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**A Dickson Poon Transnational Law Institute, King's College London
Research Paper Series**

‘Transitional Justice in Colombia – Insights from Postcolonial Feminist Theory’

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TLI *Think!* Paper 13/2020

Founding Editor: Peer Zumbansen, Co-Director Transnational Law Institute
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ABSTRACT: In 2016, Colombia's biggest Guerrilla group, the FARC, and the government under president Santos reached a breakthrough in the lasting peace negotiations after the decades-long armed conflict and established a comprehensive transitional justice system. Although the accord is described as relatively progressive, the peace process is currently fraying. This paper aims to address some of the deficits of the Colombian peacebuilding, focusing on insights from postcolonial feminist theory. Building on experiences of past transitional justice processes, the essay examines the Colombian example with regard to women in decision-making positions and the lack of an intersectional approach. Moreover, the paper challenges the capacity of TJ as a tool to address the root causes of conflicts and to achieve a transformation of the society which is necessary in order to accomplish sustainable peace.

KEYWORDS: Transitional Justice, peacebuilding, Colombia, FARC, postcolonial feminist theory, intersectionality, women, structural inequalities.

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Abstract

In 2016, Colombia's biggest Guerrilla group, the FARC, and the government under president Santos reached a breakthrough in the lasting peace negotiations after the decades-long armed conflict and established a comprehensive transitional justice system. Although the accord is described as relatively progressive, the peace process is currently fraying. This paper aims to address some of the deficits of the Colombian peacebuilding, focusing on insights from post-colonial feminist theory. Building on experiences of past transitional justice processes, the essay examines the Colombian example with regard to women in decision-making positions and the lack of an intersectional approach. Moreover, the paper challenges the capacity of TJ as a tool to address the root causes of conflicts and to achieve a transformation of the society which is necessary in order to accomplish sustainable peace.

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Introduction

For decades, the Colombian government and armed paramilitaries fought against Guerrilla groups, each of them causing numerous deaths and forced displacements among civilians. Finally, in late 2016 the government and the biggest Guerrilla group – the Revolutionary Armed Forces of Colombia (FARC) – reached a breakthrough in the lasting peace negotiations. A comprehensive transitional justice system of Truth, Justice, Reparation and Non-Recurrence was established,¹ combining various mechanisms to ensure peace with justice.² Particular emphasis has been given to the issues of gender equality and victims' reparation.³

Although Colombia's peace accord has been described as one of the most progressive systems of transitional justice (TJ) to date⁴, it has been shown that the peace process is currently fraying.⁵ The victims of the conflict feel left alone by the state,⁶ the TJ mechanisms are implemented very slowly or not at all⁷ and the level of violence, especially against women and human rights activists, is rising.⁸

¹ 'Background: After Decades of Conflict, Cementing Peace and Securing Justice for Victims in Colombia' (2019) *International Center for Transitional Justice (ICTJ)*, <<https://www.ictj.org/our-work/regions-and-countries/colombia>>, accessed 22 November 2019.

² Ted Piccone, 'Peace with Justice: The Colombian Experience with Transitional Justice' (2019) *Foreign Policy at Brookings*, 2.

³ Mónica Acosta, Angela Castañeda, Daniela García, Fallon Hernández, Dunen Muelas and Angela Santamaria, 'The Colombian Transitional Process: Comparative Perspectives on Violence against Indigenous Women' (2017) 0 *IJTJ* 1, 17; ICTJ-Colombia (n1); Piccone (n2) 10.

⁴ Virginia M Bouvier, 'Gender and the Role of Women in Colombia's Peace Process' (4 March 2016) *UN Women Background Paper*; Jaskiran Kaur Chohan and Verónica Ramírez Montenegro, 'In Colombia Civil Society Fights for Peace' (25 April 2019) *Nacla*, <<https://nacla.org/news/2019/04/25/colombia-civil-society-fights-peace>>, accessed 22 November 2019.

⁵ Helga Malmin Binningsbø, Marianne Dahl, Håvard Mokleiv Nygård, Abbey Steele and Michael Weintraub, 'Colombia's Historic Peace Agreement with the FARC is Fraying. We talked to 1,700 Colombians to Understand Why' (7 August 2019) *Washington Post*, <<https://www.washingtonpost.com/politics/2019/08/06/colombias-historic-peace-agreement-with-farc-is-fraying-we-talked-colombians-understand-why/>>, accessed 13 December 2019; see also Parker Asmann, '3 Obstacles for Transitional Justice in Colombia' (19 October 2018) *InSight Crime*, <<https://www.insightcrime.org/news/analysis/3-obstacles-transitional-justice-colombia/>>, accessed 22 November 2019.; Maria Alejandra Navarrete Forero and Angela Olaya, 'Gentil Duarte's Master Plan to Reunite Colombia's FARC Dissidents' (3 April 2019) *InSight Crime*, <<https://www.insight-crime.org/news/analysis/gentil-duarte-unify-farc-dissidents-colombia/>>, accessed 22 November 2019.

⁶ Binningsbø et al. (n5).

