

# APPROACHES TO CRIMINAL RESPONSIBILITY OF ECONOMIC ACTORS IN TRANSITIONAL JUSTICE PROCESSES: LESSONS FROM COLOMBIA

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Despite increasing awareness that economic actors can play a significant role in international crimes committed during armed conflicts, little international experience on how to achieve their criminal accountability in transitional justice processes exists. The innovative approach taken by Colombia in the Final Peace Agreement between the Colombian government and the FARC-EP in 2016 provides a fascinating case for analysis. In sharp contrast with the Colombian Justice and Peace process, which started in 2005, the Final Peace Agreement included economic actors in the remit of the Special Jurisdiction for Peace, a criminal tribunal specifically created to investigate crimes committed during the Colombian internal armed conflict. This Article provides a detailed examination of why and how these actors were included in the remit of the Special Jurisdiction for Peace, the contentious nature of this endeavour, and the lessons that can be learned from this for future transitional justice processes with regard to achieving criminal accountability of economic actors.

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## I. INTRODUCTION

Transitional justice—that is “processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation,”<sup>1</sup>—has historically tended to focus primarily on the responsibility of state actors.<sup>2</sup> Nevertheless, the fact that a whole range of other actors might play an important role in these abuses and violations, including international crimes, was already recognized in the Nuremberg and post-Nuremberg trials against actors such as the owners of important factories<sup>3</sup> and some leading bankers<sup>4</sup>

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1. U.N. Secretary-General, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, 2, U.N. Doc. ST/SG(09)/A652 (Mar. 2010).

2. Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 15, U.N. Doc. A/HRC/21/46 (Aug. 9, 2012) (“[M]easures that emerged were adopted as a response to a particular kind of violation, namely, those associated with the abusive exercise of State power through precisely those institutions.”). See Naomi Roht-Arriaza, *The Belated Centrality of the Economic Dimension in Transitional Justice: A Case Study*, in PINOCHET’S ECONOMIC ACCOMPLICES, 21, 23, 26 (Juan Pablo Bohoslavsky, Karinna Fernández, Sebastián Smart eds., 2020); see also Clara Sandoval et al., *Linking Transitional Justice and Corporate Accountability*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 9, 26 (Sabine Michalowski ed., 2013).

3. See, e.g., U.S. v. Flick, Vol. VI, 1217–23 (Nuremberg Military Tribunals Under Control Council Law No.10, 1952) (holding defendants Flick and Steinbrink liable because they had contributed funds to the SS); The Krupp Case, Vol. IX, Judgment, 1438 (Nuremberg Military Tribunals Under Control Council Law No.10, Jul. 31, 1948) (holding defendant Krupp, who used slave labor, criminally liable); Trial of Bruno Tesch and Two Others (“The Zyklon B Case”), Law Reports of Trials of War Criminals Case No. 9, 93-103 (British Military Court Mar. 1946) (holding liable Tesch, who produced and sold poison gas and provided instruction regarding its use for killing concentration camp inmates for business reasons and profit).

4. See, e.g., United States v. von Weizsaecker (“The Ministries Case”), Judgment B, 609 (Nuremberg Military Tribunals Under Control Council Law No. 10, Apr. 1949) (holding Puhl liable, who had been Deputy President of the German Reichsbank during the Third Reich and played an active role in arranging “for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps.” Puhl had, *inter alia*, been actively involved in organizing recasting the gold from the gold teeth and crowns of concentration camp inmates.).

for their role in Nazi crimes.<sup>5</sup> Since then, many truth commissions<sup>6</sup> have investigated and documented the involvement of economic actors<sup>7</sup> in crimes or human rights violations committed during armed conflict or military dictatorships. These commissions have often served to unravel the often complex alliances and interests behind conflict and oppression related violence.<sup>8</sup> Recently, for example, the Colombian Truth Commission emphasized in its final report that the main actors responsible for gross violations of human rights and international humanitarian law committed in the Colombian armed conflict were “the Colombian state, paramilitary groups, the guerrillas, drug traffickers, armed groups after demobilization, and the so-called third-party civilians,”<sup>9</sup> including economic actors.<sup>10</sup> However, most truth

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5. See, e.g., 4 Trial of Major German War Criminals, Judgment 448 (International Military Tribunal, Sept. 30, 1946) (“Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and businessmen.”). For in-depth discussions of the industrialist trials, see, e.g., Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 100, 113–14, 158–59 (2002); Florian Jessberger, *On the Origins of Individual Criminal Responsibility under Int’l Law for Business Activity*, 8 J. INT. CRIM. JUST. 783, 794–95 (2010); Leigh A. Payne et al., *International Pressure for Corporate Accountability*, in TRANSITIONAL JUSTICE FROM BELOW—DEPLOYING ARCHIMEDES’ LEVER 61, 64–72 (2020).

6. For an excellent overview and analysis, see Leigh A. Payne et al. *Truth-Telling from Below*, in TRANSITIONAL JUSTICE FROM BELOW—DEPLOYING ARCHIMEDES’ LEVER, 165–213 (2020).

7. In this Article, the term “economic actors” will be used for those whose involvement in grave human rights violations and international crimes in periods of conflict or repression was linked to their economic activities, such as business directors or large landowners. See Sabine Michalowski et al., *Centro de Estudios de Derecho Justicia y Sociedad, Dejusticia, Entre Coacción y Colaboración – Verdad Judicial, Actores Económicos y el Conflicto Armado Colombiano*, 19 (2018) (discussing the important role played by economic actors in the armed conflict and the limited jurisdiction of Justice & Peace tribunals with respect to them).

8. See, e.g., 4 S. AFR. TRUTH AND RECONCILIATION COMM’N, FINAL REPORT, ch. 1–6, (Oct. 29, 1998) (examining the role businesses might have played in apartheid and violations of human rights); 2 REPUBLIC OF LIBER. TRUTH AND RECONCILIATION COMM’N (June 30, 2009) (detailing economic crimes and lack of accountability during conflict periods in Liberia).

9. Comisión para el Esclarecimiento de la Verdad [CEV], *la Convivencia y la No Repetición, Hay Futuro si hay verdad, Informe Final, Hallazgos y Recomendaciones*, 136 (CEV 2022).

10. Citing a list produced by Colombia’s Attorney General’s Office, the truth commission report states that “[i]n that list, there were many names of

commissions, including Colombia's, do not have the mandate to determine criminal responsibilities, and this creates an impunity gap.<sup>11</sup> Unless their work is complemented by other transitional justice mechanisms to ensure that criminal offenses documented by a truth commission can be investigated and potentially punished, this disparity will persist.

Indeed, criminal justice is regarded as an important pillar of transitional justice<sup>12</sup> and widely regarded as an integral part of States' compliance with their international obligation to investigate, prosecute, and punish the perpetrators of certain human rights violations and international crimes.<sup>13</sup> This is the case whether they were committed by state actors, members of armed groups, or third-party civilians, which includes economic actors.<sup>14</sup> This, in turn, is an

businesspeople, tradespeople, ... cattle farmers or landowners who allegedly sponsored the armed conflict." *Id.* at 549–55.

11. See also Inter-Am. Comm'n H. R., Informe sobre Empresas y Derechos Humanos: Estándares Interamericanos [Report on Business and Human Rights: Inter-American Standards], OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19, ¶ 209 (Nov. 1, 2019), [https://www.oas.org/en/iachr/reports/pdfs/Business\\_Human\\_Rights\\_Inte\\_Americana\\_Standards.pdf](https://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_Americana_Standards.pdf) [<https://perma.cc/9RA9-XA6A>].

12. Pablo de Greiff, (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014); Fabian Salvioli, (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. Doc. A/HRC/48/60 (Jul. 9, 2021).

13. The exact scope and content of this obligation are highly contested. See, e.g., TRANSITIONAL JUST. INST., THE BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY (2013); Louise Mallinder, *The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws*, 65 INT'L & COMP. L.Q. 645, 654 (2016); PAUL SEILS, SQUARING COLOMBIA'S CIRCLE: THE OBJECTIVES OF PUNISHMENT AND THE PURSUIT OF PEACE (Int'l Center for Transitional Just. 2015); Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?*, 110 AM. J. INT'L L. UNBOUND, 172–77 (2016); Courtney Hillebrecht et al., *The Judicialization of Peace*, 59 HARV. INT'L L.J. 279 (2018); Allen Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 211 (2016). For the Colombian Constitutional Court's interpretation of Colombia's international obligations, see Corte Constitucional [Constitutional Court] [C.C.], Sentencia C-579 de 2013, M. P. Jorge Ignacio Pretelt Chaljub.

14. Hum. Rts. Comm'n, *General Comment No. 31*, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add/13 (May 26, 2004); *Velasquez Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (Jul. 29, 1988); *Caso de la Masacre de Pueblo Bello v. Colombia*, Judgment, Inter-Am. Ct. H.R., ¶ 145 (Jan. 31, 2006); INTER-AM. COMM'N H.R., *supra* note 11 at ¶¶ 58, 129, 211, 214–16.

important aspect of the satisfaction of victims' rights to truth, justice, and reparation.<sup>15</sup> Filling this gap and achieving criminal justice for victims has proved difficult, and successful outcomes in the form of an economic actor's criminal conviction is rare.<sup>16</sup>

A novel attempt to address this impunity can be found in the Final Peace Agreement between the Colombian government and the FARC-EP, which was signed in 2016 to put an end to more than 50 years of civil war.<sup>17</sup> One component of the complex transitional justice process that the Peace Agreement designed is a specially created criminal justice mechanism, the Special Jurisdiction for Peace (SJP).<sup>18</sup> The competence of the SJP is not limited to those who directly took part in the armed combat, that is, the guerrilla fighters and the state militaries. Its jurisdiction also extends to state actors who were not members of the Colombian Armed Forces and to so-called third-party civilians,<sup>19</sup> a category that includes economic actors.<sup>20</sup>

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15. See U.N. Working Grp. on Bus. & Hum. Rts., *2020 Rep. to the UN General Assembly, Business, Human Rights and Conflict-affected Regions: Towards Heightened Action*, ¶ 81, U.N. Doc. A/75/212 (Jul. 21, 2020) (discussing how victims can seek justice through criminal prosecution of economic actors); see also Rep. of the H.R. Council, Working Group on the Issue of and Transnational Corporations and Other Business Enterprises, *Implementing the Third Pillar: Lessons from Transitional Justice Guidance by the Working Group*, ¶, Annex, ¶ 22, U.N. Doc. A/HRC/50/40/Add.4 (June 8, 2022).

16. Leigh A. Payne et al., *Introduction: Transitional Justice and Corporate Accountability*, in TRANSITIONAL JUSTICE FROM BELOW—DEPLOYING ARCHIMEDES' LEVER 1, 9 (2020) ("Compared to an assumed level of complicity by economic actors in past human rights violations, the total number of judicial actions initiated, and the small number of outcomes, impunity seems to be a better description than accountability.").

17. Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [Final Agreement for the Termination of Conflict and the Construction of Stable and Lasting Peace], FARC-EP, Gobierno de Colombia (Dec. 11, 2016), [https://www.cancilleria.gov.co/sites/default/files/Fotos2016/12.11\\_1.2016nuevoacuerdofinal.pdf](https://www.cancilleria.gov.co/sites/default/files/Fotos2016/12.11_1.2016nuevoacuerdofinal.pdf) [<https://perma.cc/ZH3A-ZQLA>] [hereinafter *Final Peace Agreement*].

18. The SJP offers reduced criminal sanctions to those with the highest responsibility for the most serious international crimes, as well as amnesties, waivers of criminal prosecution, or the suspension of already existing sanctions in all other cases, in exchange for contributions to truth, reparation, and guarantees of non-recurrence. Ley 1957 de 2019 [Law 1957 de 2019], at 5–6 (Colom. June 6, 2019).

19. This stands in stark contrast to the approach adopted in the Colombian Justice and Peace process, which only addressed the responsibility of demobilized members of illegal armed groups, as will be explained *infra* in Section II.A.

20. See *Final Peace Agreement*, *supra* note 17, at 149.

Prior to the Peace Agreement that created the SJP, worldwide attempts to achieve criminal accountability of economic actors in transitional justice contexts primarily took the form of criminal trials either in international tribunals<sup>21</sup> or national criminal courts, such as those of Argentina,<sup>22</sup> Chile,<sup>23</sup> Colombia,<sup>24</sup> the Netherlands,<sup>25</sup> and

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21. See, e.g., Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Trial Judgment (Int'l Crim. Trib. Rwanda Dec. 3, 2003); Prosecutor v. Musema, Case No. ICTR-96-13-1, Amended Indictment (Int'l Crim. Trib. Rwanda Apr. 29, 1999). For a discussion of these trials, see, e.g., Payne et al., *supra* note 5, at 75–79.

22. Tribunal Oral en lo Criminal Federal de la Capital Provincial de Salta [National Oral Tribunal in Criminal Matters of the Provincial Capital of Salta], “Causa v. Marcos Jacobo Levin, Víctor Hugo Bocos, Víctor Almirón y Víctor Cardoz” (Arg. Mar. 18, 2016); Cámara Federal de Casación Penal [C.N.C.P.] [National Court of Appeal on Criminal Matters], sala 3, “Almirón, Víctor Hugo y otros *s/* recurso de casación” (Arg. Oct. 4, 2017); Tribunal Oral en lo Criminal Federal No. 1 de San Martín [National Oral Tribunal in Criminal Matters No. 1 of San Martín], “Pedro Muller y otros” (“Ford” case) (Arg. Dec. 11, 2018).

23. Corte Suprema [C.S.J.] [Supreme Court], “Caso Paine episodio Collipeumo,” Rol de la causa:1568-2017 (Chile Nov. 16, 2017).

24. Juzgado Quinto Penal del Circuito Especializado de Medellín [Fifth Criminal Court of the Specialized Circuit of Medellín], Gabriel Jaime Sierra Moreno y otros (“Urapalma”) (Colom. Oct. 30, 2014). For a detailed analysis of this case, see e.g., LAURA BERNAL BERMUDEZ, THE POWER OF BUSINESS AND THE POWER OF PEOPLE: UNDERSTANDING REMEDY AND BUSINESS ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS, COLOMBIA 1970–2014, 214–46 (2017), <https://ora.ox.ac.uk/objects/uid:f211a449-8222-4fbb-8a53-07abc6add43c> [<https://perma.cc/5JAV-2QTA>]; Alejandra Bonilla Mora, *Nueva Condena a Exintegrante del Fondo Ganadero de Córdoba por Despojo Paramilitar* [New Sentence for Ex-Member of Córdoba Livestock Fund for Paramilitary Plundering], EL ESPECTADOR (Aug. 2, 2018), <https://www.elespectador.com/colombia-20/paz-y-memoria/nueva-condena-a-exintegrante-del-fondo-ganadero-de-cordoba-por-despojo-paramilitar-articulo/> [<https://perma.cc/3ZH7-C88J>]. For a brief analysis of the Urapalma and Fondo Ganadero cases, see also Sabine Michalowski & Juan Pablo Cardona, *Responsabilidad Corporativa y Justicia Transicional* [Corporate Responsibility and Transitional Justice], 11 ANUARIO DE DERECHOS HUMANOS DE LA UNIVERSIDAD DE CHILE, 173–82 (2015); Jurisdicción Especial de la Paz [J.E.P.] [Special Jurisdiction for the Peace], Resolución 5015, Solicitante Jaime Blanco Maya, ¶ 1.1 (Oct. 19, 2021) (referencing prior hearings for this defendant in the Sala Penal del Tribunal Superior del Distrito Judicial de Bogotá [Criminal Chamber of the Superior Tribunal of the Bogotá Judicial District] and Juzgado Tercero Penal del Circuito de Valledupar [Third Criminal Court of the Valledupar Circuit]).

25. Gerechtshof's-Hertogenbosch [Court of Appeal of Hertogenbosch], ECLI:NL:GHSHE:2017: C.M.J. Ryngaert, (Neth.), <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHSHE:2017:1760> [<https://perma.cc/6BVM-P28Z>].

France.<sup>26</sup> These trials importantly highlight that criminal responsibility can attach to certain forms of third-party collaboration with armed groups or the state military and police or to other involvement in international crimes committed during periods of armed conflict or repression. The persistence and creativity with which victims and civil society initiate and pursue attempts to achieve criminal accountability of these actors emphasizes that criminal justice is perceived as a missing step of transitional justice that is necessary to combat widespread impunity.<sup>27</sup> Nevertheless, these trials encounter significant problems. It regularly takes many years until a final judgment is rendered<sup>28</sup> and those litigating these cases face both procedural and substantive challenges. These range from statutes of

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26. See the May 2022 conviction of the French cement company Lafarge in Paris for complicity in crimes against humanity and endangering the lives of its employees in Syria through transferring millions of US dollars to armed groups and intermediaries, including the Islamic State. Sandra Cossart et al., *Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights into the French Court Decisions*, OPINIO JURIS (Nov. 15, 2022), <https://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions/#:~:text=In%20a%20groundbreaking%20decision%2C%20French,the%20Supreme%20Court%20is%20awaited.> [https://perma.cc/EJ27-9XRR]. In this case, not only some of the company's directors but rather also the company itself was convicted.

27. See, e.g., THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2015) (asserting that international law demands accountability for economic accomplices); Charles A. Abrahams, *Lessons from the South African Experience*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 153, 164–165 (Sabine Michalowski ed., 2013) (analyzing the efficacy of consideration of economic actors during South Africa's transitional process); PEACE, EVERYONE'S BUSINESS! CORPORATE ACCOUNTABILITY IN TRANSITIONAL JUSTICE: LESSONS FOR COLOMBIA (Joris van de Sandt & Marianne Moor eds., 2018) (examining the need for accounting for economic actors in Colombia's transitional process).

28. See, e.g., the Ford case in Argentina, which was initiated by victims in 2002 and resulted in a conviction in 2018 that was confirmed by the Federal Appeals Chamber in 2021. See Luciana Bertoia, *Secuestros y Torturas a 24 Trabajadores de Ford: Confirmaron las Condenas Contra Dos Exdirectivos de la Empresa* [Kidnappings and Torture of 24 Ford Workings: Convictions of Two of its Directors Confirmed], 12 (Sept. 30, 2021); Victoria Basualdo, *The Ford Case, 40 years Later*, JUSTICEINFO.NET (Feb. 18, 2019), <https://www.justiceinfo.net/en/40348-the-ford-case-40-years-later.html> [https://perma.cc/5Z7G-4LJ9].



limitation<sup>29</sup> to complex questions of how to determine the criminal liability of actors who often will have provided crucial acts of assistance but did not commit crimes with their own hands—for example, through financing military dictators or armed groups.<sup>30</sup> Criminal trials might also face political obstacles.<sup>31</sup> To date, very few trials have resulted in firm convictions. This reality confirms the challenges of attempting to achieve criminal accountability of economic actors for their role in massive violations through isolated criminal trials.<sup>32</sup>

In many transitional justice contexts, such trials will nevertheless be the only option to address the criminal responsibility of economic actors during or after a period of transition. The Colombian example, where a special transitional justice tribunal was created, provides the opportunity to analyze an alternative approach. This approach might well be considered in other future transitional justice processes, as Colombia is regarded as an important and influential

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29. Juan P. Bohoslavsky, et al., *Statute of Limitations on Actions for Complicity*, in *THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS* 143 (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2015).

