

In Law and War: Policy Legacies in the Adoption of Transitional Justice

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States are under increasing international pressure following armed conflicts to address wartime abuses through transitional justice. This pressure includes calls for trials, truth commissions, amnesties, and reparations, among other measures. In this policy brief, we explore the implementation of such policies during conflict and argue that “during conflict” behavior often shapes which measures are taken once the conflict has ended. By combining uniquely positioned datasets on justice policies adopted during and after conflict, we show how this relationship can be observed globally. We then examine this relationship through the case of Colombia and identify three mechanisms that help explain this relationship.

Brief Points

- Accountability and reconciliation strategies adopted during armed conflict can have direct impacts on justice institutions established after conflict.
- Measures taken during conflict create a policy precedent, help to build an institutional repertoire, and raise public expectations for similar justice policies once a conflict has ended.
- In Colombia, government policies of truth-seeking, accountability and reparations from the 2000s helped shape policies to address wartime abuses in the 2016 Final Peace Agreement.

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Introduction

The transitional justice framework in the 2016 Final Peace Agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) is considered one of the most victim-centered, innovative, and comprehensive justice policies adopted to date. The policy includes a criminal tribunal, a truth commission, a unit for the search of missing persons, and comprehensive reparation measures. These transitional justice institutions evolved from a mixture of accountability and reconciliation laws and institutions in Colombia dating back at least two decades. Beginning in the early 2000s, the Colombian government, with pressure from domestic and international actors, began to gradually build up a justice regime. We posit that these frameworks of accountability and reconciliation provided precedent and repertoires for future justice measures that raised public expectations for certain forms of justice.

While transitional justice is often studied independent of the dynamics of the preceding conflict, the trajectory in Colombia calls us to interrogate the impact that justice processes adopted during conflict may have had on post-conflict institutional outcomes. These processes include trials, truth commissions, reparations programs, amnesty provisions, and purging or lustration processes. While scholars have focused on these institutions primarily in the post-conflict period, such processes and policies are often put in place *before* a conflict has ended, a phenomenon referred to as “during-conflict justice”. Our definitions of during- and post-conflict justice processes are value-neutral and do not presuppose the misuse of legal institutions nor the highest legal standards. In other words, the processes for addressing past abuses may be both judicial and quasi-judicial.

The Colombia case illustrates that how violence is addressed during armed conflict can often directly impact the transitional justice decisions made once a conflict has ended. We argue that the relationship between justice processes during and after conflict is a product of three mechanisms: policy precedent, institutional repertoire, and public expectations. In this policy brief, we combine two unique data sources on during- and post-conflict judicial processes to examine the relationship between these two temporal periods. We argue that under certain conditions the use of judicial processes by

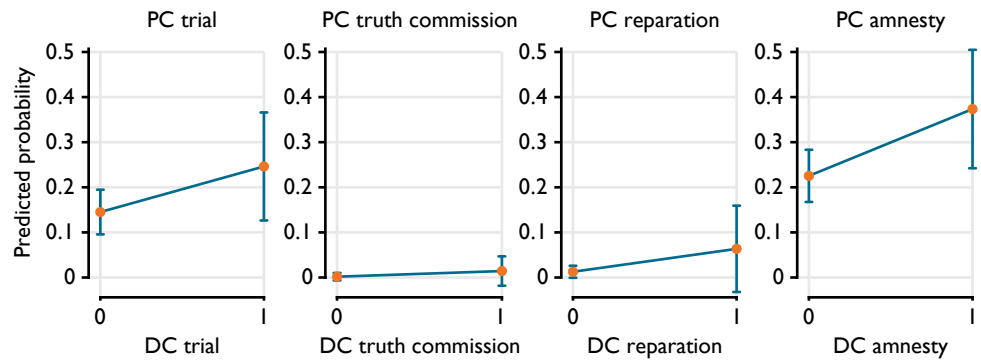


Figure 1: Predicted probabilities of post-conflict (PC) justice processes given the presence or absence of similar during-conflict (DC) justice processes, 1946–2016 (354 observations)

governments during conflict makes post-conflict justice more likely and that past experiences with particular justice policies leads to policy continuity post-conflict. To illustrate these points, we trace global patterns in the relationship between justice during and after conflict and examine justice measures implemented in Colombia as a case study.

During-Conflict Determinants of Post-Conflict Justice

If certain justice decisions are made once, we find those decisions are likely to be made again. Behavior during conflict shapes policies adopted after conflict through three mechanisms. First, the adoption of judicial institutions creates a policy precedent, offering policy guidance on how to proceed in certain situations. Policy precedent refers to how a prior policy or action, for example commitment to accountability, can function as a guide for handling similar circumstances later. In Bangladesh, the government offered amnesties and reparations to Shanti Bahini rebels at various times during the 1975–1991 conflict to incentivize them to lay down arms. Similar policies were central to the 1997 peace agreement. When dealing with wartime abuses, how governments have chosen to deal with these violations in the past can offer guidance for how to proceed in the future.