⁷ Lisa Haugaard, 'Peace Accord Implementation Advances in Colombia: Progress, But Challenges Abound' (5 April 2017) *Latin America Working Group*, <<https://www.lawg.org/peace-accord-implementation-advances-in-colombia-progress-but-challenges-abound/>>, accessed 22 November 2019; Mimi Yagoub, 'Colombia Prematurely Claims Victory in Fight for Former FARC Turf' (8 March 2017) *InSight Crime* <<https://www.insight-crime.org/news/analysis/colombia-prematurely-claims-fight-former-farc-territories-already-won/>>, accessed 22 November 2019.

⁸ Sarah Taylor, 'Conflict, Peacebuilding, and Perspectives in Colombia: Q&A with Charo Mina-Rojas' (22 November 2017) *IPI the global observatory*, <<https://theglobalobservatory.org/2017/11/conflict-peacebuilding-perspectives-colombia/>>, accessed 22 November 2019; Asmann (n5); Diana M Barrero Jaramillo, 'El Grito: Violence in Colombia Continues to Kill Activists' (19 August 2019) *The conversation*, <<http://theconversation.com/el-grito-violence-in-colombia-continues-to-kill-activists-120725>>, accessed 22 November 2019.

Taking into account the huge potential of the holistic peace accord, this paper aims to explore the reasons for these problems and to what extent TJ provides an answer thereon. The essay is situated in the broader context of postcolonial legal scholarship, analysing the effects of TJ processes on post-conflict societies.

The main argument of my essay is that the problems of the Colombian peace process are best explained by insights from a postcolonial feminist perspective. Concentrating on the lack of women's decision-making authority and the disregard of intersectionality, I argue that the failure to include women properly in the peace process impedes a peace-promoting societal change in Colombia.

Therefore, I will first identify the main strands of feminist critique, build upon the experience of past TJ processes, before analysing to what extent this critique is valid for the Colombian case. Finally, I will carefully consider the limits of TJ as a tool for sustainable peace, looking beyond the Colombian peace process.

1. Gender-inclusion: a weakness of TJ

Ruti Teitel defined TJ as the ‘conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’.⁹ One of the main aims of these processes is to bring peace to war-torn countries.¹⁰ Yet, many feminist legal scholars and activists have come to emphasize that ‘peace is not just about ending a conflict but about bringing in social, racial, and gender justice’.¹¹ It has been shown that setbacks in peace processes are often linked to the failure of TJ mechanisms to include women.¹² I have identified two strands of feminist criticism, recurrent in the analyses of TJ processes. First, I will consider the consequences of women’s neglect in decision-making positions. Second, the paper addresses the disregard of intersectional approaches.

No women in decision-making positions

For a long time, peacebuilding processes focused on the ending of violence and the criminal responsibility of the armed forces.¹³ Those who did not take up arms, mostly women, were systematically left out. Even though women and girls are among the most affected by armed conflicts.¹⁴

Since the 1960s, efforts to recognize the status of women in conflict situations have led to the adoption of several important instruments, for instance the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the 1995 Beijing Declaration and Platform for Action. However, it was not until the adoption of the Women, Peace and Security Agenda in the form of UN Security Council Resolution 1325 (UNSCR 1325) in 2000, that women’s roles in conflict and peacebuilding were officially and comprehensively addressed.¹⁵ The instrument acknowledged that women and girls have a special need for protection from gender-based violence during and post-conflict. Yet, more importantly, the

⁹ Ruti G Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *HHRJournal* 69, 69.

¹⁰ *Ibid* 79; Shana Tabak, ‘False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Colombia’ (2011) 44 *NYU JILP* 103, 108.

¹¹ Taylor (n8); see also Marie O’Reilly, Andrea Ó Súilleabháin and Thania Paffenholz, ‘Reimagining Peace-making: Women’s Roles in Peace Processes’ (2015) *IPI*, 3.

¹² Belquis Ahmadi, ‘Afghanistan Talks: No Women, No Peace - Negotiations with the Taliban Must Include Afghan Women to Protect Their Progress and Build a Sustainable Peace’ (1 March 2019) *USIP*, <<https://www.usip.org/publications/2019/03/afghanistan-talks-no-women-no-peace>>, accessed 5 December 2019.

¹³ O’Reilly et al. (n11) 1; Christina Bache, ‘Women’s Role in Peace Processes’ (May 2019) *EP Think Tank - Policy Department for Citizen’s Rights and Constitutional Affairs*, available at <<http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html>>, 25.

¹⁴ Judith Gardam and Hilary Charlesworth, ‘Protection of Women in Armed Conflict’ (2000) 22 *HRQ* 148, 148; Christina Binder, Karin Lukas and Romana Schweiger, ‘Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts’ (2008) 101 *Radic. Hist. Rev.* 22, 22; ‘Overview – Women, Peace and Security’ (2010) *United Nations Development Fund for Women (UNIFEM)*, 3.

¹⁵ Binder et al. (n14) 22; Christine Bell and Catherine O’Rourke, ‘Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements’ (2010) 59(4) *ICLQ* 941, 943.

resolution emphasized, for the first time, the need for equal participation of women, not only in all stages of peacebuilding but also within international, national and regional institutions.¹⁶ Although until today 83 countries have adopted a National Action Plan to translate these commitments into national policies,¹⁷ many of the provisions have not been put into action.¹⁸ Women are still denied a say in important decisions that affect them and continue to suffer from gender-based violence.¹⁹ Postcolonial feminist scholars point out that this phenomenon bases upon the failure of top-down gender-mainstreaming instruments to address the root causes of the conflict and to fight persistent stereotypes.²⁰ In particular, most women do not have access to economic and financial resources or education which would allow them to effectively participate in decision-making.²¹ The intrinsic neglect of women in decision-making positions matters in particular for two reasons.