30. See e.g., Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability*, 50 *TEX. INT'L L.J.* 403 (2015) (evaluates liability standards in this context by examining cases under the Alien Tort Statute, in international criminal tribunals, and U.S. criminal proceedings); Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 *J. INT'L CRIM. JUST.* 851, 862–63 (2010) (discussing individual criminal liability for business leaders, with particular attention to cases of aiding or abetting); 2 *INT'L COMM'N JURISTS EXPERT LEGAL PANEL ON CORP. COMPLICITY IN INT'L CRIMES, CRIMINAL LAW AND INTERNATIONAL CRIMES: CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY*, <http://www.refworld.org/pdfid/4a78423f2.pdf> [<https://perma.cc/LS2D-AFXM>] (considering under what circumstances companies or individual officials might be criminally responsible for gross human rights abuses).

31. Daniel Marín López, *Justicia Transicional Fragmentada: Entender la Complicidad Corporativa con Actores Armados Desde la Construcción Judicial en Colombia* [Fragemented Transitional Justice: Understanding Corporate Complicity with Armed Actors since the Judicial Construction in Colombia], in *JUSTICIA TRANSICIONAL EN COLOMBIA: UNA MIRADA RETROSPECTIVA* [TRANSITIONAL JUSTICE IN COLOMBIA: A RETROSPECTIVE LOOK] (Juana Acosta-López and María del Rosario Acosta López eds., 2023), at ¶ 73.

32. Nelson Camilo Sanchez, *Global Initiative for Justice, Truth & Reconciliation & Due Process of Law Foundation, Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America: The Cases of Colombia, Guatemala, and Argentina*, 65 (2021).

transitional justice example.<sup>33</sup> As other bodies design transitional justice processes that include economic actors, they could benefit from critically analyzing Colombia's approach.

In this respect, Colombia not only presents an excellent case study for an analysis of the first, and so far only, attempt worldwide to include economic actors in the criminal justice mechanism of a transitional justice process. Rather, its history also provides an opportunity to analyze a country's attempts to implement the opposite approach. The Colombian Justice and Peace process—which began in 2005 and preceded the Final Peace Agreement—provided a mechanism to create a special criminal justice mechanism that excluded economic actors. It set up a specific criminal justice process in the form of special Justice and Peace tribunals within the ordinary criminal jurisdiction. Access to the Justice and Peace tribunals and the benefits of the process<sup>34</sup> were only made available to demobilized members of armed groups, primarily paramilitaries. All other actors, from members of the military to economic actors, were left under the auspices of the ordinary criminal jurisdiction, law, and sanctions.<sup>35</sup>

Given the fundamental differences between the two approaches, Colombia provides an exceptional opportunity to gain important insights into the implications of including or excluding economic actors from the criminal justice component of a transitional justice process. Indeed, while the Justice and Peace process highlights some fundamental problems with leaving economic actors outside of transitional justice mechanisms, to include them brought its own challenges, as demonstrated by the experience of the transitional justice process following the Final Peace Agreement.

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33. See, e.g., Diego Fernando Tarapués Sandino, *El Sistema Integral de Justicia Transicional y Sus Mecanismos para Satisfacer el Derecho a la Justicia de Cara al Deber Estatal de Investigar, Juzgar y Sancionar* [Integrated System of Transitional Justice and its Mechanisms to Satisfy the Right to Justice in the Face of State Duty to Investigate, Judge, and Sanction], in *JUSTICIA TRANSICIONAL, REFORMA CONSTITUCIONAL Y PAZ: REFLEXIONES SOBRE LA ESTRATEGIA INTEGRAL DE JUSTICIA TRANSICIONAL EN COLOMBIA* [TRANSITIONAL JUSTICE, CONSTITUTIONAL REFORM, AND PEACE: REFLECTIONS ON THE INTEGRATED STRATEGY OF TRANSITIONAL JUSTICE IN COLOMBIA] 155-85 (Diego Fernando Tarapués Sandino ed., 2017).

34. Alternative sanctions of imprisonment of five to eight years were offered even in cases of the most serious and atrocious crimes in exchange for demobilization, truth, and, to some extent reparation/ L. 975 de 2005, DIARIO OFICIAL [D.O.], arts. 17, 29 (Colom. Jul. 25, 2005).

35. L. 975 de 2005, DIARIO OFICIAL [D.O.] (Colom. Jul. 25, 2005).

An analysis of the Colombian experience contributes to the incipient academic debates on how to approach the criminal responsibility of economic actors as part of transitional justice.<sup>36</sup> To date, these discussions primarily focus on what can be learned from the limited international precedent in the form of criminal trials for achieving successful prosecutions of economic actors<sup>37</sup> and how to overcome the procedural and substantive legal hurdles that adversely affect their criminal accountability.<sup>38</sup> They also include analyses of the impact of extra-legal issues on approaches to economic actor accountability, such as lack of political will,<sup>39</sup> corporate veto,<sup>40</sup> and the importance of civil society.<sup>41</sup>

These questions will arise no matter how criminal justice of economic actors is being pursued, but they might play out differently in the context of pursuing criminal accountability of economic actors through ordinary criminal courts, as opposed to a special transitional justice tribunal. As will be seen, the transitional justice aims of the Colombian criminal transitional justice mechanism broaden the focus of the accountability effort from an exclusive emphasis on criminal justice to wider considerations of achieving peace. In stepping outside of the logic of individual criminal trials, achieving retributive justice is not necessarily the only, or primary, goal. Rather, it might have to be balanced against other aims of transitional justice, such as achieving truth, reparation, guarantees of non-recurrence, and the ultimate aim

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36. See e.g., Michalowski et al., *supra* note 7; Payne et al., *supra* note 5; IRENE PIETROPAOLI, BUSINESS, HUMAN RIGHTS AND TRANSITIONAL JUSTICE (2020); CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE (Sabine Michalowski ed., 2013); see generally JOANNA KYRIAKAKIS, CORPORATIONS, ACCOUNTABILITY AND INTERNATIONAL CRIMINAL LAW: INDUSTRY AND ATROCITY (2021).

37. Michalowski et al., *supra* note 7, at ch. 3; Payne et al., *supra* note 5, at 176; Pietropaoli, *supra* note 36, at ch. 2–4.

38. See e.g., Michalowski et al., *supra* note 7, at 224-79; Bohoslavsky et al., *supra* note 29, at 144 (examining the role of statutes of limitations in civil actions and comparing the regime with their lack of applicability to cases of crimes against humanity).

39. See e.g., Marín López, *supra* note 31, at 355; UNWG, *supra* note 15, at ¶ 73.

40. Payne et al., *supra* note 5, at ch. 3.

41. *Id.* at ch. 5; see also Wolfgang Kaleck, *International Criminal Law and Transnational Businesses: Cases from Argentina and Colombia*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 178, 183-84 (Sabine Michalowski ed., 2013) (describing the important role Argentinean civil society played in pursuing criminal trials, including against economic actors).

of securing lasting peace.<sup>42</sup> This facilitates a fresh perspective on the aims of criminal prosecutions of economic actors in a transitional justice context.

In-depth accounts of recent developments on economic actor accountability in Colombia in the English language are scarce.<sup>43</sup> Before delving into an analysis of the implications of including or excluding economic actors from specifically-created transitional criminal justice mechanisms, this Article will introduce the most relevant features of the Justice and Peace process and analyze some of the consequences of excluding economic actors from a criminal transitional justice mechanism.<sup>44</sup> It will then explain in detail why and how the Final Peace Agreement included economic actors in the competence of the SJP, introduce the political controversies that became apparent during the legislative process implementing the Final Peace Agreement, and discuss the fundamental changes to third-party inclusion brought about by the Colombian Constitutional Court. This Article will then contrast the benefits and challenges of different possible models of dealing with corporate accountability in a newly created transitional justice tribunal, discussing their respective potential to contribute to a country's compliance with its international obligations, as well as their enhancement of the aims of transitional justice, including truth, justice, reparation, non-recurrence, and peace.

Through its analysis of the Colombian approaches to economic actor accountability as part of its transitional justice processes, this Article aims to inform future transitional justice practice, advocacy

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42. Final Peace Agreement, *supra* note 17, at 127.

43. For an excellent analysis in English of some of the implications of the design of the Justice and Peace process for economic actor responsibility, see Philipp Wesche, *Business Actors, Paramilitaries and Transitional Criminal Justice in Colombia*, 13 INT'L J. TRANSITIONAL JUST. 478 (2019).

44. See *id.* at 491–93 (analyzing the implications of the exclusion of business actors from the transitional justice process); Michalowski et al., *supra* note 7, at 105–14, 129–36.

efforts,<sup>45</sup> and international accountability initiatives.<sup>46</sup> In advancing academic thinking on the linkages between transitional justice and economic actor accountability, it also feeds into broader debates on the scope and remits of transitional justice.<sup>47</sup>

## II. CREATING A SPECIAL CRIMINAL JUSTICE MECHANISM THAT DOES NOT INCLUDE ECONOMIC ACTORS – THE EXPERIENCE OF THE COLOMBIAN JUSTICE AND PEACE PROCESS

This Part will introduce the Colombian Justice and Peace process' main relevant features regarding economic actor responsibility and implications of excluding these actors from a special

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45. See, e.g., EUR. CTR. CONST. AND HUM. RTS, <https://www.ecchr.eu/en/business-and-human-rights/> [https://perma.cc/V4MU-HMZ8] (documenting the organization's work in the area of business and human rights with regard to the military dictatorship in Argentina, trade unionists in Colombia, and South Africa under apartheid, among other cases); *Corporate Accountability in Transitional Justice*, <https://corpaccountabilitylab.org/corporate-accountability-in-transitional-justice> [https://perma.cc/E8SX-UZ9L] (describing the project of the Corporate Accountability Lab (CAL) to hold actors accountable); *Memory, Truth & Justice: Trelew Massacre*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES, <https://www.cels.org.ar/web/en/category/memorytruthjustice/> [https://perma.cc/9B7K-YENY] (outlining the work of CELS as it acts as plaintiff in criminal trials against businesspeople for their involvement in crimes committed during the latest Argentinean military dictatorship).

46. Rep. of the Working Grp. on the Issue of Human Rights and Transitional Corporations and Other Business Enterprises, *Implementing the Third Pillar: Lessons from Transitional Justice Guidance by the Working Group*, U.N. DOC. A/HRC/50/Add.4 (Jun. 8, 2022); Fabián Salvioli (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence), *Role and Responsibilities of non-State actors in Transitional Justice Processes*, ¶¶ 30-46, U.N. DOC. A/HRC/51/34 (Jul. 12, 2022).

47. For influential texts that have been shaping this debate, see, e.g., Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1 (2007); Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?*, 2 INT'L J. TRANSITIONAL JUST. 310 (2008); Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266 (2008); Ismael Muvingi, *Sitting on Powder Kegs: Socio-Economic Rights in Transitional Societies*, 3 INT'L J. TRANSITIONAL JUST. 163 (2009); Dustin Sharp, *Addressing Economic Violence in Times of Transition: Towards a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT'L L.J. 780 (2012); Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21(2) SOC. LEG. STUD. 171 (2012); CLARA SANDOVA, REFLECTIONS ON THE TRANSFORMATIVE POTENTIAL OF TRANSITIONAL JUSTICE AND THE NATURE OF SOCIAL CHANGE IN TIMES OF TRANSITION, in JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES 166 (Roger Duthie & Paul Seils eds., 2017).

criminal transitional justice mechanism for addressing their criminal responsibility. The Justice and Peace process also contextualizes the choices made in the Final Peace Agreement with regard to third-party actors.

A. Relevant features of the Justice and Peace process

The Colombian Justice and Peace process, which started in 2005 and at the time of writing is still ongoing, was initiated to incentivize the demobilization of members of illegal armed groups.<sup>48</sup> Special tribunals and branches of the Public Prosecutor's Office were tasked with prosecuting those members of illegal armed groups who demobilized, fully confessed their crimes, and contributed to reparations for victims. These prosecutions were conducted according to specially designed procedural rules, including alternative criminal sanctions of five to eight years of imprisonment even for the most serious offences, such as crimes against humanity.<sup>49</sup> The criminal responsibility of all other actors, including economic and other third-party actors, for conflict related crimes stayed under the remit of the ordinary criminal jurisdiction and its ordinary sanction system.

By 2012, the Justice and Peace process had resulted in only 14 judgements. The Inter-American Commission on Human Rights commented with concern that none of the judgements involved the higher ranks of the paramilitaries, or shed light on the criminal structures of paramilitarism.<sup>50</sup> To address the structural problems behind this unsatisfactory outcome, the prosecution strategy changed in 2012 to reflect the recognition that systematic crimes cannot adequately be prosecuted by focusing on the responsibility of individuals through a case-by-case approach.<sup>51</sup> Rather, from then on, the Justice and Peace prosecutors and tribunals were tasked with investigating the macro-criminal structures within which these crimes had taken place.<sup>52</sup> This was regarded as essential for determining the truth of what had happened and facilitating the dissolution of the

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48. L. 975/05, DIARIO OFICIAL [D.O.], Arts. 1-2 (Colom. Jul. 25, 2005).

49. *Id.* at Arts. 17, 29; *see also* Hillebrecht et al., *supra* note 13, at 325 (articulating the special procedures and prosecution rules created by the Justice and Peace Law in Colombia).

50. Inter-Am. Comm'n. on Hum. Rts., Country Report Colombia, Truth, Justice and Reparation, OEA/Ser.L/V/II.Doc.49/13, 134 (2013).

51. L. 1592/12, diciembre 3, 2012, Diario Oficial [D.O.] Art. 14 (Colom.); L. 3011/2013, diciembre 26, 2013, Diario Oficial [D.O.] Arts. 4, 7 (Colom.).

52. L. 3011/2013, diciembre 26, 2013, Diario Oficial [D.O.] Arts. 4, 7 (Colom.).

organizational and power structures of the demobilized groups and their support networks.<sup>53</sup> It moreover enabled the prosecution to focus on the most serious and representative cases and to bring to trial those with the highest responsibility,<sup>54</sup> as requested by the Inter-American Court of Human Rights in the case of *Manuel Cepeda Vargas v. Colombia*.<sup>55</sup>

The new focus on organizational and power structures and support networks indicates an awareness that actors beyond the members of the illegal armed groups, including economic actors, played an important part in the conflict. However, the jurisdiction of the Justice and Peace tribunals was not extended to these actors, and they rather remained outside of the transitional justice process. Nevertheless, the confessions of the demobilized members of armed groups and the investigations into patterns of macro-criminality and support structures have brought to light many instances of economic actor involvement. Indeed, it is an important achievement of the Justice and Peace process that it has been collecting and documenting ample information about the role of economic and other actors who were not on trial, but whose actions were highly relevant for understanding the complexities of paramilitarism and of the different layers of responsibility for the crimes and atrocities committed in its context.<sup>56</sup> Despite its limited jurisdiction, the process has thus

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53. L. 1592/12, diciembre 3, 2012, Diario Oficial [D.O.] Art. 14 (Colom.).

54. See Directiva No. 0001, Fiscalía General de la Nación (Oct. 4, 2012) (laying out the Justice and Peace process' prosecution strategy).

55. *Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213 ¶ 118 (May 26, 2010).

56. MICHALOWSKI ET AL., *supra* note 7, at 32–71. An analysis of all decisions rendered by Justice and Peace tribunals revealed that economic actors were mentioned 766 times. Of these, roughly 60% referred to natural persons and 40% to legal persons. *Id.* at 41. For both natural and legal persons, the vast majority of mentions (over 60% in both cases) related to the use of land. *Id.* at 44. For example, the cattle farmer associations of Córdoba and Urabá Grande (Aganar) were mentioned for their support of paramilitary groups in the form of providing opportunities for these groups to enter a territory or to supply them with funding. Tribunal Superior de Medellín [T.S.M.] [Superior Court of Medellín], Sala de Justicia y Paz, diciembre 9, 2014, M.P: Rubén Darío Pinilla Cogollo, 55, Sentencia condena de Jesús Ignacio Roldán Pérez, alias Monoleche, (p. 155) (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. de Casación Penal, julio 27, 2011, Sentencia SP 31.653 condena de Édgar Eulises Torres y Odín Horacio Sánchez Montes de Oca, (p. 71) (Colom.).

contributed significantly to painting a more holistic picture of the structures behind the armed conflict.<sup>57</sup>

However, as a consequence of the limited jurisdiction of the Justice and Peace tribunals, the *res judicata* of their decisions focuses exclusively on the responsibilities of the demobilized paramilitaries, while the role of all other actors, including economic actors, is by design relegated to the context within which these crimes took place. When information related to the responsibility of other actors in conflict-related crimes comes to the knowledge of the prosecutors and judges involved in the Justice and Peace process, they cannot themselves investigate, start criminal proceedings against, or adjudicate the responsibility of economic actors.<sup>58</sup> Instead, they need to refer the relevant information to the prosecutors and courts of the ordinary jurisdiction to investigate and prosecute cases against these actors.<sup>59</sup> Furthermore, no benefits are available to incentivize third-party actors to confess and assume responsibility for their crimes. Despite the extensive documentation of the role of economic actors in conflict related crimes as part of the decisions of the Justice and Peace tribunals, and the referral of hundreds of requests made for investigation of economic actors to ordinary prosecutors by the Justice and Peace tribunals,<sup>60</sup> very few of these resulted in criminal trials and

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57. See also Yamile Salinas Abdala & Juan Manuel Zarama Santacruz, *Justicia y paz: Tierras y Territorios en las Versiones de los Paramilitares* (2012); Sanchez, *supra* note 32, at 39 (concluding that academic inquiry into the accounts of economic actors involved in acts of violence reveals the widespread nature of economic actors' complicity in such acts).

