 leftist party members were subsequently targeted and killed after entering into "legitimate" politics as part of the Patriotic Union political party. This included eight members of congress, two presidential candidates, and 13 mayors, with 5,000 political sympathizers eventually forced into exile.[181] With the exception of the peace process with the FARC-EP, cease-fires have not been traditionally maintained by this group or the ELN. Political officials have been kidnapped or killed during negotiations, and violence has persisted. The counter to this narrative has been that the Colombian government is hypocritical. Not only has it endorsed state-sponsored violence and encouraged impunity and a lack of truth telling, it has also participated in an internationally assisted destabilization of guerrilla held regions. Hence, the issue of rebuilding trust between the guerillas vis-à-vis the State is a thorny one. This is especially true in the process of demobilization, where an asymmetry in power emerges, leaving one side more vulnerable and, even more so, without arms.

180 *Global trends. Forced displacement in 2015*, UNHCR, 2016, https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf.

181 Virginia Marie Bouvier, "New Hopes for Negotiated Solutions in Colombia," United States Institute of Peace Working Paper, September 25, 2015, http://www.usip.org/sites/default/files/Sept2007.pdf.

PRE-TRANSITIONAL PROCESS

Although peace negotiations have been underway in Colombia for years, the road has been paved with aborted processes, reprisal killings, and cycles of violence. Up until recently, peace attempts in Colombia had generally been exclusionary—conducted with one armed group at a time. Groups not part of the negotiations tended to face increased military persecution. This model has not worked effectively. With the exception of sporadic demobilization attempts, reaching agreements with disparate groups failed, which ultimately hindered a sustainable, comprehensive, and inclusive peace agreement.[182] Bouvier argues that in instances where there is more than one armed group, the classical government vs. non-state actor peace negotiation process is insufficient. Instead, peacemaking must be conceptualized through a more comprehensive framework. Bouvier's analysis is especially relevant in cases such as Colombia, where negotiations with multiple groups need to be conducted simultaneously. Multi-party conflict frameworks highlight the importance of coordinating different negotiations while concurrently anticipating how outcomes with one group may affect the others. Not only does Colombia's case study offer insight into multi-party negotiations, it also elucidates considerations for a minimalist vs. maximalist agenda. Within Colombia, a dominant and persistent question has been whether to focus the negotiation agendas on broad political, economic, and social issues, or whether it should be constricted to agreements on cease-fire, disarmament, and reincorporation.[183]

In 1984, the Uribe Accord was signed with FARC-EP. This Accord included a bilateral cease-fire and an outline for discussions on various social and political reforms of particular concern to the FARC-EP. Parallel but separate talks were also ongoing with the M19, EPL, and ELN. However, after these talks started to break down in 1985, the M19 guerillas retaliated by kidnapping and murdering several Supreme Court justices and employees. In the aftermath, a 40-member peace commission was set up by President Betancur in which a variety of social and political sectors came together in order to re-establish dialogue. But by 1987, talks with FARC-EP had also broken down, and in response, large numbers of its political wing, the Patriotic Union (UP), were targeted and killed by paramilitaries, drug lords, and marginal sectors of the Colombian military. The 1990s was a particularly salient time in Colombia's pursuit of peace as sticking points between parties

182 Ibid.

183 Virginia Marie Bouvier, *Colombia: Building Peace in a Time of War* (Washington, DC: United States Institute of Peace, 2009).

crystallized. The government recognized that demobilizing the various guerilla and paramilitary groups was critical to a peaceful future. A significant impediment for these factions was their demand for political recognition, something the 1886 Constitution did not afford. Under the Virgilio Barco administration (1986-1990) constitutional reform was initiated, which opened a door to the political process. While the reform itself was not initially adopted, Barco's gesture signaled sincerity to groups like M-19, who began engaging in dialogue. This small step activated civil society, and eventually a constitutional reform process began in 1991. These shifts were particularly democratic for Colombia and set a precedent for a more inclusive way of reaching political consensus within the country.[184]

President César Gaviria (1990-1994) recognized the near impossibility of pushing constitutional reform through a congress dominated by the two traditional parties, so he called the National Constituent Assembly (ANC) to convene. The ANC included a wide range of interest groups, including political parties, evangelical associations, marginalized groups, and ethnic minorities such as indigenous communities. Eventually, the ANC even hosted organizations of demobilized guerillas (M-19, EPL, MAQL, and PRT).[185] The president also sought collaboration with the student movement, which strongly supported the initiative. In an unanticipated response, various guerilla groups (FARC-EP, ELN, and the M-19) began demanding that the Constituent Assembly be called to discuss wider social and political conflicts related to the ongoing peace talks. This broad-based mechanism for public debate was mildly successful, although democratic participation did not lead to an immediate decline in violence. In fact, with increased civic participation, the civil population was no longer seen as neutral actors, and as a result, some of them became victims of direct violence. What this process did do, however, was broaden the parameters of civil debate in a more inclusive way, which set an important precedent for the future.

Political integration and demobilization became a priority in engaging with armed groups for the Gaviria administration. President Gaviria understood that opening up the space for political involvement was central to the initial phase of the demobilization process. In order for these groups to transition into the political arena, measures had to be taken to safeguard them from criminal liability. Given that smaller militias were no longer excluded from the political process by the state and because the legal mechanisms of pardon and amnesty ensured their freedom, the motivation to demobilize was high. The Gaviria administration was also successful at holding negotiations with several small guerilla groups such as EPL, the Quintin Lame group, and PRT, all of whom eventually laid down their arms and became part of the Constituent Assembly. In each of the peace agreements established during the mid-1990s, political benefits were a part of the deal. These benefits included the possibility of (1) participating in the ANC; (2) legal allowance of political movements with support and guarantees granted by the government; and (3) political participation through the appointment of "movement" representatives to Congress.[186]

Next, President Gaviria initiated exploratory talks with the ELN and FARC-EP, but their demands were broader in scope. They were also more ideological in nature and, therefore, more complex to negotiate. Talks were held outside of the country in Venezuela and Mexico, but they broke down when a dissident faction of the EPL kidnapped and killed a former government official. Following the breakdown of these talks, the Colombian peace movement increased and gained political force. The creation of civil society initiatives, such as the National Network for Citizen Initiatives for Peace and Against War, the Colombian Conference of Bishops National Conciliation Commission, and sectarial peace groups, such as *Ruta Pacífica de Mujeres, Red Universitaria por la Paz, Planeta Paz, Ideas por la Paz,* and the National Peace Council, was part of this momentum. Moreover, the growth of broad-based coalitions and the increase in public demonstrations during the mid to late 1990s were successful in pressuring the Pastrana government (1998-2002) to pursue a renewed political solution to the conflict.[187] Grassroots initiatives within the Colombian peace movement emerged, eventually broadening to include mainstream sectors of society such as the business community, church, and politicians. It quickly splintered, however, due to nonaligned interests, particularly around the historic class conflict. As the public activated, so too did attempts by traditional forces to restrain peace efforts. Increased violence, guerilla kidnappings, and public terror were eventually successful at polarizing the movement.

184 Monica Hurtado, "Proceso de reforma constitucional y resolución de conflictos en Colombia," *Revista de Estudios Sociales* 23 (2006): 97-104, http://res.uniandes.edu.co/view.php/517/view.php.

185 Ibid.

186 Sergio Jaramillo et al., *Transitional Justice and DDR: The Case of Colombia* (New York: International Center for Transitional Justice, June 2009), https://www.ictj.org/sites/default/files/ICTJ-DDR-Colombia-Case-Study-2009-English.pdf.

187 Bouvier, "New Hopes for Negotiated Solutions in Colombia."

In the late 1990s, a National Peace Council was convened at the state level. It was to serve as an advisory group for the Colombian Executive branch on policies related to peaceful resolution of the armed conflict. The Council included representatives of the President and some of his ministers, a High Commissioner for Peace, social organizations, trade groups, ethnic minorities, unions, churches, and other sectors. It became a permanent structure to be utilized at the discretion of subsequent presidents, who were the only ones with official power to convene it. Although the Council was not often activated, its role signified, at least rhetorically, the democratic value of including and consulting a cross-section of society in which the diverse ethnic and sectarial makeup of Colombia was reflected.

The successes of the peace coalition model of the 1990s had become fairly marginalized by the time President Pastrana reignited talks with FARC-EP, which ran intermittently through 1999 and 2000. Interests between parties varied. The government continued to press for demobilization of guerrilla forces, but the guerrillas wanted to defer discussion of security guarantees and instead discuss a broad social, economic, and political agenda. What is unique about these negotiations and those held earlier in the 1990s was that FARC-EP's military strength and influence had increased enough to demand where negotiations would take place. Instead of the negotiations being held in another country, FARC-EP commanders demanded that they remain in Colombia in demilitarized zones (DMZ), which were effectively controlled by the guerrillas. Security forces cleared 42,000 kilometers in "El Caguan" region, to facilitate formal peace talks between the Colombian state and the FARCE-EP. However, a series of disagreements took place undermining the process before it had even begun. These talks ended abruptly in February 2002 after the FARC-EP hijacked a plane and kidnapped a senator. The security situation deteriorated, and the mistrust between both sides and the Colombian society eroded the progress of the peace negotiations. Nevertheless, before talks broke down, agreements meant to facilitate future peace negotiations had been reached. These included the Loz Pozos Agreement, the Humanitarian Accord, and the Agreement of San Francisco de la Sambra. Unfortunately, none of these agreements were ever realized. But what this process indicates is that parties were starting to more effectively negotiate their interests.

President Pastrana was active in creating a variety of responses to the political instability, drug trade, and ongoing violence in the country. During the peace process, for example, he instituted The Commission of Notables, a participatory mechanism in which two special advisers to the negotiation table would stay in constant contact with FARC-EP and the government. Public hearings were also held at the same time through the National Thematic Committee, which included participants from a variety of sectors of Colombian society. These hearings took place on an individual, public, and sectarial basis, as well as by electronic submission. As previously mentioned, the president also initiated an international humanitarian "aid" scheme through partnership with the United States. Arguably meant to help rebuild conflict-affected areas, this initiative was framed as an alternative development policy used to create legal income and employment opportunities for farmers based on private-sector investment. Funding was contingent on the eradication of illicit crops and a commitment not to plant them in the future. With the support of international agencies, these programs would foster social processes in which communities would be empowered. At the onset, and in theory, this development strategy was anticipatory and strategic. And while there has been immense criticism in the outcomes related to U.S. involvement and the dubious militarization of aid, the idea of alternative development was born. Within the development community, this approach has since gone through several clarifying iterations with the recognition that a regional strategy, promoting integral, participatory, and rural development is essential to Colombia's peaceful future.

However, Pastrana's failure to bring about a comprehensive peace agreement with FARC-EP and ELN led to wider acceptance of President Uribe's military tactics toward leftist guerilla groups in his first term as president (2002-2006). Having campaigned on promises to take aggressive action against the guerrillas once elected, combating insurgents became the defining objective of the government. As a result of Uribe's overriding priority, Colombian civil society experienced a dramatic decrease in violence. For a majority of Colombians, security has long been a significant issue, and by the end of his term in 2010, President Uribe had a 75% approval rating because, indeed, he had begun making Colombia a safer place by strengthening and enhancing security efforts. He sought to regain social and territorial control through the application of his "Democratic security strategy": that is, by increasing the capacity of troops and deploying them throughout the country, bolstering protection of oil and natural gas pipelines, and initiating a network of more than one million civilian collaborators and informants to gain access to information related to insurgents. However,

as his tenure as president progressed, dubious accounts of state corruption and human rights violations cast a shadow on his administration's image. Under President Uribe's policies the phenomenon of "False Positives" developed: a practice in which soldiers participated in extrajudicial executions. They killed civilians and then manipulated the scene to make it appear as if the person was a guerrilla killed in combat. This was done in order to gain financial rewards for the high body count. Concerns were also raised about the misuse of power, particularly collaborators with vendettas, semi-trained peasant militia forces left in isolated places, and military personnel who were given police powers without judicial approval or oversight.[188]

Despite the "parapolitics" shadowing President Uribe's administration, during his first term a formal process to demobilize the right-wing paramilitary group United Self Defense Forces (AUC) was set in place through the passage of the controversial Justice and Peace Law (No. 975/2005). This law stipulated that in exchange for "contribution to the attainment of national peace, collaboration with the justice system, reparation for the victims, and the person's adequate re-socialization,"[189] the worst perpetrators would receive reduced prison sentences of five to eight years. This led to the demobilization of more than 30,000 paramilitary combatants. The Justice and Peace Law was the first to introduce elements of transitional justice to Colombia through the conditions of truth confessions and reparations to victims. Although President Uribe initially introduced the law for the purpose of demobilizing the AUC, it was modified with input from Colombian civil society, the international community, and the UNHCR. Many civil society groups, however, distanced themselves from the process of demobilization, because the law excluded state agents and only applied to a small, select number of individual perpetrators who would receive low prison sentences.

The disarmament, demobilization, and reinsertion (DDR) of armed groups has been at the heart of Colombia's peace strategies since the 1990s. How it is understood and implemented, however, has changed significantly over the course of the past 25 years. Two very separate mechanisms for demobilization have emerged, with the FARC-EP peace process in Havana both reflecting and perhaps constrained by the original implementation of practices under Gaviria's Presidency. In the 1990s, the government granted amnesties and pardons after giving political status to guerrilla groups who had complied with DDR. Political recognition was necessary for negotiation, and it was the bridge to signing a peace agreement. At the time, granting amnesty was not problematic because guerilla groups were motivated primarily by political ideals, and generally crimes had been against institutional structures, with the exception of several crimes against humanity.[190] Colombia's armed conflict, however, is made up of numerous parties with multiple motivations, interests, and positions. A one-size-fits-all framework is not expedient, prudent, or effective. For example, the demobilization of paramilitary groups does not fit as easily into the same category as leftist guerillas as they were not generally motivated by political ideals, and because many of them were criminal gangs, drug traffickers, and thugs. The reinsertion and reintegration of these groups not only has significant social ramifications but also causes political and legal tensions. Additionally, Colombia's government is highly centralized with vast regions of the country left without much support. Uribe's DDR program was a government-imposed strategy in which former militia members were reinserted back into conflict-torn territory. Much of this was done without consultation with local authorities, and the lack of coordination has since been detrimental to the quality and coverage of the program in assisting individuals and groups to transition back into civilian life.[191]

As Uribe was implementing DDR and focusing on enhancing security, the international community began playing a more intensified role behind the scenes. They facilitated contact between the Colombian state and different armed groups, as well as lobbied foreign governments to support future peace talks. International attention from the Organization of American States (OAS), European nations, and the United States exerted pressure on the Colombian government to renew peace negotiations. Supported by the Catholic Church, exploratory talks between the Colombian government and the ELN took place between 2006 and 2008 with the involvement of Norway, Spain, and Switzerland. The ELN had been strong proponents for civil society participation in peace processes and had previously conducted consultations with civil society sectors.[192] During these negotiations, demobilization remained the most contentious issue, reflecting the

188 *Colombia: President Uribe's Democratic Security Policy*, Latin America Report N°146 (Brussels: International Crisis Group, November 13, 2003), http://www.crisisgroup.org/en/regions/latin-america-caribbean/andes/colombia/006-president-uribes-democratic-security-policy.aspx.

189 Hurtado, "Proceso de reforma constitucional y resolución de conflictos en Colombia."

190 Jaramillo et al., *Transitional Justice and DDR: The Case of Colombia.*

191 Ibid.

192 Armengol, *A Possible Peace Process with ELN in Colombia.*

continued tension and mistrust over the fate of demobilized fighters in the 1990s. The ELN called for amnesty for all political prisoners. Amid increasing violence, the talks finally faltered in 2007 with no preliminary agreement signed. The issue of demobilization turned out to be one of the most contentious issues in the dispute.

While international pressure was focused on the national pursuit of peace, religious and civil society groups had already begun transitional justice initiatives. For example, in their efforts to foster peace initiatives, the Catholic Church strongly advocated for a negotiated settlement rather than military victory over guerrillas and paramilitaries, arguing that a lasting peace could never be imposed from above. They called for dialogical processes with civil society that would encourage social reconciliation. More importantly, they took a stand on behalf of "just peace," asserting that addressing underlying social and economic inequities fueling the conflict were indispensable issues to the peacebuilding process.[193] The Catholic Conference of Bishops was actively engaged in advising, facilitating, and mediating between the government and armed groups. Protestant churches, representing a much smaller constituency, were also involved in local-level conflict mediations. Additionally, faith-based groups (FBOs) were working at the community level dealing with issues of truth, justice, and reconciliation through thousands of peacebuilding activities taking place in all regions of the country.[194] Other important sectors of civil society involved in the preparation and sustainment of the process at the time included women's groups, indigenous and Afro-Colombian communities, labor unions, journalists, human rights, and peace organizations.

Despite the failure of the 2006-2008 talks, continued public and civil society pressure for the release of kidnapped hostages pushed President Uribe to pursue a humanitarian accord with FARC-EP in his second term. Attention around high profile hostages like Ingrid Betancourt was also a mobilizing factor due to the international interest that accompanied this initiative. The killing of 11 out of 12 departmental legislators kidnapped by the FARC-EP in June 2007 further galvanized the public with over five million Colombians taking to the streets in protest. Negotiations between FARC-EP and the Colombian government over the prisoner exchanges continued with suggestions for a demilitarized area to facilitate the exchanges. The Humanitarian Accord was reached in 2007, facilitated by the Catholic Conference of Bishops and in particular then-Venezuelan President Hugo Chávez. Hundreds of FARC-EP prisoners who had been held by the government—including the FARC-EP's so-called "foreign minister" Rodrigo Granda—would later come to play a role in the negotiations in Havana.

Peace process initiatives diminished in the growing political scandals that characterized the rest of Uribe's term in office. Near the end of 2007, Venezuelan President Hugo Chávez withdrew as mediator between Colombia and FARC-EP following a disagreement with President Uribe over his role. External relations between the countries continued to deteriorate for the remainder of Uribe's term. Additionally, a cross-border strike into Ecuador to pursue FARC-EP leaders also weakened relations between the two countries. Internally, President Uribe became engulfed in political scandals. A number of political associates of the president, including his cousin Mario Uribe, were arrested under the Justice and Peace Law due to his ties with paramilitary groups. However, Uribe's efforts with the Humanitarian Accord with FARC-EP paved the way for his successor, Juan Manuel Santos, to pursue peace talks when he was elected in August 2010.[195] That same year President Santos began to explore talks with FARC-EP through the exchange of secret letters.

Although President Santos announced that the government was engaging in exploratory peace talks with FARC-EP in 2012, he had been laying the groundwork for them since his inauguration in 2010. These official talks were the first in a decade between the two parties and the fourth attempt at a peace process in 30 years. In anticipation of this peace process, President Santos enacted several legislative reforms within his first two years of office, including a victim and restitution law (Law 1448) in 2011 and a legal framework for peace and justice (Law 975) in 2012, which will be discussed in the following section. He also began to normalize relations with neighboring countries such as Ecuador and Venezuela, which had endured considerable strain under Uribe's presidency. Parallel to these processes, however, Santos maintained an aggressive security stance and dealt a significant blow to FARC-EP in 2011 by conducting a raid on a compound in central Colombia, killing FARC-EP's top leader, Alfonso Cano. A week later, their new leader, known as Timoleón Jiménez, made a public overture to Santos by opening

193 "The Church's Role in Peacebuilding in Colombia," Catholic Peacebuilding Network, 2015, http://cpn.nd.edu/conflicts-and-the-role-of-the-church/colombia/the-churchs-role-in-peacebuilding-in-colombia/.