First, TJ processes often reveal a tendency of failure to achieve sustainable peace, where women were not considered in the TJ process. While countries with a high level of gender equality are in general associated with durable peace and a lower probability of violent conflict,²² the year-long lack of women's participation, for instance in Afghanistan, is assumed to have contributed to the failure of the peace process.²³ Recent qualitative and quantitative studies show that women's participation in peace processes is influencing the durability and the quality of peace positively.²⁴ For example in Liberia, peace negotiations were more likely to be ending in an agreement, if women took part in the talks.²⁵ It is said that peace accords with female signatories include more provisions indicating a political, social and economic reform.

¹⁶ UN Security Council (UNSC), 'Resolution 1325 on Women and Peace and Security' (31 October 2000) S/RES/1325, <[https://undocs.org/S/RES/1325\(2000\)](https://undocs.org/S/RES/1325(2000))>, para 1-4, 8; Amy Barrow, "[It's] Like a Rubber Band." Assessing UNSCR 1325 as a Gender Mainstreaming Process' (2009) 5 *IJLC* 51, 51; Bache (n13) 16.

¹⁷ Peace Women, 'National Action Plans for the Implementation of UNSCR 1325 on Women, Peace and Security' (2019) *Peace Women* <<https://www.peacewomen.org/member-states>>, accessed 18 December 2019.

¹⁸ Binder et al. (n14) 25; Anne Marie Goetz, 'Identifying Women's Peace and Security Priorities: Building Voice and Influence' (2010) *Guidance Note - UNIFEM*, 1; UNSC 'Guidelines for the Informal Expert Group on Women and Peace and Security' (2016) S/2016/1106, <<https://undocs.org/pdf?symbol=en/S/2016/1106>>, 2.

¹⁹ UNSC, 'Women and Peace and Security - Report of the Secretary General' (2004) S/2004/814, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/534/14/PDF/N0453414.pdf>>. 76; Goetz (n18) 1; Bache (n13) 25.

²⁰ See Dianne Otto, 'A Sign of Weakness-Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325' (2006) 13 *Michigan J. Gender L.* 113, esp. 115, 165; Barrow (n16) 61.

²¹ Bureau for Crisis Prevention and Recovery (BCPR) 'Gender Approaches in Conflict and Post-Conflict Situations' (2002) *UN Development Programme*, 11-12; Binder et al. (n14) 25.

²² Mary Caprioli, 'Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict' (2005) 49(2) *ISQ* 161, 171; Theodora-Ismene Gizelis, 'Gender Empowerment and United Nations Peacebuilding' (2009) 46(4) *J. Peace Res.* 505, 506; see Valerie Hudson, Bonnie Ballif-Spanvill, Mary Caprioli and Chad F Emmett, 'Sex and World Peace' (2012) *CUP*.

²³ Otto (n20) 144, 145; Ahmadi (n12).

²⁴ Anne Marie Goetz and Anne-Kristin Treiber, 'Gender and Conflict Analysis' (2006) *Policy Briefing Paper - UNIFEM*, 3; O'Reilly et al. (n11) 11-12; Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44(6) *Int. Interact.* 985, 997-1003.

²⁵ Binder et al. (n14) 27; Laurel Stone, 'Women Transforming Conflict: A Quantitative Analysis of Female Peacemaking' (13 May 2014), <<https://ssrn.com/abstract=2485242>>, 7.

Furthermore, they are more likely to be implemented²⁶ which contains great potential for a sustainable peace, as the cases of Kenya and Burundi show.²⁷ In addition, such agreements have a higher chance to last longer.²⁸ The causes for the higher success rate are interpreted differently. While I reject the essentialist assumption of women's peaceful nature and political honesty and impartiality,²⁹ I consider, in line with other authors, that women are on average more aware of the variety of cultural, ethnic and religious groups' concerns and also include activist movements to campaign for peace.³⁰ The thereby developed 'linkage' between the female negotiators and local women civil society groups leads to a broader acceptance of the peace agreement within the society and thus to a more durable peace.³¹

Second, the lack of inclusive TJ mechanisms decreases the probability of an incorporation and implementation of gender provisions into the peace accord that tackle women's needs and concerns.³² As mentioned above, women suffer differently than men during conflict.³³ Not only are they more likely to be targeted by sexual violence, but they often suffer from indirect consequences of conflict, such as internal displacement, human rights abuses, breakdown of social order or the spread of infectious diseases.³⁴ By means of their participation, women can raise awareness to the different kinds of violence and harm they suffer from during conflict and in post-conflict situations, thus preventing a continuum of violence.³⁵ And yet, the consideration of different forms of violence is part of a second weakness of TJ mechanisms that will be discussed hereinafter.

Intersectionality

The second main strand of feminist critique on TJ processes concerns the feminist approach of intersectionality. Considering especially personal narratives, third wave feminism challenges

²⁶ Krause et al. (n24) 1001.