58. MICHALOWSKI ET AL., *supra* note 7, at 117.

59. By April 2020, the Attorney General's Office had received 16,134 referrals (compulsas de copias, in Spanish), out of which 311 were related to third-party actors. Fiscalía General de la Nación, *Fiscalía Concluye Estudio sobre Terceros Civiles Vinculados al Conflicto Armado* (May 23, 2019), <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-concluye-estudio-sobre-terceros-civiles-vinculados-al-conflicto-armado/> [<https://perma.cc/SCG8-8PV4>].

60. Wesche, *supra* note 43, at 486 (noting that there were 732 such referrals made by 2018, as reported in response to a Freedom of Information Act request).



convictions.<sup>61</sup> Thus, widespread impunity of economic actors still prevails.<sup>62</sup>

B. Implications of not including economic actors in the Justice and Peace process

The Justice and Peace process shows that vast amounts of information about economic actors can come to light even when such actors are excluded from a transitional justice mechanism. However, the limited competence of the Justice and Peace tribunals also had important implications. On the one hand, particularly if there are incentives for certain actors of a conflict, in that case the demobilized paramilitaries, to divulge all the information at their disposal, a wealth of information about other actors will be forthcoming. This, in turn, at least to some extent facilitates the creation of a judicial narrative that portrays the complexities of a conflict and the structures behind it. Indeed, the Justice and Peace experience shows that the systemic nature and patterns of the crimes committed by those whose conduct fell under the jurisdiction of the Justice and Peace tribunals could not adequately be investigated without also considering their close collaboration with actors outside of its jurisdiction.<sup>63</sup>

On the other hand, because of the lack of jurisdiction over economic actors, the information was neither subjected to the rules of evidence, nor used for a legal analysis of their criminal responsibility. Instead, it was presented in the context section of the Justice and Peace

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61. According to an ICC Report (ICC) the Attorney General's Office (AGO) of Colombia informed the ICC that "it was conducting a total of 2,683 cases against [non-state actors] for crimes related to the promotion, support or financing of illegal groups," including 1,329 active and 1,354 inactive cases. The AGO also "reported that 703 concern crimes allegedly committed by civilians" and that "judgments had been rendered in relation to 15 cases: ten cases had resulted in convictions, two in acquittals and three reached the sentencing phase after plea agreements." OFF. OF THE PROSECUTOR, INT'L CRIM. CT., ¶ 112, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/HY6H-YGAS>]. Report on Preliminary Examination Activities 2020, INTERNATIONAL CRIMINAL COURT (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/HY6H-YGAS>]. For an explanation of the inaction of the ordinary jurisdiction, see Laura Bernal-Bermúdez & Daniel Marín Lopez, *Los Empresarios en la Guerra: Elementos de la Verdad Judicial Sobre la Complicidad Empresarial en Colombia*, in CUENTAS CLARAS 65 (Nelson Camilo Sánchez León et al., eds., 2018).

62. CEV, *supra* note 9, at 356.

63. MICHALOWSKI ET AL., *supra* note 7, at 32–71.

decisions, whose purpose was to discuss the context in which the paramilitaries' crimes were situated, including their collaborations with other actors and support networks.<sup>64</sup> To some extent, it might even have been conducive to exploring the role of economic actors that this could be done without having to establish their criminal responsibility, given the difficulties of determining and proving the criminal responsibility of those who support the commission of crimes rather than committing them through their own hands.<sup>65</sup>

The context sections in the Justice and Peace tribunal decisions are sometimes over 100 pages long.<sup>66</sup> No unified protocol for how to present information on economic actors for their role in crimes committed by the paramilitaries on trial existed, and the different tribunals in different parts of the country developed different methodologies for the inclusion of information on economic actors.<sup>67</sup> For example, some decisions provide general descriptions of the role of particular economic sectors in the crimes on trial,<sup>68</sup> some provide the names of specific individuals or businesses.<sup>69</sup>

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64. In 2012, in a directive, the Prosecutor General of Colombia explained the meaning and purpose of the context section, which contained a “[f]ramework providing the essential aspects of geographical, political, economic, historic and social factors within which criminal groups committed crimes.” Directiva No. 0001, Fiscalía General de la Nación 2 (Oct. 4, 2012). The directive also emphasized the need to describe “the strategy of the criminal organization, its regional dynamics, fundamental logistic aspects, communication networks and support networks, amongst others.” *Id.* It stated the goals as to “(i) know the truth of what happened; (ii) avoid its repetition; (iii) establish the structure of the criminal group; (iv) determine the level of responsibility of the members of the group and their collaborators.” *Id.*

65. See sources cited *supra* note 30 (explaining the difficulties of determining the criminal responsibility of these actors).

66. See *e.g.*, Tribunal Superior de Bogotá [T. Sup. de Bogotá] [Superior Court of Bogotá], Sala. de Justicia y Paz octubre 31, 2014, Salvatore Mancuso Gómez y otros (120–76) (Colom.).

67. MICHALOWSKI ET AL., *supra* note 7, at 103–16.

68. For example, “at the beginning, the financing of the guerrilla took place through voluntary donations by the villagers, later by some farmers and owners who regarded them as a form of protection against robberies and rustlers.” Tribunal Superior de Bogotá [T. Sup. de Bogotá] [Superior Court of Bogotá], Sala. de Justicia y Paz, julio 31, 2015, José Gregorio Mangonez Lugo y Omar Martínez Ossias (p. 415) (Colom.).

69. Tribunal Superior de Bogotá [(T. Sup. de Bogotá).] [Superior Court of Bogotá], Sala. de Justicia y Paz diciembre 9, 2014, M.P: Rubén Darío Pinilla Cogollo (p. 159) (Colom.).

Some of the descriptions of economic actor involvement in the context sections of Justice and Peace tribunal decisions are merely factual, while others relate to their actions in legal language.<sup>70</sup> For example, the context sections often state that certain actors made payments to the paramilitaries under coercion, a legal concept, but they do not provide any legal analysis of the elements of coercion<sup>71</sup> in light of the facts as reported.<sup>72</sup> The legal conclusions tribunals draw of economic actors' coercion are based on confessions by paramilitary defendants in which they accuse individual businesspeople and businesses of involvement in crimes—for example, for having financed the groups of which the paramilitary defendants were members, in exchange for security protection.<sup>73</sup>

It is problematic because of due process concerns for a tribunal to draw conclusions about the legal responsibility of individuals who were not on trial. Indeed, to name economic actors as parties to crimes for which they have not been convicted might affect their good name and reputation without them being given the opportunity to defend themselves against the accusations.<sup>74</sup> On the other hand, exculpatory statements that convey the impression that large sectors made payments to paramilitary groups based on coercion without detailed legal analysis might result in an undifferentiated exculpatory judicial narrative that does not accurately reflect the wide variety of motives for which economic actors collaborated with paramilitary groups.<sup>75</sup>

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70. See *id.* (noting that arms and uniforms were delivered to the paramilitaries in a truck owned by the dairy company Proleche).

71. For a discussion of the legal concept of coercion in decisions of the Colombian Justice and Peace tribunals see, e.g., MICHALOWSKI ET AL., *supra* note 7, at 265–266; for a discussion of the concept in international criminal law see e.g. *id.* At 153–158, 160–162, 170; US Military Tribunal Nuremberg. *United States v. Flick* (“The Flick Case”), 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10*, 1196–1201; US Military Tribunal Nuremberg, judgment of 31 July 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IX (*Krupp Trial*), p. 1438–1444. ICTY. *Prosecutor v. Erdemovic*, Case IT-96-22-A, Appeal Judgment (Oct. 7, 1997).

72. See, e.g., Tribunal Superior de Bogotá (T. Sup.) [Superior Court of Bogotá], Sala de Justicia y Paz, enero 25, 2010, M.P. Uldi Teresa Jiménez López (p. 38) (Colom.).

73. Tribunal Superior de Bogotá, *supra* note 66, at ¶ 558 (Colom.). This legal reasoning was later questioned by the Corte Suprema de Justicia [C.S.J] [Supreme Court], Sala de Casación Penal, noviembre 25, 2015, Salvatore Mancuso Gómez y otros (p. 142) (Colom.).

74. Sabine Michalowski et al., *Los terceros complejos: la competencia limitada de la Jurisdicción Especial para la Paz* 50 (Dejusticia 2019).

75. MICHALOWSKI ET AL., *supra* note 7, at 265.

At the same time, the fragmented competence over the different actors of the conflict resulted in a disjointed judicial narrative, centering the role and potential accountability of those actors lying within the transitional justice tribunals' jurisdiction. The potential culpability of economic actors, on the other hand, will be considered only as part of the background to those crimes and without the possibility to invite their own contributions to the truth, including with regard to their role in the conflict as well as those of other actors with which they might have colluded.

An even more important problem of this fragmented jurisdiction is that the information about economic actor involvement that comes to light in the Justice and Peace decisions needs to be referred to the ordinary criminal jurisdiction for further investigation and prosecution.<sup>76</sup> The criminal responsibility of the paramilitaries and that of the economic actors who collaborated with them and facilitated their crimes is thus investigated and tried in different jurisdictions, according to different laws and applying different legal sanctions, even though it is often based on their joint involvement in the same crimes. For example, Chiquita Brands indirectly but crucially facilitated the provision of paramilitaries with arms and ammunitions that entered the country via its harbors.<sup>77</sup> The tribunals in the ordinary justice system that receive these cases, according to their geographical jurisdiction over them, have to start investigations without having the same deep knowledge of the collaborations and structures acquired by the Justice and Peace magistrates.<sup>78</sup> Their task is made harder by the fact that, because the investigations of economic actors in the Justice and Peace tribunals are not focused on establishing their legal responsibility, the referrals often do not provide all the information necessary to facilitate an effective investigation in the ordinary jurisdiction.<sup>79</sup>

Leaving the criminal responsibility of economic actors outside of the legal framework of the transitional justice process makes their prosecution and punishment more difficult than that of the paramilitary group members. The conviction of the latter in the Justice and Peace process is made relatively easy by the fact that paramilitary

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76. *Id.* at 19.

77. Tribunal Superior de Bogotá, *supra* note 66, at ¶ 495 (Colom.).

78. Wesche, *supra* note 43, at 492; Michalowski & Cardona, *supra* note 24, at 173–182.

79. MICHALOWSKI ET AL., *supra* note 7, at 132.

members need to confess their crimes fully in order to qualify for the alternative criminal sanctions, which means that they themselves largely provide the evidence on which their convictions are then based, even though its veracity has to be corroborated.<sup>80</sup> As the same benefits do not apply to economic actors, they not only have little incentive to confess their role before the ordinary criminal courts, but rather have every reason not to do so. The prosecution of economic actors is further complicated by the fact that their criminal responsibility is rarely straightforward, as economic actors will, in many cases, have had less direct involvement in the crimes than the combatants.<sup>81</sup> This raises complex questions regarding *actus reus*,<sup>82</sup> *mens rea*,<sup>83</sup> the causal link between economic actor participation and the crimes committed,<sup>84</sup> and more generally the boundaries between their legitimate economic activities and complicity in the crimes of others.<sup>85</sup>

At the same time, the exclusion of economic actors from the beneficial sanction system of the Justice and Peace process raised the important question of the proportionality of punishment.<sup>86</sup> The different sanction systems in the Justice and Peace and the ordinary

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80. L. 975, julio 25, 2005, DIARIO OFICIAL [D.O] 28 (Colom.).

81. Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L L. & HUM. RTS. 304, 306 (2008).

82. Michalowski, *supra* note 30, at 410–14.

83. Sabine Michalowski, The Mens Rea Standard for Corporate Aiding and Abetting Liability - Conclusions from International Criminal Law, 18 UCLA J. INT'L L. & FOREIGN AFF. 237, 239 (2014); Mohamed Elewa Badar, The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective, 19 CRIM. L.F. 473, 507–08 (2008).

84. This causes particularly difficult legal issues in the context of financing. See Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 430–45 (1998); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARV. HUM. RTS. J. 157, 172–78 (2010); Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a 'Killing Agent'*, 8 J. INT. CRIM. JUST. 829, 834 (2010); Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451, 453 (2012).

85. Michalowski, *supra* note 30, at 405; Christoph Burchard, Ancillary and Neutral Business Contributions to 'Corporate-Political Core Crime,' Initial Enquiries Concerning the Rome Statute, 8 J. INT'L CRIM. JUST. 919, 922–25 (2010); Andrea Reggio, Aiding and Abetting in International Criminal Law: the Responsibility of Corporate Agents and Businessmen for "Trading With The Enemy" of Mankind, 5 INT'L CRIM. L. REV. 623, 628 (2005); Wim Huisman & Elies van Sliedregt, Rogue Traders, Dutch Businessmen, International Crimes and Corporate Complicity, 8 J. INT'L CRIM. JUST. 803, 806 (2010).

86. Michalowski & Cardona, *supra* note 24, at 173–82.

criminal tribunals make it possible that, for their involvement in a crime carried out by paramilitary groups, corporate directors could end up with a criminal punishment of much more than eight years,<sup>87</sup> but the paramilitary carrying out the offence who adhered to the Justice and Peace process, and was found to have complied with the prerequisites of the process, would end up with an alternative sanction of a maximum of eight years of imprisonment.<sup>88</sup>

The Colombian Justice and Peace process thus exemplifies some of the problems of limiting a transitional justice process to specific actors without also addressing the responsibility of their collaborators. The approach leads to inconsistencies of treatment—such as reduced sanctions for those who are regarded as the main perpetrators and therefore included in the process, and ordinary sanctions for everybody else—and the duplication of prosecution and adjudication efforts. In rendering impossible holistic investigations of emblematic and systemic crimes committed through alliances between the paramilitaries and economic actors, members of the armed forces, and other state agents,<sup>89</sup> it also results in a fragmented judicial truth<sup>90</sup> and narrative of the conflict.<sup>91</sup> The combination of these factors significantly contributes to perpetuating the widespread impunity of economic actors, despite the wealth of information about their

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87. As was the outcome in the case of Urapalma, where corporate directors were sentenced to between 14 and 16 years of imprisonment in first and second instance decisions. See Juzgado Quinto Penal del Circuito Especializado de Medellín (Juzg. Cir.) [Fifth Criminal Court of the Specialized Circuito of Medellín], octubre 30, 2014, Gabriel Jaime Sierra Moreno y otros (Colom.); Tribunal Superior de Medellín (T.S.M.) [Superior Court of Medellín], Sala de Decisión Penal, noviembre 4, 2016, Gabriel Jaime Sierra Moreno y otros (Colom.).

88. L. 975/05, julio 25, 2005, DIARIO OFICIAL 45.980 [D.O.] art. 29 (Colom.).

89. *E.g.*, land displacement. See Jurisdicción Especial para la Paz (J.E.P.) [Special Jurisdiction for Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [Chamber for the Acknowledgment of Truth, Responsibility and Determination of Facts and Actions], agosto 30, 2022, Auto SRVR N° 104, Caso 008 (p. 82–83) (Colom.) (noting the importance of evaluating conduct from the alliances between actors rather than individual actors).

90. For an analysis of the importance and limits of judicial truth in transitional justice contexts, see Rodrigo Uprimny Yepes & María Paula Saffon Sanín. *Verdad Judicial y Verdades Extrajudiciales: La Búsqueda de una Complementariedad Dinámica*, DEJUSTICIA (July 24, 2017), [https://www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_39.pdf](https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_39.pdf) [<https://perma.cc/98DV-D46U>].

91. Marín López, *supra* note 31, at 384.

involvement in conflict-related crimes and the many referrals to the ordinary jurisdiction for further investigation and prosecution.<sup>92</sup>

### III. THE COMPETENCE OF THE SPECIAL JURISDICTION FOR PEACE OVER ECONOMIC ACTORS

The transitional justice process based on the Peace Agreement between the Colombian government and the FARC that was signed on August 24<sup>th</sup>, 2016<sup>93</sup> and came into force in its renegotiated form on November 24<sup>th</sup>, 2016, was the result of various years of complex negotiations in Havana, Cuba. It needs to be understood as a negotiated peace between the two parties of the agreement and a hard-won political compromise aiming to put an end to an armed conflict that lasted over 50 years and that neither party could win through military means.<sup>94</sup>

The question of whether and how to include economic and other third-party actors in the remit of the SJP was highly controversial during the peace negotiations.<sup>95</sup> These controversies persisted when the relevant provisions of the Final Peace Agreement needed to be endorsed by the Colombian Parliament,<sup>96</sup> the Colombian Constitutional Court<sup>97</sup> and the Colombian people.<sup>98</sup> To draw lessons from the Colombian approach to the inclusion of economic actors in the criminal justice component of the transitional justice process created by the Final Peace Agreement, it is thus important not only to understand the technicalities of how this was designed, but also the political disputes around this inclusion and their effect on the final design of the competence of the SJP over economic actors.

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92. MICHALOWSKI ET AL., *supra* note 7, at 131–32; Sanchez Leon, *supra* note 32, at 66.

93. Sibylla Brodzinsky, *FARC Peace Deal: Rebels and Colombian Government Sign Accord to End War*, GUARDIAN, (Aug. 25, 2016), <https://www.theguardian.com/world/2016/aug/24/colombia-government-farc-rebels-peace-deal-52-year-war> [https://perma.cc/8C7K-2N2W].

94. Mark Freeman & Ivan Orozco, *Negotiating Transitional Justice. Firsthand Lessons from Colombia and Beyond*, chapter 1, *The context* (Cambridge University Press 2020).

95. Angelica Rettberg, *The Colombian Private Sector in Colombia's Transition to Peace*, in CIVIL ACTION AND THE DYNAMICS OF VIOLENCE 255, 270–71 (Deborah Avant ed., 2019).

96. *See infra* Section III.B.

97. *See infra* Section III.B.

98. SANCHEZ, *supra* note 13, at 172.

A. Economic actors in the Final Peace Agreement

In its chapter 5, called the Victims' Agreement, the Final Peace Agreement sets out the creation of an integral system of truth, justice, reparation, and guarantees of non-recurrence. This system consists of a truth commission; a special unit for the search for persons who disappeared during the conflict; the SJP; integral reparation measures; and guarantees of non-recurrence.<sup>99</sup> Criminal justice, which is at the center of this Article, is thus only one part of the comprehensive transitional justice system.

When the Colombian government and the FARC negotiated the justice component of the transitional justice system, many different interests had to be considered. The FARC and its leaders at the negotiating table would not have agreed to lay down arms and end the armed conflict if they had faced prison sentences.<sup>100</sup> Accommodating the interests of the combatants in order to achieve peace needed to be reconciled with Colombia's obligations under international law, in particular the obligation to investigate, prosecute, and punish certain international crimes and to guarantee the rights of the victims of the armed conflict to truth, justice, and reparation.<sup>101</sup>

As a consequence, the justice component of the integral system is based on a complex scheme of criminal benefits,<sup>102</sup> the receipt of which is conditional upon engaging with the transitional justice process—including by contributing to truth-finding, reparation and guarantees of non-recurrence.<sup>103</sup> This reflects a recent trend in transitional justice that promotes a combination of measures under the four pillars of truth, justice, reparation, and guarantees of non-recurrence.<sup>104</sup> This holistic approach acknowledges that addressing all

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99. Final Peace Agreement, ch. 5.1.