194 Bouvier, "New Hopes for Negotiated Solutions in Colombia."

195 Adriaan Alsema, "Hypocrisy? Uribe offered FARC-EP demilitarized zone for peace talks," *Colombia Reports*, October 5, 2014, http://colombiareports.co/uribe-tried-peace-talks-FARC-EP-offered-demilitarized-zone/.

up political dialogue and releasing all of its "exchangeable hostages."[196] Following the commencement of peace talks with FARC-EP in 2012, the ELN leadership began to express its interest in renewing talks with the government, calling for a bilateral cease-fire as a precondition for dialogues. In contrast to FARC-EP, the ELN does not see itself as a future political party but rather a social and popular movement. The following section will discuss the continuing evolution of Colombia's peace process with the FARC-EP through a description of its framework and the competing conceptualizations.

FRAMEWORK

The focus of this discussion will primarily concentrate on the talks between FARC-EP and the Colombian government. However, the importance of simultaneously addressing different conflicts and multiple parties should not be overlooked as this has been a consistent variable plaguing Colombia's ineffectual peace processes. President Santos has stated that the conflict and peace process are all one, and despite different armed groups potentially being engaged in it, they should all follow the same model employed by the Colombian government and FARC-EP to reach agreement.[197]

The root causes of the Colombian conflict have been addressed in the FARC-EP process in a more comprehensive way than previous attempts. The opinions of a wide array of victims from various sectors in society, such as other guerilla groups not yet engaged in the peace process, have been included. In the renewed rounds of talks beginning February 2, 2015, the Historical Commission on the Conflict and its Victims presented their analysis of the root causes of Colombia's armed conflict at the negotiation table.[198] These types of broad-based and inclusive initiatives should be recognized as a step toward a more sustainable peace agreement. As mentioned earlier, groups like FARC-EP and the ELN share similar political and economic ideologies, and their call for deep structural change has been unequivocal. Having the Historical Commission validate and confirm the leftist guerilla's grievances against the inequality embedded in Colombia's political system, society, and economy acknowledges and legitimizes their position. It also encourages these parties to remain at the table.

196 Beittel, "Peace talks in Colombia."

197 Presidencia de la República, video, *Alocución del Presidente de la República, Juan Manuel Santos*, March 30, 2016, accessed November 1, 2016, https://youtu.be/wrkU1OyRw54.

198 Adriaan Alsema, "Historic Commission releases report on causes of Colombia conflict," *Colombia Reports*, February 11, 2015, http://colombiareports.co/historic-commission-releases-report-causes-colombia-conflict/.

CONCEPTUALIZATIONS

Transitional justice is a pressing topic of discussion in Colombia. Debates and tensions about the future implementation of the peace agreement with the FARC-EP in Colombia revolve around the issues of justice, peace, political participation, and reconciliation.[199] The concept of transitional justice is not new to Latin America. A number of states such as Chile, Argentina, Uruguay, and Brazil have employed various models as they transitioned from authoritarianism to democracy.[200] In its theoretical basis and application, transitional justice implies a change in the institutions or politics of a society. Historically, however, institutional reform and true political integration have not taken place in Colombia. Many of the reforms that transitional justice would imply such as increased political access and accountability, education, protection of human rights, and adherence to international laws and treaties have already been established in Colombia. It has a progressive constitution, a very active constitutional court, and civil society. Rather, in Colombia, the problem is that the legal frameworks are present but the behavior or norms to enforce them are not.[201] The basic human rights of rural communities have been violated by both armed groups and state agents. Accountability, transparency, and legitimacy are common failings in the Colombian political and social system. Special interests such as the drug trade, paramilitaries, and multinational corporations have infiltrated the state. As such, the problems of pursuing peace and justice in transitional justice are heightened in a context where a radical social and political transformation is unlikely.[202] The individuals and institutions that have participated in or oversaw human rights abuses remain in power. This reality has significantly influenced transitional justice discussions in Colombia.

The conceptualizations of transitional justice for the peace process with the FARC-EP mainly emphasize truth-seeking, victim's reparation, justice through judicial process, and social reconciliation. Statements by both the National Prosecution Unit for Justice and Peace and the Supreme Court of Justice have both emphasized retributive justice. Reflecting the principles of the 2012 Legal Framework for Peace and the basis of

199 Felipe Gómez Isa, *Justice, truth and reparation in the Colombian Peace Process* (Oslo: NOREF, April 2013), http://peacebuilding.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf.

200 Havner, *Unspeakable Truths*.

201 Jaramillo et al., *Transitional Justice and DDR: The Case of Colombia*.

202 Rodrigo Uprimny Yepes et al., *¿Justicia Transicional sin Transición? Verdad, Justicia y reparación para Colombia* (Centro de Estudios de Derecho, Justicia y Sociedad, Bogotá: Edicisones Antropos, 2006).

the FARC-EP negotiations, they have argued for the need of case selection based on the "most responsible" perpetrators of serious human rights abuses and crimes against humanity. They have also emphasized that cases reflect the types of abuse that occurred, such as extrajudicial killings, torture, forced disappearances, sexual violence against women, forced displacement, and the illegal recruitment of minors, when these qualify as crimes against humanity, genocide, or war crimes committed in a "systematic manner."[203]

The limitation on selection and prioritization of cases has been one of the most controversial aspects of the FARC-EP peace process and was one of the reasons that some parts of Colombian society rejected the peace agreement. The use of selected cases would suggest that in order to achieve peace, some perpetrators and offenses may not be prosecuted. This is the fear that pervades many victims' and civil society organizations' discussions related to judicial justice mechanisms and truth commissions. Most Colombian civil society organizations have lobbied and initiated projects that support truth-seeking measures such as a truth commission. While victims and their families have repeatedly stated their desire for acknowledgement and information on their loved ones, they are wary of a truth commission, because they associate amnesty and reconciliation with immunity for perpetrators.

The issues of amnesty, pardons, truth, justice, and reconciliation are terms that met significant resistance in the negotiation of the peace process and polarized Colombian society in particular. The experience that many victims felt in their first encounter with transitional justice through the Justice and Peace Law (No. 975/2005) and the demobilization of paramilitaries has left them disillusioned. Reparation through the Justice and Peace Law largely meant monetary compensation for victims, while many felt that demobilized fighters enjoyed amnesty and rehabilitation measures to reintegrate them back into civilian life. There is a fear that "amnesty" for FARC-EP guerillas through demobilization or a truth commission would mean impunity. In order to assuage concerns related to impunity, in February 2015, former Colombian ex-President César Gaviria proposed that civilian actors, such as businessmen and politicians, be included in a transitional justice program.[204] His proposal not only acknowledges the role that such actors played in the conflict but also seeks to address the issues of equal treatment that were lacking in the Justice and Peace Law, where demobilized fighters received reduced sentences while civilian actors did not. However, these discussions on key transitional justice issues, particularly the association between truth-telling mechanisms, amnesty, and impunity, have generally emphasized the judicial route. As negotiations in Havana were taking place, international organizations and figures challenged these transitional justice perceptions. For example, in February of 2015, former United Nation Secretary General Kofi Annan hosted a conference in Bogotá on "Truth Commissions and Peace Processes: International Experiences and Challenges for Colombia."

Other transitional justice issues such as restitution, institutional reform, and human rights have been discussed by civil society and ethnic minorities. Within some civil society organizations, conceptualizations of justice extend beyond the dichotomy of the perpetrator and trial to the broader social issues and structures that underline the conflict. Such actors conceive justice in terms of stronger democratization such as accountability, transparency, and the rule of law. In addition, they emphasize the need to increase rights of marginalized groups in society such as ethnic minorities and women.

Transitional justice is also conceived differently by indigenous and Afro-Colombian groups who make up 3.36% and 10.26% of the total population, respectively.[205] Their cosmological beliefs and their communal lifestyle are intimately bound by their relationship to territory. As such, there have been critics of some of the individualized conceptualizations of transitional justice for ethnic minorities that focus too much on compensation (of land, for instance) and on illegal deposition rather than "legal" displacement through state-backed, large-scale projects such as dams, mining, and large-scale agricultural plantations.[206] For such communities, a distributive understanding of justice that emphasizes restitution may be more appropriate and preferable than the idea of transitional justice.[207] The concept of Collective Ethnic Justice (CEJ), a process that emphasizes consent, consultation, and the incorporation of cultural identity, is an emerging area of discussion throughout Colombia as a framework to make transitional justice initiatives more empowering for participants and sensitive to the specific abuses suffered by indigenous people.

203 Kai Ambos et al., *Justicia de Transición y Constitución: Análisis de la Sentencia de la Corte Constitucional* (Bogotá: Editorial Temis S.A., 2014), 166.

204 César Gaviria Trujillo, "Justicia transicional para todos', pide César Gaviria," *El Tiempo*, February 15, 2015, http://www.eltiempo.com/politica/justicia/expresidente-gaviria-habla-de-la-justicia-transicional/15249538.

205 FOKUS - Foro de Mujeres y Desarollo, *Aportes para el debate sobre la paz* (Bogotá: Estampando Conciencia, May 2013), 43.

206 Morten Bergsmo et al., *Distributive Justice in Transition* (Oslo: Torkep Opsahl Academic EPublisher, 2010).

207 Ibid.

LEGAL FRAMEWORK

Although Colombia became a State Party to the Rome Statute and the International Criminal Court (ICC) in November 2002, it is one of the most violent and conflict-affected state parties to this international treaty. At the time, Colombia enlisted article 124 of the ICC, which suspended the jurisdiction of the court for seven years.[208] This expired on November 1, 2009. As such, Colombia is now subject to the Court's jurisdiction. This will have implications for the implementation of peace agreements given the restrictions by the ICC on impunity. Already, Colombia's obligations under the Rome Status have limited its legislative scope for amnesties. This can be seen in the development of its legislation to address conflict issues, which have become more progressive over the years.

A set of legislative actions have been brought forth to facilitate and support transitional justice processes. These moves began with President Uribe's Justice and Peace Law (No. 975/2005), which first introduced key concepts of transitional justice, truth, and reparations into Colombian Law.[209] This law aimed to facilitate the reintegration of the members of illegal armed groups into civilian life. It stipulated that an ex-combatant may face a reduced sentence from the standard 40 years down to five or eight if they told the truth and provided sufficient compensation to their victims. A 2006 Constitutional Court amendment to the law reduced its scope by setting more strict criteria for their reintegration. Among other things, the 2006 amendment ensured that paramilitarism could not be considered a "political crime"; beneficiaries of the law would be required to confess all their crimes; and the obligation for paramilitaries to provide reparations is based on the entirety of their assets, both legal and illegal.[210] The law has significantly influenced engagement with the paramilitaries. Twenty-five of 37 active fronts were demobilized, culminating in an estimated 30,000 paramilitaries giving up arms.[211] It also led to the indictment of a number of high-level political and business figures for their involvement with the paramilitaries.

The Justice and Peace Law is not without controversy. A significant weakness in the law was that it did not address victims of state agents who had collaborated with the paramilitaries. Critics also argue that while perpetrators enjoy reduced sentences and reintegration programs, the reparation process, which is centered on monetary compensation, is slow and ineffective. A 2008 mechanism to facilitate the financial reparation program has thus far not produced the expected results: first, because the resources deliberated by the demobilized groups are insufficient and, second, due to the lack of coordination between the sentence of the courts and the capacity of the Victims Unit in charge of distributing economic compensation. Poor management of data on individual paramilitaries has also led to a failure to verify individual confessions.[212] Furthermore, the pre-selection of candidates eligible for programs by the executive office and paramilitary groups has hindered the strategies to dismantle the criminal network in which these groups have been embedded.

Despite weaknesses in the implementation of the Justice and Peace Law, it provided the first legal framework for the recognition and protection of victims' rights to truth, justice, and reparation. In particular, Article 50 established the National Commission for Reparation and Reconciliation (CNRR) with an eight-year mandate. It was envisioned as a compliment to the demobilization of the paramilitaries, tasked with not only overseeing the reintegration process of former fighters but also designing and implementing a model for reparations to the victims. This included informing victims of their rights under the Justice and Peace Law and promoting civic reconciliation for victims through truth initiatives and public policies. Part of the CNRR's role in providing reparations was to publicly explore the judicial truth of the conflict as well as the historical narrative. In 2005, the Historical Memory Group was created under the CNRR to explore the source and evolution of the armed groups, highlighting the different memories of the conflict and focusing

208 Amanda Lyons and Michael Reed-Hurtado, *Colombia: Impact of the Rome Statute and the International Criminal Court* (New York: International Center for Transitional Justice, June 2010), https://www.ictj.org/sites/default/files/ICTJ-Colombia-Impact-ICC-2010-English.pdf.

209 Procuraduría General de la Nación, "Conceptos básicos acerca de la ley 975 de 2005 (Justicia y paz) y de los derechos de las víctimas," 2007, http://www.procuraduria.gov.co/portal/media/file/descargas/victimas_2007/conceptosbasicos_ley975.pdf.

210 Felipe Gómez Isa, *Justice, truth and reparation in the Colombian Peace Process*, Norwegian Peacebuilding Resource Center (NOREF), 2013, http://noref.no/var/ezflow_site/storage/original/application/5e7c839d-7cf77846086b6065c72d13c5.pdf.

211 Agencia colombiana para la Reintegración, *Sistema de información para la reintegración*, "Cuadro 4: Caracterización de la población," 2016, http://www.reintegracion.gov.co/es/la-reintegracion/_layouts/15/xlviewer.aspx?id=/es/la-reintegracion/Cifras/Cuadro%204%20Caracterizaci%C3%B3n%20de%20la%20Poblaci%C3%B3n.xlsx&Source=http%3A%2F%2Fwww%2Ereintegracion%2Egov%2Eco%2Fes%2Fla-reintegracion%2FPaginas%2Fcifras%2Easpx.

212 Lyons and Reed-Hurtado, *Colombia: Impact of the Rome Statute and the International Criminal Court*.

particularly on the perspectives of victims. It published reports on truth and memory of the conflict in various regions of the country, with an emphasis on specific emblematic events.

CNRR was closed in 2011 after the passing of the Victims and Land Restitution Law (No. 1448/2011), also known as the Victims Law, by President Santos. The Victims Law sought to provide rehabilitation measures and protect the rights of displaced populations. This includes a number of transitional justice initiatives in the area of reparation through restitution, compensation, and guarantees of non-repetition. It provides victims with reparation in the form of land or monetary compensation and public recognition through monuments, as well as the creation of the National Day of Remembrance and Solidarity with Victims.

The National System for Assistance and Reparation of Victims (SNARIV) was created to implement the law and consists of over twenty ministries and public agencies with transitional justice committees at regional and local levels. To achieve this goal, four primary units were established; the Victim Assistance and Reparations Unit/the Victims' Unit; Land Restitution Unit; Land Judges; and the National Historical Memory Center. The Victims' Unit collects data for the Victims Registry and creates and implements public policy on reparations and humanitarian aid measures. The Land Restitution Unit oversees the legal process of restituting and legalizing the land of the victims. As part of this, the Land Restitution Unit is responsible for creating a registry of stolen and abandoned land, receiving and assessing victims' claims. The Unit is supported in its endeavors by Land Judges or civil court judges who specialize in the restitution of land. Finally, the National Historical Memory Center is responsible for promoting processes that guarantee the right of victims and the whole of society to the reconstruction of historic memory. While its academic counterpart, the Historical Memory Group, publishes reports on the contested memory of specific events, the National Historical Memory Center is tasked with documenting and collecting evidence related to human rights violations in order to create and manage human rights and historical memory program and museum. However, their capacity to implement and present such evidence is based on their relationship to the government, which may influence their ability to present the comprehensive scope of Colombia's armed struggle.

The Victims Law was landmark legislation for Colombia that provided a number of legal and social transitional justice measures meant to address issues around reparation, memory, truth, and reform. However, the law is not without its weaknesses. The Commissioner for human rights in Colombia has stated that while the Victims Law ensures that victims' ownership of the land will be recognized, it does not give them the right to determine the use of that land. Under the law, reparation does not extend to lost goods, such as housing, crops, and livestock. Furthermore, the restitution of land is problematic as IDP community leaders have been targeted by paramilitary groups when they have campaigned for the restitution of their lands, especially when it remains under paramilitary control.

In July 2012, the Colombian Congress passed the Legal Framework for Peace (No. 1/2012) as the foundation for facilitating the 2012-2016 peace talks between FARC-EP and the Colombian government. Importantly, the measure stipulates that the guerillas, unlike the paramilitary groups, can be considered a "political group."[213] This legislation provided a legal package of transitional justice mechanisms that denied impunity for war crimes, provided flexibility in the punishment of perpetrators (demobilizing), and secured the rights of victims in the peace negotiations.[214] In 2013, the Constitutional Court (No. C-579/2013) enshrined these transitional justice mechanisms into the Colombian constitution, which is a historic step in the Latin American region.[215] The 2013 constitutional amendment also offered frameworks for alternative sentencing and punishment for cases not pursued by the formal justice system. The goal of such initiatives was to uncover the truth about events and provide adequate compensation to victims.[216] This legally opened the space for the establishment of a truth commission, a view that has been supported by the Colombian Supreme Court, which has called for a "complimentary" mechanism to accompany the ongoing judicial process.

On June 4, 2016, the Colombian government and FARC-EP officials announced that they had come to an agreement on the nature and mandate of a truth commission, which would be called the "Commission for the Clarification of Truth, Coexistence, and Non-Repetition."[217] The Commission would have eleven members, three of whom can be foreigners, and would

213 Isa, *Justice, truth and reparation in the Colombian Peace Process.*

214 Ibid.

215 Ambos et al., *Justicia de Transición y Constitución: Análisis de la Sentencia de la Corte Constitucional.*

216 Ibid.

217 *What the "Truth Commission" Can, and Can't, Do,* Advocacy for Human Rights in the Americas, June 8, 2015, http://colombiapeace.org/2015/06/08/what-the-truth-commission-can-and-cant-do/.

be responsible for "clarifying and making known the truth about what happened in the conflict." The Commission would be established within six months after the signature of the final agreement and would run for three years.[218] The Commission would investigate the worst cases of war crimes and crimes against humanity, but it would not have a judicial element. As such it would not name the worst individual perpetrators, recommend punishments, or share evidence with the judicial system. A separate transitional justice body, the Special Jurisdiction for Peace in Colombia, would be responsible for these actions. Instead, the Commission would explore the collective responsibilities of institutions, including the state and government, private corporations, foreign governments, as well as military units such as FARC-EP and paramilitary groups.

The question of what to do about crimes perpetuated by the state is also an issue to be discussed in the context of transitional justice mechanisms. In response to the "false positive" scandals, the Colombian Congress adopted an amendment in December 2012 that could have allowed the prosecution of crimes by members of the military to be transferred from ordinary to military courts. The bill would have allowed the military justice system jurisdiction over past and possible future crimes by military members including rape, inhumane treatment, arms trafficking, and collaboration with paramilitaries or criminal gangs. This amendment had been heavily criticized by international, regional, and national groups as a method of easing the prosecution of crimes committed by the military forces that have a history of ruling leniently on rights abuses. After significant civil society pressure and a ruling by the Constitutional Court upholding the necessity for both International Humanitarian Law and International Human Rights Law to be followed, the bill was amended in April 2015. This is a significant step towards accountability as the bill ensures that all human rights abuses will remain in the jurisdiction of civilian courts.[219]

A clear weakness in the Legal Framework for Peace is that it grants Congress the authority to decide what constitutes a crime and therefore which individuals will be offered the legal benefits provided by the adoption of transitional justice. This is important not only in the context of recent political scandals in the two chambers but also because it politicizes and potentially undermines the aims of transitional justice. In particular, we must bear in mind that 2018 will be not only the year of the peace agreement implementation but also a pre-electoral year in which the peace process has the risk of being politicized. This risk has been exemplified in the reactions of former President Uribe and his supporters during the campaign against the peace agreement, who have been some of the harshest critics of this transitional justice measure.