²⁷ O'Reilly et al. (n11) 15; Thania Paffenholz, 'Beyond the Normative: Can Women's Inclusion Really Make for Better Peace Processes?' (2015) *Policy Brief: Graduate Institute of Geneva and CCDP*, 3.

²⁸ Stone (n25) 28.

²⁹ Inger Skjelsbaek, 'Is Femininity Inherently Peaceful?' in Inger Skjelsbaek and Dan Smith, *Gender, Peace and Conflict* (SAGE Publications 2001) 47, 60; Judy El-Bushra, 'Feminism, Gender, and Women's Peace Activism' (2007) 38(1) *Dev. Change* 131, 141.

³⁰ O'Reilly et al. (n11) 6; Krause et al. (n24) 1004; 'Women's Participation in Peace Processes' (2019) *University of Edinburgh and CFR*, available at <<https://www.cfr.org/interactive/womens-participation-in-peace-processes>>.

³¹ Krause et al. (n24) 1005.

³² Christine Bell, 'Text and Context: Evaluating Peace Agreements for their Gender Perspective' (2015) *PSRP Report*, 8; Krause et al. (n24) 992.

³³ Gardam and Charlesworth (n14) 149.

³⁴ HRW, "'Our Rights are Fundamental to Peace' - Slow Implementation of UN Security Council Resolution 1325 (2000) Denies the Rights of Women and Girls in Armed Conflict' (2015) *Human Rights Watch*, available at <https://www.hrw.org/sites/default/files/supporting_resources/our_rights_are_fundamental_to_peace.pdf>, 11; O'Reilly et al. (n11) 5.

³⁵ Barrow (n16) 58; O'Reilly et al. (n11) 5.

the concept of ‘a universal womanhood’³⁶. It opens up to the principle of inclusivity, incorporating various forms of feminism³⁷ and emphasizes that the identity of a women can be defined by more than just gender³⁸.

In the context of TJ the sole focus on sexual violence as a weapon of war, i.e. rape by combatants, has been criticized for “essentializing and sexualizing women’s experiences” during armed conflict.³⁹ Ignoring that not all women suffer from the same kind of violence, depending on their race, religion or social status, other experiences are marginalized.⁴⁰ As an example, female members of the Moro-minority in the Philippines have not only suffered from sexual violence by combatants, rival clans or their families. They often face in addition domestic violence and internal displacement, due to legal disadvantages in assuming land-ownership.⁴¹ Despite a high participation-rate of women in the recent peace process,⁴² these indigenous realities stay ‘under the radar’⁴³ of the TJ mechanism, leaving a great amount of violence unfinished and failing to dissolve inherent patriarchal structures in the community.⁴⁴ Focusing on aspects of the public realm, TJ fails to consider those issues of the private life that women are predominantly suffering from.⁴⁵ Applying an intersectional lens on post-conflict situations would allow to address women’s experiences beyond the effects of public violence and to challenge systemic inequalities inherent in the respective society.

Moreover, the lack of intersectionality causes practical issues. The strong emphasis on sexual violence accentuates women’s role as victims.⁴⁶ The, in TJ predominant, Western concept of victimhood with its inherent idea of innocence⁴⁷ implies a certain vulnerability, powerlessness

³⁶ Charlotte Krollokke and Anne Scott Sorensen, ‘Three Waves of Feminism: From Suffragettes to Grrls’ (2006) *Gender communication theories & analyses: From silence to performance* 1, 17; R Claire Snyder, ‘What is Third-wave Feminism? A New Directions Essay’ (2008) 34(1) *Signs* 175, 184.

³⁷ Leslie Heywood and Jennifer Drake, *Third Wave Agenda: Being Feminist, Doing Feminism* (University of Minnesota Press, 1997), 3; Shelley Budgeon, ‘The Contradictions of Successful Femininity: Third-wave Feminism, Postfeminism and ‘New’ Femininities’ in Rosalind Gill and Christina Scharff, *New Femininities* (Palgrave Macmillan 2011) 279, 282.

³⁸ Margaret E Montoya, ‘Mascaras, trenzas, y grenas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse’ (1994) 17 *Harv. J.L. & Gender* 185, 219; Snyder (n36) 187.

³⁹ Fionnuala Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition’ (2007) 16 *UCLA Women's LJ* 229, 261-262.

⁴⁰ Fionnuala Ní Aoláin, ‘Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-conflict Societies’ (2009) 35 *Queen's LJ* 219, 240.

⁴¹ O’Reilly et al. (n11) 26; Ronli Sifris and Maria Tanyag, ‘Intersectionality, Transitional Justice, and the Case of Internally Displaced Moro Women in the Philippines’ (2019) 41(2) *HRQ* 399, 406, 408.

⁴² O’Reilly et al. (n11) 19.

⁴³ Tabak (n10) 121-122; Sara E Davies, Jacqui True and Maria Tanyag, ‘How Women’s Silence Secures the Peace: Analysing Sexual and Gender-based Violence in a Low-intensity Conflict’ (2016) 24(3) *Gend. Dev.* 459, 462-463.

⁴⁴ Sifris and Tanyag (n41) 413, 416.