100. Weiner, *supra* note 13, at 217–18.

101. Sandra Borda & Mateo Morales, *Colombia: La Internacionalización de la Paz*, ANUARIO INT'L CIDOB 2016–17 239, 246 (Apr. 2017); Hillebrecht et al., *supra* note 13, at 325.

102. E.g. in the form of amnesties, waivers of prosecutions, pardons and lenient sanctions, as explained in more detail below.

103. Final Peace Agreement at 171-175.

104. Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, to the Human Rights Council, U.N. DOC. A/HRC/21/46 (Aug. 9, 2012); *see also* Working Grp. on Bus. and Hum. Rts. Report to the Gen. Assembly, *Business*,



of the pillars is essential in order to meet the international obligations of states and satisfy the corresponding rights of victims; but, after mass atrocities, it will most likely not be possible to meet every obligation under any of the pillars. In the wake of such atrocities, a combination of measures under each pillar is seen as the most promising route towards achieving the largest possible protection of all rights at stake.<sup>105</sup>

In practice, this meant that the justice component of the integral system granted far-reaching amnesties to the members of the FARC<sup>106</sup> and waivers of prosecution to the military and all other state actors,<sup>107</sup> except in cases of the most serious international crimes.<sup>108</sup> For those with the greatest responsibility for crimes falling into this category (*maximos responsables* – “most responsible”), the Final Peace Agreement created a differentiated system of criminal sanctions.<sup>109</sup> If the accused accept responsibility before the case was brought to trial, the Final Peace Agreement would impose so-called special sanctions (*sanciones propias*), consisting of punishment of five to eight years of effective deprivation of liberty without prison.<sup>110</sup> Those who recognize responsibility during trial were eligible for alternative criminal sanctions of five to eight years of imprisonment.<sup>111</sup> In case of a

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*Human rights and Conflict-affected Regions: Towards Heightened Action* ¶ 86, U.N. Doc. A/75/212, (July 21, 2020).

105. De Greiff, *supra* note 104, at ¶¶ 21–27.

106. Final Peace Agreement, Ley de Amnistía, Indulto y Tratamientos Penales Especiales [Law of Amnesty, Pardon and Special Criminal Treatment], tit. 2, ch. 5, ¶¶ 38–39.

107. Final Peace Agreement, Ley de Amnistía, Indulto y Tratamientos Penales Especiales [Law of Amnesty, Pardon and Special Criminal Treatment], tit. 3, ch. 2, ¶ 44, tit. 3, ch. 3, ¶ 50.

108. For a list of these crimes, see Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, ¶ 40. For such crimes, international law excludes unconditional amnesties. For literature on the differing views on the compatibility of amnesties with international law, see the text accompanying note 22, *supra*. For a critical analysis of the Colombian focus on achieving compliance with international law and the resulting judicialization of the transitional justice processes, see Jinu Carvajalino & Maja Davidovic, *Escaping or Reinforcing Hierarchies? Norm Relations in Transitional Justice*, 25 INT’L STUD. REV. (2023).

109. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], Listado de Sanciones [Listing of Sanctions], ch. 5, at 171–75.

110. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, at ¶ 60.

111. *Id.*

conviction without the admission of responsibility, the punishment was 15 to 20 years of imprisonment.<sup>112</sup>

The integral system of transitional justice agreed upon in Havana, as well as the design of the SJP, was intended to maximize the chances of a successful transition to peace by incentivizing demobilization and contributions to truth, reparation, and guarantees of non-recurrence through lenient sanctions.<sup>113</sup> In order to achieve this, the SJP, as the criminal justice mechanism, was tasked with concentrating its efforts on punishing only those with the greatest responsibility for the most serious and representative crimes.<sup>114</sup> This requires applying an investigative strategy that does not follow a case-by-case approach, but rather identifies patterns of violence.<sup>115</sup> Such patterns may include, for example, repeated crimes against particular groups of society, such as against social leaders; or repeated crimes aimed to achieve particular purposes, such as large-scale forced displacement to enable land grabbing.<sup>116</sup> Such an investigative strategy makes it necessary to investigate the motivations and structural alliances of the different actors behind the most serious international crimes committed during the conflict.<sup>117</sup>

A transitional justice process that attempts to put a holistic approach based on a combination of the four pillars into practice was novel, and the political choice to offer criminal sanctions without imprisonment to those most responsible for the gravest international crimes was highly controversial.<sup>118</sup>

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112. *Id.*

113. Final Peace Agreement, at ¶ 127.

114. L. 1957/19, junio 6, 2019, Diario Oficial 50976 [D.O.] art. 19 (Colom.).

115. Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013, Sentencia C-579/13 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, (p. 287–93) (Colom.).

116. Jurisdicción Especial de la Paz [J.E.P.] [Special Jurisdiction of the Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, agosto 30, 2022, Auto SRVR 104, Caso 008, ¶¶ 25,162–63 (Colom.).

117. As demanded in *Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 118 (May 26, 2010). For a voice of caution regarding whether such an approach makes successful prosecutions more likely, see Alejandra Azuero Quijano, *Sobre la Arquitectura de la Paz en Colombia*, EL ESPECTADOR (Aug. 21, 2013) <https://www.elespectador.com/politica/sobre-la-arquitectura-de-la-paz-en-colombia-article-441646/> [<https://perma.cc/2Y9T-WTAF>].

118. For criticism of this approach, see *Human Rights Watch Analysis of Colombia-FARC Agreement*, HUMAN RIGHTS WATCH (Dec. 21, 2015),

Another innovative but controversial feature of the Colombian transitional justice approach was the inclusion of third-party actors in the transitional justice system. The Final Peace Agreement accorded the SJP jurisdiction over all actors involved in the conflict,<sup>119</sup> including those who were not members of the armed groups (so-called third-party actors),<sup>120</sup> a category that includes those at the center of this Article: economic actors.

There were several reasons for the inclusion of economic and other third-party actors within the competence of the SJP. As documented in the context sections of the Justice and Peace judgments and in a number of reports by civil society organizations and the Center for Historical Memory,<sup>121</sup> a whole range of actors and interests, including economic actors, played an important role in the occurrence and prolongation of the Colombian armed conflict and in the specific crimes that were committed. Recognizing this, and attempting to avoid repeating the problems of the Justice and Peace process, third-party civilians were included in the remit of the transitional criminal justice mechanism so that the complexities of the conflict might be unraveled

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<https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement> [<https://perma.cc/DFS9-9AJ5>].

119. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, ¶ 32 (“The justice component of the Integral System of Truth, Justice, Reparation and Guarantees of Non-Recurrence applies to everybody who participated directly or indirectly in the armed conflict.”).

120. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, ¶ 63 (“Persons who without having formed part of armed organizations or groups contributed directly or indirectly to the commission of crimes in the context of the conflict, can adhere to the justice mechanisms.”). Paragraph 50(f), in turn, specifically refers to third parties when stating that the Chamber for the Definition of the Legal Situation (*Sala de Definición de la Situación Jurídica*) of the JEP has jurisdiction over “persons who, without having belonged to a rebel group, are under investigation for acts that fall within the jurisdiction of the JEP.” *Id.* at ¶ 50(f). It goes on to expressly explain the Chamber’s competence over “civilian non-combatants” and “third-party actors” (*terceros*). *Id.*

121. *See, e.g.*, Centro Nacional de Memoria Histórica, *La Maldita Tierra: Guerrilla, Paramilitares, Minas y Conflicto Armado en el Departamento del Cesar* [The Damned Earth: Guerrilla, Paramilitaries, Mining and Armed Conflict in the Department of Cesar] (2016); Consultoría para los Derechos Humanos y el Desplazamiento, *Informe sobre los Procesos de Desplazamiento, Despojo y Restitución de Tierras en el Predio El Toco, Departamento de Cesar* [Report on the Processes of Displacement, Disposal and Restitution of Lands in the El Toro Property, Department of Cesar] (2016) (discussing the interaction of the complex factors underlying the Colombian conflict).

through investigating the full range of responsible actors.<sup>122</sup> Their inclusion also aimed to counteract the prevailing impunity of these actors, incentivize them to engage with the transitional justice process and contribute to truth and reparation by offering them the same benefits applicable to combatants, protect the rights of victims; and achieve closure of all conflict-related crimes.<sup>123</sup> Moreover, the inclusive approach reflected the FARC's demands that the transitional justice process, including the SJP, should establish the responsibilities of all actors for their involvement in the conflict, including "combatants and non-combatants, state officials, FARC members, politicians, civilians who financed, initiated or organized paramilitarism and paramilitaries who had enjoyed impunity."<sup>124</sup>

Despite opting for an inclusive approach that gave the SJP jurisdiction over third-party civilians, the Final Peace Agreement made distinctions between combatants and non-combatants.<sup>125</sup> Long and detailed provisions dealt with the circumstances in which the guerrilla fighters qualify for amnesties and the state military for a waiver of criminal prosecution. They provided criteria for how to decide which of their actions were committed with a sufficient link to the conflict to justify inclusion in the transitional justice process.<sup>126</sup> Provisions on third-party actors, on the other hand, were very abstract and scarce.

More importantly, while the SJP was given mandatory jurisdiction over members of the FARC and the Colombian military, which meant that it had the power to summon and investigate them

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122. Fondo de Capital Humano, *Inst. For Integrated Transitions, Los Debates de La Habana: Una Mirada desde adentro* 222–23 (Andres Bermúdez Liévano ed., 2020).

123. *Id.* at 223.

124. Delegación de Paz de las FARC-EP, *Mensaje al Pueblo Colombiano sobre el Cierre Definitivo de la Jurisdicción Especial para la Paz y el Acuerdo Parcial sobre Víctimas* [Message to the Colombian People About the Definitive Closure of the Special Jurisdiction for the Peace and the Partial Agreement About Victims] (Dec. 15, 2015).

125. Final Peace Agreement, *Jurisdicción Especial de la Paz* [Special Jurisdiction of the Peace], ch. 5, ¶ 32.

126. *See, e.g.*, Acto Legislativo 1 de 2017 [Legislative Act 1 of 2017], abril 4, 2017, *Diario Oficial* 50196 [D.O.] art. 21–26 (Colom.) (containing special provisions for members of the Armed Forces); L. 1820/16 (Amnesty Law), diciembre 30, 2016 *Diario Oficial* 50976 [D.O.] 50102 (Colom.) (containing lengthy provisions both for the disarmed guerrilla and the members of the Armed Forces); *see also* L. 1957/19, junio 6, 2019, *Diario Oficial* 50976 [D.O.] art. 127–46 (Colom.).

and define their legal situation through sanctions, amnesties, or waivers of prosecution, the Final Peace Agreement did not provide the SJP with a similar jurisdiction over third-party actors. Instead, its competence over these actors depended on the level of their participation in conflict-related crimes. If they voluntarily subjected themselves to the SJP's jurisdiction, all third-party actors, including those who already had firm convictions under ordinary jurisdiction, would have been able to benefit from the transitional justice framework and its reduced sanctions and waivers of prosecution for all crimes committed in the context of the conflict.<sup>127</sup> However, the SJP had mandatory powers to summon third-parties only where their involvement reached the severity threshold of "determinative or habitual participation" in the most serious crimes.<sup>128</sup> The meaning of "determinative or habitual participation," a concept absent from both Colombian and international criminal law, was not further defined, but it seems to have pointed towards a very high level of responsibility. Thus, according to the Final Peace Agreement, the SJP could only have exercised its jurisdiction over economic actors without their agreement in the most serious cases, so that only a small minority would have been under the mandatory jurisdiction of the SJP and its special (lenient) sanctions system, while the vast majority of economic actors would have been free to decide whether or not to succumb to the SJP's jurisdiction.<sup>129</sup>

Both the lack of detail regarding the treatment of third-party actors as opposed to that of combatants and the limitations of the SJP's mandatory jurisdiction over third-party actors suggest that the combatants were regarded as the main addressees of the transitional criminal justice mechanism. The term "third party" itself seems to reflect a particular vision of the conflict, as it conveys the idea that these actors stand somewhat outside of the conflict, whereas the combatants were the primary actors. It is unclear to what extent this was a deliberate political compromise, aimed at reconciling the FARC's demand of an inclusive transitional justice system with important political sectors' strong opposition to their inclusion in the SJP's remit.

In a highly polarized climate, the Final Peace Agreement was put to a referendum and was rejected by a small majority on October

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127. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, ¶¶ 62, 33–34.

128. Final Peace Agreement, Jurisdicción Especial de la Paz [Special Jurisdiction of the Peace], ch. 5, ¶ 32.

129. For an interpretation of the concept as referring to a high level of responsibility, see also MICHALOWSKI ET AL., *supra* note 7, at 192.

2, 2016.<sup>130</sup> There was some evidence that the “no” campaign was at least partly motivated by a wish to avoid the accountability of economic actors for their role in the conflict and that it received funding from businesses that had been named by a paramilitary leader as financial supporters of paramilitary groups during the armed conflict.<sup>131</sup> The “no” vote led to renegotiations of some aspects of the Agreement. The main change made to the way the Agreement dealt with economic and other third-party actors was to replace the reference to “determinative or habitual participation” in conflict-related crimes as a basis for triggering the mandatory jurisdiction of the SJP over these actors with a reference to “active or determinative participation,”<sup>132</sup> and the changes to the Final Peace Agreement were positively received by parts of the economic sector.<sup>133</sup>

#### B. Legislation Implementing the Final Peace Agreement

To facilitate the implementation of the Final Peace Agreement through legislation, a special, fast-track procedure was put in place until the end of November 2017 to make the passage of the relevant legislation through Parliament quicker and easier.<sup>134</sup> Once adopted by Parliament, legislation implementing the Final Peace Agreement required constitutional review by the Constitutional Court.<sup>135</sup> For the purposes of this Article, two pieces of legislation are particularly important. The first is the Constitutional Amendment Act 01 of 2017, which amended the Constitution to include transitory provisions incorporating into the document the main features of the SJP. The second is the Statute Regulating the Administration of Justice by the

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130. *Colombia Referendum: Voters Reject FARC Peace Deal*, BBC (Oct. 3, 2016), <https://www.bbc.com/news/world-latin-america-37537252> [https://perma.cc/R89X-BM6T].

131. Sanchez, *supra* note 32; Rettberg, *supra* note 92, at 271; *Los Cuestionamientos a Bananeros detrás del No*, VERDADABIERTA.COM (Oct. 13, 2016), <https://verdadabierta.com/los-cuestionamientos-a-los-bananeros-detras-del-no/> [https://perma.cc/SMW5-WNLE]; Payne et al., *supra* note 8, at 198–99.

132. Final Peace Agreement Ch. 5, ¶ 32; Payne et al., *supra* note 8 at 146.

133. *'El Nuevo Acuerdo Es Mejor que el Anterior': Rosario Córdoba*, EL TIEMPO (Nov. 20, 2016) <https://www.eltiempo.com/archivo/documento/CMS-16754742> [https://perma.cc/7FU6-KK8Q].

134. L. 1788/16, julio 7, 2016, DIARIO OFICIAL [D.O.], art. 1 (Colom.) [hereinafter Acto Legislativo 01 de 2016].

135. *Id.* at art. 2.

SJP,<sup>136</sup> which contains detailed provisions regarding the function and competence of the various branches of the SJP.

The Constitutional Amendment Act 01 of 2017 (“Constitutional Amendment Act”) included one provision, Article 16, specifically dealing with third-party actors. The content of Article 16 was highly contested. In the final version adopted by Parliament, after several lengthy and acrimonious debates in which quite a few amendments were proposed to limit the SJP’s reach over third-party actors,<sup>137</sup> Article 16 had two paragraphs. The first paragraph stated that all persons who, without belonging to an armed group, had contributed directly or indirectly to the commission of crimes in the context of the conflict, could adhere to the SJP to receive the benefits the SJP can award in exchange for contributions to truth, reparation, and guarantees of non-recurrence.<sup>138</sup>

Article 16’s second paragraph confirmed the mandatory competence of the SJP “with regard to the appearance of those third-party actors who had participated in an active or determinative way” in a list of serious crimes.<sup>139</sup> The second paragraph of Article 16 ended with a definition of determinative participation which was, “for these

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136. L. 1957/19, junio 6, 2019, DIARIO OFICIAL [D.O.] (Colom.). This is not an ordinary statute but rather stands above ordinary statutes because of the constitutional relevance of its content [ley estatutaria].

137. See, e.g., Tatiana Duque, *Así Se Resolvieron los Pulsos alrededor de la JEP*, LA SILLA VACÍA (Mar. 21, 2017), <https://www.lasillavacia.com/historias/silla-nacional/asi-se-resolvieron-los-pulsos-alrededor-de-la-jep-actualizacion-> [<https://perma.cc/BAT6-WGDZ>] (listing the debates that took place, the arguments on each side, and how they were resolved); *El Debate sobre los Financiadores de la Guerra*, EL ESPECTADOR (Mar. 6, 2017), <https://www.elespectador.com/colombia-20/paz-y-memoria/el-debate-sobre-los-financiadores-de-la-guerra-article/> [<https://perma.cc/4M2G-RWHD>] (explaining the background of the debate surrounding how to treat businesses and entrepreneurs in the transitional justice process). An overview of the amendment proposals can be found in Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17 (p. 528–31) (Colom.).

138. Leidy Marcela Ramírez Hoyos & Leidy Catalina Duque Salazar, *Reflexiones sobre la Ley Estatutaria de la Jurisdicción Especial para la Paz desde el Estatuto de Roma*, 21 DIALNET 128, 140–41 (2019) (quoting Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz, Proyecto de Ley Estatutaria 008 de 2017 del Senado y 016 de 2017 de la Cámara [Statutory Bill 008 of 2017 of the Senate and 016 of 2017 of the Chambers], 2017–2018 Legislatura, art. 16 (2017) (Colom.) (prior to final amendments)).

139. In particular, genocide, crimes against humanity, systematically committed war crimes, kidnapping or other grave deprivations of liberty, torture, extrajudicial killings, forced disappearances, rape and other forms of sexual violence, child abduction, forced displacement, and recruitment of child soldiers.

purposes . . . understood to mean an effective and decisive action in the realization of the crimes.”<sup>140</sup>

Thus, Article 16 of the Constitutional Amendment Act mirrored the dual approach to the competence of the SJP over third-party actors adopted in the Final Peace Agreement. It provided all third-party actors with the opportunity voluntarily to adhere to the SJP and avail themselves of its benefits with regard to their responsibility for crimes committed in the context of the armed conflict. On the other hand, it limited the SJP’s mandatory powers to summon third parties to those with active or determinative participation in particular crimes.