Second is the influence of institutional repertoires. An institutional repertoire is the menu of institutional options that can be mobilized in a particular circumstance. When choosing between mechanisms of accountability, for example, policy makers are likely to draw from a repertoire of institutional arrangements which have been used in the past. Instead of designing

new accountability institutions from scratch, consecutive governments draw on tools used in the past and take actions to refine or reconfigure these institutions for the present moment. Members of the separatist group ETA in Spain, for example, were prosecuted for violent acts in the ordinary courts of the country both during the most violent years of the 1980s and in subsequent, less violent, years. While conflict termination offers an opportunity for institutional innovation, governments often fall back on prior institutional repertoires when deciding how to deal with the past.

Third, past policies are likely to establish public expectations for certain institutional responses, thereby increasing the likelihood of public pressure for specific judicial outcomes. In Uganda, the adoption of the 2000 Amnesty Act during the war against the Lord's Resistance Army lead to public expectations around impunity for returning soldiers, such as rebel leader Thomas Kwoyelo. These expectations for a specific measure to be implemented condition public demand and put pressure on the post-conflict government to respond to past abuses in a particular way.

Global Patterns in the Relationship between During and Post-Conflict Justice

While our three mechanisms suggest that addressing violations during the conflict will make post-conflict justice more likely, these same drivers also make specific institutional forms more likely. Experience with trials, for example, makes it more likely for a government to use trials following armed conflict. The same relationship holds for other justice policies such as amnesties and reparations programs.



Figure 2: Coefficient plots for contextual variables and post-conflict justice processes, 1946–2011 (354 observations)

Experience with a specific type of justice policy during conflict makes adoption of that same policy more likely once the conflict has ended.

To investigate these relationships, we combined two global datasets covering the presence or absence of justice processes during and after armed conflicts occurring between 1946 and 2011. Figure 1 shows how the probability of a post-conflict justice process changes given the presence of similar processes during a conflict. The likelihood of post-conflict trials and amnesties almost doubles if such processes were also used during conflict: from 14.5% to 24.6% probability for post-conflict trials and from 22.5% to 37.4% for amnesties. Truth commissions and reparations are less common both during and after conflict. The likelihood of truth commissions post-conflict is not significantly affected by their use during conflict, but the probability of reparations post-conflict raises substantially when there were reparations also during conflict, from 1.3% to 6.4%. These findings suggest a strong relationship between the policy decisions during and after conflict.

Justice Now and Later in Colombia

In light of this research, we turn to the case of Colombia, which offers a rich example through which to explore the relationship between during and post-conflict judicial policies. In the most recent armed conflict in Colombia, leftist rebel groups established in the 1960s, most importantly the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, FARC), sought to unseat the national government. The intensity of the conflict rose in the 1980s as the FARC strengthened militarily and violence against civilians swelled with

the increased activity of paramilitary groups. According to the 2022 Truth Commission report, the FARC, the paramilitaries, and the state were responsible for more than 450,000 deaths, 121,000 forced disappearances, 50,000 kidnappings, and eight million victims of forced displacement during the armed conflict.

During-Conflict Justice in Colombia (2005–2016)

In Colombia, historically, ex-combatants did not face criminal prosecution for past crimes but were rather given amnesty. This approach was used to incentivize demobilizations to facilitate an end to the fighting. The policy of impunity for wartime abuses remained pervasive during the 20th century. In the early 2000s, however, domestic and international mobilization produced a shift toward addressing wartime abuses (rather than ignoring them) and holding perpetrators accountable (rather than providing blanket amnesty).

This shift arose in response to President Álvaro Uribe's proposed Alternative Penalties Law in 2003, which advocated for criminal trials to facilitate individual accountability for past crimes but argued for restrictions (instead of prison sentences) such as bans on holding public office, running for popular elections, and carrying firearms.

Uribe's draft law met massive resistance from human rights and victims' organizations, politicians, lawyers, and others who, in response, amplified the call for accountability for wartime abuses. Discussions and compromises with Uribe would lead to the final Justice and Peace Law, adopted in 2005, which expanded victims' rights and included prison sentences of five to eight years. To obtain reduced prison sentences, defendants were required to tell the truth, contribute to reparations, and promise non-repetition. However, human rights lawyers identified judicial loopholes in this law, questioning whether truth-telling, reparations, and non-repetition would be ensured. Implementation of the tribunals also faced major obstacles, in part as the number of potential defendants grew far beyond expectations. As this number reached more than 4,000, the tribunals were reformed in 2012 to prioritize 16 key commanders and put greater emphasis on contextual analysis of crimes.

Apart from tribunals, Colombia began developing comprehensive reparations programs in the 2000s. The first reparations programs compensated larger communities under the National Commission for Reparations and Reconciliation in 2005. In 2008, reparations also became available to individuals, and in 2011, were finally extended to also include victims of the state (under the Victims and Land Restitution Law).