⁴⁵ Fionnuala Ní Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice’ (2012) 6(2) *IJTJ* 205, 210; Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge 2013), 20-21.

⁴⁶ Ní Aoláin and Turner (n39) 261-262.

⁴⁷ Kieran McEvoy and Kirsten McConnachie, ‘Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy’ (2012) 9(5) *Eur. J. Criminol.* 527, 531-532.

and a lack of agency of women, thus disregarding their multiple experiences, resilience and autonomy.⁴⁸ This strict ‘victim-perpetrator dichotomy’⁴⁹ raises furthermore specific expectations in trials and truth commissions as to the way women should report about their experience with violence.⁵⁰ Conversely, a public testimony under tears not only has an effect of revictimization but also clashes significantly with indigenous concepts of group identity and honour.⁵¹ Stressing the significance of family and community loyalty in local contexts, the protection of male leaders silences indigenous women, rendering their experiences of public and private violence invisible – an aspect, too often neglected in TJ mechanisms.⁵²

Developing the link to the broader postcolonial criticism of TJ processes, feminist critique profoundly confronts the failure of TJ processes to achieve a real transformation of society that permits an end of structural inequalities and allows a substantive representation of women.⁵³ For example in South Africa, despite a comprehensive TJ system, the underlying social norms and the concept of masculinity prohibit a remarkable improvement of women’s situation.⁵⁴ Even though I have emphasized the importance of female participation in peace processes, the sole presence of women in these institutions does not suffice. Rather feminist scholars highlight that a lack of contextualization, the neglect of social and economic rights and the application of a “one-size-fits-all-approach”⁵⁵ hinder to deliver a successful process of justice and reconciliation⁵⁶ that tackles the root causes of the problem.⁵⁷

⁴⁸ Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15(2) *HHRJournal* 1, 10; Karen Engle, ‘Feminism and its (Dis) contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’ (2005) 99(4) *AJIL* 778, 813.

⁴⁹ Ní Aoláin and Turner (n39) 266.

⁵⁰ Kimberly Theidon, ‘Gender in Transition: Common Sense, Women, and War’ (2007) 6(4) *J. Hum. Rights* 453, 474; Erin K Baines, ‘“Today, I Want to Speak Out the Truth”: Victim Agency, Responsibility, and Transitional Justice’ (2015) 9(4) *IPS* 316, 319.

⁵¹ Davies et al. (n43) 466; Sifris and Tanyag (n41) 410.

⁵² Acosta et al. (n3) 8; Sifris and Tanyag (n41) 411.

⁵³ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29(2) *Third World Q* 275, 284; see Kara Ellerby, ‘A Seat at the Table is Not Enough: Understanding Women’s Substantive Representation in Peace Processes’ (2016) 4(2) *Peacebuilding* 136.

⁵⁴ Penelope Andrews, ‘Democracy Stops at My Front Door: Obstacles to Gender Equality in South Africa’ (2007) 5 *Loyola University Chicago ILR* 15, 26-27; Khanyisela Moyo, ‘Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends’ (2012) 1(2) *Int’l Hum. Rights LR* 237, 252.

⁵⁵ Dustin N Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’ (2013) 26 *HHRJournal* 149, 161.

⁵⁶ Simon Robins, ‘Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-conflict Nepal’ (2012) 44(1) *Crit. Asian Stud.* 3, 21.

⁵⁷ Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) 40 *NYU J Int’l L. & Pol.* 1, 5; Sarah Maddison and Laura J Shepherd, ‘Peacebuilding and the Postcolonial Politics of Transitional Justice’ (2014) 2(3) *Peacebuilding* 253, 259-260.

2. Women in Colombia

Following the review of postcolonial feminist critique on TJ processes, I will now apply this critique to the Colombian case and show that the continuing shortfall in considering women's issues is to some extent the reason why the peace process is currently fraying.

On first sight, the Colombian peace agreement seemingly gives a successful reaction to a considerable part of the weaknesses of TJ systems, pointed out by postcolonial and feminist scholars. In the aim of achieving peace with justice⁵⁸ Colombia's comprehensive TJ system incorporates elements of retributive and restorative justice mechanisms, including a Special Jurisdiction for Peace, a Commission for the Clarification of the Truth, Co-Existence, and Non-Repetition, and a Unit for the Search of Missing Persons.⁵⁹ The parties have established a new relationship with the United Nations (UN) as international actor whose mission is limited to confirming the weapon-handover and coordinating the tripartite mechanism through monitoring and verification.⁶⁰ The peace process has also been described as a lot more victim-centred, compared to other TJ processes, considering among others the extensive reparation provisions and victims' inclusion during and after the negotiations.⁶¹ Notably, the Colombian peace process is famous for its strong attempt to include gender-justice into the peace agreement.⁶² Unlike other TJ processes, the Colombian case constitutes an example where women participated at first in local working groups and were included over time in the national negotiating process as part of victims delegations and within the negotiation teams of the conflict parties.⁶³ Alongside material provisions in the accord to strengthen gender equality, the introduction of institutions, such as the sub-commission on gender and the women's truth and memory commission, presents the most visible and innovative success of women's inclusion in the peace

⁵⁸ See Piccone (n2).