The SJP’s grant of mandatory jurisdiction over crimes committed by these actors in the context of the Colombian armed conflict did not create any criminal responsibility that would not have already been in place under Colombian and international criminal law. Including these economic actors in the SJP’s jurisdiction gave them access to the special benefits of the transitional justice system in exchange for contributions to truth, reparation, and guarantees of non-recurrence, reduced and special sanctions in cases of highest responsibility, and waivers of prosecution in cases of lesser responsibility.

It would then seem as if their inclusion in the justice component of the transitional justice process would not have been detrimental, but rather beneficial to economic actors. All but those with the highest responsibility for conflict-related crimes had a free choice of whether to adhere to the SJP and avail themselves of its benefits. Thus, the vast majority of economic actors could obtain legal certainty in the form of a waiver of prosecution, while a criminal sanction would only loom in the most serious cases in which the reduced sanctions in the SJP might have been an attractive alternative to the ordinary sanctions foreseen under the Colombian Criminal Code. Indeed, some civil society organizations expressed concern that the

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140. Leidy Marcela Ramírez Hoyos & Leidy Catalina Duque Salazar, *Reflexiones sobre la Ley Estatutaria de la Jurisdicción Especial para la Paz desde el Estatuto de Roma*, 21 DIALNET 128, 140–41 (2019) (quoting *Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz*, Proyecto de Ley Estatutaria 008 de 2017 del Senado y 016 de 2017 de la Cámara [Statutory Bill 008 of 2017 of the Senate and 016 of 2017 of the Chambers], 2017–2018 Legislatura, art. 16 (2017) (Colom.) (prior to final amendments)).



approach taken in the implementing legislation was so beneficial to economic actors that it risked perpetuating their impunity.<sup>141</sup>

A number of factors may explain why some parts of Colombian society, including political actors, strongly opposed including third-party actors within the SJP's competence. First of all, their inclusion raised the fundamental issue of how to determine the circumstances under which criminal punishment of these actors is necessary and justified in the context of a system that provides the ex-combatants with the most far-reaching amnesties possible. It seems inevitable that these highly political issues should have sparked bitter controversy, especially bearing in mind that the role of economic actors in the conflict was highly contested.

Quite a few economic actors saw themselves primarily, if not exclusively, as victims of the conflict, rather than as perpetrators.<sup>142</sup> The Final Peace Agreement adopted a differentiated approach and made clear that economic and other third-party actors might have been victims of the conflict but also possibly perpetrators. While they are included in the competence of the SJP as potential perpetrators, the list of victims whose rights the peace process aims to restore expressly mentions businessmen and farmers as among the victims of the conflict.<sup>143</sup> Their inclusion in the jurisdiction of the SJP was perceived by some as inappropriately putting them on the same level as the guerrilla fighters.<sup>144</sup> Indeed, in particular some politicians and parts of the business sector intimated that economic actors would suffer large-scale persecution by the SJP, while the real criminals as they saw it—members of the FARC—benefited from far-reaching amnesties or unacceptably low sanctions that did not appropriately reflect their

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141. See the list of interventions, in particular those by Mónica Feria-Tinta et al. and Movimiento Nacional de Víctimas de Crímenes del Estado (MOVICE), to the Constitutional Court in Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17 (annex 1) (Colom.).

142. Roberto Junguito Bonnet et al., *Historial del Consejo Gremial Nacional 2010-2014* 348 (2015).

143. Final Peace Agreement, *supra* note 17, at 189.

144. Mauricio Botero Caicedo, *Con la Plática de Mister Soros...*, EL ESPECTADOR (Mar. 17, 2018), <https://www.elespectador.com/opinion/columnistas/mauricio-botero-caicedo/con-la-platica-de-mister-soros-column-744973/> [https://perma.cc/L5TZ-5NAR]; Jorge Botero, *Pax Christi*, SEMANA (Mar. 8, 2018), <https://www.semana.com/opinion/articulo/jorge-botero-columna-pax-christi/559448/> [https://perma.cc/W3XV-T9VM].

culpability.<sup>145</sup> The oft-repeated fear of a “witch hunt” or vengeance against them expressed a deeply seated lack of trust in the SJP and in fact in the whole peace process.<sup>146</sup>

This was not helped by the fact that “active or determinative participation,” the criterion that defined the mandatory competence of the SJP over third-party actors, was a newly created concept, absent from both Colombian and international criminal law.<sup>147</sup> Given the lack of clarity about its scope and application in individual cases, it was unclear what kind of involvement could reach the severity threshold that would have triggered the mandatory competence of the SJP, since economic actors did not tend to commit any of the relevant crimes through their own hands.<sup>148</sup> This uncertainty further fueled the fears

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145. SEMANA, *supra* note 141. It is important to stress, though, that the Colombian business sector is by no means a homogenous group and was rather highly divided with regard to its approach to the Peace Agreement. *See, e.g.*, Nicolás Jiménez et al., *Underwriting the Peace Dividend: Colombian Business after the Plebiscite*, FORBES (Oct. 29, 2016), <https://www.forbes.com/sites/realspin/2016/10/26/underwriting-the-peace-dividend-colombian-business-after-the-plebiscite/?sh=c5888421ed74> [https://perma.cc/M3JB-FEFC] (explaining how different industries in different regions reacted differently to the peace process).

146. *See* Juan Carlos Rojas, *Como Equilibrar la Jurisdicción Especial para la Paz?*, EL TIEMPO (Oct. 1, 2017) <https://www.eltiempo.com/politica/partidos-politicos/entrevista-de-maria-isabel-rueda-a-rodriigo-lara-presidente-de-camara-de-representantes-sobre-la-jep-136630> [https://perma.cc/4DYL-76N4 ] (answering questions from the point of view of skeptics); Yamid Amat, *Dos Caras de la Posición Empresarial frente la Reglamentación de JEP*, EL TIEMPO (Oct. 28, 2017), <https://www.eltiempo.com/politica/proceso-de-paz/santiago-castro-y-bruce-mac-master-hablan-sobre-reglamentacion-de-la-jep-145892?hootPostID=ad41f4631929356d248a606c1e069ac6> [https://perma.cc/923K-ZXKG]. *But see* Kai Ambos & Susann Aboueldahab, *The Special Jurisdiction for Peace and Impunity: Myths, Misperceptions and Realities*, in *TRANSITIONAL JUSTICE IN COLOMBIA: THE SPECIAL JURISDICTION FOR PEACE* 37, 38 (Kai Ambos & Stefan Peters eds., 2022) (arguing that the opening of the JEP’s first case, case 01, which indicted the highest FARC leaders for hostage taking and other international crimes, refutes the claim that the JEP was a tribunal favoring the FARC).

147. Juan David Velasco, *Las Empresas Privadas Serán Juzgadas en el Posconflicto?*, RAZÓN PÚBLICA (July 18, 2016), <https://razonpublica.com/las-empresas-privadas-seran-juzgadas-en-el-posconflicto/> [https://perma.cc/2KX7-BZSU]; Semana, *Con su Fallo, la Corte Blindó a los Empresarios de la JEP*, SEMANA (Nov. 15, 2017), <https://www.semana.com/pais/articulo/corte-constitucional-blinda-a-empresarios-de-la-jep/252413/> [https://perma.cc/M8BC-8QN8].

148. For a discussion of this concept, *see* MICHALOWSKI ET AL., *supra* note 7, at 192–93, and 250–59.

of economic actors and their political allies in the Colombian Parliament that these concepts would be interpreted broadly, resulting in the persecution of economic actors.<sup>149</sup> All of this resulted in extremely polarized debates of the legislation implementing this aspect of the Final Peace Agreement.<sup>150</sup>

Accommodating these concerns, the Bill Regulating the Administration of Justice by the SJP (“Bill”) adopted a restrictive interpretation of the concept of determinative participation by requiring a symbiotic relationship between the principal offender and the third-party actor and a *mens rea* standard of participating in crimes with the primary purpose of bringing about the violations.<sup>151</sup> Had the legislation been adopted with those restrictions in place, it would have conveyed the message that cases of economic actors who collaborated with members of the armed groups would only be worthy of the attention of the SJP if they had acted with the primary purpose of facilitating the massive human rights violations that were committed. On the other hand, the SJP would not have had mandatory competence over those third-party actors who collaborated with the combatants in pursuance of their own personal and economic interests, knowing that their assistance would have a substantial effect on the crimes committed, without necessarily wishing for them to happen. This would have made it very difficult to include some of the most emblematic cases of economic actor involvement, in particular, financing the armed groups, in the mandatory competence of the SJP.<sup>152</sup>

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149. *¿Empresarios al Banquillo?*, SEMANA (Mar. 9, 2016), <https://www.semana.com/nacion/articulo/justicia-transicional-para-empresarios-involucrados-en-el-conflicto-armado/492271/> [<https://perma.cc/A4W9-HDKQ>].

150. See, e.g., Gabriel Ignacio Gómez, *Las Disputas por la Jurisdicción Especial para la Paz (JEP): Una Reflexión Crítica sobre su Sentido Político y Jurídico*, 69 VNIVERSITAS (2020), <https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/29008> [<https://perma.cc/ZFN6-CMT2>] (discussing the debates surrounding the design and implementation of the JEP); *Con su Fallo, la Corte Blindó a los Empresarios de la JEP*, SEMANA (Nov. 15, 2017), <https://www.semana.com/pais/articulo/corte-constitucional-blinda-a-empresarios-de-la-jep/252413/> [<https://perma.cc/8TKP-DZ9N>]; Wesche, *supra* note 43, at 497–99.

151. Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz, Proyecto de Ley Estatutaria 008 de 2017 del Senado y 016 de 2017 de la Cámara [Statutory Bill 008 of 2017 of the Senate and 016 of 2017 of the Chambers], 2017–2018 Legislatura, art. 62 (2017) (Colom.).

152. For a summary and critical analysis, see *Comentarios sobre el Proyecto de Ley Estatutaria para Administrar la Jurisdicción Especial para la Paz*, FUNDACIÓN IDEAS PARA LA PAZ (Oct. 27, 2017), <https://ideaspaz.org/publicaciones/noticias/2017->

In the midst of the parliamentary debates about the Bill, and a few days before the fast-track procedure for the implementation of the Final Peace Agreement through legislation ended,<sup>153</sup> the Constitutional Court delivered a judgment that declared the mandatory competence of the SJP over third-party actors according to paragraph 2 of Article 16 of the Legislative Act 01 of 2017 to be unconstitutional. In doing so, the Court also made obsolete the restrictions on this competence that were included in the Bill.<sup>154</sup> Two weeks after the decision was handed down, Parliament finally adopted the Statute Regulating the Administration of Justice by the SJP.<sup>155</sup> While, as will be shown below, the Constitutional Court's decision was highly controversial and problematic, many commentators saw the statute's adoption as a direct consequence of that decision, including its approach to third-party actors.<sup>156</sup>

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11/comunicado-sobre-el-proyecto-de-ley-estatutaria-de-administracion-de-la-jep [https://perma.cc/SK42-Q9TJ] (highlighting the ambiguity around the *mens rea* standard and critiquing the limiting scope of the requirements for the third party's relationship with the armed groups in the draft bill); MICHALOWSKI ET AL., *supra* note 7, at 257–59 (explaining the draft language, comparing it with international standards, and applying it to cases).

153. Wesche, *supra* note 43, at 497–98.

154. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia No. C-674/17 (Colom.).

155. *Aprobada en último debate Ley Estatutaria de la JEP*, OFICINA DE INFORMACIÓN Y PRENSA CÁMARA DE REPRESENTANTES (Nov. 27, 2017), <https://www.camara.gov.co/aprobada-en-ultimo-debate-ley-estatutaria-de-la-jep> [https://perma.cc/V4P7-3QE7].

156. Juanita Leon & Juan Esteban Lewin, *Con su Fallo 'Prozac', la Corte Salva la JEP*, LA SILLA VACÍA (Nov. 15, 2017), <https://www.lasillavacia.com/historias/silla-nacional/con-su-fallo-prozac-la-corte-salva-la-jep> [https://perma.cc/7Z4N-UBQD]; *Corte Constitucional Calma a los Empresarios con Aprobación de la JEP*, SEMANA (Nov. 15, 2017), <https://www.semana.com/pais/articulo/corte-constitucional-tranquiliza-a-empresarios-con-la-jep/252396/> [https://perma.cc/77E7-2J2G]; *Los 10 Puntos con los que la Corte Puede Haber Salvado a la JEP*, SEMANA (Nov. 14, 2017), <https://www.semana.com/nacion/articulo/los-condicionamientos-de-la-corte-constitucional-a-la-jep/547220/> [https://perma.cc/437J-FQST]; *Con su Fallo, la Corte Blindó a los Empresarios de la JEP*, SEMANA (Nov. 15, 2017), <https://www.semana.com/pais/articulo/corte-constitucional-blinda-a-empresarios-de-la-jep/252413/> [https://perma.cc/8TKP-DZ9N] (observing that the Court's decision ended congressional debate over the statute).

C. The Colombian Constitutional Court's Decision on the Inclusion of Economic Actors

The importance and the controversial nature of the inclusion of economic actors within the competence of the SJP are reflected in amicus curiae briefs<sup>157</sup> filed with the Constitutional Court to inform its deliberations on the constitutionality of Article 16 of the Constitutional Amendment Act. These deliberations ultimately resulted in the aforementioned decision on the inclusion of economic actors within the SJP's competence. Many briefs strongly criticized the approach of the Final Peace Agreement, mirrored in Article 16, Paragraph 2 of the Constitutional Amendment Act, to limit the mandatory competence of the SJP over economic actors to only those with active or determinative participation in the most serious crimes. The amicus brief submitted to the Colombian Constitutional Court by the International Center for Transitional Justice, for example, argued that it was unconstitutional not to give the SJP mandatory competence over all economic actors who might have incurred responsibility for conflict-related crimes.<sup>158</sup> Other civil society organizations feared that Article 16 made it possible for the SJP to limit its mandatory competence and therefore perpetuate economic actor impunity by restrictively interpreting the legal concept of "determinative participation," which served as a gatekeeper for the mandatory competence of the SJP.<sup>159</sup> This stood in stark contrast to economic actors' apprehension that the ill-defined nature of key legal concepts would give the SJP wide discretion to persecute these actors.<sup>160</sup> Some briefs took the stance that the statute itself and the use of the concept of determinative participation were unproblematic so long as they were interpreted and applied in a manner consistent with international law and Colombian constitutional principles.<sup>161</sup>

The Prosecutor of the International Criminal Court submitted an amicus brief to the Colombian Constitutional Court setting out

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157. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia No. C-674/17 (annex 1) (Colom.).

158. *Id.* at 437–38. The ICTJ also submitted a petition for a hearing to the Inter-American Commission of Human Rights, which took place in Lima in June 2017.

159. *Id.* at annex 1 (listing interventions, including those of Mónica Feria-Tinta et al. and Movimiento Nacional de Víctimas de Crímenes del Estado (MOVICE)) (Colom.).

160. SEMANA, *supra* note 141.

161. See Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, (anexo 1, p. 432, 440) (Colom.) (summarizing the interventions from Essex Transitional Justice Network and Dejusticia).

some principles of customary international law that would need to be considered to make the statute compatible with international criminal law. The Prosecutor's brief promoted the view that the Court's competence should be interpreted broadly to avoid impunity.<sup>162</sup>

The Constitutional Court not only did not follow any of these recommendations but instead declared any mandatory jurisdiction of the SJP over third-party actors to be unconstitutional because it violated the principle of the natural judge.<sup>163</sup> This principle is a due process right guaranteed by Article 29 of the Colombian Constitution, according to which no one can be judged other than by a competent judge.<sup>164</sup> The inclusion of FARC members within the SJP's jurisdiction was deemed to be constitutional because it happened with their agreement and indeed upon their insistence on being judged by a specifically created transitional justice tribunal.<sup>165</sup> The inclusion of the members of the Colombian Armed Forces in the mandatory jurisdiction of the SJP was considered justified because of their combatant status:

To the extent that the institutional scheme introduced by the Constitutional Amendment Act 01 of 2017 constitutes an essential component of the transitional justice process, it seems clear ... that, without affecting the principle of the natural judge, it is applicable to all combatants, with the purpose to guarantee symmetrical treatment of all actors of the conflict who find themselves in similar legal positions.<sup>166</sup>

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162. Office of the Prosecutor, *Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional sobre la Jurisdicción Especial para la Paz ante la Corte Constitucional de la República de Colombia* (Oct. 17, 2017), <http://cr00.epimg.net/descargables/2017/10/21/17135b6061c7a5066ea86fe7e37ce26a.pdf?int=masinfo> [<https://perma.cc/8GXC-TDFC>].

163. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, *Sentencia C-674/17 Gaceta de la Corte Constitucional [G.C.C.]* (p. 393) (Colom.).

164. The Colombian Constitutional Court has interpreted this principle to guarantee the pre-determination of the judge who will hear a case, which means that the competent court must have been previously created by law, that their competence was established before the matter to be decided occurred, that the judge does not sit outside of jurisdictional structures (ex post) and was not instated to hear a particular case (ad hoc), and that a matter under the jurisdiction of ordinary courts of law must not be submitted to a special jurisdiction. *See* Corte Constitucional [C.C.] [Constitutional Court], diciembre 1, 2014, *Sentencia T-916/14 Gaceta de la Corte Constitucional [G.C.C.]* (No. 3.5) (Colom.).

165. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, *Sentencia C-674/17 Gaceta de la Corte Constitucional [G.C.C.]* (p. 392) (Colom.).

