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PART I

Negotiating Transitional Justice

A Conceptual Framework

INTRODUCTION

It is tautological to say that the Colombian experience of negotiating peace with justice was unique. How could it be otherwise? Yet, the uniqueness of the experience was limited, not absolute. Some aspects of the experience were context-specific, while others were intrinsic to the choice to negotiate peace with justice in the first place. Separating out these aspects is a sine qua non for making sense of the Colombian experience, or indeed any experience, of negotiating peace with justice.

As such, Part I is devoted to this endeavour. It is divided into three main sections.

First, there is an examination of what makes ensuring justice for atrocity crimes more difficult, both normatively and practically, than for non-atrocity crimes. In terms of practical difficulties, the analysis distinguishes three types of situations: one in which there is neither negotiation nor transition out of war; one in which there is transition without negotiation; and one in which there is negotiation without transition. Subsequently, the analysis focuses on the unique structural complications of seeking justice in the latter situation.

The second section of Part I examines a surprising gap in international law when it comes to the negotiation of peace with justice. It is the absence of a body of law that could provide incentives, guidance, and support to states such that they could become both more inclined to choose and better able to achieve negotiated rather than military solutions to prevent and resolve internal armed conflict.

The third and final section enumerates some conceptual and practical rules of thumb to guide future efforts at negotiating peace with justice. These draw from the Colombian experience as well as other country contexts.

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1

General Considerations

The term 'atrocity crime', as used here, refers to the international crimes of genocide, crimes against humanity, and war crimes – and could reasonably be extended to include gross human rights violations. Such crimes destroy human dignity, life, or both, and on levels that are usually irreparable. That is because no amount of justice against the perpetrator of such crimes, and no amount of reparation in favour of the victim, can be adequate to redress the harm caused. Morally speaking, every remedy is second best. Restoring the status quo ante is not an option.

Nevertheless, international law obliges states to make a good-faith effort to ensure national-level justice for atrocity crimes. Thus, the normative and practical impossibility does not exonerate the legal responsibility.

In a state in which there is neither negotiation nor transition out of war, the fulfilment of this legal responsibility involves what we may designate **first-order** difficulties. These are the kinds of unavoidable challenges that may be expected in any case of serious crime for which the perpetrator does not admit guilt, such as the high burden of proof that must be met; the limited amount of direct, inculpatory evidence; the exorbitant time and cost of investigation; the lack of willing and reliable eyewitnesses; and so forth.

These difficulties will be familiar to any prosecutor or judge in a country that enjoys the rule of law. Trying serious crimes is, with rare exception, an uncertain and complex undertaking in the absence of a guilty plea.

In a state in which a transition out of war or dictatorship is under way, a set of **second-order** structural difficulties exists on top of the first ones. First, wars and dictatorships tend to produce an unmanageable number of perpetrators, and equally unmanageable number of victims, in relation to the capacity of the justice system. Second, the independence and effectiveness of legal institutions themselves are typically low. Third, the destruction of evidence is often widespread. Fourth, the fears of witnesses will be deep-seated, as threats and

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intimidation will remain prevalent. Fifth, legal obstacles to justice – such as lapsed prescription periods, earlier amnesties that remain in force, and lacunae in the criminal code vis-à-vis atrocity crimes – are common. Sixth, less money tends to be available for retroactive justice efforts, since so much has to be allocated to national reconstruction, institution building, and processing of new crimes. Finally, with the exception of trials against dispensable enemies, transitional governments tend to be reluctant to prosecute the past, as they are understandably wary about jeopardising a fragile or hard-won stability.

Let us now imagine a third state in which there is negotiation without transition (i.e., a state that remains at war politically, militarily, or both). Here, each of the first- and second-order difficulties of achieving justice must be taken into account, but also a **third-order** set.

What are these? First, prior to signing any political settlement or peace accord, the parties to a negotiation need and want to understand the legal risks their signature might entail inside the borders of the country. As such, if there is going to be justice as a formal part of the settlement, it will have to be the subject of explicit, consensual agreement. Second, in a negotiation, consent will normally have to come from the persons presumed to bear greatest responsibility for past atrocity crimes, as they will almost always be among those sitting at the negotiating table. The prospect of retroactive justice is something such persons most certainly perceive as contrary to their interests. Third, as any negotiated settlement involves multiple and competing agenda items, the issue of justice cannot be hived off but must instead be form-fitted with the other issues. These may include complex security, political, economic, and other decisions that move in the opposite direction of justice.