⁵⁹ ICTJ-Colombia (n1).

⁶⁰ UNSC, 'Resolution 2261 Identical letters dated 19 January 2016 from the Permanent Representative of Colombia to the United Nations addressed to the Secretary-General and the President of the Security Council' (19 January 2016) S/RES/2261, <[https://undocs.org/S/RES/2261\(2016\)](https://undocs.org/S/RES/2261(2016))>, paras.1-2; See Javier Ciurlizza, 'Post-conflict in Colombia: The International Potential of Peace' (9 March 2016) *Crisisgroup*, <<https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/post-conflict-colombia-international-potential-peace>>, accessed 11 December 2019; Juana García, 'The UN's New Role in Colombia Can Strengthen the Peace Process During its Most Vulnerable Phase' (14 July 2017) *LSE Latin America and Caribbean blog*, <<https://blogs.lse.ac.uk/latamcaribbean/2017/07/14/the-uns-new-role-in-colombia-can-strengthen-the-peace-process-during-its-most-vulnerable-phase/>>, accessed 11 December 2019.

⁶¹ Camila de Gamboa Tapias and Fabio AD Pabón, 'The Transitional Justice Framework Agreed Between the Colombian Government and the FARC-EP' In *The transitional justice framework agreed between the Colombian Government and the FARC-EP* (Routledge 2018) 66, 68; Piccone (n2) 10.

⁶² Jamille Bigio, Rachel B Vogelstein and Anne Connell, 'Women's Participation in Peace Processes: Colombia' (15 December 2017) *CFR*, <<https://www.cfr.org/blog/womens-participation-peace-processes-colombia>>, accessed 11 December 2019; Odette Chalaby, 'Colombia's Peace Agreement is the World's First to Have Gender at its Core' (12 January 2018) *Apolitical*, <https://apolitical.co/solution_article/colombias-peace-agreement-worlds-first-gender-core/>, accessed 11 December 2019.

⁶³ Bouvier (n4) 20, 22.

negotiations.⁶⁴ These commissions deal specifically with gender-based violence and women's participation, considering issues of the peace agreement through a feminist lens, thus broadening the agenda.⁶⁵

In spite of the promising provisions of the peace accord on paper, the persistent violence and the economic situation in rural areas of the country draw a different picture of women's situation. I will examine the problems of the peace process in the light of the two identified strands of feminist critique.

Women at the table, but still no authority?

Notwithstanding the progressiveness of Colombia's TJ system, especially considering its emphasis on gender equality, the development of the process mirrors yet a structural underrepresentation of women in the peace negotiations. In the very beginning of the peace talks in Norway in 2012 only one woman participated.⁶⁶ The 2016 peace accord consequently originates in a process without a gender-just participation, even if the situation changed over time. This reflects how women continue to be unrecognized as equal negotiators in peace talks.⁶⁷ The integration of women later in the process makes it seem like a "necessary component" to fulfil, in order to please the international community that sees including women nowadays as the "correct thing to do".⁶⁸

Even the adoption of the gender sub-commission, despite its important symbolic character, is to be seen in relation with its actual power. The commission has no decision-making authority and it is not guaranteed that their recommendations will be accepted or integrated.⁶⁹ Furthermore, it has been pointed out that the provisions on gender equality are slower implemented than others, if at all, because the budget is not aligned to concrete plans for actions.⁷⁰ Hence, Colombia's ambitious gender-mainstreaming efforts come at a price. While the prevailing

⁶⁴ Chalaby (n62).

⁶⁵ 'Gender Equality, Women's Empowerment Central to Colombian Peace Process – UN Officials' (26 July 2016) *UN News*, <<https://news.un.org/en/story/2016/07/535452-gender-equality-womens-empowerment-central-colombian-peace-process-un-officials>>, accessed 07 January 2020; Kimberley Brown, 'For Many Women in Colombia, Peace Never Arrived' (Santander de Quilochao, 9 May 2019) *Al Jazeera News*, <<https://www.aljazeera.com/indepth/features/women-colombia-peace-arrived-190509194227891.html>>, accessed 11 December 2019.

⁶⁶ Bouvier (n4) 19; Chalaby (n62).

⁶⁷ Bouvier (n4) 19.

⁶⁸ Genevieve Riccoboni, 'Turning "Unimaginable Dialogues" Into "Possible Dialogues": WILPF CSO Briefer Interview With Rosa Emilia Salamanca' (12 April 2019) *Peace Women - Women's International League of Peace and Freedom*, <<https://www.peacewomen.org/e-news/article/turning-%E2%80%99Cunimaginable-dialogues%E2%80%9D-possible-dialogues-wilpf-cso-briefer-interview-rosa>>, accessed 11 December 2019; See also Paffenholz (n27) 2.

⁶⁹ Bouvier (n4) 21.