FRAMEWORK OPERATIONALIZED

The peace negotiations between FARC-EP and the Colombian government began as "exploratory meetings" hosted by Norway in March 2011. These meetings continued for nearly a year and a half until there was agreement on the agenda for peace talks. These talks concluded with the signing of the "General Agreement Ending the Conflict and Building a Stable and Lasting Peace" in September 2012, which is essentially a "road map" for the process. This agreement framed the purpose of the process, stipulated conditions, and defined the rules of engagement, one of which is "nothing is agreed until everything is agreed." Consensus was a mandatory condition before any comprehensive peace agreement could be reached.

The five critical discussions points that were mutually agreed upon included:[220]

1) Programs for rural development and land (to address poverty and promote equality),

2) Political participation (to deepen democracy and avoid the use of violence as a political method),

3) Disarmament, demobilization, and reintegration of combatants (to end the armed conflict),

4) Drug trafficking (to put an end to the production, commercialization of illicit drugs and crime),

5) Victims and Integral System of Truth, Reparations, Justice and Non-repetition

A sixth point of discussion emerged later that stipulated agreement on the "means" of how the future agreement will be implemented. Two options for this

218 "Colombia and FARC-EP rebels agree to form truth commission," Aljazeera, June 5, 2016, http://www.aljazeera.com/news/2015/06/colombia-FARC-EP-rebels-agree-form-truth-commission-150604235948145.html;
"Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera," http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf.

219 "Colombia government amends legislation to limit military court power," *Jurist*, April 16, 2015, accessed March 10, 2016, http://www.jurist.org/paperchase/2015/04/colombia-modifies-bill-limiting-military-court-power.php.

220 "Oficina del Alto Comisionado para la Paz," http://www.altocomisionadoparalapaz.gov.co/Paginas/inicio.aspx.

were a National Constituent Assembly to inclusively implement the agreement (preferred by FARC-EP and also endorsed by the ELN) or a national referendum on the agreement (favored by the government). With the historic cease-fire agreement in Havana and the peace negotiations moving into their final phase, Colombia's constitutional court approved a referendum to vote on the finalized peace treaty signed on September 26, 2016 by the national government and FARC-EP in the city of Cartagena, Colombia.[221]

The referendum was held on October 2, 2016 but did not obtain the support of Colombian society. With a low turnout of less than 38%, 49.78% of Colombians gave their support to the peace agreement while 50.21% rejected it.[222] Because the implementation of the peace accords was now impossible, the national government initiated a new round of conversations between the political parties that campaigned for the "No" vote, civil society organizations, and the FARC-EP. Issues with the transitional justice system and the future political participation of the demobilised guerrilla members were among the arguments used by civil society groups and political forces such as the *Centro Democrático* (Democratic Center Party) to reject the peace agreement.

After 41 days of intense negotiations, the National Government and the FARC-EP finally presented and signed a "New final agreement for the termination of the conflict and the construction of a stable and lasting peace"[223] in the city of Bogotá, Colombia, on November 24, 2016. According to the Chief Negotiator, Humberto de la Calle, and the High Commissioner for Peace, Sergio Jaramillo, the new agreement introduced nearly 90% of the changes promoted by the opponents to the agreement. These new changes included additional assurances to landowners on the right to private property and more stringent financial obligations (FAR-EP will have to declare and hand over all their assets, which will be used for victims' reparations). Despite the reluctance perceived by some of the political actors, Congress finally ratified the new peace agreement on October 30, 2016. With the support of the Supreme Court resolution to back up the fast track legislation method in Colombia, the new amnesty law is expected to be developed early in 2017, opening a new phase for the peace process implementation. Furthermore, with the endorsement of the Congress, the combatants of the FARC-EP have already begun their demobilization, disarmament, and reintegration process within the transitional zones that have been adapted. The United Nations is overseeing the disarmament process. Finally, the "Commission for Monitoring, Promotion and Verification" was created as a way to oversee the implementation of the agreement. This Commission is of particular importance as it is composed of members of the Colombian national government, the FARC-EP, and the United Nations mission that will monitor the cease-fire and disarmament.[224]

It is worth mentioning that this peace process differs from previous frameworks in several ways. One significant shift is that it is more inclusive and encompassing of representatives from civil society. Historically, representatives were either appointed to negotiation teams or served as mentors to the process. In past peace processes, members of civil society were involved in the preparatory phase and then later in the implementation of the outcomes, but they were not actively engaged parallel to or within the processes themselves.[225] In this framework, the principle of pursuing a more inclusive process was formalized in an exploratory meeting before formal negotiations began. The 2012 General Agreement stipulated the following:

> Attending the clamor of the population for peace, and recognizing that: the construction of peace is an issue of the society as a whole that requires the participation of everybody without distinction, including other guerrilla organizations which we invite to joint this proposal..... [226]

This agreement indicated acknowledgement from the signatories that effective measures must be put in place throughout the peace process that promote greater participation in national, regional, and local policy

221 Corte Constitucional de Colombia 2016, "Ley Estatutaria por medio de la cual se regula el plebiscito para la refrendación del Acuerdo final para la terminación del Conflicto y la construcción de una paz estable y duradera," http://www.corteconstitucional.gov.co/comunicados/No.%2030%20comunicado%2018%20de%20julio%20de%202016.pdf.

222 "Polarización del país, reflejada en resultados del escrutinio," El Tiempo, October 2, 2016, accessed November 15, 2016, http://www.eltiempo.com/politica/proceso-de-paz/resultados-plebiscito-2016/16716558.

223 Oficina del Alto Comisionado para la paz, "Nuevo Acuerdo para la terminación del conflicto y la construcción de una paz estable y duradera," http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf.

224 "Colombia and FARC-EP request UN mission to monitor any ceasefire," BBC News, January, 19 2016, accessed May 18, 2016, http://www.bbc.com/news/world-latin-america-35357170.

225 Liliana Zambrano and Felipe Gómez Isa, *Participation of civil society in the Colombian peace process* (Oslo: NOREF, July 2013), http://www.peacebuilding.no/Regions/Latin-America-and-the-Caribbean/Colombia/Publications/Participation-of-civil-society-in-the-Colombian-peace-process.

226 "General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace," FARC-EP-Ep International, August 2012, http://FARC-EP-epeace.org/index.php/havana-general-agreement.html.

building from of all sectors of society, including the most vulnerable populations. It also offered space for the participation of the ELN in future peace talks. The peace process itself was built as a participatory mechanism for civil society through its various commissions, electronic submissions, and consultations. The progress of the talks has been periodically published on a website created exclusively for the peace process as an instrument to keep the general public informed and receive civil society inputs and proposals.[227]

After the initiation ceremony in Oslo, delegates headed for Havana, where official talks were held between 2012 and November 2016. During the peace negotiations Norway and Cuba acted as guarantors of the process, while Chile and Venezuela also accompanied the talks. Negotiations were constructed around each discussion point in the General Agreement. This was done through forums in which tables may ask for input and support from the United Nations, civil society groups, or other relevant constituents to the topic. For example, in the Forum on Integral Development Policy, 1,200 people participated. Participants were divided into discussion tables on diverse topics such as Free Trade Agreements, mining, agro-fuels, and food sovereignty. Different communities, organizations, and people from around the country presented their proposals for consideration. After input from a broad range of stakeholders, negotiations continued until consensus was reached.

The first three points in the preliminary discussion agenda were agreed upon, but the fourth point related to victims, justice, and truth was particularly complex. Discussions had largely centered on the meaning of justice, truth, and impunity. In December 2015, the Colombian government and FARC-EP signed an accord in Havana on recognizing and compensating victims.[228] The accord also paved the way for the establishment of an "Integral System of Truth, Justice, Reparation and No Repetition" that is designed to provide a framework for the implementation of all accords related to victims. The agreement also included a pledge by both guerillas and government representatives to ensure that such violence is never repeated. Two other problematic issues related to amnesty for minor crimes and the possibility of FARC-EP transitioning into a politically recognized party. Another debated issue specifically related to transitional justice concerned what types of alternative punishment (other than prison sentences) should be administered during the DDR process. Also included in these negotiations had been the topic of reforming the state security apparatus, including military and police who have been implicated in state-related crimes.

In response to the initial Victim Forum, the FARC-EP and state officials agreed to create a Historical Commission of the Conflict and its Victims, which presented a report in February 2015.[229] Initially, these forums ran parallel to the peace process in Havana and were held in Colombia. However, since August 2015, five historic meetings have taken place in which victims of the conflict have been able to tell their stories and to make public proposals to the Conversation Table in Havana. Alongside these discussions has been the inclusion of symbolic reconciliation events. In December 2014, FARC-EP publicly recognized its responsibility and asked forgiveness from the victims of the 2002 Bojayá Massacre. During the infamous confrontation between FARC-EP and paramilitary groups, a mass killing of 79 villagers took place.[230] Lead negotiator Humberto de la Calle called the meeting between FARC-EP and victims from Bojayá a "valuable step" and exhorted leaders to recognize that all parties had been agents of serious human rights violations and breaches of International Humanitarian Law during the 50 years of internal armed conflict. Similar events have been taking place all over the country since the signature of the final agreement. According to the lead negotiators these events are the essence of a reconciled nation.[231]

Gender sensitivity has been another characteristic of the negotiations and agreement and has contributed to the seemingly more progressive framework surrounding the process. Gender is a central component of the Colombian conflict. Women have been both perpetrators and victims. They have participated as civilians and armed actors in guerrilla groups and to a lesser extent with paramilitaries. Reflecting this reality, there had been broad agreement that issues relating to women need to be discussed within all

227 "Mesa De Conversaciones: Para la Terminacion del Conflicto y la Construccion de una Paz Estable y Duradera en Colombia," https://www.mesadeconversaciones.com.co/.

228 Joe Parkin Daniels, "Colombia's Peace Process Just Took a New Big Step Forward," *Vice News*, December 25, 2015, accessed May 18, 2016, https://news.vice.com/article/colombias-peace-process-just-took-a-new-big-step-forward.

229 Comisión Histórica del Conflicto y sus Víctimas, "Contribución al entendimiento del conflicto armado en Colombia," 2015, https://www.mesadeconversaciones.com.co/sites/default/files/Informe%20Comisi_n%20Hist_rica%20del%20Conflicto%20y%20sus%20V_ctimas.%20La%20Habana%2C%20Febrero%20de%202015.pdf.

230 Virginia Marie Bouvier, "Peace Process Gearing Up for the Next Round," *Colombia Calls* (blog), January 20, 2015, https://vbouvier.wordpress.com/2015/01/20/peace-process-gearing-up-for-the-next-round/.

231 "Oficina del Alto Comisionado para la Paz," http://www.altocomisionadoparalapaz.gov.co/Paginas/inicio.aspx.

social and economic areas relating to disparities in geography, education, and the ongoing democratization process. Women were included in each of the negotiating delegations. Even though there were initially only men present in the Colombian government delegation, pressure exerted by Norway and Colombian civil society gave way to the inclusion of women at the negotiation table.[232]

At the end of 2013, Nigeria Renteria, a lawyer and woman of Afro-Colombian descent, was named the Presidential Adviser on Women's Equality and the head of the Gender subcommission. Along with human rights lawyer Maria Paulina Riveros, she also formed part of the government's delegation. The Presidential Adviser on Women's Equality was set up with the mandate to assist in technical matters, such as the protection of women, support for public policy initiatives (particularly in relation to victims and reparations), maintenance of open dialogues with women's civil society groups, and the mainstreaming of gender into policy.[233] According to members of women's organizations, during her tenure as head of the gender subcommission and the governmental delegation, Ms. Renteria's role was vital. She demonstrated an effective leadership style at the negotiation table and was seen as sympathetic and eager to consult with women's organizations. In turn, women's organizations felt confident to lobby her personally on issues related to the talks and to exchange information.[234] For instance, Ms. Renteria held close contact with the Women for Peace network throughout the time she was involved in the negotiations.

From a broad range of political perspectives, the role of women's organizations has also increased during the peace process, although these groups have already been politically and socially strong for many years in Colombia. As in any other sector, however, there are a myriad of political and ideological forces in the Colombian women's movement. At times, women's groups are ideologically opposed to one another, and at other times, they may collaborate on an overarching cause. Women's organizations have offered their visions for the peace process, and they have also contributed propositions related to increased democratization, gender equality, and women's rights as part of a democratic society.[235] Many of these organizations have been inspired by feminist thought as it relates to their efforts in helping women attain rights and the assurance of a more equitable society for all Colombians.

The success of Colombia's peace process has also been heavily influenced by external actors. The United States has been a key player in the conflict for several decades. Its inflexible position on the counter-narcotic operations and negotiation with guerillas thwarted the 1990s peace processes under President Pastrana, while disinterest in peace talks and the labeling of FARC-EP as terrorists in the post-9/11 environment ended the 1998-2002 peace process. Pending extradition requests on nearly every FARC-EP leader is a significant obstacle for the peace process. This prevents FARC-EP from participating in politics and weakens the demobilization process if its leaders may be extradited.[236] The Obama administration was supportive of Santos' peace negotiations with FARC-EP, which could see the end of a haven for drugs and terrorism in the United States' backyard. There has also been support from the United States for demobilization efforts since 2003. In a strong sign of support for the peace process, Bernard Aronson was appointed as Special Envoy to the negotiations in Havana in February 2015.

In the long term, the United States also has significant power to influence the transitional justice process. In 2014, the U.S. Congress amended the aid budget legislation, stipulating that some military assistance would be frozen if amnesties are offered to those accused of serious abuses in Colombia.[237] In early February 2016, President Obama announced that the 15-year-old Plan Colombia will become "Peace Colombia."[238] While continuing White House efforts to reduce drug trafficking, the plan also aimed to broaden support for a post-conflict process. President Obama planned to ask Congress to increase aid to Colombia from 300 million USD in 2015 to 450 million USD in 2017 to support peace processes if the rebels and government signed an agreement. At the same time, to help counter the power and drug trafficking vacuum that may emerge if FARC-EP demobilizes, the revamped plan also prioritizes the following: strengthening progress on security and counter narcotics while reintegrating

232 Interview in discussion with the author, December 2, 2014.

233 "Presidential Advisory for Women's Equality," http://www.equidadmujer.gov.co/Paginas/equidad-mujer.aspx.

234 Interview in discussion with the author, December 2, 2014.

235 Ibid.

236 Alsema, "Historic Commission releases report on causes of Colombia conflict."

237 Adam Isacson, *Ending 50 Years of Conflict: The Challenges Ahead and the U.S. Role in Colombia* (Washington, DC: Washington Office on Latin America (WOLA), April 14, 2014), http://www.wola.org/publications/ending_50_years_of_conflict.

238 Adriaan Alsema, "The 3 pillars of America's newly proposed security policy for Colombia," *Colombia Reports*, Febraury 5, 2016, accessed May 18, 2016, http://colombiareports.com/the-4-pillars-of-americas-new-foreign-policy-approach-to-colombia/.

FARC-EP into society; expanding state presence to strengthen rule of law to prevent violence and control over civilian authority, especially in remote areas; and promote justice and other supportive services for conflict victims. Colombian government officials are hoping that the new administration of Donald Trump will not sway too far from President Obama's original intentions. These external interests and contingencies have added another layer of complexity to the peace negotiations and make the United States another party with a stake in Colombia's outcome.

ANALYSIS

Colombia has suffered high levels of impunity with major challenges continuing in its justice system. At the height of the violence in May 2007, 55,000 individuals had filed claims as direct victims of paramilitary crimes, 30,000 had "disappeared," and paramilitary groups were responsible for 80 percent of the 2.5 million internally displaced.[239] At the same time, FARC-EP was holding 4,000 "economic" hostages for ransom, in addition to several political prisoners.[240] In terms of scale, the possibility of addressing just this period of victims through the already strained Colombian judicial system is impossible. Rampant impunity will remain unless other avenues are explored. The judgments by both the National Prosecution Unit for Justice and Peace and the Supreme Court of Justice on the need for identifying and prosecuting the "most responsible" perpetrators of human rights abuses and International Humanitarian Law reflect this reality.

There are a number of challenges that Colombia faces in implementing the ratified peace agreement. Colombia is a signatory to a number of international humanitarian law treaties, and as of November 2009, the International Criminal Court has jurisdiction over war crimes, crimes against humanity, and genocide committed since the state became a State Party to the Rome Statute in 2002. This legal implication expands the list of crimes that the state, guerillas, and paramilitaries may be tried for and also limits the scope of pacifying initiatives that the Colombian state can use to guarantee a peace agreement. Previous peace agreements with M-19, EPL, MAQL, PRT, and even the paramilitaries were all reached by granting impunity to the fighters, regardless of whether they had perpetrated human rights abuses. However, such norms are no longer acceptable as evidenced by the 2012 Legal Framework for Peace, which states that there can be no amnesty for perpetrators of serious crimes under international law. The ICC also has the authority to investigate perpetrators and bring them to justice if the state is unwilling. The ICC Prosecutor's Office has been conducting preliminary investigations of human rights abuses in Colombia since 2004.[241] In such a context, the contentious expansion of military jurisdiction over personnel crimes in 2012 can be understood as an attempt to ensure a level of exemption from some crimes. This is particularly relevant given the occurrence of "false positives" in which an estimated 3,000 civilian were murdered[242] and that 80 percent of the 2.5 million internally displaced have identified paramilitary groups as responsible for their relocation.[243] International humanitarian law is unequivocal in that crimes such as genocide, extrajudicial execution, torture, and forced displacement are to be prosecuted in civilian courts no matter which actors commit them; impunity is out of the question. Official attempts to subvert this process by preventing the identification of such crimes in the Colombian case have become problematic.

Other challenges in the Colombian peace process are collective demobilizations. Instances of individualized demobilizations are a regular occurrence in Colombia. For example, Elda Neyis Mosquera, considered one of FARC-EP's most brutal commanders, defected in 2008. However, the challenges of collective demobilization are complex and have been the downfall of previous peace processes, most notably the 2007 negotiations with the ELN. Collective demobilization is a difficult process, not least of which because of the lack of trust between groups and the state. In the Colombian case this is further problematized due to a history of reprisals against demobilized guerillas and the extradition orders pending against many of FARC-EP's top leaders. The logistics of demobilizing and reintegrating an estimated number between 7,000 and 15,000 guerillas and collaborators into civilian life is a daunting task and a challenge to the institutional capacity of Colombia.