166. *Id.*

However, the mandatory application of the transitional justice framework to non-combatants, such as third-party civilians and state agents outside of the Armed Forces, was determined to be unconstitutional.<sup>167</sup> The Court expressed the concern that the SJP runs the risk of being structurally tendentious<sup>168</sup> with regard to noncombatants, because of its special features—in particular, that it was designed in response to the needs of the transitional justice process<sup>169</sup> as an *ad hoc* tribunal operating with special sensitivity towards the armed conflict and the measures needed for its termination, and that its magistrates were selected according to different rules than those that apply to the appointment of judges to other courts and tribunals.<sup>170</sup>

According to the Constitutional Court, the special legal regime governing the SJP allows partial replacement of the retributive component of criminal sanctions with a reparatory and restorative focus. It thus “determines sanctions not only in light of the crimes committed, but also of the subsequent behavior of the accused and, in particular, his contribution to truth, reparation[,] and non-repetition.”<sup>171</sup> This, the Court held, provided the SJP with ample discretion to define criminal sanctions according to the needs of the victims, rather than based on a clearly determined catalogue of sanctions, as would be the case in the ordinary criminal jurisdiction.<sup>172</sup> Accordingly, the Court concluded that to make the jurisdiction of the SJP mandatory for third-party actors meant to impose a different substantive legal regime and justice paradigm on them than the one set forth by Colombian substantive and procedural law when the acts occurred.<sup>173</sup>

In this way, the Court created a two-tier system of actors involved in the conflict, allowing the state to only impose transitional justice measures on combatants and not on civilians. The Court did not clarify why the combatant status of members of the Colombian Armed Forces puts them in a legal situation similar to the members of the FARC guerrilla, even though, unlike the latter, the former did not specifically demand or consent to being subjected to the jurisdiction of the SJP. Nor did the Court explain which differences between

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167. *Id.*

168. *Id.* at 400.

169. *Id.* at 395–96.

170. *Id.* at 396–97.

171. *Id.* at 401.

172. *Id.*

173. *Id.*

combatants and non-combatants justified the application of the principle of the natural judge to only the latter but not the former.<sup>174</sup>

In a recent decision, the Appeals Chamber of the SJP challenged whether the obligatory submission of FARC members to the SJP depended on their combatant status. The Chamber suggested that it was based on submission to the command structures of the FARC and thereby on the decisions of the FARC negotiators who accepted the SJP's competence on its behalf. According to the Chamber, this applied whether the individual member of the FARC had a combatant or non-combatant role in the organization.<sup>175</sup> It rightly considered that the distinction between combatants and non-combatants might be useful in the context of regulating conduct during hostilities but not when it comes to determining over which actors the SJP has competence.<sup>176</sup>

D. Summary of the main features of the competence of the SJP over economic actors

After the decision of the Colombian Constitutional Court, the competence of the SJP over third-party actors is now as follows: they can voluntarily submit to its jurisdiction and benefit from the special sanctions or a waiver of criminal prosecution, depending on the level of their involvement, in exchange for contributing full truth and reparations.<sup>177</sup> Those who decide against doing so will remain under the jurisdiction of the ordinary criminal courts, to be judged under ordinary criminal law with the penalties provided by the Criminal Code—a much less beneficial system. Third-party actors can postpone

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174. See also Enrique Santiago Romero, *La JEP: Instrumento de Paz, Justicia y Verdad: Cambios Unilaterales y Arbitrarios, Enemigos y Perspectivas*, in *EL ACUERDO DE PAZ EN COLOMBIA* 185 (Jairo Estrada Alvarez ed. 2019) (noting that the Court's decision to exclude non-combatants based on the principle of the natural judge facilitated impunity and counteracted the rights of victims).

175. Jurisdicción Especial de la Paz [JEP] [Special Jurisdiction of the Peace], Sección de Apelación [Appeals Chamber], julio 22, 2022, Auto TP-SA 1187 of 2022, En el asunto de Rodrigo Tovar Pupo (¶¶ 47–49) (Colom.) [<https://perma.cc/W4KM-Q9U7>].

176. *Id.* at ¶ 67.

177. For a detailed analysis of the procedure for voluntary submission and the legal treatment of third-party actors by the JEP, see SABINE MICHALOWSKI ET AL., *TERCEROS CIVILES ANTE LA JURISDICCIÓN ESPECIAL PARA LA PAZ (JEP)* (Dejusticia 2020), <https://www.dejusticia.org/wp-content/uploads/2020/03/TercerosJEP-Web-Mar9.pdf> [<https://perma.cc/ZRQ8-YHDP>].



the decision to voluntarily adhere to the SJP until the ordinary jurisdiction investigates and indicts them.<sup>178</sup>

Unlike in the Justice and Peace process, economic actors can now benefit from the SJP's alternative sanctions system if they so wish. However, the Constitutional Court decision reintroduced some important features of the problematic fragmentation of jurisdiction under the Justice and Peace process that the Peace Agreement aimed to overcome. Just like in the context of the Justice and Peace process, it is extremely likely that, as the SJP goes about its role of carrying out comprehensive investigations and establishing a judicial truth about the crimes committed during the conflict and the culprits who committed them, information will come to light about the participation of economic actors.<sup>179</sup> If these actors do not voluntarily submit to the jurisdiction of the SJP, this information will need to be referred to the ordinary jurisdiction tasked with investigating and trying these crimes, resulting in the duplication of the judicial process and impediments to holistic investigations and trials that already caused problems under the Justice and Peace process. If economic actors, once indicted, decide to adhere to the SJP, the case will have to be dealt with anew by that jurisdiction in light of its own procedural and substantive legal framework.

In practice, the decision of the Constitutional Court means that, despite the benefits of adhering to the SJP, whether economic actors will make use of this mechanism and engage with the transitional justice process will depend on the effectiveness of the investigations and prosecutions undertaken by the ordinary jurisdiction. To date, very few economic actors have voluntarily submitted to the jurisdiction of the SJP,<sup>180</sup> and all of them either

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178. L. 1957 de 2019, junio 6, 2019, DIARIO OFICIAL [D.O.], Art. 63, ¶ 4 (Colom.).

179. See, e.g., the hearing in the SJP with Salvatore Mancuso, one of the leading figures of Colombia's paramilitarism. Luke Taylor, *Colombian Elite Backed Death Squads, Former Paramilitary Commander Says*, THE GUARDIAN (May 19, 2023), <https://www.theguardian.com/world/2023/may/19/colombia-paramilitary-salvatore-mancuso-auc-death-squads> [<https://perma.cc/QN5A-2FRP>] ("Mancuso alleged that hundreds of businesses—including banana companies and multinationals such as Coca-Cola and Drummond—helped fund the AUC in the 1990s as it grew from a community of vigilantes into a national terror machine, while military generals trained and supplied the AUC commanders with helicopters and uniforms. Coca-Cola and Drummond have previously denied the allegations.").

180. Precise numbers of third-party civilians admitted to the SJP's jurisdiction are not being published, but, as of Aug. 25, 2023, a total of 178 individuals that are

already have convictions,<sup>181</sup> have proceedings against them in the ordinary jurisdiction at an advanced stage, and/or are in pretrial detention.<sup>182</sup> This confirms that the main, if not the only, incentive to adhere to the SJP under the competency rules created by the Colombian Constitutional Court would be to avoid higher sanctions in the ordinary jurisdiction, have their convictions in ordinary criminal courts replaced by the beneficial treatment in the SJP, and/or obtain liberty. Thus, the criminal accountability of these actors primarily depends on how the ordinary jurisdiction advances with respect to investigations and prosecutions of these actors, progress which has been slow at best.<sup>183</sup>

#### IV. LESSONS FROM THE COLOMBIAN EXPERIENCE FOR WHETHER AND HOW TO INCLUDE ECONOMIC ACTORS IN A SPECIFICALLY CREATED CRIMINAL TRANSITIONAL JUSTICE MECHANISM

When discussing lessons to be learned from the two different Colombian examples of the inclusion of economic actors in a criminal justice mechanism during a transitional justice process, one needs to be mindful that these processes are still ongoing. It is also important not to lose sight of the specific features of the Colombian approaches when drawing broader conclusions from them—in particular, that the Justice and Peace process was aimed at incentivizing the

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neither members of the former FARC guerrilla nor the Colombian Armed Forces have signed the statement of adherence. This is 1.3% of the overall number of persons admitted to the SJP's jurisdiction. This figure comprises state agents other than members of the Armed Forces, third-party civilians, and social protest. *La JEP en Cifras*, JEP (Aug. 25, 2023), <https://www.jep.gov.co/Infografas/cifrashtml/cifras-agosto-25.aspx> [<https://perma.cc/JF7M-X32U>].

181. See the case of Jaime Blanco Maya for an example of a former contractor for Drummond who was sentenced to 37 years in prison in the ordinary criminal jurisdiction and voluntarily adhered to the JEP. Jurisdicción Especial de la Paz [JEP] [Special Jurisdiction of the Peace], Sala de Definición de Situaciones Jurídicas [Chamber for the Definition of Legal Situations] octubre 19, 2021, Resolución 5015, Solicitante Jaime Blanco Maya (Colom.) [<https://perma.cc/EWC5-EQFN>].

182. See the case of David Char Navas for an example of a businessmen and state agent who voluntarily adhered to the JEP while in pretrial detention and with advance criminal proceedings against him before the Colombian Supreme Court. Jurisdicción Especial de la Paz [JEP] [Special Jurisdiction of the Peace], Tribunal para la Paz [Tribunal for Peace] agosto 21, 2018, Auto TP-SA 19/18, En el asunto de David Char Navas (¶¶ 3.1–3.15) (Colom.) [<https://perma.cc/4DMU-8E5Z>].

183. See the discussion of the Justice and Peace process in Section II, *supra*.

demobilization of a specific group of actors in the armed conflict, that the peace agreement was the result of a negotiated peace in both processes, and that the special tribunal had the power to provide important benefits in exchange for truth, reparation, and guarantees of non-recurrence.

A. Who to include in the remit of a criminal transitional justice mechanism

As the two Colombian examples show, where a transitional justice process with a particular criminal justice component is set up after a period of armed conflict, a decision needs to be made as to who to include in or exclude from its remit. Those not included within the jurisdiction of such a mechanism will usually remain under the remit of the ordinary criminal courts of the transitional country. Therefore, a decision about the remit of a special transitional justice tribunal is not, in principle, about who will be held to account for their crimes but rather primarily determines whose responsibility will be addressed as part of the specifically designed transitional justice process.

Dealing with the responsibilities of all actors involved in the conflict, not just specific groups of actors, such as combatants, was regarded by those negotiating the Final Peace Agreement as necessary for several reasons: to address the complexities of the conflict by investigating the full range of responsible actors, to counteract the prevailing impunity of economic actors, to incentivize them to engage with the transitional justice process and to contribute truth and reparation by offering them the same benefits available to combatants, to protect the rights of victims, and to achieve closure of all conflict-related crimes.<sup>184</sup> However, this does not suggest that all members of included groups were therefore regarded as perpetrators, or that members of included groups could not also have been victims of the conflict.<sup>185</sup> Instead, it simply means that the transitional justice

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184. Liévano, *supra* note 122, at 222–24; Delegación de Paz de las FARC-EP, *supra* note 124.

185. Indeed, the Peace Agreement explicitly recognized the potential victim status of economic actors: “The end of the conflict constitutes the best opportunity to realize the rights of victims to truth, justice, reparation and non-repetition, and in general assures the full satisfaction of the human rights of all.” Final Peace Agreement at 189. The long list of victimised groups that follows explicitly includes farmers, ranchers, merchants and businessmen, and women. *See also* Sanchez, *supra* note 32, at 14 (noting that reports about the participation of some businesses in human rights abuses do not mean all businesses were complicit or that commercial actors could not be victims).

tribunal was tasked with investigating those within each included group who might have incurred criminal responsibility. Thus, in the Colombian context, just as the inclusion of the Colombian Armed Forces does not mean that all of its members held criminal responsibility for conflict-related crimes, the inclusion of economic and other third-party actors in the SJP equally does not express a judgment that all third-party actors are criminals.

While to limit the competence of a transitional criminal justice mechanism to particular actors, as was the case with the Colombian Justice and Peace process, did not mean that those who were included were the only actors with criminal responsibility for conflict-related crimes, it reflected the political aim to incentivize, at that particular point in time, the demobilization of members of paramilitary groups and their engagement with a transitional justice process. Thus, whoever is included or excluded from the jurisdiction of a criminal transitional justice mechanism reflects a certain conception of who the relevant actors of an armed conflict were, those whose responsibility needs to be addressed as part of a particular transitional justice process. In that sense, once the path of setting up specific transitional justice measures is chosen, who falls within the scope of these mechanisms and who remains excluded send important messages about whose accountability is regarded as most emblematic or important for achieving the aims of the transitional justice process, such as lasting peace and the satisfaction of the rights of victims.

As the Colombian peace process shows, the attribution of responsibilities can be highly contested. Indeed, one of the most divisive questions was whether—in a context in which ex-combatants benefited from far-reaching amnesties or lenient criminal sanctions—it would be appropriate for non-combatant, third-party actors to be held criminally accountable<sup>186</sup> and face criminal sanctions as though they bore the greatest responsibility for conflict-related crimes. This reflects the well-known problem that it will often be difficult after a period of armed conflict to reach political agreement on who bears responsibility, including who the aggressors were, who acted in

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186. See, e.g., Velasco, *supra* note 147 (examining whether commercial actors ought to be subject to criminal as well as civil liability); *¿Qué Tanto Puede la Jurisdicción Especial para la Paz Meterse con los Empresarios?*, SEMANA (Aug. 31, 2016), <https://www.semana.com/nacion/articulo/acuerdo-de-paz-mitos-de-la-jurisdiccion-especial-para-la-paz/491955/> [https://perma.cc/E3DM-TXEW] (recognizing that private actors could be criminally liable, but only in extreme cases).

legitimate self-defense or based on coercion, and who was clearly a victim.<sup>187</sup>

Nevertheless, from a legal perspective, criminal responsibility for international crimes is not limited to combatants, and neither can only combatants be most responsible for such crimes.<sup>188</sup> The Rwandan media case, for example, where several Rwandan civilians were convicted by the International Criminal Tribunal for Rwanda for their role in the Rwandan genocide, principally for disseminating hatred through a radio station and other means while occupying “positions of leadership and public trust,” confirms that economic actors can commit international crimes.<sup>189</sup> That they can in some cases be among the most responsible for conflict-related crimes is demonstrated, for example, by prosecutions of some industrialists during the Nuremberg trials whose remit was to concentrate on the “trial and punishment of the major war criminals.”<sup>190</sup> Whether or not someone’s responsibility falls into this category thus does not depend on being a combatant, but rather on the level of their involvement in international crimes.<sup>191</sup> To task a transitional justice tribunal primarily with focusing its accountability efforts on international crimes and on those with the highest responsibility for these therefore does not mean that its competence should automatically be restricted to combatants.

In this context, it is also important to recall that the international obligation of states to investigate and in certain cases prosecute and punish those responsible for international crimes for which no amnesty is allowed focuses on the gravity of the crime and the criminal conduct, not on whether or not the perpetrator was a combatant.<sup>192</sup> The Inter-American Court of Human Rights<sup>193</sup> has

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187. Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 84 (Routledge, 2011).

188. Kyriakakis, *supra* note 36, at 221.

189. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Trial Judgment, ¶ 1098 (Dec. 3, 2003).

190. Charter of the International Military Tribunal (Nuremberg Charter) art. 6, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284.

191. Prosecutor v. Charles Blé Goudé, ICC-02/11-02/11, Decision on the Defence Challenge to the Admissibility of the Case against Charles Blé Goudé for Insufficient Gravity (Nov. 12, 2014) at 5–7.

192. See, e.g., Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 38544 (“[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”).

193. Manuel Cepeda Vargas v. Colombia, *supra* note 55, at ¶ 118; Truth, Justice and Reparation: Fourth Report on Human Rights Situation, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.Doc. 49/13, 21 (Dec. 31, 2013).

interpreted this obligation to mean that states need to investigate comprehensively the patterns of criminality and the structures that made them possible, as well as the beneficiaries of crimes and violence. The precise content and scope of the obligation to investigate, prosecute, and punish are not clearly defined, and what flexibility can be applied in this regard in transitional justice scenarios is equally unclear.<sup>194</sup> However, it seems that at a minimum, those who are regarded as the most responsible for the most serious crimes need to be investigated, prosecuted, and punished.<sup>195</sup>

Based on an extensive analysis of international jurisprudence,<sup>196</sup> the Colombian Constitutional Court defined the concept of most responsible as referring to

The person who has an essential role in the criminal organization for the commission of each crime, i.e., who directed, controlled or financed the systemic commission of crimes against humanity, genocide or

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194. Nelson Camilo Sánchez León & Rodrigo Uprimny, *The Challenges of Negotiated Transitions in the Era of International Criminal Law*, in *BEYOND THE BINARY: SECURING PEACE AND PROMOTING JUSTICE AFTER CONFLICT* 28–29 (Dejusticia, 2019), <https://www.dejusticia.org/wp-content/uploads/2019/03/Beyond-the-Binary-Securing-Peace-and-Promoting-Justice-after-Conflict.pdf> [<https://perma.cc/Z2EA-7KRV>] at 102; Juana I. Acosta L. & Ana María Idárraga M., *Alcance del deber de investigar, juzgar y sancionar en transiciones de conflicto armado a una paz negociada: convergencias entre el Sistema Interamericano de Derechos Humanos y la Corte Penal Internacional*, 45 *REVISTA DERECHO DEL ESTADO* 59 (2020); JUANITA GOEBERTUS, *Compatibility Between Transitional Justice Tools in Colombian and International Law*, in *THE COLOMBIAN PEACE AGREEMENT*, 110, 113 (Jorge Luis Fabra-Zamora et al. eds., Routledge, 2021); RENÉE JEFFERY, *NEGOTIATING PEACE: AMNESTIES, JUSTICE AND HUMAN RIGHTS* 6–7 (Cambridge University Press, 2021); Mark Freeman & Louise Mallinder, *Negotiating Amnesties, Peace and Justice: A New Path*, *JUSTICE INFO* (Feb. 28, 2022), <https://www.justiceinfo.net/en/88026-negotiating-amnesties-peace-justice-new-path-2.html> [<https://perma.cc/2YLE-J8QF>]; see also *supra* note 13 (discussing the scope of state responsibility to seek criminal accountability during a transitional justice process).

195. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, *Gaceta de la Corte Constitucional* [G.C.C.] (p. 382) (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013, Sentencia C-579/13, *Gaceta de la Corte Constitucional* [G.C.C.] (p. 384–385) (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 15, 2018, Sentencia C-080/18, *Gaceta de la Corte Constitucional* [G.C.C.] (p. 215–218) (Colom.).

196. See also Sabine Michalowski et al., *¿A quiénes sancionar? Máximos responsables y participación determinante en la Jurisdicción Especial Para la Paz* (Dejusticia, 2020) (providing a detailed analysis of the jurisprudence of ad hoc international criminal tribunals on the concept).

war crimes. This concept therefore not only includes leaders who ordered the commission of the crime, but also acts through which these were financed, such as drug trafficking.<sup>197</sup>

Thus, economic and other third-party actors can be among those whose responsibility for conflict-related crimes states are under an obligation to investigate, prosecute, and punish.