This being the case, it is not surprising to observe that affirmative national-level justice commitments rarely appear in negotiated political and peace settlements (unless foisted by third-party mediators upon weak parties, as in South Sudan 2015). Instead, the parties to a negotiation typically resolve the issue in one of the following ways:

- With guarantees of neither justice nor truth-seeking against those presumed to bear greatest responsibility for past atrocity crimes (e.g., Lebanon 1991, Bosnia 1995, Afghanistan 2001, Angola 2002),
- With guarantees of truth-seeking but explicit deferral or conditioning of the prospect of justice to another time or process (e.g., El Salvador 1992, Burundi 2000, Kenya 2008, Philippines 2015), or
- With guarantees of truth-seeking but neither explicit deferral of justice nor explicit promises of it (e.g., Haiti 1993, Guatemala 1994, Sierra Leone 1999, Nepal 2006, Mali 2015).

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The reason for this pattern should be self-evident. The combination of first-, second-, and third-order difficulties radically reduces the bandwidth for guaranteeing justice in any form. As such, the default outcome is either one of those described above or a breakdown in the overall talks (as occurred in Uganda where, from 2003 to 2008, the government sought to negotiate national-level justice as part of a larger agreement with the Lord's Resistance Army meant, in fact, to avert the threat of international justice).

It was only in Colombia that the parties succeeded, in the central negotiation process, to reach agreement on the establishment of a national-level, post-conflict justice mechanism and corresponding set of criminal sanctions (all of which was part of a comprehensive transitional justice system). The result, though messy, is unprecedented – and, for that reason alone, worth understanding in detail.

Yet, before examining the factors that made Colombia's agreement possible, it is first important to understand two key implications of the *non*-context-specific difficulties of negotiating justice for atrocity crimes.

First, the combined effect of (1) the requirement of consensus, (2) the decision-making role of those bearing greatest responsibility, and (3) the imperative to align justice with other agenda items obligates the negotiating parties to be far more **flexible** in legal, tactical, and other terms. That is because the force of these three variables militates massively against agreements on justice.

Second, the combined effect of these same variables also compels the parties to adopt an **integrated** concept of justice that (1) takes account of the original insight of transitional justice, which conceives justice as something broader than mere criminal justice, (2) interlocks the mechanisms and rhythms of justice with those pertaining to disarmament, political participation, institutional reform, and more, and (3) understands the imperative of ending armed conflict or repressive rule as superior, rather than subordinate, to that of justice.

In turn, these structural needs – for flexibility on the one hand, and integrated methodology on the other – produce yet more consequences in the context of an effort to negotiate peace with justice.

First, a wide range of *negotiation-specific* techniques must be learned and deployed. Three of these we examine in some depth in this book: recourse to constructive ambiguities, use of confidence-building measures, and the separation of controllable and uncontrollable risks. Second, a parallel set of *justice-specific* techniques must be canvassed and utilised. These include a variety of creative options for reconciling competing expectations of dignity and legal security; choosing between ordinary and extraordinary mechanisms; agreeing on who is victim and who is victimiser; distinguishing causes and

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consequences of the conflict; resolving the interplay of truth-seeking and justice; parsing retributive, restorative, and distributive forms of justice; and balancing national sovereignty and international standards.

What must be understood is that these techniques and choice points cannot be avoided in any setting in which a deliberate decision is made to negotiate peace with justice. That is because, without them, there is no way to be sufficiently flexible and integrated so as to consummate an agreement. Indeed, we can see this with particular clarity in the case of Colombia's negotiation because the negotiating parties made the unprecedented and radical choice to put victims 'at the centre' of the negotiation agenda, and because the government was emphatic that it would not sign a deal that risked breaching its international legal obligations.

But before we come to all of this (in Part II of the book), we present the reader with the following, more general theory of negotiating peace with justice.

A. SAFELAND, TRANSITIONLAND, AND NEGOTIATIONLAND

In any context of dictatorship or armed conflict, there is a strong likelihood, if not guarantee, that atrocities will be committed. Even a conflict actor that is broadly committed to upholding international human rights and humanitarian law will have difficulty preventing excesses across the entirety of its political or military structures.

However, under international law, positive intentions are all but irrelevant to the question of state responsibility. They will not excuse a government from its duties to investigate, prosecute, and punish those responsible for atrocities.