One significant challenge relates to the specific gender dimensions of demobilization. Women have been participants and leaders both as guerillas and paramilitaries. In the chauvinistic culture of Colombia, former female fighters often lose some of the status that they gained through military rank when they reintegrate into civilian life. They face significant identity and

239 Uprimny Yepes et al., *¿Justicia Transicional sin Transicion? Verdad, Justicia y reparacion para Colombia.*

240 Bouvier, "New Hopes for Negotiated Solutions in Colombia."

241 Isa, *Justice, truth and reparation in the Colombian Peace Process.*

242 Isacson, *Ending 50 Years of Conflict: The Challenges Ahead and the U.S. Role in Colombia.*

243 Uprimny Yepes et al., *¿Justicia Transicional sin Transición? Verdad, Justicia y reparación para Colombia.*

mental health challenges.[244] Some of the recent discussions among women's groups about equality reflect this reality. There also needs to be space to discuss the specific violence that women may have used or been subject to. For example, female FARC-EP fighters may have experienced personally specific violence, particularly the practice of forced abortions. Gender sensitive frameworks that address these challenges are critical for the success of female combatant reintegration into society.

Another unique challenge within the demobilization process is the danger that some former fighters might establish or return to illegal activity. The criminal networks, in particular FARC-EP's relations with the drug trade, must be circumvented by offering alternative skills training and employment opportunities for demobilized actors. The problems with compromised demobilization processes are evident in the case of the AUC. After eight years, many paramilitaries that were jailed are now being released. The criminal networks that have supported these various organizations remain and have simply become more fragmented.[245] This issue is connected to another potential spoiler for the peace process, which relates to Colombia's longstanding war economy. Large land and estate owners (*latifundios*), drug traffickers, criminal gangs, corrupt politicians, and businessmen who benefit from the conflict stand to lose a great deal if the peace agreement is successfully implemented. Such actors see the peace process as a direct threat to their interests.[246] Alternative development efforts must be strategic and assist in the reorientation of the economy to one that is legal, viable, and able to sustain Colombia's citizens.

There is significant resentment among the civilian population toward the past actions of the guerillas. A number of soldiers are still being held by FARC-EP. Sectors within civil society still opposing the peace process worry that it will again only lead to impunity for the perpetrators. Yepes et al.[247] argue that previous transitional justice approaches in Colombia, such as the demobilization of left-wing groups in the 1990s and paramilitaries under the Justice and Peace Law in 2005, have mainly been "amnesic pardons" that did not seek to satisfy victims' right to truth, reparation, and reconciliation but instead focused on forgetting.

244 Lyons and Reed-Hurtado, *Colombia: Impact of the Rome Statute and the International Criminal Court*.

245 Interview in discussion with the author, December 2, 2014.

246 Zambrano and Isa, *Participation of civil society in the Colombian peace process*.

247 Uprimny Yepes et al., *¿Justicia Transicional sin Transición? Verdad, Justicia y reparación para Colombia*.

In light of the socio-political residual left behind from these previous processes, consideration of a restorative model is warranted. A framework focused on repairing harm could address the needs of victims for truth, acknowledgement, and reparation while also benefitting the society at large by offering a more participatory and transparent process.

Colombia stands at a threshold. There is much at stake in the success of the peace process and the various transitional justice forums. Tremendous support has been given from the international community to ensure that negotiation infrastructures are in place and that capacities are strengthened. To this end, several international funds have been promised by the international community, the FARC-EP has been temporarily suspended from the European Union terrorist list organizations, and the Norwegian Nobel Committee decided to award the Nobel Peace Prize for 2016 to President Juan Manuel Santos at the same moment in which the result of the referendum in Colombia left the peace process at a crossroad. Furthermore, in pursuit of peace, the government has passed laws, amended the Constitution, and made peace the overarching priority for the country. Over the past years, thousands of guerrillas and paramilitaries have demobilized and attempted to reintegrate back into civilian life. INGOs, NGOs, FBOs, and civil society platforms have been tireless in their efforts to encourage truth, accountability, victim acknowledgement, and reparations throughout decades of struggle. Citizens, who have borne the brunt of violence and terror for over 50 years, struggle with hope and despair; they vacillate between resignation, wariness, and resilience.

The Colombia case study offers opportunities to examine the complexities that emerge within a protracted, asymmetrical, and multi-party civil war. It also offers considerations and insight into the demobilization, reinsertion, and reintegration of multiple paramilitary and guerrilla groups. Additionally, it illustrates how transnational dynamics such as ideological affiliations, drug syndication and illicit crime networks, and neighboring states' interests can influence and/or impede the realization of peace. The Colombian government and FARC-EP have come a long way, but the country still has a long way to go. First, the government and FARC-EP will need to build trust and secure the social and political support for the implementation of the peace agreements by complying with the demobilization process and the development of an amnesty law. Second, it remains to be seen if the national government will dispose of the necessary economic resources to comply with all the

structural reforms agreed for the peace agreement's implementation. Third, the national government will have to make an effort to resume the peace negotiations with the ELN and overcome any security risk that could challenge the peace process's implementation. Colombia faces many challenges. However, the lessons the country has learned through years of fighting and aborted peace processes may offer enough wisdom and insight for all of the parties to move forward together into a radically different future.

LESSONS FOR SYRIA

Auveen Woods and Dr. Teri Murphy

HISTORY OF THE CONFLICT

The Syrian conflict rages on towards its sixth year of violence, with no victor or viable political settlement in sight. It has degenerated from peaceful grassroots protests in local neighborhoods to provincial uprisings, civil conflict, and a regional proxy war with little to no engagement, consultation, or consideration for the Syrian people. Out of the country's pre-war population of 22 million, between 400,000 to 470,000 people are estimated to have been killed.[248] Approximately 7.8 million citizens have been internally displaced as they flee the fighting and economic stagnation that has accompanied it,[249] while another 4.8 million are registered as refugees across the region in Egypt, Iraq, Jordan, Lebanon, and Turkey.[250] Thousands more have risked the dangerous journey to Europe.

The challenges of finding a solution and supporting peacebuilding in Syria appear ever more difficult. The apparent intractability of the conflict is as much to do with the increasing interdependence of the war's dynamics and parties as it is with the depth of the violations and destruction itself. The nature and scope of the violence that Syrian communities have suffered range in both time and scale. The tactics used in the current conflict have particularly targeted civilians with evidence of atrocities and war crimes committed by the regime, militias, and jihadist groups. This includes acts of mass murder, torture, rape, and enforced disappearances. As a war tactic, civilians have been isolated and starved in their communities; they have been victims of chemical weapons by the regime, Free Syrian Army groups, and Daesh (the Arabic acronym for the Islamic State of Iraq and the Levant), and they have been targeted by indiscriminate bombardment such as barrel bombs. The tactics of both the Assad regime and jihadist groups have fermented sectarian divisions. In response to the growing violence, the different ethnic, linguistic, and religious communities of the country have retreated into their social enclaves for survival.

The daily atrocities of the conflict follow decades of repression and state-sponsored violence in Syria. A permanent state of emergency has been in place since 1963. For over 30 years Hafez al-Assad ruled the country in an autocratic system fostering a culture of nepotism, corruption, and impunity in which any dissent was brutally suppressed. Assad's rule was characterized by militarized oppression and control of social life. This system continued with the accession of Bashar al-Assad in 2000 after the death of his father. The history of Syria is intricately entwined with the Ba'ath Party, the Syrian Army, and the Assad family. The root of much of the current conflict lies in this repressive domestic environment from which it grew.

SYRIA AND THE ASSAD REGIME

Military interference in civilian government has characterized Syrian politics throughout its history. With the country's independence from French rule in 1946, new political ideologies, parties, and alignments jostled for power. Military coups were frequent during this period, with political power becoming more concentrated in the security institutions with each intervention. Due to the instability and corruption of this era, popular support began to grow for alternative ideological movements such as Ba'athism and Nasserism. Support for Nasserism, the belief that Arab unity would solve the problems of instability and legacies of colonialism, led to the ill-fated and brief creation of the United Arab Republic of Syria and Egypt under General Abdel Nasser in 1958. Within the Republic, Syrian political organizations such as the Ba'ath Party were closed down in favor of the personal rule of General Nasser in Cairo. However, the pattern of Syrian military intervention soon emerged again. Inspired by the Iraqi Ba'ath Party's seizure of power in February 1963, elements of the Syrian military once again intervened in politics. On March 8, 1963, an elite group of Ba'athist officers, including Hafez al-Assad, called the Military Committee seized power and established the Syrian Arab Republic.[251]

248 Numbers vary between those reported by the UN and other sources. The UN estimates that 250,000 people have been killed in the Syrian war, but they stopped collecting statistics in 2014. The Syrian Center for Policy Research and the Arab League put the number between 400,000 to 470,000 people. Ian Black, "Report on Syria conflict finds 11.5% of population killed or injured," The Guardian, February 11, 2016, accessed May 5, 2016, http://www.theguardian.com/world/2016/feb/11/report-on-syria-conflict-finds-115-of-population-killed-or-injured.

249 "2015 UNHCR Country Operations Profile - Syrian Arab Republic: Overview," United Nations High Commissioner on Refugees, January 2017, accessed January 10, 2017, http://www.unhcr.org/pages/49e486a76.html.

250 "Syrian Regional Refugee Response: Inter-agency Information Sharing Portal," United Nations High Commissioner on Refugees, January 2017, accessed January 2017, http://data.unhcr.org/syrianrefugees/regional.php.

251 *Syria: The Reckoning Parts 1 and 2*, directed by Suhaib Abu Doulah, *Al Jazeera World*, 2013 Documentary.

The deconstruction of the domestic political structures and opposition parties during the United Arab Republic left the Syrian political sphere floundering in the wake of the incremental expansion of the military's power. With the 1963 coup, the officers of the Military Committee were now the most prominent force for Ba'athism in Syria. Ba'athism was an appealing ideology to intellectuals, the middle class, and ethnic and religious minorities who felt marginalized by the successive Sunni regimes that governed the country after 1946. Developed in the 1930s, Ba'athism was conceived as a secular, anti-colonial ideology that emphasized socialism, Arab nationalism, and unity across religious and ethnic divides.[252] In contrast to its intellectual roots as espoused by Michel Aflaq and others, the Ba'athism of the Military Committee abandoned the central tenant of Arab Nationalism for national unity and emphasized the position of the Syrian armed forces as a means of social mobility, protection, and political power.

The 1963 coup was followed by several years of instability, military intervention, and internal power struggles, both between the branches of the armed forces and within the Military Committee itself. In the end, Hafez al-Assad emerged as the leader of the Syrian Arab Republic in 1970 in a final coup that he termed "the Corrective Movement." Hafez al-Assad's era in power was one of the most stable in Syria's history but was punctuated by vicious crackdowns on dissent, especially where the regime felt threatened.

The Muslim Brotherhood in Syria was the staunchest domestic opposition group to both the Military Committee and Assad. A small militant wing of the Muslim Brotherhood escalated attacks throughout the 1960s and 1970s, which resulted in thousands of members being detained and massacres of real and suspected members of the group, while civilians were caught in the middle. The situation reached a climax in 1982 in Hama. Two hundred fighters from the Muslim Brotherhood military wing tried to seize control of the city and killed 20 soldiers in an attempt to instigate an armed uprising against Assad.[253] Over a three-week period, the government sealed the city and laid siege to it with indiscriminate bombing and artillery attacks before sending in ground forces to go door-to-door. The regime did not differentiate between fighters and civilians. By the end of the three weeks, Hama had been destroyed and between 20,000-40,000 people killed, including the 200 militants. The legacy of Hama and other incidents hangs over Syria and its current violent dynamics. It was from such events that the regime developed its current counter-insurgency approach that indiscriminately targets combatants and all civilians in their area.[254]

Over a 30-year period of rule, Hafez al-Assad established a unique hybrid system of authoritarianism that was characterized by personalized rule and highly structured state institutions. The regime co-opted diverse sectors of society through an institutionalized system of patronage and clientelism. Economic and social mobility were channeled through a web of social organizations such as professional associations and cultural groups that were all under the umbrella of the Ba'ath Party.[255] Non-Alawite constituencies such as Sunni, Druze, and Christian groups were all able to get positions within the state as members of the Ba'ath Party.

The potency of this institutionalized system of clientelism and patronage in reaching across religious sects was personified in the Syrian Armed Forces and the benefit system attached.[256] A career in the Syrian Army offered unique opportunities to lower-class Syrians, especially those from rural areas, for rapid social mobility. This included home ownership in cities and privileged access to state services like hospitals and schools. High level positions in the army, however, remained tightly controlled by the regime, which employed a sectarian narrative when it came to appointing positions of authority. But in general, a newly graduated army officer, irrespective of religious or ethnic backgrounds, enjoyed heavily subsidized services, food, and military housing with the opportunity to buy property in one of the army's housing districts that are located in the suburbs of Damascus, Deir Ezzor, Aleppo, and Tartus.[257] Promotions and benefits such as housing were not an entitlement but

252 *Iraq Backgrounder: What Lies Beneath*, Middle East Report N°6 (Amman/Brussels: International Crisis Group, October 1, 2002), accessed January 27, 2016, http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/006-iraq-backgrounder-what-lies-beneath.aspx, 4.

253 Raphael Lefevre, *Ashes of Hama: The Muslim Brotherhood in Syria* (Oxford, UK: Oxford University Press, 2013).

254 Brian Michael Jenkins, *The Dynamics of Syria's Civil War* (Santa Monica, CA: Rand Corporation, 2014), accessed January 25, 2016, http://www.rand.org/pubs/perspectives/PE115.html.

255 *Syria Under Bashar (II): Domestic Policy Challenges*, Middle East Report N° 24 (Amman/Brussels: International Crisis Group, February 11, 2004), accessed January 27, 2016, http://www.crisisgroup.org/en/regions/middle-east-north-africa/syria-lebanon/syria/024-syria-under-bashar-2-domestic-policy-challenges.aspx, 2.

256 Kheder Khaddour, *Assad's Officer Ghetto: Why the Syrian Army Remains Loyal* (Beirut: Carnegie Middle East Center, November 4, 2015), accessed February 1, 2016, http://carnegie-mec.org/2015/09/30/assad-s-officer-ghetto-why-syrian-army-remains-loyal/iigr.

257 Ibid.

a matter of discretion that encouraged nepotism and clientelism.[258] For example, the waiting period to be eligible to buy subsidized military property had typically been 10 to 15 years, during which time sufficient funds and connections must be established to ensure acquisition. It could be another 20 years to pay off the property, ensuring an individual's long-term if not lifetime commitment to the armed forces. This conditional benefit system delicately linked nearly all aspects of an officer's professional and family life to the regime. These opportunities are also important to consider given the gradual decrease in the socio-economic prosperity of most Syrians since the late 1990s. Such a benefit system incentivized loyalty to the status quo. The Syrian Armed Forces was not the only institution to utilize such a system. Throughout the Assad era public sector workers such as teachers and other state employees enjoyed the benefits of similar systems.

This pluralistic patronage under the umbrella of Ba'ath Party membership was accompanied by personalism of key state institutions such as the legislature. Three institutions have been the underlying foundation of the Assad family regime: the armed forces, the security services, and the hollow institutions of the Ba'ath Party. Particularly sensitive core elements of these institutions such as the elite Republican Guard have been placed in the personal control of Assads' Alawite tribe, the Qalbiyya.[259] Close family members were responsible for leading sensitive security and military commands. Hafez al-Assad's brother Rifat al-Assad was head of internal security forces such as the Republican Guard and led his own paramilitary organization until his exile in 1984. Today, Bashar al-Assad's brother, Maher, leads the core security forces of the regime as commander of both the Republican Guard and the Fourth Armored Division. Despite the proclivity for Alawite dominance within the inner circle, some Sunni and other groups were able to ascend to high-level positions in the government cabinet.

The stereotypical image of the Assad regime as one built solely on repression overlooks the complex system of nepotism, clientelism, and patronage that co-opted a large representation of the country's many religious and ethnic groups across socio-economic lines. This dual system of repression and pluralistic authoritarianism succeeded in either co-opting or destroying any forms of domestic opposition or alternative leadership, even within the regime's own Alawite sect, thus effectively linking the security and insecurity of the beneficiaries of this system to the fate of Assad's state.[260] This carefully cultivated system has been tenacious, surviving the death of Hafez al-Assad in 2000 and a brief period of political opening called the "Damascus Spring" in 2001 and again in 2005 before it was crushed.[261] Bashar al-Assad inherited both his father's position and the carefully cultivated system that supported it.

THE SYRIAN CONFLICT

The 2011 protests had been a long time in the making after decades of repressive autocratic rule and entrenched nepotism and corruption that had mangled state institutions, services, and industries. In the weeks following the spread of the Arab Spring in Tunisia, Egypt, and beyond, the situation in Syria remained comparably uneventful. While regime oppression, particularly the brutal actions of its security services in the preceding decades, precipitated and incited later protests, socio-economic grievances were an important initial element fueling public discontent in the March protests.

Since 2000, economic conditions have deteriorated for the majority of the population. While the economy was not a priority under Hafez al-Assad, cautious economic liberalization had been underway when Bashar al-Assad took power with the regime negotiating economic association agreements and seeking technical assistance. Despite market-orientated reforms since 2000, Syria retained a state-dominated economy with no private banks or mobile phone operators.[262] Instead these initiatives remained largely in the control of the Syrian elite as joint ventures with Syrian or regional entities. One of the best examples of this is Bashar-al-Assad's maternal cousin Rami Makhlouf, who, among other things, is believed to control banks, duty free shops, and TV channels in Syria. In addition, he also holds the majority shares in Cham Holding, which is considered Syria's largest private company

258 Kheder Khaddour, *Strength in Weakness: The Syrian Army's Accidental Resilience* (Beirut: Carnegie Middle East Center, March 14, 2016), accessed March 15, 2016, http://carnegie-mec.org/2016/03/14/strength-in-weakness-syrian-army-s-accidental-resilience/iuz7.

259 *Syria Under Bashar (II)*, 2.

260 *Syria's Metastasising Conflicts*, Middle East Report N°143 (Amman/Brussels: International Crisis Group, June 2013), accessed December 1, 2015, http://www.crisisgroup.org/en/regions/middle-east-north-africa/syria-lebanon/syria/143-syrias-metastasising-conflicts.aspx.

261 *Popular Protest in North Africa and the Middle East (VI): The Syrian People's Slow-motion Revolution*, Middle East Report N°108 (Amman/Brussels: International Crisis Group, July 6, 2011), accessed February 26, 2016, http://www.crisisgroup.org/en/regions/middle-east-north-africa/syria-lebanon/syria/108-popular-protest-in-north-africa-and-the-middle-east-vi-the-syrian-peoples-slow-motion-revolution.aspx.

262 David Butter, *Syria's Economy Picking up the Pieces* (London: Chatham House Middle East and North Africa Programme, June 2015), accessed February 27, 2016, https://www.chathamhouse.org.

and has stakes in several oil and gas companies.[263] New business classes that did emerge were based on family ties in the diaspora.

At the same time, as the Syrian state tried to continue its hold on the economy, it reduced its subsidizing of certain services and products such as fuel and opened its market for imports. The result was that while the salaries for most people stagnated, the cost of living sharply increased[264] with cheap imported goods flooding local markets and hitting manufactures and neighborhood retailers. Middle-class people, largely employed by state institutions, found themselves squeezed on all sides and pushed into working-class neighborhoods. Meanwhile, rural communities found themselves hit by both the economic reforms and prolonged drought. This precipitated the migration of rural people to the cities in search of work leading to rapid urbanization. The ruling elite and the internal benefit systems of certain institutions such as the Syrian Armed Forces were the few social enclaves to continue to benefit from the status quo.

