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Mark Freeman , Iván Orozco
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NEGOTIATING TRANSITIONAL JUSTICE

The recent Colombian peace negotiations took the art and science of negotiating transitional justice to unprecedented levels of complexity. For decades, the Colombian government fought a bitter insurgency war against FARC guerrilla forces. After protracted negotiations, the two parties reached a peace deal that took account of the rights of victims. As first-hand participants in the talks, and principal advisers to the Colombia government, Mark Freeman and Iván Orozco offer a unique account of the mechanics through which accountability issues were addressed. Drawing from this case study and other global experiences, Freeman and Orozco offer a comprehensive theoretical and practical conception of what makes the ‘devil’s dilemma’ of negotiating peace with justice implausible but feasible.

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FIRSTHAND LESSONS FROM COLOMBIA
AND BEYOND

MARK FREEMAN

Institute for Integrated Transitions

IVÁN OROZCO

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Preface

It is frequently remarked that negotiating peace with justice is a great challenge. Indeed, few would argue otherwise. Yet, the causes of the challenge are rarely interrogated honestly or fully, and the practical means for surmounting it even less so.

This book fills that gap. In part, it is inspired by our firsthand experience of the Colombian government's negotiations with the FARC rebel group, when the negotiating parties made the counterintuitive decision to put the issue of 'victims' at the centre of the negotiating agenda. Although the parties took the decision on the basis of very different political, legal, and moral premises, it was made in full knowledge that the issue would prove an extraordinarily difficult hurdle to climb.

As we discovered through our experience of the talks, the parties' expectations about the meaning and scope of the issue were surprisingly non-overlapping. This manifested itself in the great difficulty each side experienced in deciphering and deconstructing the adversary's distinctive presumptions, and in identifying realistic pathways to achieve an overlapping consensus.

Being independent advisers to the government delegation throughout the negotiation of the 'victims' issue in Havana – which began in June 2014 and lasted until December 2015, when a complete agreement on the issue was published – we had the privilege of being insiders and outsiders at the same time. We were present at most internal deliberations of the government delegation, and at the negotiation table itself, but without the burden of representing particular views or taking formal decisions. This constituted a unique perch, allowing us to be 'participant-observers' inside the process.

Yet, while the book is inspired by our firsthand experience of the negotiation – and the luxury of hindsight – it is not written as a chronicle of what transpired. Instead, it offers an intellectual exploration of the how and why of

key aspects of the agreements reached in Havana on the subject of criminal justice and the related themes of truth, reparation, and non-repetition. In doing so, the book also draws upon our previous scholarship and experience working on issues of peace, war, negotiation, and justice elsewhere.

Throughout the text we pay close attention to questions of law and legal theory, as these are intrinsic to the exercise of negotiating transitional justice. Yet, by necessity, we endeavour to pay equal attention to the theory and practice of negotiation. In a *negotiation* of justice, there is no adequate or responsible way to divorce the two themes.

The book has two main parts that draw upon nearly five years of in-depth conversation between the authors. Part I, written by Mark with Iván's feedback, offers a general conception of what makes negotiating peace with justice implausible but feasible. Part II, written by Iván with Mark's feedback, goes into the specifics of the Colombian experience, beginning with a contextual overview and continuing with three personal essays.

Being in Havana was a rare experience. In the following pages we transmit some of the knowledge we were privileged to acquire while there, and the broader understanding it allowed us to have of the devil's dilemma of foisting justice on peace.

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