Nevertheless, states have significant leeway with how to meet this obligation. In the case of *Vereda la Esperanza v. Colombia*, for example, the Inter-American Court of Human Rights explained that limiting the Justice and Peace process to demobilized members of paramilitary groups and the ensuing fragmentation of the transitional justice process was not in itself problematic.<sup>198</sup> This is because where the process brought to light information about the criminal responsibility of actors excluded from its jurisdiction, such as the state military or business people, their cases were referred to the ordinary criminal jurisdiction.<sup>199</sup> However, the Court found a violation of the obligation to investigate, prosecute, and punish because of the slow progress in the ordinary jurisdiction with regard to opening investigations in response to the referrals by the Justice and Peace tribunals.<sup>200</sup>

In principle, therefore, it seems that states are free to include third-party actors in a specific transitional criminal justice mechanism or leave them out, as long as they comply with the obligation to investigate, prosecute, and punish through effective prosecutions, which can be done through ordinary criminal courts. However, the decision confirms that the problems of the fragmented Colombian Justice and Peace process in this respect—discussed in some detail in a previous section of this Article—can result in a violation of Colombia's international obligations if the large-scale impunity of these third-party actors in the ordinary jurisdiction is not addressed.

Several conclusions can be drawn from this discussion. First, there are no legal reasons not to include economic actors in a

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197. Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013, Sentencia No. C-579/13, Gaceta de la Corte Constitucional [G.C.C.] (p. 279–284) (Colom.).

198. *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341, ¶ 233 (Aug. 31, 2017).

199. *Id.* at ¶¶ 232–33.

200. *Id.* at ¶¶ 235–36. In that case, investigations had still not started more than seven years after the referral.

specifically created transitional justice mechanism, as they can hold responsibility for international crimes, including the highest responsibility. Second, this inclusion is not required to meet a state's obligation to investigate, prosecute, and punish as long as it does not result in impunity for economic actors who hold high level criminal responsibility and effective alternatives to comply with the obligation are in place. However, the experience with the Colombian Justice and Peace process casts serious doubts on the possibility that a fragmented process will in practice be sufficiently efficient to comply with that obligation.

Are there nevertheless good reasons for not including economic actors in a specifically created transitional criminal justice mechanism in contexts with evidence that some of them clearly held responsibility for conflict-related crimes? The main reason for caution might be that such inclusion could cause additional tensions and endanger the transitional justice process. As already explained, it is not new to transitional justice that the attribution of responsibilities for past atrocities is highly contested.<sup>201</sup> Broadening the remit of a transitional justice process runs the danger that these tensions multiply. Indeed, as the powerful opposition to the inclusion of economic actors in the remit of the SJP demonstrates,<sup>202</sup> such inclusion might risk increasing and cementing polarization instead of contributing to overcoming it. It might also heighten the risk of spoilers of the transitional justice and peace process.<sup>203</sup>

To take seriously the hazards of including economic actors when setting up a transitional criminal justice mechanism is clearly important. In some circumstances, it might lead to a political decision to leave them outside of the remit of a transitional criminal justice mechanism and address economic actors' accountability through different means, which would, in most cases, probably be trials in the ordinary courts. The many problems with such trials, identified *supra*, would then need to be addressed in order to avoid perpetuating impunity and violating international law obligations.<sup>204</sup> However, at least in Colombia, it seems as if the resistance against including

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201. HAYNER, *supra* note 187.

202. For a detailed discussion of this theme, see *supra* notes 133–136 and accompanying text.

203. See also Payne et al., *supra* note 5, at 140–147 (discussing strategies employed by businesses to obtain favorable outcomes through the transitional justice process).

204. *Vereda La Esperanza*, *supra* note 198, at ¶ 235–236.



economic actors in the remit of the SJP was primarily directed against their mandatory inclusion, not against making its benefits available to them if they regarded adherence to be advantageous. It is then worth considering whether, for future transitional processes, allowing inclusion of economic actors but making inclusion dependent on their consent could avoid both the many problems with leaving economic actors outside of the remit of a transitional criminal justice mechanism and the risk attached to including them against their strong opposition.

#### B. Voluntary inclusion

Where the engagement with a transitional justice tribunal is voluntary, it is imperative to provide incentives for engagement, because voluntariness invites the individual to carry out an analysis of the benefits that adherence would bring and of the consequences of not opting into the process. Indeed, were no benefits to be had, it is unlikely that anybody would choose to expose themselves to criminal investigations, prosecutions, and sanctions.<sup>205</sup> This has created serious challenges for achieving accountability of economic actors as part of the Colombian transitional justice process.

What might be regarded as a benefit will largely depend on the context in which the voluntary decision needs to be made. To illustrate this point, consider the hypothetical scenario that economic actors had been given the possibility to participate voluntarily in the Justice and Peace process and obtain the reduced sanctions of five to eight years of imprisonment in exchange for full confessions and reparation. For the demobilized members of armed groups who would have faced considerably higher sanctions had they not adhered to the Justice and Peace process, engagement with the process was clearly beneficial. The situation of economic actors is, however, somewhat different. While they might in some cases face higher sanctions than the maximum punishment of eight years of imprisonment,<sup>206</sup> in other cases the sanctions in the ordinary jurisdiction might be lower. For example, the

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205. For some recommendations on how to incentivize the voluntary submission of third-party actors to the JEP, see MICHALOWSKI ET AL., *supra* note 74, at 28–37.

206. See, e.g., the case of Urapalma, *supra* note 24 (imposing a sentence of 16 years).

criminal sanctions for complicity are reduced by one quarter compared to those for authors of a crime under Colombian criminal law.<sup>207</sup>

A criminal sanction of a maximum of eight years of a deprivation of liberty without prison for those who have the highest responsibility for conflict related crimes and a waiver of criminal prosecution in all other cases of criminal responsibility, as is the case under the Colombian Peace Agreement, is clearly much lower than the sanctions that would await economic actors in the ordinary criminal jurisdiction. However, all benefits are conditional upon contributions to the transitional justice process in the form of truth, reparation, and recognition of responsibility. In cases of the highest responsibility, third-party actors voluntarily confessing to participation in these crimes before the SJP considerably increases the risk of facing sanctions, however lenient. Given the widespread impunity of these actors in the ordinary jurisdiction and the resulting improbability of any legal consequences of their acts if they choose to stay outside of the transitional criminal justice mechanism, such risk may prove disincentivizing. Even if the responsibility lies at the lower level and its recognition would provide legal certainty and lead to a waiver of criminal prosecution, this is only a benefit if the chances of an investigation and sanction in the ordinary jurisdiction are high. So far, this has not been the case in Colombia. Unlike demobilized members of armed groups who reintegrate into society by engaging with the transitional justice process, economic actors might instead lose their social status and suffer reputational damage by doing so.

It becomes clear that the main incentive to engage with a system that relies entirely on the voluntariness of those who want to benefit from it are rigorous and timely investigations and prosecutions in the ordinary jurisdiction that create the real risk of much higher criminal sanctions.<sup>208</sup> Indeed, only third-party actors who already have

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207. Criminal Code Art. 30 (Colom.). For a discussion of the potential punishment of third-party actors in the ordinary criminal courts, *see* Wesche, *supra* note 43, 486–87.

208 *See* Wesche, *supra* note 43, at 499 (arguing that, given that voluntary participation “depends on the existence of a credible threat of receiving a regular criminal sanction” the JEP’s influence over these actors “now greatly depends on the ordinary criminal justice system;” nonetheless concluding that, “considering the difficulties and poor results that have characterized the investigations of the ordinary prosecutors thus far... few businessmen will have sufficient incentives to present themselves before the JEP” and “its contribution to clarify their role in paramilitarism and hold them accountable will be rather limited”).

convictions that they want to see reduced<sup>209</sup> or those against whom proceedings in the ordinary jurisdiction are at an advanced stage and who therefore face a real risk of much higher sanctions<sup>210</sup> have so far made use of the possibility of voluntarily submitting to the competence of the SJP.<sup>211</sup> This, in turn, suggests that this option in practice primarily serves the interests of the few economic actors who have been convicted in the ordinary jurisdiction or are at a heightened risk of such a conviction.

The problems of a voluntary approach are further exacerbated when the decision to participate is left open until proceedings in the ordinary jurisdiction are initiated, as is the case in Colombia.<sup>212</sup> This means that economic actors lose nothing by placing their bet on impunity because they can still circumvent the higher sanctions in the ordinary jurisdiction by adhering to the transitional justice tribunal later, if that bet does not go their way. If one were to design a system based on voluntariness, it might be important to consider setting a clear time limit for economic actors to decide whether to adhere to the transitional justice mechanism. This could create an incentive to engage with the criminal transitional justice mechanism in order to gain legal certainty and avoid the harsher sanctions in the ordinary jurisdiction if proceedings are initiated at some future point. However, the effectiveness of this incentive would depend on the experience of accountability or impunity and the perceived risk of prosecution in any given context. The reputation and trust in the impartiality of the transitional justice tribunal might be another important factor.<sup>213</sup>

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209. See JEP, *supra* note 175.

210. JEP, *supra* note 175.

211. The recently signed cooperation agreement between the Prosecutor General's Office and the JEP aims to end impunity of third-party actors, *inter alia*, through better collaboration between both institutions. The hope is to create stronger incentives for economic actors to adhere to the JEP, particularly in the context of the new macro-case 08 on alliances between different actors of the conflict including third-party actors. See *Fiscalía General de la Nación y Jurisdicción Especial para la Paz (JEP) firman acuerdo de cooperación contra la impunidad*, FISCALIA GENERAL (Oct. 10, 2022), <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-general-de-la-nacion-y-jurisdiccion-especial-para-la-paz-jep-firman-acuerdo-de-cooperacion-contra-la-impunidad> [https://perma.cc/K2EX-WPP4].

212. See Ley 1957 de 2019, Art. 63 ¶ 4 (providing the procedure for voluntary participation).

213. Some of the anxieties of economic actors that they might face persecution under the Peace Agreement had to do with their reservation about some of SJP magistrates. See Wesche, *supra* note 43, at 598–99.

These complexities raise the question whether the Final Peace Agreement—that gave the SJP mandatory competence over certain third-party actors, while adopting a voluntary approach for all others—was an effective compromise. The Agreement’s differentiated approach has the advantage of at least subjecting those with the greatest responsibility to the transitional criminal justice process, while assuring all other third-party actors that they are not regarded as determinative actors of the conflict.<sup>214</sup> However, making adherence voluntary for all third-party actors whose responsibility for conflict-related crimes did not reach the highest threshold—the vast majority—would mean that the above-identified problems of a voluntary approach, would apply to most of these actors. Issues surrounding the lack of incentives to encourage engagement with the criminal transitional justice process would become particularly problematic. Furthermore, the differentiation made between combatants with lower-level responsibility who are mandatory subjects of the SJP and third-party actors falling into the same category whose adherence was designed to be voluntary is difficult to explain or justify.

The original approach, moreover, caused problems in the form of legal uncertainty, given that the mandatory competence of the SJP over third-party actors rested on the novel and undefined legal concept of determinative participation. This, as previously discussed, seems to have aggravated resistance to any mandatory competence of the SJP over these actors.<sup>215</sup> If one were to consider introducing a system whereby a transitional criminal justice tribunal had mandatory competence only over third-party actors with the highest level of responsibility, it would be recommendable to design clear criteria according to which to distinguish this highest level responsibility from all other levels, to enhance predictability, and to allay fears of arbitrariness and witch hunts. While it will take much more than clearly defined legal concepts to make political choices of who to prosecute more acceptable, this would be an essential first step.

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214. This can be inferred, for example, from the words of then President Manuel Santos when he explained that those who voluntarily adhered to the JEP would “be clean for life and have any mention in the ordinary jurisdiction deleted.” *¿Empresarios al banquillo?*, SEMANA, *supra* note 149.

215. See Velasco, *supra* note 147 (stating additional clarity surrounding business culpability is needed to ensure JEP does not threaten judicial security of these actors); SEMANA, *supra* note 149 (discussing concerns that such an exercise of jurisdiction would undermine the JEP’s credibility.)

Even if strong incentives could be developed to coax economic actors into adhering to a transitional criminal justice mechanism, it is far from clear that a system that is voluntary for third-party actors would be desirable or even justifiable. Leaving engagement with a transitional criminal justice mechanism to their individual assessment would mean prioritizing personal interests over the aims of the transitional justice process—including the satisfaction of victims' rights to justice, truth, and reparation. At the same time, as long as the inclusion is mandatory for other actors, as is the case for combatants in Colombia, excluding third-party actors from the mandatory competence sends a message that they are not regarded as essential actors of the conflict whose responsibility needs to be addressed as part of transitional justice.<sup>216</sup> In a context like the Colombian one with a complex set of responsibilities because systemic international crimes were committed through alliances between different actors and not by the combatants alone, such a view is difficult to sustain.

Nevertheless, Colombia was unsuccessful in including even economic actors with the highest level of responsibility in the mandatory jurisdiction of the SJP and the powerful opposition to this demonstrates that such an inclusion might risk increased polarization and heighten the risk of spoilers of the peace and transitional justice process. Where mandatory inclusion is not politically feasible, voluntary inclusion might have the advantage that at least those few third-party actors who voluntarily appear before the transitional criminal justice tribunal would be incentivized to provide information that was previously unknown. This information could include, for example, details about alliances between third parties and other actors in the conflict, such as paramilitary groups and the state military.<sup>217</sup> At least those few actors who choose to adhere to the SJP will provide truth and other reparation to victims.<sup>218</sup>

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216. As discussed in the text accompanying notes *supra* 163–73, this seems to have been the view of the Colombian Constitutional Court.

217. Sala de Definición de Situaciones Jurídicas [Chamber for the Definition of Legal Situations], Subsala Especial A de Conocimiento, octubre 19, 2021, Resolución 5015, (¶ 83) [Colom.].

218. Jurisdicción Especial para la Paz, *A esto se comprometió David Char Navas ante la JEP* (Oct. 2019), <https://www.jep.gov.co/Sala-de-Prensa/Paginas/A-esto-se-comprometi%C3%B3-David-Char-Navas-ante-la-JEP.aspx> [<https://perma.cc/7AK6-DJGM>].

### C. Mandatory inclusion

However, mandatory inclusion has several important advantages over an approach that relies on voluntariness. Outside of the Colombian context, referring to prosecutions in transitional justice contexts more broadly, the former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, observed that:

Mass violations usually require not just complex organization of the “armed” operations that immediately cause the violations, but the coordination of those operations with supportive political and economic actors, and even with social and cultural entrepreneurs, capable of mobilizing large groups and resources. A prosecutorial strategy at the domestic level which seeks to have long-term impact should therefore target the “nodes” in this web of actors. Clearly, this requires a particular prosecutorial focus that emphasizes patterns of violations, helps discover chains of command, links between armed actors and other groups, as well as financial and other support, including arms trade and smuggling. The challenge here is not only to establish individual criminal accountability for isolated violations, but to zero in on the structures or networks that enabled the various actors to jointly make the horrific violations happen. To target those enabling connections could contribute to the dismantlement of the whole criminal set-up.<sup>219</sup>

Specific transitional justice tribunals are not the only way to dismantle structures of violence, as the necessary prosecutorial strategies can also be employed in ordinary criminal courts. Nor is it suggested that investigations and prosecutions that establish individual responsibilities with a focus on the individual’s role in structures and alliances will be easy and undisputed when carried out in a specially designed transitional justice tribunal. However, where such tribunals are created, to include all actors in its mandatory reach would be the only way to prevent the fragmentation of the criminal justice efforts that caused so many problems in the Colombian Justice

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219. Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence) *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, to the Human Rights Council, ¶ 72, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014).

and Peace process and concerns. This is true not only within Colombia, but also in the Inter-American Court of Human Rights<sup>220</sup> and the Office of the Prosecutor of the ICC.<sup>221</sup> At a minimum, that all actors can be investigated and prosecuted together would make comprehensive investigations of the alliances behind conflict-related international crimes and successful prosecutions more likely. The tribunal would be able to follow up on information that comes to light in the context of hearings and trials against ex-combatants and could include all relevant actors in the investigation of systemic crimes.

Indeed, the problematic experience of the Justice and Peace process repeats itself to some extent in the newly opened macro case 08 of the SJP that investigates the crimes committed by members of the Colombian armed forces and other state agents in alliances with paramilitaries and third-party actors.<sup>222</sup> Comprehensive investigations of these alliances face important challenges given that very few of the economic actors who are suspected of having played an important role in the crimes have currently succumbed to the jurisdiction of the SJP. As in the context sections of the decisions issued by the Justice and Peace tribunal against paramilitaries, the role of economic actors could be documented, but this will not result in judicial truth-finding. Instead, an attribution of criminal responsibility would need to be deferred to the ordinary courts.

To mandatorily include all those with responsibility for conflict-related crimes in the remit of such a mechanism would also alleviate concerns of inequitable treatment of different actors. It would avoid the detrimental differential treatment which arises where some actors are excluded from the competence of a transitional justice tribunal and the benefits it offers to those under its jurisdiction, as was the case of the Colombian Justice and Peace process.<sup>223</sup> On the other hand, it would prevent those whose adherence is voluntary from placing their bet on impunity outside of the criminal transitional justice mechanisms, while other actors do not have this possibility.

Overall, it seems that where a special criminal transitional justice tribunal is being created, mandatory inclusion would be the

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220. Vereda La Esperanza v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341, ¶ 235–36 (Aug. 31, 2017).

221. See Office of the Prosecutor, International Criminal Court, Situation in Colombia: Interim Report ¶ 210 (Nov. 14, 2012).

222. JEP, *supra* note 87.

223. Wesche, *supra* note 43, at 502.

most effective way for states to comply with the obligation to carry out comprehensive investigations of the structures of violence,<sup>224</sup> achieve accountability of all actors,<sup>225</sup> and maximize the satisfaction of the rights of victims<sup>226</sup> who deserve truth and reparation whether or not individual economic actors volunteer to engage with the transitional justice process.<sup>227</sup>

Nevertheless, since the mandatory inclusion of third-party actors in the remit of the SJP created powerful resistance and was overturned in the end, perhaps there are lessons to be learned from this for future transitional justice processes other than leaving them outside of the remit of a transitional justice tribunal. It might be possible that the resistance to the inclusion of economic actors could have been mitigated at least to some extent if the remit of the SJP had been defined from the outset with a focus on conflict-related international crimes, instead of on particular actors of the conflict.<sup>228</sup>

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224. Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 118 (May 26, 2010).

225. See U.N. Working Grp. on Bus. and Hum. Rts., Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action, ¶ 89, U.N. Doc. A/75/212 (July 21, 2020).