These underlying socio-economic dynamics are evident in the city of Deraa in the south of the country, where the first protests erupted. Deraa was traditionally considered a bastion of support for the regime. But the collapse of the local economy, in addition to corruption and neglect by officials, fostered the discontent of the first protests.[265] These initial protests at corruption and repression, however, began to spiral in reaction to the regime's violent crackdown on protesters. The Assad regime's targeting of civilians has been one of the key sources of the conflict's escalation. In tactics eerily similar to those employed in the 1980s, the regime responded to the peaceful protests throughout the country by detaining, kidnapping, or killing civil activists. The initial targeting of protesters served to broaden the movement's reach as colleagues, friends and families of the victims protested in response to the regime's actions. However, the increased targeting of civilians decreased the potential for a peaceful settlement by raising the cost of non-violent civil disobedience. The brutal targeting of civilians also encouraged some military conscripts to defect and supported the militarization of opposition groups. In 2011, up to 3,000 low-level Sunni officers defected.[266]

The majority of the regime's soldiers are conscripts of Sunni origin and therefore of questionable loyalty as they are more likely to have relatives in the opposition.[267] Conscripts of Sunni origin are neither invested in the ideology of the regime nor have benefited from its military system of privileges. In the past they simply fulfilled their period of military services and then returned to their homes. Fear of greater defections and internal mutiny among conscripted soldiers has resulted in the regime keeping many of its Sunni-majority units in their garrisons with some officers reportedly in prisons. This has forced the regime to increasingly rely on its traditional long-distance strategy of aerial bombardment to compensate for the loss in manpower while occasional on-the-ground support has been provided by core loyal units stacked by Alawite career soldiers such as the Republican Guard. The regime has also been supported on the ground by pro-government paramilitary groups such as the National Defense Forces (NDF), which are mainly manned by Alawites. The NDF acts as a parallel armed force on the ground with members paid significantly more than the average soldier, making it an attractive economic and defense mechanism to recruit loyal soldiers. These tactics have escalated the conflict as the regime has indiscriminately bombed moderate opposition areas killing both civilians and soldiers.

Parallel to these dynamics, the rise in extremist groups has fuelled the conflict by exacerbating sectarian divisions, escalating the violence, and narrowing both the potential for peace and alternative leadership to the regime. On the one hand, this rise in extremism is a natural product of a protracted conflict. On the other hand, it has been fermented by both the actions of the regime and foreign backers. Near the end of 2011, the Assad regime deliberately released a number of Islamist militants from Saidnaya prison in Damascus.[268] In the context of increasing oppression and human rights violations, the Islamists' narrative of violent resistance gained credence and provided an Islamist overtone to the growing militancy of opposition groups.

Since 2011, the main military opposition to the regime has been formed by the Free Syrian Army (FSA). However, the FSA is viewed as corrupt and has fragmented into a conglomeration of different groups. The jostling of sponsorship for these groups from

263 "Bashar al-Assad's inner circle," BBC News, Middle East, July 30, 2015, accessed March 31, 2016, http://www.bbc.com/news/world-middle-east-13216195.

264 *Popular Protest in North Africa and the Middle East (VI).*

265 Ibid.

266 Khaddour, *Strength in Weakness.*

267 Jenkins, *The Dynamics.*

268 Phil Sands, Justin Vela, and Suha Maayeh, "Assad Regime Set Free Extremists from Prison to Fire up Trouble during Peaceful Uprising," *The National*, January 21, 2014, accessed December 1, 2015, http://www.thenational.ae/world/syria/assad-regime-set-free-extremists-from-prison-to-fire-up-trouble-during-peaceful-uprising.

different Gulf States deepened the fragmentations and the emergence of a warlord mentality of patronage and violence among some. The growing militancy and fragmentation of such opposition has also reduced its foreign funding, notably from the United States, and therefore, the potency of a moderate opposition. With decreased funding, the FSA has been pillaged by the rise in Islamic extremist groups since 2013, with its fighters either killed by or recruited to the jihadist cause. The current economic devastation in Syria has also meant that young Syrian men choose to join an extremist organization simply because they will pay them rather than for ideological reasons.

The rise in extremism has also fermented sectarian divides. This is both a product of the conflict and a strategy that has been played upon by the government, opposition, and jihadist groups. Religious leaders on all sides have also fuelled this dynamic by inciting sectarian violence. The rise of jihadist groups has helped the regime retain the reluctant loyalty of a number of minority groups such as Alawites, Christians, and to a lesser extent Druze, while also bolstering the position of Assad to the international community as the lesser of two evils. The establishment of locally created and led militias in every minority community, even in those opposed to the regime such as the Turkmen, has reinforced these sectarian divisions in the country. The regime's acquiescence to long-held Kurdish ambitions for autonomy in the North, after decades of social and political marginalization, is also part of the government's sectarian agenda in fracturing potential support bases and creating buffers against any opponents, both rebels and jihadists.

The most notable jihadist groups operating in Syria are Daesh and the former al-Qaida affiliated Jabhat Fateh al-Sham. While both aim to establish Islamic rule they differ in their tactics and relationship to the Assad regime. Despite their rhetoric, Daesh has little motivation in directly engaging and trying to overthrow the Assad regime. They are far more interested in destroying rival groups, expanding their control over territory in the east and north of the country, and creating rival local governance structures in their territories. Jabhat Fateh al-Sham, in contrast, has joined with other opposition fractions in fighting against the Assad regime, most notably in Idlib since 2014 and Aleppo in 2015. Despite these differences, civilians in areas under jihadist control have suffered due to a number of factors. Many civilians, including minorities and Kurdish communities, flee the impending approach of jihadist groups, particularly Daesh. For those who stay, they face oppression related to the new governance systems imposed, especially for women. Civilians in jihadist-held areas, in particular, consistently suffer from aerial bombardment and attack from the regime, its supporters, and international opponents of the groups.

An additional layer of complexity is the international dynamics of this conflict not only by the migration of refugees but also the significant involvement of foreign actors. Foreign fighters fill the ranks of both regime militias and jihadist groups. Individuals from North Africa and Western Europe are at the forefront of jihadists groups such as Jabhat Fateh al-Sham and most notably Daesh. Fighters from Afghanistan and Iran have fought on the side of the regime.[269] In particular, Hezbollah, an organization with strong ties to both Iran and the Syrian regime, has established militias and sent fighters to support Assad's forces. Both Russia and Iran, for alternating reasons of economic relations and geopolitical interests, have openly supported Assad in his targeting of moderate opposition areas. A Sunni coalition of states, including Qatar, Turkey, and most notably Saudi Arabia, have lent their support to "opposition" parties fighting Assad forces including Islamist networks such as the Syrian Muslim Brotherhood. These include groups such as Jaysh al Fatih (Army of Conquest) and Ahrar al-Sham (The Free of Syria). In addition, Turkey has also targeted Western-backed Kurdish forces, the People's Protection Units (YPG), in the north of the country as they struggle with the emergence of a Kurdish state on their southern flank and their own conflict with the outlawed PKK (Kurdistan Workers' Party). In a twist worthy of Shakespeare, the YPG are also fighting against Western-backed FSA groups over control of territory near Aleppo. Meanwhile, a disparate of Western states such as the United States, the United Kingdom, France, and Sunni countries such as Turkey and Jordan are bombing Daesh positions located in the center of civilian areas.

A fundamental aspect of the conflict is that there is no viable alternative leadership to the extremist groups or the Assad regime. The initial 2011 protests were local in nature. Any leadership that could have emerged from the protests was undermined by the Assad regime's targeting of the local leaders, killing them or forcing them into exile. Throughout the conflict, the constant bombardment of civilian areas such as market places and institutions such as schools, hospitals, and municipalities under opposition control continues to prevent any civil movement from emerging. These actions have prevented the emergence of an effective

269 *Syria's Metastasising Conflicts*, 16.

national movement that could pose a serious challenge to the regime.[270] This has been further undermined by fragmentation and radicalization in the country. There is no strong alternative leadership for Syrians and no unified vision for the country to challenge the status quo, a problem that continues to this day. The lack of alternative leadership is a glaring challenge in each attempt at peace talks between the regime and the weak kaleidoscopic groups that compose the Syrian opposition (jihadist groups and the Kurds are excluded). This is one of the fundamental challenges to the Syrian people's recovery.

CONFLICT TRANSITION AND JUSTICE CONSIDERATIONS

The nature and scope of the challenges facing the Syrian people appear overwhelming. This chapter, however, tries to highlight certain parallels to both the successes and failures of conflict transition in the case studies of South Africa, Indonesia, and Colombia that were explored in this research with the hope that this will lead to new ideas and policies to address Syria now and in the future. Each of the three cases explored in this study sheds unique insight into the different concepts and challenges of transitional justice. They also offer a strong argument of the need for preparatory steps prior to a peace agreement. For example, in South Africa, secret meetings between political leaders began in 1984, and civil society platforms emerged by 1987, years before the country's first democratic election was held in 1994. Such multiparty discussions contributed to the eventual outcome of their negotiated peace agreement and the establishment of the landmark Truth and Reconciliation Commission (TRC). In contrast to this, Indonesian political and civil society leaders were taken completely by surprise by the sudden fall of the 43-year-old Suharto dictatorship in 1998. Instead of being prepared and able to effectively pressure the transitional Indonesian government, victims and civil society groups were left to learn about transitional justice as political transition was actually taking place. In the Indonesian province of Aceh, however, consistent civil society activism and pressure since the time of the conflict has finally led to the establishment of a TRC in 2016. Similarly, public discussions in Colombia related to transitional justice have been taking place parallel to ongoing conflict and peace negotiations for decades. This has allowed some civil society organizations such as victim associations and women's groups to directly participate and influence the peace talks between the Colombian government and FARC.

Some steps are already being taken by Syrian NGOs and activists that are contributing to the process of conceptualizing transitional justice now and in the future. In contrast to the experiences of Indonesia, there is a greater awareness among many Syrian NGOs about the necessity of transitional justice, with many already producing research on possible avenues and aspects to implement.[271] This awareness of transitional justice knowledge has also been facilitated by the work of international organizations such as the International Center for Transitional Justice, which was very active in the first years of the conflict in promoting the importance of transitional justice. Syrian organizations, however, need to consider not only what types of transitional justice they want but also what is possible in a transitioning Syria and the consequences of each mechanism that might be employed. There are always limitations in what can be achieved in any method. In South Africa, for example, there was no outright winner, and actors had to negotiate for peace. This directly influenced and limited the type and scope of its transitional justice.

The case studies illustrate the need for transitional justice measures to penetrate all levels of society. A significant weakness in many of the case studies has been the way that transitional justice measures have been implemented. In South Africa, while civil society involvement was critical in preparing the ground for political transition, the TRC itself, as a transitional justice mechanism, is an example of a top-down approach to transitional justice. While the TRC did attempt to be victim-sensitive, the process opened up old wounds and in the end communities were left to deal with the trauma and injustices largely without state support. Indonesia is an example of two separate transitional justice processes; one at the state level and the other at the local level. In the absence of effective national measures, local areas in Indonesia have continued to conduct truth-seeking initiatives on their own. As a result, truth has become localized, which has impacted and limited a broader and more collective national narrative. This tendency has also stymied the ability of national institutions to retrieve information

270 *Anything But Politics: The State of Syria's Political Opposition,* Middle East Report N°146 (Amman/Brussels: International Crisis Group, October 2013), accessed December 1, 2015, http://www.crisisgroup.org/en/regions/middle-east-north-africa/syria-lebanon/syria/146-anything-but-politics-the-state-of-syria-s-political-opposition.aspx.

271 Syrian activists, NGOs, and representatives of the Syrian Opposition focus group in discussions with Auveen Woods, Teri Murphy, and Maria Christina Vibe, Gaziantep, April 2, 2015; Syrian women activists and female representatives of NGOs in discussions with Auveen Woods, Teri Murphy, and Maria Christina Vibe, Gaziantep, April 3, 2015; Syrian NGOs and representatives in discussions with Auveen Woods, Teri Murphy, and Maria Christina Vibe, Istanbul, April 5, 2015.

and publish an official account of history. Finally, in Colombia, civil society groups have worked with the government and parallel to it, at both a national and local level. Colombian civil society groups have been very active and have established their own networks that bring together diverse actors to more effectively pressure the government and gain access to the ongoing peace process. However, there is a significant gap between what the Colombian State has been willing to officially acknowledge against the amount and severity of violence that has been experienced within local communities. For a future transitional justice mechanism in Syria to be truly effective, it will need to incorporate a wide array of judicial, non-judicial, international, national, and local approaches into a broad and inclusive framework.

Civil society can act as an influential counterweight to that of the state and its supporters, or it can exacerbate fragmentation. Indonesia in the 1960s, for example, was a deeply divided and polarized country with a vibrant and strong civil society that reflected and exacerbated this division. This polarized climate fermented the outbreak of the anti-Communist massacres in 1966. Syrian civil society is a motley mix of different NGOs, community associations, religious groups, activists, and military groups. To become a more potent force, a diverse group of actors representing Syrian NGOs, community groups, activists, and faith-based groups of all denominations need to work together whether that be through a formalized network or not. There needs to be greater inclusion of a wide array of local and national perspectives to ensure that current peacebuilding efforts do not remain localized now and in the future. There is a need to bridge national peace and transitional justice initiatives to the local level and vice versa.

Transitional justice frameworks must respond to the complexity and multidimensional character of the conflicts and grievances in which they operate. A key finding from the analysis of the South Africa, Indonesia, and Colombia case studies is the need for a strong bridge linking international and national initiatives to local practices. There has been a call to hybridize transitional justice frameworks for several years, but rarely—if ever—has there been an effective implementation of a combined top-down, bottom-up, and middle-out approach. In Indonesia, national bodies such as Komnas-HAM and Komnas Perempuan have tried to act as bridges between local and national initiatives. Both have supported alternative transitional justice measures outside state-led initiatives. Both have challenged the Indonesian military and the state on behalf of victims over human rights abuses. However, the commissions' power and activism are also dependent on the members of the commission themselves, who are nominated by the government, thus weakening their advocacy at times. In contrast, in Colombia, a National Constituent Assembly (ANC) was convened in 1991 in an effort find a political solution to the conflict. The ANC was a national meeting of citizens who had been chosen by the electorate to make changes to the constitution. Another method was the establishment of the National Peace Council, a permanent advisory group to the Colombian president that included representatives of the government, social organizations, ethnic minorities, and religious groups. The Council, however, was not often used as it could only be convened at the pleasure of the president.

There are many initiatives and mechanisms that can be initiated in the pursuit of transitional justice. However, as these examples from Colombia and Indonesia illustrate, ensuring the efficiency and relevance of these measures is froth with shifts in power dynamics and vested interests of conflict parties and incumbents. The demands of justice, truth, reconciliation, and amnesty overlap and compete during political transitions and pose dilemmas for governments and civil society, especially when there is widespread violence. Striking a balance between justice and national unity is a difficult challenge all countries face when transitioning from conflict to peace. Systematic human rights abuses and crimes against humanity are evident in the South African, Indonesian, and Colombian cases. Like Syria, the scale and timing of these crimes accentuate the limitations of evidentiary truth and judicial process. In these three case studies, prosecution for all those who participated in human rights abuses was neither possible nor preferable in the pursuit of peace. Serving retributive justice, alone, was not enough for the health of society. For legitimacy, transitional justice frameworks must not only hold the tension between appropriating justice but also seek social reconciliation and healing. At the same time, those typically brokering negotiations often seek amnesty and leverage their power to obtain it.

From the beginning Bashar al-Assad and his accomplices have used every strategy available to them to cling to power and weather the pressure on them to resign. During peace negotiations Assad has resisted attempts to sideline him and rejected calls for a "transitional body" to oversee the change in regime.[272] Similarly, future discussions with some of the militias and opposition groups operating inside Syria on even limited

272 "Executive Summary for March 30th," *Syria Deeply*, March 30, 2016, accessed April 7, 2016, https://www.newsdeeply.com/syria/executive-summaries/2016/03/30.

disarmament, demobilization, and reintegration will center on issues of power, amnesty, and security. Multi-party conflict frameworks highlight the importance of coordinating negotiations with numerous conflict actors while concurrently anticipating how outcomes with one group may affect the others. The experiences of multi-actor negotiations in Colombia and its failure over the decades illustrate both the difficulty and necessity in undertaking such an approach for peace. These are just a few illustrations of the political realities embedded inside conflict transition and the ongoing discussions that Syria will have to face. The experience of Colombia, Indonesia, and South Africa reflect this tension. Syria is no exception to the tensions and the inherent challenges around power, justice, and security in pursuing transitional justice. Syrians are well aware of the cost of impunity. The memory and effects of the massacres and violence of the 1970s and 1980s were still apparent prior to 2011. Similarly, Colombian civil society is reluctant to support transitional justice, particularly amnesties and pardons, fearing impunity for government and armed groups complicit in human rights abuses. The peace talks had stalled many times over these and other competing reasons.

Third country meddling or interventions on behalf of various conflict parties has also had a significant impact on conflict and peace dynamics in the Syrian conflict. This is not a new phenomenon. Third party interventions into domestic affairs and conflicts are a common occurrence generally, whether they be through subtle moral or rhetorical solidarity or outright resource support. There is little, however, that can be done in terms of ensuring accountability or justice where foreign engagement has exacerbated the conflict, either by accident or design. Similar to Syria, Lebanon suffered a 25-year period of widespread political violence. From 1975 to 1990, kidnappings, assassinations, sniper attacks, car bombs, and even tank raids were common. Foreign powers such as Syria and Israel provided both material support and troops to conflicting internal actors. This violence resulted in killings, mass displacement, and enforced disappearances. The Taif Agreement in November 1989 finally brought an end to the civil war and the start of the transition period, which Lebanon is arguably still undergoing. The agreement provided a framework for the withdrawal of Syrian forces from Lebanon and the disarmament of both national and non-national militias.[273] The only militias that have not disarmed are Hezbollah and non-Lebanese groups such as Hamas. One of the main legacies of the 25-year Lebanese civil war has been widespread impunity. While research suggests that the Lebanese assign a higher level of responsibility for the war on internal actors, the role of foreign sponsorship and fighters in aiding these militias and contributing to the conflict has not been addressed. In Lebanon, while there is discussion of the foreign powers intervening during the conflict, there is less on the violence committed by internal actors through their foreign sponsors.[274] This particular aspect of the conflict is, therefore, little understood. There have been no steps, symbolically or otherwise, to try and to hold foreign fighters responsible for their role in the conflict and the violence that followed in the early 1990s. Transitional justice measures implemented so far have failed to address the legacy of violence.[275]

The proxy war dynamics of the Syrian conflict complicate the issue of transitional justice, not only in terms of foreign fighters or the sectarianism of the violence but also in attempts to hold foreign states accountable for their role in the violence. The sheer number and dominance of competing countries impacts all aspects of the Syrian conflict. This includes the great power countries of the United States and Russia; middle power states like France and Britain; regional hegemonies such as Iran, Saudi Arabia, and Turkey; and other influential actors, for example, Qatar and Iraqi Kurdistan. In addition, there are 66 countries participating in various capacities with the International Coalition to Counter the Islamic State.[276] Foreign intervention into the Syrian conflict has helped to turn an indigenous grassroots uprising into a civil conflict and now a transnational proxy war with little to no engagement, consultation, or consideration for the Syrian people. Foreign powers have a significant impact on Syria, from the funding of competing opposition and government forces to peace processes and security and justice structures in the future. For example, attempts to refer Syria to the International Criminal Court for possible prosecution of war crimes and crimes against humanity committed during the country's civil war were vetoed by Russia and China for a fourth time in the UN despite widespread backing by countries in the

273 *How People Talk About the Lebanon Wars: A Study of the Perceptions and Expectations of Residents in Greater Beirut* (New York: International Center for Transitional Justice, October 2014), accessed April 12, 2016, https://www.ictj.org/sites/default/files/ICTJ-Lebanon-FocusGroup-Report-2014.pdf.