During-conflict justice	Post-conflict justice
<ul style="list-style-type: none"> Accountability: Justice and Peace Tribunals (2005) 	<ul style="list-style-type: none"> Accountability: Special Jurisdiction for Peace (2016)
<ul style="list-style-type: none"> Truth-seeking: Historical Memory Group (2005); National Center for Historical Memory (2013) 	<ul style="list-style-type: none"> Truth-seeking: Truth, Coexistence and Non-Recurrence Commission (2016); The Special Unit for the Search of Persons deemed as Missing (2016)
<ul style="list-style-type: none"> Reparations: National Commission or Reparations and Reconciliation (2005); Victims and Land Restitution Law (2011) 	<ul style="list-style-type: none"> Reparations: Comprehensive reparations measures for peacebuilding

Figure 3: Institutions and programs on accountability, truth, and reparations in Colombia during armed conflict and after the 2016 Peace Agreement with the FARC

The Historical Memory Group (established in 2005) was the last of the during-conflict institutions created and served as a truth-seeking process for addressing past harms. The Historical Memory Group delivered both comprehensive and specific reports about the conflict, before the 2011 Victims and Land Restitution Law turned the Historical Memory Group into the National Centre for Historical Memory, a government agency. This turn enabled an expansion of truth-seeking efforts in Colombia.

Accountability after conflict in Colombia

The 2016 Final Peace Agreement and its transitional justice framework did not develop in a vacuum. First and foremost, the framework follows the precedent of holding perpetrators of wartime abuses accountable for their actions through trials intended to advance accountability while maintaining a focus on truth-telling and reparations. In this way, the 2016 justice measures expanded the work of the Justice and Peace Law (2005) and Victims and Land Restitution Law (2011).

A key measure in the 2016 Final Peace Agreement is the Special Jurisdiction for Peace. This tribunal examines human rights violations by focusing on eight macro-cases, each one centered around key themes of abuse. In proceedings, the tribunal demonstrates more attention to victims' needs for justice than the 2005 Justice and Peace Law. If defendants acknowledge the complete and detailed truth about their crimes and accept full responsibility for them, they receive five to eight years of restricted liberty, though not in a prison-setting. This tribunal also examines abuses by state agents and stipulates that abuses by third party actors should be examined as well (even though when the Tribunal was established in 2017, third parties and former presidents were exempted).

The 2016 Agreement also created a Truth, Coexistence, and Non-Recurrence Commission responsible for uncovering information about the conflict and wartime abuses, and promoting recognition of victims, thus building on the work of earlier truth-seeking efforts. As part of its work, the Commission held numerous public events of reconciliation throughout the country and abroad. Most prominently, the commission gathered testimonies for a final report issued in June 2022. The Agreement created the Special Unit for the Search for Persons Deemed as Missing, which collaborated with victims and ex-combatants to identify missing persons.

The 2016 Peace Agreement also established reparations measures beyond the 2011 Victims and Land Restitution Law, including collective processes for the return of displaced persons, reparations for victims abroad, and development plans for particularly conflict-affected communities.

In sum, the policy precedent, as well as persistent public demand, for accountability, truth-seeking, and reparations that emerged in the 2000s, made a return to broad-based amnesty no longer possible. Together with the institutional repertoires established through the 2005, 2008, and 2011 laws and institutions, the trajectory of conflict-related justice processes in Colombia show how behavior during conflict impacted behavior post-conflict.

Recommendations for Supporting Transitional Justice Policies

Our research suggests that a government's behavior during a conflict with regard to accountability and justice has significant influence on the justice processes that follow the end of armed conflicts. Thus, moving forward, greater attention should be placed on precedent, institutional repertoires, and public demand when discussing how to address the legacies of conflict through transitional justice.

- **Account for during-conflict justice in post-conflict advocacy.** In designing transitional justice policies, it is both helpful and essential to account for the justice policies and precedents of the conflict. Accounting for how wrongdoings were addressed during the conflict can help to establish more contextually relevant and impactful transitional justice policies once a conflict has ended.
- **Support civil society actors.** The role of civil society actors, including victims' organizations, is one key reason why Colombia has advanced on policies for victims' rights. Civil society actors, lawyers, politicians, and international observers have contested government proposals and conveyed public demand for accountability combined with truth-seeking and reparations. The case of Colombia shows that civil society actors can have significant influence to shape policies in the direction of accountability.
- **Strengthen an independent judiciary.** Another reason for advances in accountability for wartime abuses in Colombia since the 2000s, was its robust and relatively independent judiciary that existed already in the 2000s. In this way, the case of Colombia shows the value of strengthening judicial systems amid war. ■

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THE PROJECT

The project 'All is Fair in Law and War: Judicial Behavior in Conflict-affected Societies' aims to understand the immediate effects of governments' during-conflict justice (DCJ) behavior on conflict dynamics, as well as long-term effects on transitional justice and rule of law in post-conflict societies. The project is funded by the Research Council of Norway.

PRIO

The Peace Research Institute Oslo (PRIO) is a non-profit peace research institute (established in 1959) whose overarching purpose is to conduct research on the conditions for peaceful relations between states, groups and people. The institute is independent, international and interdisciplinary, and explores issues related to all facets of peace and conflict.