⁷⁰ Peace Women, 'Delivering on Colombia's Peace Agreement: Women Call For Action' (24 July 2019) *Peace Women - Women's International League of Peace and Freedom*, <<https://www.peacewomen.org/e-news/delivering-colombia%E2%80%99s-peace-agreement-women-call-action>>, accessed 11 December 2019; Riccoboni (n68).

thinking is: “if we name women, we are already including women”, the effect on fighting gender inequality is alarmingly low.⁷¹ The government’s incapacity to turn the broadened agenda into action gives rise to the society’s discontent and reinforces violence even after the official ending of the conflict, thus threatening peace in the country.⁷²

Who is asked? – the universality trap

Another obstacle for achieving peace in Colombia concerns the neglect of indigenous women’s voices. Even though the established institutions constitute a welcome step towards gender inclusion, indigenous women were systematically not considered in them.⁷³ In dealing with women’s participation in one and with ethnicity in another chapter, the Colombian peace agreement fails to assume an intersectional approach.⁷⁴ Instead of listening directly to indigenous women’s needs, the conflict parties included restorative justice measures in the agreement, assuming to cope with indigenous’ concerns. They thus legitimized inherent structures of inequality within communities in the name of tradition.⁷⁵ This lack of contextualization goes in line with the phenomenon of an “NGOization” of feminist activism in Latin America during the 1990s, where powerful NGOs, which depended increasingly on governmental funding, lost track of the people they aimed to represent.⁷⁶ TJ processes should thus ensure that grassroots activists⁷⁷ are able to participate in the negotiation process in order to allow indigenous women’s concerns to ‘travel from the margins to the centre’.⁷⁸

The latter is especially relevant to avoid the stigmatization of sexual violence as a weapon of war as the single site of women’s oppression. Following the mistakes of other cases, the Colombian peace process fails to address different forms of harm, mainly forced internal displacement and domestic violence,⁷⁹ thus encouraging their continuity.⁸⁰ In other words, falling into the universality trap, the peace accord gives attention to the public sphere of sexual violence without improving the private lives of women. The latter would ‘require a structural change that is not being made’.⁸¹ Ignoring the importance of the concept of community, the TJ system fails to break the silence of indigenous women inherent in their cultural roles of their

⁷¹ Tabak (n10) 118; Riccoboni (n68).

⁷² Tabak (n10) 138; Brown (n65).

⁷³ Bouvier (n4) 22; Acosta et al. (n3) 3.

⁷⁴ Acosta et al. (n3) 3.

⁷⁵ *ibid* 8, 14, 17.

⁷⁶ See Sonia E Alvarez, ‘Advocating Feminism: The Latin American Feminist NGO ‘Boom’ (1999) 1(2) *IFJP* 181.

⁷⁷ Sanne C Weber, ‘The Unhappy Marriage of Victimhood and Citizenship in Transitional Justice: Exploring the Potential of Gender-just Transformative Reparations in Colombia’ (Coventry University 2017), 24.

⁷⁸ Acosta et al. (n3) 4.

⁷⁹ Tabak (n10) 118; Brown (n65); Lina M Céspedes-Báez, ‘Creole Radical Feminist Transitional Justice’ in Fabio AD Pabón, *Truth, Justice and Reconciliation in Colombia* (Routledge 2018) 102, 107.

⁸⁰ Céspedes-Báez (n79) 108.

⁸¹ Brown (n65).

community.⁸² The prevailing victim-perpetrator dichotomy prevents furthermore that the considerable number of female ex-FARC combatants⁸³ can be protected from domestic violence when returning to their communities where they are set back in persistent inherent gender roles.⁸⁴

Considering the aspects above, the Colombian case reveals once again the failure of a TJ system to address the root causes of a conflict and to tackle structural inequalities, concerning gender but also ethnicity, religion and social status. A considerable part of the sufferers does not feel supported by the government and considers the peace agreement as having no real effect.⁸⁵ While the Colombian TJ system envisages a wide range of mechanisms, social and economic rights are not sufficiently included. Observers emphasize especially that the amount of reparations should address the structural inequalities that shape women's lives negatively, consequently going beyond the impacts of crimes.⁸⁶ The observation that 'two Colombias still exist',⁸⁷ illustrates that the country does not experience a real transformation in this transitional period. Promises like a water and electricity supply system in rural areas⁸⁸ and alternative livelihoods for former drug cultivators⁸⁹ were not fulfilled, which results in a destabilized peace. While the aim of the TJ system is to develop a sustainable peace,⁹⁰ the mentioned obstacles constitute long-term problems⁹¹ that might exceed the life span of the mechanisms. These observations require to scrutinize whether the TJ system of Colombia is overload⁹² and has raised overly high expectations that are yet to be fulfilled.⁹³

⁸² Acosta et al. (n3) 8; Taylor (n8).

⁸³ Bigio et al. (n62); Sruthi Gottipati, 'Colombia's Female FARC Fighters Wage a New War, for Gender Parity' (7 September 2017) *The New Humanitarian*, <<http://www.thenewhumanitarian.org/feature/2017/09/07/colombia-s-female-farc-fighters-wage-new-war-gender-parity>>, accessed 17 December 2019.

⁸⁴ Tabak (n10) 152; Bouvier (n4) 25; Acosta et al. (n3) 8-9.

⁸⁵ Binningsbø et al. (n5); Nicholas Casey, 'Colombia's Peace Deal Promised a New Era. So Why Are These Rebels Rearming?' (17 May 2019) *New York Times*, <<https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html>>, accessed 17 December 2019; Riccoboni (n68).

⁸⁶ Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27(4) *Neth. Q. Hum. Rights* 625, 640; Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8(3) *IJTJ* 339, 347; Bouvier (n4) 26.