274 Ibid., 29.

275 Kirsten J. Fisher and Robert Stewart, *Transitional Justice and the Arab Spring* (London/New York: Routledge, 2015), accessed April 12, 2016, https://books.google.com.tr books?id=sdwABAAAQBAJ&printsec=-frontcover#v=onepage&q&f=false.

276 Kathleen J. McInnis, *Coalition Contributions to Countering the Islamic State*, Library of Congress, Congressional Research Service, CRS Report for Congress, R44135, April 13, 2016, accessed April 21, 2016, https://www.hsdl.org/?view&did=791918.

Assembly.[277] As illustrated by the case of Lebanon and countless other conflicts in history, trying to pursue justice measures against foreign states that intervened in a national conflict is almost impossible. Sadly, the fate of Syria's people and their attempts at finding security and justice will continue to be overwhelmingly in the hands of foreign powers. This does not, however, exclude truth-seeking measures, memorialization, and public discussion by Syrians that acknowledge and vocalize the effect of foreign interventions particularly through their patronage of various conflict parties.

As the Syrian conflict has dragged on with jihadists gaining momentum and Assad's forces winning back key territories through Russian support, people are slowly acknowledging that there will be no outright winners. A negotiated settlement with the regime is the only way forward. International negotiations are increasingly focusing on federalism as the most practical solution to unifying the sectarian divisions of the country. This, however, is deeply unpopular among Syrians who fear the formalized sectarian division of their country like Iraq. Bashar al-Assad is a key source of the protracted conflict through the violent strategies of the regime in the past and during the current war. Though his removal will not end the war, morally and politically he will eventually have to withdraw from power if there is ever to be a settlement in Syria and the return of refugees.

Socio-economic grievances caused by corruption and mismanagement were one of the main issues fueling the initial protests in Syria in early 2011. Prior to this economic conditions in Syria had deteriorated for the majority of the population while the state and its business interests remained largely in the control of the Syrian elite as joint ventures with Syrian or regional entities. There are a number of prominent business elite with associations to the regime. In addition to trying to address the political and social devastation of the war, Syrian people in the future will also need jobs and economic opportunities in order to reduce the potency of the war economy. What role could such business elite from the Assad regime play in Syria's future?

The current economic devastation in Syria has meant that young Syrian men choose to join an extremist organization simply because they will pay them rather than for ideological reasons. This is a conflict dynamic that must be addressed. In Colombia, recognizing the nexus of development and peacebuilding in rebuilding rural conflict-affected communities, some funding was provided for farmers to develop their land on the condition that they did not grow illicit crops such as coca plants. These plants have fuelled the drug trade and violence in the country. A similar development approach needs to be extended to the Syrian context. How can alternative development be leveraged in the Syrian context to undermine the political economy of extremist groups' recruitment and bring peace?

The war economy is a potent conflict dynamic in Syria that can undermine the potential for peacebuilding both now and in the future. In addition to issues around youth unemployment and jihadist groups, there is also the presence of significant smuggling and racketeering networks. Prior to the conflict there were large smuggling networks to Lebanon, Jordan, Turkey, and Iraq. The illicit trade with the former two included the transport of weapons from Syria and militants hostile to the governments.[278] With the expansion of rebel- and opposition-held zones in Syria, the economic influence of smuggling networks has increased both across international borders and within the country. These new war economies have expanded the pre-conflict smuggling networks. Those benefiting from the war economy will oppose attempts to close it. This is particularly relevant to those valuable smuggling networks that formed a significant part of pre-conflict Syria. How can the transition from conflict to stability be leveraged to address these economic spoilers? Essentially, how can peace make a financial dividend?

Transitional justice frameworks must be comprehensive and inclusive of international, national, and community practices that operate within both judicial and non-judicial forums. Additionally, for a framework to be perceived as legitimate, it must be founded on culturally appropriate values. As was evident in South Africa, the cultural norm of *Ubuntu* was used to frame the Truth and Reconciliation Commission's spiritual and unifying force. Religious values and traditional rituals have also been used in Indonesia to resolve conflict and provide reparations to communities where national initiatives have yet to reach. In Colombia, for future transitional justice measures to be effective, incorporation of specific cosmological beliefs of indigenous and Afro-Colombian groups, who have been some of the most marginalized victims of the conflict, will need to be integrated. Sensitivity to conceptualizations is also warranted. For example, in communities where victims have been subject to marginalization

277 "UN bid to refer Syria to ICC vetoed," Al Jazeera: Politics, May 23, 2014, accessed April 24, 2016, http://www.aljazeera.com/news/middleeast/2014/05/un-bid-refer-syria-icc-vetoed-201452214271057466 5.html.

278 *Popular Protest in North Africa and the Middle East (VI)*, 21.

and land grabs, a distributive understanding of justice may be more appropriate and preferable than other forms such as retributive, restorative, or reparative approaches.

Examining historical and current case models can offer important considerations for other societies undergoing transition from conflict and authoritarian regimes. These frameworks, however, should only offer insight because transitional justice must be rooted in the specific political context or values of a society. For example, although the truth and reconciliation model of South Africa was adopted by Indonesia, modifications were made on the issue of amnesty due to the continued presence of former regime figures in the Indonesian government. But caution is also warranted due to the contradictory nature of local traditions and customs. They can invite social reconciliation, but they can also perpetuate systemic oppression or incite conflict. This can be particularly evident when traditional beliefs are manipulated by leaders or when they emphasize ethno-religious identity in an already divided or fragile society. Customary peace practices can also be an impediment to justice when power is asymmetrical, processes are heavily gendered, and they serve as the only alternative to judicial prosecution as was the case in parts of Indonesia. This is especially true for crimes against or related to women. Traditional reconciliation practices are often male-dominated affairs, which leave little room for women to participate as victims, perpetrators, and activists. Additionally, the processes themselves do not reflect women's values and priorities.

The case studies discussed in this paper attempt to draw parallels to both the successes and failures of conflict transition in other countries, particularly through the case studies of South Africa, Indonesia, and Colombia. Each state's experience of transitional justice is unique and specific to the context in which a society was hurt by political repression, violence, and war. While the issues that Syria is facing are not individually unique, the sheer scale of all these interdependent issues combined does pose challenges and create a sense of intractability to the conflict dynamics. As such, four key aspects of the conflict have been highlighted for greater analysis in terms of transitional justice. These are the foreign fighters; the Syrian military and paramilitary groups; the Syrian diaspora, refugees, and displaced communities; and gender sensitivity.

Foreign fighters

Foreign fighters have played a particularly public and violent role in Syria's conflict on all sides.[279] The involvement of foreign fighters in domestic wars is neither a new nor a uniquely Islamic phenomenon, with multiple instances of the mass recruitment of foreign nationals from the Spanish Civil War (1936-1939) to the ongoing conflict in Ukraine (2014-present). The scope and nature of foreign nationals' role in the Syrian conflict make it unique among most conflicts. Almost 45,000 foreign fighters are estimated to be fighting in Syria for different conflict parties.[280] Infamously, individuals from Western European, North African, and Middle Eastern states such as France, Tunisia, and Saudi Arabia are on the frontline with jihadists groups such as Jabhat Fateh al-Sham and most notably Daesh. The demographic of foreign fighters in the regime is less known. Hezbollah, a Shia organization with strong ties to both Iran and the Syrian regime, has established militias and sent fighters to support Assad forces. Shia fighters from Iran and countries as far away as Afghanistan and Pakistan have also been found to be fighting with the regime. Finally there have also been some instances of Westerners from America, Britain,[281] and the Netherlands[282] fighting with the YPG.

Addressing the issue of foreign fighters is a complex one encompassing international laws, individual states' national legal systems, and the Syrian people's own security and justice needs. The proxy war dynamics of the Syrian conflict further complicate the issue of foreign fighters due to distinct sectarian overtones between Sunni and Shia. The implications and reactions of foreign fighters in a transitioning Syria can

279 *The Syrian Conflict: A systems conflict analysis* (Dubai: Ark Group DMCC, February 2016), accessed February 2016, http://arkgroupdmcc.com/publications/.

280 Calculations from 2014 and 2015 estimate between 20,000 ("Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s," The International Centre for the Study of Radicalisation and Political Violence, January 26, 2015, accessed April 24, 2016, http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/) and 30,000 (*Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq* (New York: The Soufan Groups, December 2015), accessed April 25, 2016, http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf). These calculations are only for opposition and jihadist groups. There have been no accurate estimates of foreign fighters for the regime, although this number is considered to be in the thousands.

281 Linah Alsaafin, "US and British volunteers describe fighting with Kurds in Syria," *Middle East Eye*, July 29, 2015, accessed April 28, 2016, http://www.middleeasteye.net/news/lions-rojava-282706690.

282 "Dutch man suspected of killing Isis fighter could face murder charge," *The Guardian*, January 15, 2016, accessed April 28, 2016, http://www.theguardian.com/world/2016/jan/15/dutch-man-suspect-killing-isis-fighter-arrest.

take a number of forms. First, for some fighters, they may simply move on to another conflict irrespective of a peace process or not. This can happen if fighters feel that their objectives in Syria have been achieved or a more pressing conflict breaks out in another country.[283] This scenario is unlikely, but it has happened before in a number of conflicts. For example, some career jihadists and foreign fighters in Afghanistan moved on after the removal of Soviet forces in 1989 to Bosnia in the 1990s and Chechnya in 1995. More recently, there were reports of fighters from the initial 2011 Libyan uprising moving to Syria in 2012 to fight with opposition groups.[284] An estimated 4,000 foreign fighters were active in Iraq between 2003 and 2011. The majority of these moved on to Syria and joined the ranks of Daesh and Jabhat Fateh al-Sham. One outcome of the Syria conflict is that it will spawn yet another cycle of fighters, many with multi-conflict experience. These fighters will exacerbate regional and global security concerns, endangering civilians and challenging both international and national policies and strategies.

While some of these career fighters may move on to yet another conflict, a more realistic prospective is that they will either stay in Syria or return to their homes, creating additional security and justice challenges. There has already been a trickle of individual fighters trying to return home, particularly from Daesh. For some, this is because of disillusionment with the conflict and for others the desire to spread the geography of violence.[285] The November 13, 2015 Paris attacks in which 130 people died and the March 22, 2016 Brussels bombings that killed 32 civilians are just some of the examples of the dangers posed by returning fighters.

The policies of fighter-producing countries have a significant influence on Syrian peace, security, and justice attempts as they affect the number of foreigners that stay in the country. The focus of many international and national efforts has traditionally been on the supply chain of jihadist fighters, prosecuting, for example, those who try to recruit foreign fighters; those who smuggle them into countries; and those who provide information or money to help them. Initiatives by the United States have influenced much of the international framework on foreign fighters, particularly countering violent Islamic extremism or jihadism. This includes criminalizing the "material support, training, incitement, and solicitation" to terrorist groups; the development of effective investigative techniques to handle the complexity of counter-extremism cases; and cultivating international cooperation.[286] More recently discussions have turned to prevention and stopping recruitment at its earliest stages.

There have been few efforts, however, into considering how to engage with returning fighters. Some states such as Australia have tried to prevent the return of fighters from Syria by removing their passports.[287] Similar laws have been discussed in France.[288] Other countries have pursued prosecution for returning fighters. In the UK, for example, a woman who travelled to Syria and returned was prosecuted for being a member of Daesh and encouraging acts of terror on social media.[289] These initiatives are similar to the policies of Arab states in the 1990s towards *mujahideen* returning from Afghanistan. Returning fighters were either refused entry or persecuted by home governments out of fear that they would continue their terrorist activity on arrival. Such policies encouraged foreign fighters to avoid returning to their home countries. Instead they either stayed in the conflict-affected country or travelled around the world propagating violent extremism and practices. Free from the legal and geographical confines of a single state, such foreign fighters were difficult to both track and prosecute.[290] The most common form of action against individual fighters is prosecution upon their return or capture in a third country. Documentation

283 Jeanine de Roy van Zuijdewijn and Edwin Bakker, "Returning Western foreign fighters: The case of Afghanistan, Bosnia and Somalia," International Centre for Counter-Terrorism—The Hague, Background Note, June 2014, accessed April 22, 2016, http://icct.nl/publication/returning-western-foreign-fighters-the-case-of-afghanistan-bosnia-and-somalia/.

284 "Foreign fighters look to aid Syria's rebels," Al Jazeera, October 30, 2012, accessed April 22, 2016, http://www.aljazeera.com/news/middleeast/2012/10/201210301562772281 4.html.

285 van Zuijdewijn and Bakker, "Returning Western."

286 "Criminal Justice Sector/Rule of Law Working Group: The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector," Global Counterterrorism Forum, May 24, 2012, accessed April 23, 2016, https://www.thegctf.org/documents/10162/38299/Rabat+Memorandum-English, 8-10.

287 Andrew Lynch, Nicola McGarrity, and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (New South Wales: NewSouth, 2015); Michael Safi, "Australian government cancels passport of Queensland teenager in Syria," *The Guardian*, February 27, 2016, accessed April 23, 2016, http://www.theguardian.com/australia-news/2016/feb/27/australian-government-cancels-passport-of-queensland-teenager-in-syria.

288 Kim Willsher, "Hollande drops plan to revoke citizenship of dual-national terrorists," *The Guardian*, March 30, 2016, accessed April 24, 2016, http://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists.

289 Steven Morris, "British woman who joined Isis in Syria guilty of encouraging terror acts," *The Guardian*, January 29, 2016, accessed April 24, 2016, http://www.theguardian.com/uk-news/2016/jan/29/british-woman-tareena-shakil-joined-isis-syria-guilty-encouraging-terror.

290 David Malet, "Why Foreign Fighters? Historical Perspectives and Solutions," Foreign Policy Research Institute (Winter 2010), accessed April 23 2016, http://davidmalet.com/uploads/Why_Foreign_Fighters_Malet.pdf.

of individual involvement and prosecution in home or third countries is therefore dependent on the differing laws of individual states.[291]

In other cases, despite clearly breaking international and national laws, foreign fighters were given blanket amnesties by both host countries and home countries. This was the experience of Bosnia and Lebanon in response to the involvement of foreign fighters in their conflicts. Lebanon, for example, suffered through a highly urbanized civil war with strong inter-sectarian fighting and foreign interventions. In 1991, the Lebanese parliament enacted a General Amnesty Law. Ignoring the rights and needs of victims, the law granted amnesty to all participants in the 25-year civil war.[292] The exceptions to this general amnesty are assassinations of political and religious leaders and participation in events that are considered as the instigators of the conflict.[293]

Foreign fighters lined the ranks of all the conflicting parties in the Bosnian War (1992-1995). Fighters from Orthodox countries such as Russia and Greece fought on the side of Serbian forces; Christians from England and Spain took up arms with the Croatian army, while Muslims of North African and Middle Eastern origin fought for the Bosnian side as self-styled *mujahideen*. Compared to the scale of Syria, however, only an estimated 5,000 foreign fighters participated in the Bosnian war.[294] Most foreign fighters joined the respective military forces. On the Bosnian side, foreign fighters joined the Bosnian civil defense forces, others the Bosnian Armed Forces, while still more created their own militias. Noticeably, tensions emerged between the local Muslim population as these foreign fighters were seen as uncontrollable marauders responsible for atrocities such as decapitations, murder, and mutilations against soldiers and civilians.

The 1995 Dayton Agreement stipulated that all foreign fighters and their units were to leave Bosnia within 30 days after UN troops had been deployed. In a highly controversial move, the government of Bosnia, in a bid to lessen the tension and potential violence of the foreign fighters being forcibly evicted by UN troops, issued thousands of passports and other identifying documents such as birth certificates to extend Bosnian nationality to these foreign fighters. This allowed the fighters to stay and choose whether to leave. Many foreign fighters did leave after the fighting ended though there were instances of suicide bombing and attacks against NATO troops.

An estimated 1,000 foreign fighters, however, remained in Bosnia after the war, becoming naturalized citizens.[295] In the years after the war, especially in the aftermath of the 9/11 attacks, pressure grew on the Bosnian government to expatriate these fighters. In 2007, a Bosnian commission revoked citizenship for almost 500 people.[296] There have been no cases taken against Christian or Muslim foreign fighters in Bosnia. Only in December 2015 was a successful conviction achieved against a Muslim Bosnian army commander for failing to prevent crimes committed by foreign Islamic fighters during the 1992-1995 war.[297]

The most realistic outcome for foreign fighters in Syria is that regardless of the status of the conflict or a peace process a significant number of them will stay in the country. But as has been shown in previous instances, addressing the security and justice needs of civilians in the context of foreign fighters is incredibly challenging with multiple and overlapping sovereign and legal jurisdictions. The position of foreign fighters in a post-conflict Syria will be very dependent on the policies of foreign governments. The reality is that most foreign fighters will not be prosecuted for their crimes in Syria. In addition to the aforementioned transnational issues, a lack of capacity by weakened Syrian institutions transitioning from conflict will hamper efforts to find, prosecute, and imprison individuals. The ability of Syrian institutions to prosecute foreign fighters will also be reduced by the need to juggle multiple competing issues at the same time. This includes grappling with the issues around internally displaced people, potential refugee returns, the destruction of the country's economic, social, and physical infrastructure,

291 "Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys," Library of Congress, accessed April 19, 2016, https://www.loc.gov/law/help/foreign-fighters/country-surveys.php.

292 *Lebanon's Legacy of Political Violence: A Mapping of Serious Violations of International Human Rights and Humanitarian Law in Lebanon 1975-2008* (New York: International Center for Transitional Justice, September 2013), accessed April 26, 2016, https://www.ictj.org/sites/default/files/ICTJ-Report-Lebanon-Mapping-2013-EN_0.pdf, 82.

293 Jonathon Hall, "Displacing Evil: The 1991 Lebanese Amnesty, the City and the Possibility of Justice," (n.d.), accessed April 25, 2016, http://webcache.googleusercontent.com/search?q=cache:SpJeyg4TBAgJ:www.inter-disciplinary.net/wp-content/uploads/2009/02/hall-paper.pdf+&cd=1&hl=en&ct=clnk&gl=tr.

294 Evan Kohlmann, *Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network* (Oxford: Berg Publishers, 2004), 16.

295 Karmen Erjavec, "The 'Bosnian war on terrorism,'" *Journal of Language and Politics* 8, no. 1 (2009).

296 Nicholas Woods, "Bosnia Plans to Expel Arabs Who Fought in Its War," *The New York Times*, August 2, 2007, accessed April 28, 2016, http://www.nytimes.com/2007/08/02/world/europe/02bosnia.html.

297 Maja Zuvela, "Bosnia court indicts wartime commander for crimes by Islamic fighters," Reuters, December 23, 2015, accessed April 26, 2016, http://uk.reuters.com/article/uk-warcrimes-bosnia-idUKKBN0U61JB20151223.

tension over unemployment and hunger, in addition to attempting to reform the state and its institutions.

There are a range of justice measures that can be explored in the context of foreign fighters and their crimes in Syria. These can range from criminal prosecutions, truth commissions, and publications based on the testimony of Syrians, reparations programs (support in the form of monetary, material, or even symbolic memorials such as statues or plaques), and various kinds of institutional reform to try and ensure that such crimes are not repeated. Some transitional justice initiatives have already begun in the context of foreign fighters. Projects such as *Raqqa is Being Slaughtered Silently* document the economic, social, physical, and psychological abuses being perpetrated on both society and individuals in Daesh-held areas.