226. Indeed, the need to address the resulting impunity has been driving victims and civil society organizations' demands that the SJP investigate their responsibilities. Jurisdicción Especial para la Paz, *531 Organizaciones de Víctimas Participaron en las Audiencias de Observaciones para la Apertura de los Nuevos Casos de la JEP* (May 11, 2022), <https://www.jep.gov.co/Sala-de-Prensa/Paginas/531organizaciones-de-v%C3%ADctimas-participaron-en-las-audiencias-de-observaciones-para-la-apertura-de-nuevos-casos-de-la-JEP.aspx> [<https://perma.cc/A88K-KX7J>]; JURISDICCIÓN ESPECIAL PARA LA PAZ, INFORME DE LA COMISIÓN DE PARTICIPACIÓN A LA SALA DE RECONOCIMIENTO DE VERDAD, RESPONSABILIDAD Y DETERMINACIÓN DE LOS HECHOS Y CONDUCTAS (SRVR) 21, 24–25 (Mar. 17, 2022); CREDHOS PAZ, ESTADO: ECOPETROL, GUERRA Y PETRÓLEO: INFORME SOBRE LA RESPONSABILIDAD EN LA EMPRESA ESTATAL ECOPETROL EN EL MARCO DEL CONFLICTO ARMADO EN BARRANCABERMEJA – CASO CONTRATISTAS DE ECOPETROL (2021); MESA DE INTERLOCUCIÓN Y CONCERTACIÓN DE LOS MONTES DE MARÍA, INFORME PARA LA JURISDICCIÓN ESPECIAL PARA LA PAZ: SEMBRAR VERDAD Y JUSTICIA PARA COSECHAR PAZ Y RECONCILIACIÓN EN LOS MONTES DE MARÍA-RESPONSABILIDAD PENAL INTERNACIONAL DE TERCEROS 43 (2020); Comisión Colombiana de Juristas, *Comunicado Público a los Directivos de Drummond para Invitarlos a Presentarse ante la JEP* (Jan. 27, 2021), [https://www.coljuristas.org/nuestro\\_quehacer/item.php?id=449](https://www.coljuristas.org/nuestro_quehacer/item.php?id=449) [<https://perma.cc/DB8C-9UAD>].

227. Wesche, *supra* note 43, at 501–02; Sanchez, *supra* note 32, at 71.

228. It needs to be acknowledged that it was difficult to avoid such discussions and initial definitions of competence over particular actors in Colombia, given that



Under such an approach, the inclusion of third-party actors in criminal investigations would be the logical consequence of a comprehensive approach towards addressing the criminal responsibilities for conflict-related crimes. This would have brought the competence of the SJP in line with *ad hoc* international criminal tribunals that tend to distinguish authors from accomplices, but not combatants from non-combatants.<sup>229</sup> This approach would also have made it unnecessary to express *ab initio* that some third-party actors might have had such a high level of involvement in conflict-related crimes that they should be put on par with the most responsible members of the FARC guerrilla, as the mandatory competence over third-party actors with determinative participation suggested. Thus, such an approach might have prevented abstract discussions of whether third parties can be amongst those with the highest responsibility for conflict-related crimes that were triggered by the need for legislative definitions of the competence of the SJP over these actors and could possibly have reduced the legal uncertainty for economic actors. It would also have avoided the impression, created by the focus of the Final Peace Agreement on the combatants and the limited mandatory competence of the SJP over third-party actors, that transitional justice was primarily for the combatants, which conveyed a very narrow approach to the complex responsibilities for conflict-related crimes and made the inclusion of non-combatants then seem somewhat arbitrary.

It is, of course, merely speculative whether a crime-focused approach would have avoided—or at least mitigated—third-party actors’ rejection to being included in the competence of the SJP or precluded the polarization over who the actors of the conflict were. Indeed, the opposition to third-party inclusion was also for reasons

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a transitional justice process for the paramilitary groups was already in course when the Peace Agreement was signed and the internal civil war with other guerrilla groups still ongoing. For an overview of the complexities of current President Petro’s total peace agenda see, for example, Juanita León, *Cinco Conclusiones del Debate Constitucional sobre la Paz Total*, LA SILLA VACÍA (Aug. 23, 2023), <https://www.lasillavacia.com/historias/silla-nacional/cinco-conclusiones-del-debate-constitucional-sobre-la-paz-total/> [https://perma.cc/S84P-NC3R].

229. An approach that is focused on crimes rather than perpetrators would not exclude the possibility to accommodate, where relevant, differences between third-party and other actors over which such a tribunal has competence. This is demonstrated by the differential but equitable treatment between members of the FARC and of the Colombian Armed Forces under the Peace Agreement and the implementing legislation, such as the requirements that the FARC demobilize and provide collective recognition of responsibility, and that members of the Colombian Armed Forces can serve a potential deprivation of liberty in a military unit. See L. 1957/19, junio 6, 2019, Diario Oficial 50976 [D.O.] art. 56–57, 63 (Colom.).

unrelated to discussions over whether they were perpetrators. In particular, the composition of the tribunal with magistrates coming partly from non-governmental and human rights organizations, rather than the Colombian judiciary, created distrust. Another lesson from Colombia is therefore that the composition of the transitional justice tribunal needs to be carefully considered to avoid distrust and a perception of potential for bias, both towards certain actors as well as within its vision of the conflict.<sup>230</sup>

## V. CONCLUSION

When the inclusion of economic actors in the Victims Agreement that was negotiated in Havana and became chapter 5 of the Final Peace Agreement, international precedent on the implications of and good practice for achieving their criminal accountability existed only in the form of isolated trials of economic actors in international<sup>231</sup> and national<sup>232</sup> criminal tribunals for their role in international crimes after periods of mass atrocities. None of these trials took place as part of a specifically created criminal justice mechanism that aimed to achieve accountability, truth, reparation, guarantees of non-recurrence and the satisfaction of victims' rights through a complex system of benefits. Having adopted a completely novel approach to addressing economic actor accountability as part of a transitional criminal justice process, Colombia now sets a unique precedent with valuable lessons for future transitional justice processes to address the criminal responsibility of economic actors. Some of these lessons refer to normative questions of economic actor responsibility as part of transitional justice, some specifically relate to scenarios in which special criminal justice tribunals are being created, and others extend to the situation in which criminal accountability in the aftermath of armed conflict is left to ordinary criminal courts.

The main conclusion of this Article is that where a special criminal transitional justice mechanism is created, the Colombian Justice and Peace process highlights the many problems with excluding economic actors from that process, while the peace process between the Colombian government and the FARC demonstrates the

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230. Wesche, *supra* note 43, at 498–99.

231. *See supra* notes 14, 20.

232. *See supra* notes 14–18.

problems with including them without making that inclusion mandatory.

Despite the many challenges of holding economic actors to account for their role in international crimes after periods of armed conflict or repression, the question when a transitional justice process is being designed is not whether to address these responsibilities, but, rather, whether to do so as part of the transitional justice process or outside of it. Indeed, while the rhetoric of some economic actors regarding the SJP's remit suggested a denial of any criminal responsibility,<sup>233</sup> sweeping absolution from any criminal responsibility was never an option. Instead, the question was whether to pursue that responsibility through the SJP or leave it to the ordinary criminal courts.

Nevertheless, if a special criminal justice tribunal is put in place, the Colombian experience shows that a decision about who to include in or exclude from its jurisdiction has fundamental implications and needs to be made with the utmost caution. While not a decision about which actors do or do not have criminal responsibility for conflict-related crimes, the remit of a criminal transitional justice mechanism expresses a vision of who the relevant actors of the armed conflict were and whose responsibility needs to be addressed as part of a transitional justice process. There might be good reasons to deliberately limit a transitional justice process to dealing with the role of particular actors. For example, limits may be useful where the goal is to achieve the demobilization of a particular armed group, as in the case of the Colombian Justice and Peace process, or to facilitate a peace agreement between particular parties to an armed conflict, as was the case with the peace process between the Colombian government and the FARC. However, even then, careful consideration should be given to whether the primary aim of the process makes it necessary to exclude all other parties from the process.

Which actors will or should be included in a transitional justice process depends on context. Nevertheless, the discussion of the Colombian experience suggests that there are good reasons for an inclusive approach. Precisely because of the persistent denial that economic actors can hold criminal responsibility, despite ample evidence of their role as part of complex structures and interests behind international crimes, it is important to break with the narrative that the relevant crimes are only committed either by either

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233. Junguito Bonnet et al., *supra* note 142, at 348.

combatants, in case of conflict, or the state, in case of repression. It is equally important to dispel the idea that the main addressees of transitional criminal justice measures in the aftermath of armed conflict should only be the combatants where they carried out their crimes in close collaboration with other, including economic, actors.

Different transitional justice processes might require different considerations when setting up a special criminal tribunal, but the Colombian examples show that their logic is likely to differ from that of ordinary criminal courts since their remit and rules need to reflect the aims of the transitional justice process. In the Colombian case, that aim was to reconcile the conflicting interests of achieving peace and satisfying victims' rights through a focus on restorative, rather than solely retributive, justice.<sup>234</sup> To illustrate, economic actors under the jurisdiction of the SJP would need to make contributions to truth, reparation and guarantees of non-recurrence to avoid losing the benefits of the SJP, whether or not their responsibility is high enough to deserve a criminal sanction under the transitional justice system. Indeed, being found not to have contributed the full truth might have adverse consequences, including exclusion from the SJP in the most extreme cases.<sup>235</sup> In the ordinary jurisdiction, on the other hand, if a case does not go to trial, none of these contributions will be forthcoming. Even if the case does proceed to trial, a criminal trial in the ordinary jurisdiction would only lead to a truth limited by the confines of adversarial criminal trials in which defendants might be well advised to withhold the truth as much as possible.

There are then many reasons to include economic actors in a special transitional justice tribunal. First, it would broaden that mechanism's potential to enhance the satisfaction of victims' rights to truth, justice, and reparation. Moreover, where economic actors were part of the structures that the transitional justice process aims to uncover and dismantle, it seems that their inclusion in the process, including its criminal justice component, is the best way to facilitate producing a comprehensive judicial narrative that takes account of the complex collaborations. These complexities include economic interests that can be among the root causes of armed conflict and conflict-related

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234. See *supra* notes 169–71 and accompanying text.

235. See, for example, the case of Musa Abraham Besaile Fayad. JEP, Sección de Apelación [Appeals Chamber], Auto TP-SA 1028/2022, en el asunto de Musa Abraham Besaile Fayad, enero 26, 2022, (Colom.).

crimes; the process of dismantling the underlying structures; and that of identifying what else must be done to guarantee non-recurrence.

The international obligation to investigate, prosecute, and punish does not require the inclusion of economic actors in a transitional criminal justice mechanism that is created as part of a transitional justice process, as long as other effective criminal accountability mechanisms exist.<sup>236</sup> The Colombian experience shows, however, that comprehensive investigations to establish patterns of macro-criminality and shed light on the structures and alliances behind systemic crimes that the obligation demands become much more difficult if the jurisdiction over different actors of the conflict is scattered between different tribunals,<sup>237</sup> with the consequence of perpetuating impunity.

There are thus many reasons that point towards a holistic approach to a criminal transitional justice mechanism. A discussion of the Colombian approach under the Final Peace Agreement led to the conclusion that the most consistent way to implement this would be to provide the tribunal with mandatory jurisdiction over these actors, rather than making it voluntary for all of them or for those are not among those with the highest level of responsibility for conflict-related crimes.

Nevertheless, it cannot be underestimated that economic actors can be important veto players whose opposition to a transitional justice process can have important adverse repercussions,<sup>238</sup> as the Colombian experience confirms.<sup>239</sup> In Colombia, many of these discussions centered on contested views on responsibilities for conflict-related crimes, who were the perpetrators and who the victims of the conflict. The inclusion of economic actors into the remit of the SJP was presented as a witch hunt and persecution. While it is unrealistic to think that these contestations can be resolved and the buy-in of opponents achieved, it is important to counteract the claims that the inclusion of such actors is primarily politically, rather than legally, motivated. Indeed, it is crucial to stress that states have a duty to investigate, prosecute, and punish at least those with the highest

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236. Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 118 (May 26, 2010).

237. MICHALOWSKI ET AL., *supra* note 7, at 131–32.

238. Payne et al., *supra* note 5, at ch. 3; *see also* Wesche, *supra* note 43, at 489–90 (reflecting on how the collection of evidence became more difficult while prosecutors suffered intimidation).

239. *See supra* notes 112–25 and accompanying text.

responsibility for certain international crimes, and that economic actors can be among them.

Another possibility to mitigate polarized debates about who to include in the remit of a special criminal justice tribunal would be to define the remit with a focus on the crimes to be investigated, rather than on specific actors. Concentrating on the violations that occurred, whether they were committed by particular actors only or through alliances between different actors, might help to avert abstract and often controversial initial discussions of responsibilities. Instead, the focus would then be on who was involved in the crimes under investigation, thereby avoiding artificial limitations and fragmentations of criminal investigations of different actors of the same crime.

At the same time, if a future transitional justice process were to include economic actors in the remit of a criminal justice tribunal that provides benefits in exchange for contributions to truth, reparation, and guarantees of non-recurrence, it would be important to emphasize the benefits of such an approach for these actors. As the Colombian Justice and Peace process highlighted, the exclusion of economic actors causes concerns of detrimental differential treatment, as they will then not be able to avail themselves of the benefits offered by the transitional justice tribunal. These benefits not only consist of lenient sanctions or waivers of prosecution, but also in obtaining closure for their involvement in conflict-related international crimes.<sup>240</sup> In that respect, international experience shows that where leaving economic actors outside of a transitional justice process leads to or exacerbates an accountability gap, victims and civil society organizations are likely to seek justice through other means—be it criminal trials under domestic jurisdiction,<sup>241</sup> international fora,<sup>242</sup> or

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240. Closure may come in the form of a definitive decision with regard to their criminal responsibility, either through beneficial sanctions, a waiver of prosecution, or the conversion of an already existing criminal conviction in the ordinary criminal courts into a more lenient one.

241. *E.g.*, the criminal trials in Argentina, Chile, Colombia, the Netherlands, and France. *See supra* notes 22–226 and accompanying text.

242. *Human Rights Groups Call for ICC to Investigate Chiquita Executives for Death Squad Payments*, TELESUR (May 19, 2017), <https://www.telesurenglish.net/news/Human-Rights-Groups-Call-for-ICC-to-Investigate-Chiquita-Executives-for-Death-Squad-Payments-20170519-0009.html> [<https://perma.cc/7R3L-KJJJ>].

compensation in civil trials<sup>243</sup>—thereby leaving economic actors in a situation of legal uncertainty.<sup>244</sup>

To include economic actors in the remit of a specifically transitional criminal justice mechanism is not the only possible way to hold them to account for their role in international crimes committed during periods of armed conflict or repression. Indeed, not many examples of specially designed criminal justice mechanisms exist worldwide, and trials in ordinary criminal courts might be the main mechanism at the disposal of most transitional societies. Some of the lessons from Colombia are also relevant for such a scenario. While the issue of fragmentation between different tribunals does then not arise, the need to investigate all actors who were involved in the commission of international crimes to create a comprehensive narrative that takes account of the complex collaborations and structures behind conflict-related crimes still exists. This requires investigation strategies that allow the alliances and structures behind systemic crimes to be uncovered, and to identify and attribute the responsibilities of all actors holistically. Indeed, it is important for ordinary courts to avoid overlooking the potential criminal responsibility of such actors or dismiss that responsibility as less relevant than that of maybe more obvious culprits such as military or guerrilla commanders or direct authors of the most atrocious international crimes.

Whether or not economic actor criminal accountability is pursued through a special transitional criminal justice mechanism or ordinary criminal courts, how to apply criminal law standards to their involvement in conflict related systemic crimes still awaits much needed clarification. It is clear that, not only those who took part in an armed conflict as combatants can be subject to criminal justice, but also those who collaborated with them—including by financing them or providing logistical support.<sup>245</sup> However, to define the criminal responsibility of the latter raises complex and uncomfortable questions around the expected behavior of economic actors and other civilians in conflict situations. With regard to the economic sector, this includes

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243. See, e.g., *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2d Cir. 2007) (reviewing litigation regarding the South African Apartheid in U.S. courts under the U.S. Alien Tort Statute); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009) (reviewing litigation regarding the South African Apartheid in U.S. courts under the U.S. Alien Tort Statute).

244. KYRIAKAKIS, *supra* note 36, at 216.

245. See, for example, the conviction of the French cement multinational Lafarge for complicity in crimes against humanity for financing armed groups, including ISIS, in Syria. Cossart et al., *supra* note 26.

difficult questions of where to draw the line between acceptable business practices and complicity in international crimes and gross violations of human rights.<sup>246</sup> The inclusion of these actors in criminal trials makes discussions of the limits of legitimate business behavior as well as the post-conflict role of business that are still in their infancy<sup>247</sup> more pressing.<sup>248</sup> It also requires a serious attempt to define under what circumstances economic actors can be regarded as among those with the highest responsibility for international crimes. This question has received even less academic attention,<sup>249</sup> but will become urgent in Colombia as macro case 08 on crimes committed by the Colombian Armed Forces in alliance with economic actors, *inter alia*, advances.

None of what has been said in this Article is meant to provide a judgment on whether a special criminal transitional justice tribunal is a better way of holding economic actors to account than investigations in ordinary criminal courts. To form a view on this would require a different analysis and it might be too early to use Colombia as a case study for this. The first case before the SJP that includes an investigation of the role of economic actors—macro case 08, focusing on alliances between the Colombian military forces and other actors—is still in its infancy. Moreover, because of the limited competence of the SJP over economic actors, very few of them will be included in the criminal investigations. Rather, the purpose of this analysis was more modest: to think through the implications of including or excluding such actors from the remit of a special criminal transitional justice tribunal if such a tribunal is created and to make some recommendations for how best to design and justify such an inclusion. In this respect, it becomes clear that despite its problems and limitations, the Colombian experience offers important lessons for academic discussion and future transitional justice practice.

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246. For a discussion, see Michalowski, *supra* note 30.

247. Hugo van der Merwe & M. Brinton Lykes, *Transitional Justice and Corporate Accountability: Introducing New Players and New Theoretical Challenges*, 16 INT'L J. OF TRANSITIONAL JUST. 291, 294–95 (2022).

248. KYRIAKAKIS, *supra* note 36, at 227–28.

249. Indeed, there seems to be an assumption, widely shared during the Colombian debate, that economic actors are unlikely to be among the masterminds of international crimes. See PIETROPAOLI, *supra* note 36, at 47–48. This, however, is far from clear, as the Nuremberg trials and those in the International Criminal Tribunal for Rwanda ICTR also focused on those with the highest responsibility and nevertheless included industrialists or other business leaders. *Id.* at ch. 2.