⁸⁷ 'Peacebuilding in Colombia - Partner visit of the United Nations Peacebuilding Fund to Colombia' (2018) *UN Peacebuilding Fund*, <<https://unpeacebuildingfund.exposure.co/peacebuilding-in-colombia>>, accessed 7 January 2020.

⁸⁸ Casey (n85).

⁸⁹ *ibid.*

⁹⁰ Bouvier (n4) 28; Piccone (n2) 21.

⁹¹ Chalaby (n62); UN News (n65).

⁹² Weber (n77) 63; Piccone (n2) 21-22.

⁹³ Roger Duthie, 'Transitional Justice and Displacement' (2011) 5(2) *IJTJ* 241, 250; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-economic Wrongs' (2012) 21(2) *Soc. Leg. Stud.* 171, 179.

3. Is Transitional Justice the answer?

Current developments in Colombia do not let much space for hope. Under new president Ivan Duque, who has already announced to change parts of the peace deal, it is highly unlikely that women's rights will be implemented.⁹⁴ The ex-FARC combatants thus lose trust in the TJ system, flee into exile and rearm along with other Guerrilla groups that were not part of the peace process.⁹⁵ In the light of these events, lessons should be drawn from the Colombian case. In a context way beyond the Colombian peace accord, TJ, as a judicial method to redress harm after a conflict that shall help establishing peace, has shown its constraints due to the limited life span of its mechanisms⁹⁶ and the diminished capacity to consider the context of the conflict⁹⁷. While the method concentrates on regulating a transitional period to allow a "liberalization" of the regime, it does not seem capable of achieving a real transformation.⁹⁸ As has been emphasized already concerning the Rwandan peace process, a higher number of women in the political sphere does not automatically dislodge old power dynamics.⁹⁹

However, many legal scholars, while admitting that there is still much work to be done,¹⁰⁰ seem to believe in the concept of TJ as a tool. They cause the impression that, if we encourage national implementation of UN instruments,¹⁰¹ bring women to the table in peace talks and mainstream gender provisions in the agreements, we will be able to eliminate underlying structural inequalities and to achieve sustainable peace in societies in post-conflict settings.¹⁰²

Meanwhile, I have come to doubt that TJ as a legal method gives a comprehensive answer to the highly political process of peacebuilding. Some postcolonial and feminist authors plea for the concept of transformative justice,¹⁰³ leaving open though, how to effectively achieve such a transformation. Others emphasize the need for an interdisciplinary approach that avoids a rights-based framework, relying predominantly on anthropological and sociological methods,¹⁰⁴ including storytelling.¹⁰⁵ While an extrajudicial feminist approach is more likely to

⁹⁴ Brown (n65).

⁹⁵ Mathew Charles, 'Why Colombia's Dissident FARC Rebels Are Taking Up Arms Again' (4 September 2019) *World Politics Review*, <<https://www.worldpoliticsreview.com/articles/28163/why-colombia-s-dissident-farc-rebels-are-taking-up-arms-again>>, accessed 16 December 2019; Navarrette Forero and Olaya (n5).

⁹⁶ Waldorf (n93) 179.

⁹⁷ Tabak (n10) 116.

⁹⁸ Weber (n77) 27-28; 'What is Transitional Justice?' (2019) *ICTJ*, <<https://www.ictj.org/about/transitional-justice>>, accessed 13 December 2019.

⁹⁹ Otto (n20) 152.

¹⁰⁰ Bache (n13) 34.

¹⁰¹ Binder et al. (n14) 33.

¹⁰² O'Reilly et al. (n11) 13.

¹⁰³ See Ruth Morris, *Stories of Transformative Justice* (Canadian Scholars' Press 2000); Paul Gready, Jelke Boesten, Gordon Crawford and Polly Wilding, 'Transformative Justice—A Concept Note' (2010) *Unpublished manuscript*, available at <https://wun.ac.uk/files/transformative_justice_-_concept_note_web_version.pdf>.

¹⁰⁴ Tabak (n10) 116.

¹⁰⁵ See Molly Andrews, Corinne Squire and Maria Tamboukou (Eds.), *Doing narrative research* (SAGE Publications 2013).

interact with the context of a conflict, it would face the challenge to effectively reach the responsible conflict-parties. To ensure that women actively participate across the socioeconomic and political spheres,¹⁰⁶ a fundamental change of thinking must be performed – in the words of Colombian peace activist Rosa Emilia Salamanca: ‘We have to change unimaginable dialogues to possible dialogues’.¹⁰⁷

Conclusion

In this paper, I have shown that the arising frictions in the TJ process in Colombia are based on the failure of the negotiating parties to include women properly in the peacebuilding. I have identified two main arguments of postcolonial feminist critique that are applicable to the Colombian case – namely the lack of women in decision making positions and the non-inclusion of an intersectional perspective. Considering the progressiveness of the Colombian peace accord, especially concerning gender equality, this paper challenges the capacity of TJ as a judicial method to achieve a veritable transformation of the society which has been figured as necessary in order to accomplish sustainable peace.

¹⁰⁶ Bache (n13) 34.

¹⁰⁷ Riccoboni (n68).

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