The chasm, however, between conceptualizing justice measures against foreign fighters and achieving their successful implementation is significant. From whom should Syrians seek reparations? Individual captured foreign fighters; the fighter-producing states; Syrian opposition groups; or a transitional Syrian government? An ICC investigation into crimes against humanity perpetrated by jihadist groups and foreign fighters, for example, has been suggested. But to achieve this, foreign powers such as Russia and China, which have vetoed previous attempts to refer Syria to the ICC, would need to back it. Syria will need significant support in addressing the devastation caused by foreign fighters. This is particularly relevant in terms of criminal prosecution, often in which only the figureheads or leaders of an entity are prosecuted. It is possible that third countries may prosecute individual fighters for their crimes in Syria based on evidence and documentation gathered by victims and activists. Such prosecutions could be initiated either upon the return of a fighter to their country or their capture in another state. Prosecutions and the relevance of evidence are dependent, however, on the nature of judicial systems in a country. Third-party countries have an incentive to prosecute returning foreign fighters from Syria to try and ensure the safety of their citizens and the rehabilitation of the individual fighter. Addressing the challenges of foreign fighters, however, will require a hybrid approach to DDR. How can foreign fighters with the different conflict parties be incentivized to leave Syria and ideally return home? Foreign fighters are a significant barrier to the resolution and transition of the conflict. They will remain a barrier to attempts to reconstruct and transition the country.

The Syrian military and paramilitary groups

As previously detailed, the Syrian Armed Forces has been a means of social mobility for some Syrians, an instrument of repression for many, and a potent source of support for the regime. Integrated with the Ba'ath Party it has become two of the pillars of power of the Assad regime. Like the case studies explored in this research, the Syrian military has a long history of political intervention going back to the early days of independence in 1946. Over the years the Syrian military apparatus has become integrated into the politics and defense of the country. It has been a conduit for ambitious leaders to enter politics and paradoxically both the means of national defense and the source of internal repression and violence. These dual roles of the military allowed it to set agendas and perpetrate violence without civilian oversight.

Syrian society has been highly militarized over the past century through multiple coups and violent crackdowns. It has also become militarized through institutionalized violence. While the weakness of the police forces is one characteristic of this, one of the most potent examples is the enforcement of compulsory military service for nearly all Syrian men. This militarization has affected the perceived role of the military in society, with some seeing it, for example, as a means of social mobility. The militarization of society has affected Syrian society's pre-war tolerance for violence and ability to perpetrate violence. It has also affected the creation of gender identity and what is perceived to be masculine or feminine. In the past, for example, completing military conscription was seen as a rite of passage for young men.

Similar to the Indonesian Armed Forces, the Syrian army has conducted mass atrocities against civilians in both recent and historical incidents. People have been forcibly disappeared, while rape, sexual abuse, and other forms of torture continue to frequently occur, in addition to other social restrictions such as suspension of legal process, curfews, intimidation, and beatings. Since the start of the Syrian conflict, the Syrian Armed Forces has become significantly more corrupt, weak, and isolated from society as it has increasing farmed out its duties to paramilitary groups. This subcontracting of its military duties, however, has allowed the army to avoid many battle losses, decreasing its defection rates and bolstering its image.[298] While it is unlikely, therefore, that the Syrian Army will ever suffer such loses in direct combat that would force its officers to question their loyalty to the regime, the

298 Khaddour, *Strength in Weakness*.

question of how to reform the army through a political peace process remains.

Fundamentally, the different branches of the Syrian Armed Forces need to be reformed, ensuring greater civilian rule over the military and its depoliticization from party system development. The reform of the military is a gradual process that takes decades. It involves changes in the country's institutional framework and judicial system. It involves significant capacity building of both state institutions and civil society in exercising democratic civilian control over the military. And it involves adapting the training and internal reward and loyalty system of the different branches of the Syrian Armed Forces. Reforming the Syrian Armed Forces and addressing their complicity in crimes involves multiple forms of transitional justice from institutional changes and legislative approaches emphasizing trials, to reparations to society and rehabilitation of soldiers and their reinsertion into society. There are also multiple challenges to the extension of civilian rule over the military. In the case of Indonesia, for example, the reform of the military and its separation from a civilian police force weakened the latter's ability to enforce security. In Syria, the military's monopoly on violence and the implementation of martial law since 1968 has undermined the potency of civilian policing. This has resulted in the militarization of domestic security in Syria. Civil institutions that may have been overly dependent on the power of the military, such as the civilian police, need to be reinforced and supported in the future as part of the demilitarization of Syrian society.

The current system of incentives that encourages officers to support the regime must be changed. A system must be developed, instead, that incentivizes loyalty to a united national military institution and a political transition process. One path of reform is to enhance the role and powers of non-commissioned officers.[299] In contrast to commissioned officers, who are appointed by presidential decree, non-commissioned officers move up through the ranks of the armed forces. Increasing the professionalism of the Syrian Armed Forces through enhancing the status, training, and promotion opportunities for such rank and file leaders may help to depoliticize and weaken the nepotism endemic to the system. The privileged position of the army in politics and ethnic association must also be addressed if the Syrian Armed Forces are to transition into a professional defensive body for all the country and its citizens. Although a difficult pill to swallow, it is prudent in a transition process for the Syrian Armed Forces to retain its economic privileges. Grand concessions in peace negotiations whereby the hegemony of the military is retained in the pursuit of security or political transition must be avoided. The aim, in terms of military reform, should be to create enough time and space to incrementally institute small reforms removing the army from politics.

Aside from institutional reforms, crimes against humanity committed by the members of the Syrian Armed Forces must also be addressed. Assigning responsibility to such abuses is difficult due to the nature of most of the crimes, such as the indiscriminate use of aerial forces and also the power dynamics inherent in military institutions. For example, as a result of military conscription young men have been forcibly recruited or retained to fight on behalf of the Syrian Armed Forces, potentially against family and neighbors for a regime they neither support nor believe in. Prosecuting such individuals in mass trials alongside loyal regime soldiers is not just for either the victims or the conscripts. A one-size-fits-all framework for assigning blame is not expedient, prudent, or effective. Exploring the ways that institutions can be held responsible for their crimes is a challenging endeavor. The reality is that it is neither legally nor realistically possible to prosecute each individual member of the Armed Forces for possible crimes committed by the institutions. Particular crimes such as torture or rape may be individually prosecuted within the wider context of the conflict, but the resources to do so are significant and may overstretch those available to Syrians. More realistically, as reflected in international humanitarian law, those in positions of power guiding the policies and practices of the military are more likely to be prosecuted as they are recognized as being "most responsible." This has been the experience of a few countries such as Bosnia, Kosovo, and Colombia (with regard to paramilitary involvement).

Crimes committed by paramilitary groups, though hired by Syrian leaders and with the complicity of some army officials, are a different matter. There are an estimated 60,000 to 100,000 paramilitaries operating for the Assad regime in Syria through the conglomerate group National Defence Forces (NDF).[300] Under the umbrella of the NDF multiple other groups operate, often defending their local neighborhoods, though some members assist the Syrian Armed Forces in combat missions on the front lines. Paramilitary groups

299 Ibid.

300 Chris Kozak, *"An army in all corners": Assad's campaign strategy in Syria* (Washington, DC: Institute for the Study of War, April 2015), accessed April 29, 2016, http://goo.gl/o5p4LY, 12.

have been used in the past to carry out vicious crackdowns and security missions. Hafez al-Assad's brother Rifat al-Assad, for example, was the head of his own paramilitary organization, Saraya al-Difa (Defense Companies), which led the Hama massacre in 1982. The widespread use of paramilitary organizations has been one of the characteristics of the current conflict.

Paramilitary organizations in Syria have been responsible for some of the worst atrocities perpetrated against civilians, particularly in areas with mixed communities. There have been reports of ethnic cleansing, torture, sexual violence, and the murder of civilians including women and children. Some of their more fervent members such as Shabiha, a group of mostly Alawite men, had also participated in the suppression of early anti-Assad protests in 2011.[301] The regime's increasing reliance on various paramilitary groups represents not just a decentralization of government power but more dangerously an erosion of it with reports that the Syrian military has at times had to step in to try and prevent paramilitary groups committing further atrocities.[302] The paramilitary groups represent one of the most dangerous entities in the conflict. Those who fund them have an interest in ensuring their survival to secure political concessions whatever the outcome of the conflict. Those who participate as paramilitaries have an interest in their survival, their communities, and their privileged position.

The demobilization and prosecution of paramilitary groups differs from that of other conflict parties in Syria. Paramilitary groups do not fit as easily into the same transitional justice approaches as other non-state actors such as opposition groups, not only because of their tenuous relations with the Syrian regime but also because they are not necessarily motivated by political ideals. A number of paramilitary groups are comprised of criminal gangs and thugs. Similarly, transitional justice approaches to paramilitary groups must differ from jihadist groups such as Daesh and Jabhat Fateh al-Sham, again because they are guided by ethno-centric survival and most of their members are Syrian nationals who have committed crimes against their fellow countrymen. While on paper the crimes committed by paramilitaries may seem similar to that of other non-state actors in Syria, the motives and context in which they are acted matter greatly when conceptualizing transitional justice approaches.

Colombia represents one case study discussed in this paper that has grappled with the demands of justice, security, and peace when trying to address the legacy of its own paramilitary organizations. Like Syria, paramilitaries were used as a formidable apparatus by the Colombian government and military to fight the guerillas. Described by the Colombian government as *bandas criminales* (criminal gangs) or BACRIM, they soon began to pose a significant threat to even state security. Colombia has taken a legislative approach to addressing the crimes of paramilitaries. The controversial Justice and Peace Law in 2005 is the framework guiding the demobilization and punishment of paramilitaries in Colombia. This law stipulated that paramilitarism could not be considered a "political crime" but was a criminal act. The law also included other elements of transitional justice. To benefit from the law, paramilitaries would be required to confess all their crimes and to provide reparations to victims based on the entirety of their assets, both legal and illegal.[303] In exchange for demobilizing, only those paramilitaries found most responsible for atrocities, or the "worst" perpetrators, would receive guaranteed prison sentences of five to eight years.

The Justice and Peace Law has significantly influenced engagement with paramilitaries. Twenty-five of 37 active fronts in Colombia were demobilized, culminating in an estimated 30,000 paramilitaries giving up arms. It also led to the indictment of a number of high-level political and business figures for their involvement with the paramilitaries. This justice measure can be understood as a success in encouraging the demobilization of paramilitaries, imprisoning the most responsible such as leaders or individuals guilty of heinous crimes, and providing support and acknowledgement to victims. The Justice and Peace Law is not, however, without controversy. A significant weakness in the law was that it did not address victims of state agents who had collaborated with the paramilitaries. Critics also argue that while perpetrators enjoy reduced sentences and reintegration programs, the reparation process, which is centered on monetary compensation, is slow and ineffective. Poor management of data on individual paramilitaries has led to a failure to verify individual confessions and to fully dismantle criminal

301 Adrian Blomfield, "Syria: feared militia kills up to 21 people as protests continue," *The Telegraph*, March 27, 2011, accessed April 29, 2016, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/8409870/Syria-feared-militia-kills-up-to-21-people-as-protests-continue.html; Luke Harding and Julian Borger, "Houla killings: UN blames Syria troops and militia," *The Guardian*, August 16, 2012, accessed May 2, 2016, http://www.theguardian.com/world/2012/aug/15/houla-killings-un-blames-syria-troops.

302 *Syria Pro-Government Paramilitary Forces* (Atlanta, GA: The Carter Center, November 5, 2013), accessed May 2, 2016, http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/Pro-GovernmentParamilitaryForces.pdf.

303 Gómez Isa, *Justice, truth and reparation in the Colombian Peace Process.*

networks that sustained the groups long after their state sponsorship ended.[304]

The challenges of implementing transitional justice measures to address the crimes and impunity of paramilitaries is clearly illustrated in the case of Colombia. Colombian civil society, the international community, and the UNHCR all had input in the drafting of the law. Many civil society groups, however, later distanced themselves from the demobilization process because of the way the law was implemented. The law only allowed for a small number of perpetrators to be imprisoned receiving low sentences. Reparations for victims were not forthcoming enough, and state agents were excluded from prosecution. Addressing paramilitary crimes is difficult because of power asymmetry. As illustrated by the Colombian case, the gap between conceptualizing justice measures against paramilitaries and achieving their successful implementation is significant. Like Colombia, paramilitaries are Syrian nationals with a stake in their country. Impunity cannot be tolerated for the crimes of the paramilitaries, but neither can every victim and crime be vindicated. Paramilitaries need to be demobilized and face justice for their crimes, but this is often not possible without negotiation and compromise.

Syrian diaspora, refugees and displaced communities

One of the most defining characteristics of the Syrian conflict is the number of displaced people it has generated. Out of a pre-war population of over 20 million, more than 250,000 civilians are estimated to have been killed, 7.6 million have been internally displaced, and another 4.8 million are registered as refugees in neighboring countries, with thousands more in Europe.[305] This number may be even higher considering the number of undocumented Syrians currently in the region. Lebanon, for example, stopped allowing Syrians to register with UNHCR in May 2015 in an attempt to limit the number in the country.

Transitional justice initiatives are incredibly important in exploring durable solutions for addressing the needs and issues around refugee and displaced communities as both victims of conflict and agents of change can influence their country's security. Basic transitional justice measures in addressing displaced and refugee populations revolve largely around strengthening of security and reintegration measures. Security reforms include improving the real and perceived security of displaced and returning communities, amending the role and professionalism of the army, building up the capacity of the judicial system, and pursuing retributive justice through trials.

The goal of reintegration is to facilitate individuals and families' active participation in a community and a society again. Reintegration is a long-term and complex process that encompasses multiple levels. Economic reintegration, for example, can include property restitutions or compensation. Political integration can include efforts to make state institutions more accessible to returning populations by facilitating their participation and extending official acknowledgement of the abuses and experiences they have suffered. Finally, social integration is aimed at trying to mend trust and support tolerance between individuals, communities, and the state.

There are often tensions among different groups. Communities who stayed in the conflict area, those who were internally displaced, and those who left the country will all have different experiences and perspectives that are not necessarily mutually understood. Tensions will exist even within members of the same religious or ethnic community between those who stayed and those who left. Transitional justice measures that allow for sharing of perspectives can help address these tensions by acknowledging and validating the multiple experiences of conflict. These can be in the form, for example, of truth commissions, memorializations, or compensation for different categories of victims. Reintegration of displaced and refugee populations is just one aspect of transitional justice measures but one that is crucially important. The marginalization of displaced and refugee communities can cause instability by hindering social, economic, and political recovery and becoming outlying spoilers undermining development and peace.

Approaches to enacting traditional justice have generally focused on returning refugees and displaced people as recipients of transitional justice and not participants in developing it. For Syria, discussions around transitional justice need to be reconceived to look more broadly into who is included in and excluded from transitional justice. Analyzing who is included and excluded has an impact on the implementation of transitional justice measures.[306] For example, in

304 Amanda Lyons and Michael Reed-Hurtado, *Colombia: Impact of the Rome Statute and the International Criminal Court* (New York: International Center for Transitional Justice, January 1, 2010), accessed November 5, 2015, https://www.ictj.org/publication/colombia-impact-rome-statute-and-international-criminal-court.

305 Syrian Regional Refugee Response.

306 Susan Harris Rimmer, "Reconceiving refugees and internally displaced persons as transitional justice actors," *UNHCR New Issues in Refugee Research*, Research Paper No. 187, April 2010.

Aceh, Indonesia, there have been some compensation programs for victims of non-state combatants. However, while compensation for victims of physical violence from combatants has been forthcoming, critics claim it is impossible for victims of sexual violence to attain compensation. The absence of Acehnese women at the peace negotiation and a lack of consideration for them in designing transitional justice measures meant that sexual violence was not included as a category of conflict victims, making it difficult for them to get reparations. Surveying and including a variety of perspectives is central to designing and strengthening the implementation of inclusive and effective transitional justice processes that can meet the needs of affected populations. In Kenya, for example, the Truth, Justice, and Reconciliation Commission conducted interviews with refugees in camps to learn how such communities could be included in a transitional justice process to address post-election violence in 2007.[307] Similar practices can and should be pursued for Syrian refugees to learn their needs and issues and to help document the litany of conflict experiences. Returning Syrian refugee and displaced communities must be included into transitional justice measures as agents and participants in how such initiatives are conceived and enacted.

Due to the protracted nature of the conflict, however, many Syrian refugees are unlikely to return to Syria for years or even generations, especially those further afield in Europe. Even refugees who wish to return to their homeland may often find that it is not possible as they are no longer welcome. In some instances, this may be due to the government viewing returnees as excessive burdens on a recovering state or because of new communal boundaries with their villages and homes having been taken over by other ethnic or religious communities. All these dynamics mean that a significant number of Syrians will not be immediately returning to their homeland. Displaced Syrians need to be considered beyond the confines as potential "returnees." These Syrians are contributing to the establishment of a new entity commonly known as a diaspora, a constantly evolving concept. The conceptualization of the diaspora role in transitional justice should therefore be expanded.

Diasporas can be a potent force in pursuing transitional justice. Their war experiences of forced displacement and exile can add another perspective to the impact of the Syrian conflict. In Liberia, for example, transitional justice measures were extended to the diaspora. The Liberian Truth and Reconciliation Commission held outreach events, meetings, and public hearings with the Liberian diaspora in neighboring and overseas countries to learn their experiences. This allowed people who were unable to return to Liberia to nonetheless share their experiences and promote dialogue within the diaspora.[308] The Syrian diaspora is also an additional source of valuable evidence and documentation of crimes committed by conflict parties that can strengthen prosecution attempts. In the case of Bosnia, for example, members of the diaspora travelled to the International Criminal Tribunal for Yugoslavia (ICTY) to serve as witnesses. Their evidence greatly contributed to the narrative that emerged from the proceedings. Including members of the Syrian diaspora into transitional justice measures can not only strengthen the effectiveness of such initiatives but also extend support to this often overlooked constituency. Many members of the diaspora are often unable for financial, emotional, or physical reasons to return to their country and participate in transitional justice measures there. Expanding the conceptualization of where and who can participate in transitional justice also extends the opportunity for these people to acknowledge their war experiences and provide some comfort.

Not only are diaspora communities passive recipients of transitional justice but they can also be agents of change. A number of diaspora populations have been active in lobbying for justice through universal jurisdiction. The principle of universal jurisdiction allows third party states to prosecute alleged offenders regardless of the accused's nationality or where the crimes were committed. It is meant to prevent impunity and support the prosecution and punishment of perpetrators of war crimes. In order to implement the principle, countries must establish universal jurisdiction in their national legislation.[309] The Chilean diaspora, for example, was crucial in pressuring European governments to prosecute General Pinochet for the atrocities he had committed during his dictatorship between 1973 and 1981. Before leaving office, General Pinochet secured absolute legal impunity for himself despite Chilean civil society working tirelessly to document the forced disappearances, torture, and killings orchestrated by his regime. In 1996, lawyers for victims filed criminal complaints against General Pinochet in Spain, which allowed the case to proceed using, for the

307 Huma Haider, "Transnational Transitional Justice and Reconciliation: The Participation of Conflict-generated Diaspora in Addressing the Legacy of Mass Violence," *Journal of Refugee Studies* 27, no. 2 (2014).