Nevertheless, the kind of damage wrought by atrocity crimes is fundamentally unfixable. A group killed in the course of a genocidal campaign cannot be restored to life by the courts. Neither can an individual, enslaved and tortured as part of a systematic attack directed against a civilian population, be made whole again. This is so regardless of how severely the torturers are sanctioned, how much compensation is paid, and how much rehabilitation is offered. Physically, one can survive; morally and emotionally, the only true justice would be to have never suffered corporal and psychological desecration in the first place.

With this in mind, we offer the reader a thought experiment. Let us imagine a peaceful and democratic place called **Safeland**, in which grave violations (whether committed by state or non-state actors) very rarely occur. Rights prevail, and crime is the exception not the rule.

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Now let us imagine the occurrence of an individual atrocity in Safeland. Beyond the immediate shock, what would be the official response in such a place? The answer is obvious: investigations would be conducted, trial procedures undertaken, and sanctions and other remedies imposed should criminal culpability be established. A prosecutor or investigating judge in Safeland would have no choice but to prioritise such a case, as a failure to investigate would constitute a public scandal.

Yet, even in Safeland, finding the right evidence, persuading the witnesses, and proving the case beyond a reasonable doubt – while the defendant receives counsel from the country's top criminal lawyer – would be anything but easy. In the absence of an admission of guilt, the case could last for years; and even if proven in the first instance, it could involve many years of motions and appeals. As such, even in Safeland, a single serious case could consume considerable time and resources of the legal system, without any guaranteed outcomes.

Let us now imagine a very different country: one that is in the midst of a transition out of genocide, civil war, or prolonged and violent dictatorship. We will call it **Transitionland** and will presume that a new political dispensation is under way as the result of a public uprising, external intervention, leadership death, military victory, electoral win, or some combination thereof.

Among its many challenges, Transitionland's new government faces the question of whether or how to confront the legacy of mass violence that occurred during the prior period of repression or tumult. For purposes of illustration, we can be generous in our premises: we can assume that the new government is willing to adopt the boilerplate elements of transitional justice (i.e., truth, justice, reparation, and guarantees of non-recurrence).

However, even with good intentions, it is all but certain that the government of Transitionland will be stymied by a combination of unpleasant realities affecting the pursuit of justice.

For example, tens or hundreds of thousands of atrocity crimes may have been committed, producing untold numbers of victims who suffered at the hands of untold numbers of perpetrators – far more than even the world's best justice system could cope with. The country may also be wholly or partially impoverished after years of repression, looting, and more. In addition, much of the evidence has likely been destroyed or gone missing; and in any case, prosecutors and judges, not to mention the court facilities themselves, are ill equipped to offer fair trial standards. The country may be experiencing a spike in current crime as well, with remnants of the former militia and the old guard applying their criminal skills to new targets.

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Thus, in the pursuit of justice, not only would the government of Transitionland face the first-order difficulties of Safeland; it would also face the aforementioned second-order difficulties, guaranteeing inadequate justice vis-à-vis all those responsible for past atrocities.

The government could thus choose an alternative path. It could opt, for example, to establish a truth commission to gather evidence that could be used for follow-on efforts at prosecution and for the development of a victim reparations programme. Yet, even such a commission could be expected to fall short because of the lack of time or resources to conduct an in-depth investigation of anything more than a fraction of the total universe of atrocity crimes. Likewise, even a generous reparations programme could be expected to prove inadequate, as it would be unable to offer compensation, restitution, and rehabilitation measures commensurate with the real scale of physical, psychological, and economic costs inflicted on the country's thousands of victims.

As for criminal trials, the government may discover it has to reconsider its initial (already modest) ambitions, as judicial pursuits could risk diverting precious financial and political capital away from other urgent priorities of reconstruction, economic growth, institutional reform, and much else. Having recently overcome war or tyranny, the prospect of retroactive justice likewise could risk triggering new cycles of violence. Besides, the country's court system is likely unable to guarantee due process except in the long term, leaving only the option of politically sensitive international trials in the short and midterm. Legal obstacles such as earlier amnesties may give yet more reason to defer or delegate the task of criminal justice.

Consequently, despite its good will, the government of Transitionland (especially but not only in a postwar environment) can be expected to struggle greatly in the face of the legacy of atrocities and abuse it inherited.

Let us finally imagine a third country: **Negotiationland**. Like Transitionland, it has experienced a long history of violence, which has produced vast numbers of atrocity crimes. Yet, unlike Transitionland, it is not a country in transition; instead, its conflict persists, making problematic the very invocation of the term '*transitional* justice'.

To add colour to the thought experiment, let us presume in particular that Negotiationland is experiencing a civil war that pits state forces against rebel forces, and that there is no serious prospect of total victory for either side. The only way out appears to be through negotiation – a fact that, independently, both parties to the conflict eventually come to accept. Exploratory talks get under way, allowing the leaders of each side to assess if there is scope for a bona fide peace negotiation.

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After multiple forays over many months, the parties manage to agree to an agenda for formal peace talks. The agenda includes vague references to human rights and accountability (as opposed to a specific mention of criminal trials) and a set of rules and protocols to guide the overall process.

Yet, questions immediately arise with the public: Does the agenda imply that judicial accountability will be part of the deal? If so, what will each side have to concede to make that happen? Will the victims receive compensation? Won't the mere prospect of accountability get in the way of a final settlement, and thus discourage an end to the conflict?

In order to answer these questions, an immediate impulse many will have is to reach for the standard toolkit of transitional justice. After all, although we are in Negotiationland, and notwithstanding the absence of transition, the situation has the aura of a Transitionland challenge.

Two realities explain this impulse; together, they constitute the raison d'être of transitional justice. The first is the mass scale of violence in the war scenario in question. *Quantitatively speaking*, this guarantees a very incomplete form of *collective redress*, taking account of the number of violations. The second is the extraordinary depravity of the war violations themselves. *Qualitatively speaking*, this guarantees a profoundly unsatisfying form of *individual redress*, even for those who one day may be fortunate enough to have their cases included in a transitional justice policy.

Because of these two realities, it is understandable that many tend to 'default' in their minds (and actions) to the logic and methods of transitional justice. After all, the same impediments to individual and collective redress exist in Negotiationland.

Yet, this is deeply mistaken. Transitional justice is decidedly *not* the right analytic starting point for Negotiationland. Instead, the proper starting point is the *fact of negotiation* – and *its* intrinsic constraints.

There are three cumulative, differentiating factors (which we have called third-order difficulties) that illuminate why this is so.

Factor 1: The generic difference between bilateral negotiation and unilateral decision-making

Outside the confines of a formal negotiation, a government can take unilateral decisions on anything within its legal and political authority. While it may be prudent for it to *consult* political opponents or the public about its transitional justice plans (or anything else), it is under no obligation to obtain anyone's formal consent unless there is an independent legal obligation to do so.

In a negotiation, by contrast, formal consent is always required. Compromise and mutual concessions are intrinsic to the very choice of negotiation.

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Structurally, they offer the *only* pathway to agreement, whether on questions of transitional justice or whatever else.

Naturally, the balance of power at times can shift in a negotiation, making one side better able to secure concessions than the other. However, ultimately neither side can impose its will and vision on the other. Otherwise, it would not be a negotiation.

Intellectually and practically, the impact of this 'fact of negotiation' is hard to overstate. It affects the *moral* playing field profoundly, inasmuch as opposing interests and worldviews (some of them strongly illiberal) must be reconciled. It controls the *legal* playing field, inasmuch as the ability of the state to meet its constitutional and international legal obligations in the realm of human rights and humanitarian and criminal law becomes much more constrained. And on a *practical* level, it undercuts the speed at which decisions can be made, not merely because the parties must go through a process of identifying common ground on disputed issues, but also because anything they agree must be meticulously reduced to a detailed joint text.

These moral, legal, and practical constraints are especially pronounced in the case of a Negotiationland scenario of internal armed conflict. Negotiations in such contexts tend to have a high level of formality, rigour, and density of agenda. By design, they require a 'fiction of equality' between the parties that intrinsically favours the weaker side, as the image and reality of the negotiation must be one of procedural equality. Indeed, the parties must be seen to come to an agreement through an exercise of mutual consent, in which neither side is a clear loser or winner – hardly an environment that incentivises the negotiation of criminal accountability.

Even in a different model of Negotiationland – in which a civilian or military government is negotiating with opposition parties on the terms of a political settlement to restore democracy or instate power-sharing – the fact of negotiation has a determining influence on what may or may not be viable in the realm of justice. While such negotiations are more likely to be secret, loosely structured, and more narrowly focused on political power than those between parties to a civil war, it is the mere fact of negotiation that, once again, compels mutual concessions of a sort no transitional government would recognise. Indeed, this fact is the central reason why a broad amnesty (or extended absence of national-level justice) is far more likely in *either* version of Negotiationland than in *any* version of Transitionland.

In brief, in Negotiationland it will never be sufficient, as it might be in Transitionland, to consult and accommodate the views of opponents before ultimately making one's own decision on how to proceed. Instead, neither side gets the final say in Negotiationland. Just ask those who negotiated

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