308 Ibid.

309 "Universal jurisdiction over war crimes," International Committee of the Red Cross, March 2014, accessed May 5, 2016, https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf.

first time in history, the principle of universal jurisdiction.[310] General Pinochet was arrested by British police in 1998 on an arrest warrant issued by Spanish courts, and his "immunity" as a former state leader was annulled. Although Pinochet eventually was released without trial in 2000 due to medical reasons, this event undermined the perceived immunity of former dictators. In recent years, universal jurisdiction has been used by states such as the Netherlands, which has pursued cases against Afghan asylum-seekers charged with committing torture during the Afghan civil war in the 1980s, and against Rwandans charged with, among other things, crimes of genocide in 1994 in Rwanda.[311] Universal jurisdiction has opened up opportunities for exiled communities, offering possibilities for justice, especially when it is not possible at home.

Finally, the diaspora also has a role in raising awareness of crimes committed in their homeland and advocating for justice. For example, in France the Association of Rwandan Victims was established by members of the Rwandan diaspora and its purpose is to bring criminal suits against alleged genocide perpetrators in France.[312] Such endeavors are especially relevant if significant time has passed with impunity for perpetrators since the alleged crimes.

There are, however, often some significant barriers to diaspora populations' effectively engaging in transitional justice measures. This includes divisions within the diaspora around war crimes and responsibility and a disconnection between the diaspora and the homeland. These dynamics can result, on the one hand, in a proliferation of competing associations that can lessen the strength of cohesive complaints and, on the other, the delegitimization of the diaspora to their homeland communities. Among the most important determinants for a diaspora's ability to influence transitional justice measures is the time between the war crimes and the pursuit of justice. This affects the relevance of documentation and certain legal jurisdictions. Time also influences the relevance of the diaspora to home communities and whether they retain strong links and therefore legitimacy in their countries. And finally organizational capacity is a determinant in whether the diaspora can effectively and intelligently lobby and raise awareness on issues related to transitional justice. Due to how new most of the Syrian diaspora is, these are not yet significant problems they currently face. They still retain direct links to their homeland and communities. NGOs and organizations are already being established. Syrian diaspora groups should create transnational networks across the region and inside Syria with countrymen and across other diaspora groups to increase the potency of their advocacy and lobbying.

Gender

An important but often sidelined framework through which officials, leaders, policy makers, and practitioners must view the past, present, and future is gender. Though there has been a growing emphasis on gender in transitional justice discourse, understanding the different experiences and realities lived by men and women, boys and girls, remains superficial in most international and national responses. War is universally cruel, but it treats gender differently. For example, comparatively inconvenient issues, such as menstruation, can become serious challenges to women if they live under siege or in a camp where sanitary supplies are unavailable; if there is no privacy or bathrooms; and if social taboos around menstruation force women to change their schedules and behavior.[313] The experience of a Kurdish woman currently living in the Domiz refugee camp is not the same as that of a young Assyrian Christian man drawn into the militias. While it is difficult to specify the myriad realities of women and men, research does indicate some general gendered experiences of Syrians whose lives have been impacted and disrupted by the war.

Men face multiple forms of overt violence and immense social pressure. Because men comprise the majority of soldiers and fighters, they are on the front lines of battle and suffer a greater degree from direct violent injuries and killings from combat. In an early analysis of 60,000 documented deaths, from the onset of the war through November 2013, the UN reported that 80% of the documented victims were male.[314] Not all men fight willingly. For example, many youth have been forced to perform or extend their compulsory military service as

310 *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad* (New York: Human Rights Watch, November 1, 1998), accessed May 3, 2016, https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad.

311 Cedric Ryngaert, "Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan cases (2007)," *Hague Justice Journal* 2 (2007).

312 *Cambodian Diaspora Communities in Transitional Justice* (New York: International Center for Transitional Justice, March 2008), accessed May 3, 20016, https://www.ictj.org/publication/cambodian-diaspora-communities-transitional-justice-briefing-paper.

313 ""It happens every month": Refugee women talk about managing their periods," International Rescue Committee, May 28, 2015, accessed May 8, 2016, http://www.rescue.org/blog/it-happens-every-month-refugee-women-talk-about-managing-their-periods.

314 "Nearly 93,000 people killed in 'vicious' Syria conflict – UN human rights chief," UN News Center, June 13, 2013, accessed May 3, 2016, http://www.un.org/apps/news/story.asp?NewsID=45162#.Vy_L8oQrLIV.

backup forces for the Syrian army. Out of fear, however, many young men have fled the country or gone into hiding. Whenever they go through checkpoints, they face the risk of being caught by security personnel. Other men and boys have been pulled into fighting to protect their communities, or they have been forcibly recruited into militias. They have become prisoners of war and face cruel forms of torture, punishment, and sexual violence. In neighboring countries young men have faced discrimination, police harassment, and deportation.

Masculine norms are arguably patriarchal, to the detriment of both men and women. Syrian men traumatized from the conflict may not be able to talk about their feelings for fear of feeling emasculated. Similarly, men who may have suffered sexual violence or rape in Syria are silenced and do not have the social or cultural space to express their experiences. Men and boys also carry unique socialized responsibilities. In many contexts throughout Syria, the protection, honor, and the safety of their families are deeply ascribed. For some, the social control of women may be a strong cultural or religious expectation. Additionally, militarized or nationalistic notions of masculinity might valorize domination and violence. The dilemmas men face such as fighting or fleeing to protect their loved ones carry immense psychological and social burden. These same roles and sense of duty can also become indirectly undermined when women in their families and communities experience sexual and gender-based violence. Men and boys living in besieged cities, IDP, and refugee camps or scattered as diaspora throughout the region and Europe are largely unemployed. They may experience or be perceived as having failed their duty to their families. A by-product of their frustrated roles is evidenced in the escalating prevalence of intimate partner violence (IPV) in refugee camps in Lebanon and Jordon.[315] The losses and changes related to gender roles are aggravated by the fact that households are socially isolated, suffer tremendous financial stress, and lack privacy due to overcrowding.[316] Not only do these dynamics put women at greater risk, men who feel unable to meet their socially prescribed roles of being a provider are more susceptible to being recruited into armed groups.[317]

Women and girls caught up in the war in Syria face different challenges. They have played a variety of roles as combatants, ardent activists, and perpetrators. Women and girls have also experienced life in besieged settings, or have become IDPs in Syria or refugees in camps and cities in foreign countries. Because traditional structures and cultural norms have broken down under the strain of war, in some areas of Syria, women have become increasingly involved at the local level, in economic, social, and political spheres.[318] They have had to become breadwinners for their families as the men are either unable to find work or have been killed. They have also participated in politics through local councils in Syria. The diverse experiences of women in Syria's conflict are an understudied area, with most research focusing on their victimization or experiences as refugees. Yet, analysis should be given to the ways in which women have exhibited leadership and resilience during the war because these attributes and experiences can serve to better position them in key mainstreaming strategies for development and transitional justice.

Although women have played multiple roles during the war, research indicates that public space for women has shrunk due to militarized environments. The nature of Syrian women's social positions continually shifts. Often, Syrian women, both inside the country and as refugees in neighboring states, do not venture out alone because of insecurity and the threat of violence. In Islamist-held areas inside Syria, for example, a woman must be accompanied by a male relative if she is outside.[319] In general Syrian women's movements are strictly monitored, and the focus of their attention has understandably shifted to protecting their children and families. In many of these contexts, their prescribed gender roles serve as a foundation for their vulnerability. Women are more vulnerable in their role as caregivers, impeding their mobility if they have to suddenly flee. Those who have been displaced face greater social and economic risk due to the loss of access to sources of livelihoods as well as to basic services. Refugees in urban settings face unemploy-

315 Roula El-Masri et al, *Shifting sands: Changing gender roles among refugees in Lebanon. Joint Research Report – Summary 2013* (Oxford: Oxfam, September 2013), accessed May 4, 2016, https://www.oxfam.org/en/research/shifting-sands.

316 *Unpacking gender: The humanitarian response to the Syrian refugee crisis in Jordan* (New York: Women's Refugee Commission, March 12, 2014), accessed May 7, 2016, https://www.womensrefugeecommission.org/resources/gender-issues/985-unpacking-gender-the-humanitarian-response-to-the-syrian-refugee-crisis-in-jordan.

317 *Masculinities, conflict, and peacebuilding: Perspectives on men through a gender lens* (London: Saferworld, November 2014), accessed May 8, 2016, http://www.saferworld.org.uk/resources/view-resource/862-masculinities-conflict-and-peacebuilding-perspectives-on-men-through-a-gender-lens.

318 *Four Years in Crisis: Women's Participation in Northwestern Syria* (Dubai: Ark Group DMCC, June 2015), accessed July 2015, http://arkgroupdmcc.com/four-years-crisis/.

319 Ibid.

ment, high rentals, discrimination, and overcrowded housing conditions. Limited work opportunity and a lack of school options for their children only contribute to their growing sense of hopelessness, isolation, and anxiety.

Expansive research indicates that the types of violence specific to displaced women in general include mass rape, military sexual slavery, trafficking, forced pregnancy, gang rape, sexual and physical assault, and resurgence of female genital mutilation, to name just a few.[320] General and ongoing security issues related to wartime violence for Syrian women, including pervasive harassment at checkpoints, physical and systematic sexual violence, transactional or survival sex, forced early marriages, slavery, and restricted freedom of movement, have been acute and widespread both inside Syria and among Syrian communities.[321] The effects of this violence are further problematized by a lack of access to essential services such as healthcare for sexual assault, rape, and reproductive support inside Syria and inadequate access in host countries.

Women and men experience and remember conflict and the multiple levels of direct and indirect violence it brings differently. To be effective, transitional justice must therefore treat the gendered experiences of war differently, too. Women and men of all ages have suffered affronts to their physical, cultural, and sexual integrity—and most of them have not been able to process the trauma effectively. Sexual and gender-based violence (SGBV) has been replete throughout the experiences of Syrians. Multiple strategies and services must be coordinated to mitigate psychological and other health-related sequelae. Young Syrian girls experience double marginalization due to the intersectionality of gender and age. Fear of sexual exploitation and violence contributes to early marriages as parents hope the protection of a husband will keep their daughters safer.[322] A high percentage of people returning to Syria will carry with them unhealed wounds that will damage the prospects for peace if not effectively treated. Ensuring that immediate, widespread recovery and rehabilitation programs are enacted will engender trust and confidence in communities. Healthcare outreach, trained staff, appropriate medical supplies, and strategies on how to best identify survivors must be enacted immediately. Protocols for the documentation of medical evidence and mechanisms for referrals must be in place. Key services include health, psychosocial services and counseling, security and police, and engagement with traditional and non-judicial legal context. Acute focus must be given to culturally appropriate and sensitive services—and that they are provided with the utmost confidentiality.

Ideally, a gendered approach to transitional justice is broad in scope with a transformative vision. If Syria's future is to be rights-based and inclusive, men and women's participation and leadership must be ensured in the design and implementation of all aspects of the framework. The integration and incorporation of their perspectives and experiences is critical to strengthening the effectiveness of transitional justice measures. The experiences in Aceh, Indonesia, illustrate that the failure to include gendered perspectives into transitional justice initiatives resulted in victims of SGBV being excluded from any forms of support despite the endemic nature of such crimes. In Colombia, women have been both victims and perpetrators as leaders of guerillas and paramilitary groups. In the chauvinistic culture of Colombia, former female fighters often lose some of the status that they gained through military rank and face mental health challenges when they demobilize and reintegrate into civilian life. Gender sensitive frameworks that recognize and address such challenges are critical for the success of their reintegration into society.

There are a variety of international laws and resolutions in place that support gender sensitivity and gendered approaches, particularly the inclusion of women into transitional justice. For example, Security Council Resolution 1325 (2000) and subsequent resolutions on Women, Peace, and Security, have identified the need to ensure women's involvement in every aspect of post-conflict recovery and peacebuilding. All nation-states are legally obliged to take responsibility in four critical areas: the protection of women and girls during conflict; the participation of women in decision making in relation to prevention, management, and resolution of conflict; inclusion of gender perspectives in conflict analysis and trainings for civilian and military personnel involved in peacekeeping; and gender mainstreaming in UN implementation and reporting. Additionally, specific attention must be given to the redress for conflict-related abuses to women's rights.

320 *"We Just Keep Silent": A report on gender-based violence among Syrian refugees in the Kurdistan Region of Iraq* (New York: UN Women, April 27, 2014), accessed May 1, 2016, http://uniraq.org/images/documents/We%20Just%20Keep%20Silent%20final%20English.pdf.

321 *Syria women & girls: Fleeing death, facing ongoing threats and humiliation* (New York: International Rescue Committee, August, 2012), accessed April 28, 2016, http://www.alnap.org/resource/9166.

322 *Regional situation report for Syria crisis* (New York: United Nations Population Fund, September 2014), accessed March 31, 2016, https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA%20Regional%20SitRep%201%20-%2030%20September%202014%20%20_%2025%20.pdf.

The call for accessible, innovative, and effective strategies to ensure an inclusive process is founded on the necessity of a full and equal participation of women in the reconciliation and reconstruction process for a stable and peaceful society. Given the diverse ethnic, political, linguistic, and religious variance within Syria, these strategies will not only need to be culturally specific but also sensitive to the varied gender traditions and norms within Syrian communities.

The different needs and interests of women and men should not be "in addition to" but rather fully woven throughout all peace agreements, structures, institutional reforms, and processes. To date, women have been typically excluded from formalized peace processes. According to UN Women 2012,[323] only one in 40 peace negotiations had a woman present, and 3% of signatories to peace agreements have been women. Colombia represents one of the few cases of women participating at multiple levels of the peace negotiations with FARC as direct participants, consultants, and victims. A recent report[324] analyzing the impact of women in 40 peace processes globally found that in cases where women's groups were able to exert a strong influence on negotiations, the prospect of reaching a final agreement were much higher than where women's influence was weak. Women's participation could range from direct participation, to observer status and consultant, all the way to mass action. What makes a difference is not counting the number of women in a peace process but incorporating women into the process. Even though UNSCR 1325 was adopted nearly 16 years ago, women have been largely absent from high-level discussions. Their absence may be a result of unequal representation in government positions, civil society, and business, as well as a history of restrictive and discriminatory laws and customary practices. There has been a long history of active women's groups in Syria prior to the war. Despite pressure to stymie collective action though repressive control, a lack of funding, and a reorientation of priorities such as basic survival, women have continued to work as peace activists in Syria.[325] Identifying and assembling a wide range of influential (formal and informal) leaders, along with parallel capacity building and empowerment, will strengthen and secure the future inclusion and active participation of women within transitional processes. It will also better ensure that the experiences, interests, and needs of women and men are addressed.

CONCLUSION

In Syria, some preparatory steps in supporting transitional justice have begun. Documentation, an essential aspect of justice procedures, whether that be through courts, reparations, truth commissions, or memorializations, is already underway. A number of Syrian activists and organizations have been documenting the atrocities and violence being carried out in Syria by the multiple conflict parties since 2011. Local reconciliation efforts have been initiated in some areas. Many of these efforts, however, are being carried out by the Syrian regime's Ministry for National Reconciliation Affairs, which was established in 2013. These "reconciliation" efforts are usually in areas that have been under siege by the regime for a long time and capitulate due to the pressure. It is incredibly difficult to initiate any form of peacebuilding or transitional justice mechanisms in besieged or occupied areas. For this reason, the few legitimate transitional justice initiatives or peacebuilding efforts in Syria have been in areas when they have been free of regime control such Al-Hasaka in the North, Eastern Ghouta in the South, or in areas around Idlib in the Northwest. Projects in these respective areas include mediation efforts by women and programs promoting the resolution of conflicts and elimination of violence (Al-Hasaka), efforts to address sexual assault survivors and witnesses (though often from another district due to the sensitivity) (Eastern Ghouta), and discussions on democracy, transitional justice, and women's political participation (Idlib).

Transitional justice constitutes the fluid space between a violent past and a sustained, peaceful future. During this critical phase, multiple actors and a dense array of needs and interests sit next to the realities and pragmatic demands within any post-war environment. Calls for multiple expressions of justice converge at the same time. Mass atrocity and gross human rights violations have occurred; impunity will not be tolerated. At the same time, infrastructures have been destroyed, economic resources have long been depleted, and diaspora scattered throughout the four corners of the

323 *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women, October 2012), accessed May 3, 2016, http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-03a-womenpeacenegotiations-en.pdf.

324 Thania Paffenholz et al., *Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations* (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies), UN Women, April 2016), accessed April 15, 2016, http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf?utm_source=Core+contacts&utm_campaign=1cd2ce6fd9-.

325 *Peacebuilding defines our future now: A study of women's peace activism in Syria* (Istanbul: Badael Foundation, 2015), accessed November 2015, http://badael.org/wp-content/uploads/2015/10/Syria_october22.pdf.

earth have been waiting to return. Basic questions such as *Where to begin?*, *How to begin?*, and *What to do?* seem trivial at best. And yet, this space, this opportunity, and all the potential within it must be recognized and approached with near reverence. The potential to do more harm and the potential to thread a cycle of violence back into a future social fabric is exceptionally high. Instead of justice transforming the past, it can become complicit with it. The complexity within any transitional phase is what adds to its mystery. Processes are tediously technical yet they demand fluidity and intuition, too. It is for these reasons that deliberate analysis and intentional frameworks must be incorporated from the get-go. Without wisdom and foresight, the systemic patterns from yesteryear will inevitably resurface alongside unimagined by-products from simplistically conceived strategies.

All of Syrian society has experienced multiple traumatic events, tremendous loss, and a complete upheaval of their lives. At the individual, communal, and collective levels, psychological, emotional, and spiritual recovery will take time. Critical infrastructures have been destroyed, and as some of the refugees and diaspora begin to make their way back to what was once considered "home," many returnees will face complete rubble. Water and food may be scarce, health and government services will be very limited, and in many places there will not be a fully functioning economic sector. Economic and social recovery will take time, but the lives of these displaced people have already been put on hold for six years. They will return having experienced multiple traumas and with high expectations of the government and international donors. Frustrations and despair may quickly mount, which could become problematic and reignite smoldering tensions. Economic and social stability are foundational for human security, and these fundamental needs must be addressed as a very basic expression of justice before more formalized procedures related to crimes committed during the war are enacted.

For Syria to move well into its future, the need to align relief and development efforts as part of transitional justice strategies is critical. A concentrated effort to hold perpetrators of war crimes accountable or to instigate institutional reform will not be enough. Instead, a coherent, strategic, and multi-layered set of frameworks will need to be coordinated, harmonized, and sequenced to better ensure a sustained and peaceful future. Generations of Syrians have been divided by state oppression, militarization, and violence. Because of the war, ideologies have become even further polarized, and now citizens face dire humanitarian conditions and economic hardship. Human security and basic needs must be met, while at the same time economic opportunity, democratic governance and rule of law, social justice, and accountability must emerge. For the impact of Syria's history and recent civil war to be transformed, ensuring justice, human rights, and human security for all is an imperative. Peaceful coexistence, however, will not occur without national dialogue and the ability of civil society to tolerate multiple perspectives and narratives. One dominant narrative cannot encapsulate the history of Syria or adequately express its civil war. Transitional justice efforts will need to speak to all of these issues simultaneously, which is why international, national, and local level initiatives must be choreographed across multiple sectors and through a variety of agencies.

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SABANCI ÜNİVERSİTESİ KAMPUSU
ISTANBUL POLICY CENTER
AT SABANCI UNIVERSITY

ISBN: 978-605-9178-75-4

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