The Peace Agreement in Colombia in the Light of International Law[*]

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Abstract

After a half-century of armed conflict between the government of Colombia and the Revolutionary Armed Forces of Colombia – the People's Army (FARC-EP), the signing of the 2016 peace agreement helped put an end to internal fighting and encouraged a stable peace. However, this agreement created a new challenge: that of respecting the principle of equality before the law. This article proposes a framework to help address the difficult choice between the right to peace and the right to equality before the law by considering international human rights standards. The text suggests the use of constitutional and conventional judicial reviews as the two best judicial remedies for verifying the compatibility of domestic law with international principles of human rights. Based on the principle of supremacy of the imperative international law, these judicial reviews can be used to analyze the validity of a national rule that contravenes an international human rights standard. Considering these tools, through the lens of the theory of legal pluralism, can help to explain how the transitional justice in Colombia, "Special Jurisdiction of Peace" (SJP), conforms with international standards. Finally, this article concludes that equality before the law is not an absolute principle and that transitional justice, where revolutionaries lay down their arms in exchange for the possibility of being tried by a transitional justice system, is a viable option of a last resort, in any case where permanent war is the only other option. As for peace, it must be considered as a fundamental right in both international and national legal orders, to guarantee the necessary conditions for the respect of other rights and freedoms for all.

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Keywords: Peace Agreement, Colombia, Principle of Equality, Transitional Justice, Constitutional, Conventionality, Compatibility, Invalidity, International Law.

Résumé

La signature de l'accord de paix en 2016 a aidé à mettre fin au conflit armé interne et encourager une paix stable entre le gouvernement de la Colombie et les forces armées révolutionnaires de la Colombie – l'armée du peuple (FARC-EP). Cependant, cette entente a généré un autre défi, soit celui de respecter le principe d'égalité devant la loi. Afin que les révolutionnaires soient incités à déposer leurs armes, l'État échange la possibilité de se faire juger par une justice transitionnelle. Le pluralisme juridique permet d'expliquer pourquoi la « Juridiction spéciale de paix » (JSP) peut être en conformité avec les normes internationales. Cet article propose une façon d'expliquer ce choix difficile entre le droit à la paix et le droit à l'égalité devant la loi en considérant les normes internationales des droits de la personne. Le texte suggère l'utilisation des contrôles de la constitutionnalité ainsi que de la conventionnalité, comme étant les deux recours judiciaires appropriés qui permettent de vérifier la compatibilité entre les règles de droit national et les principes internationaux relatifs aux droits de la personne. Ces contrôles judiciaires peuvent être utilisés pour analyser l'invalidité d'une norme nationale qui contrevient à une norme internationale relative aux droits de la personne en se basant sur le principe de la primauté du droit international de type impératif. Finalement, il est conclu que l'égalité devant la loi n'est pas un critère absolu et que la justice transitionnelle devrait être le dernier recours, dans le cas où la guerre permanente se présenterait comme la seule autre option. Quant à la paix, elle est considérée comme étant un droit fondamental dans l'ordre juridique international et national, afin de garantir les conditions nécessaires pour le respect des autres droits et libertés à tous.

Mots clés : Accord de paix, Colombie, Principe d'égalité, Justice transitionnelle, Constitutionnalité, Conventionnalité, Compatibilité, Invalidité, Droit international.

Resumen

La firma del acuerdo de paz en 2016 ayudó a poner fin al conflicto armado interno entre el gobierno de Colombia y las Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC-EP). Sin embargo, este acuerdo provocó otro desafío, cómo respetar el principio de igualdad ante la ley. Con el fin de que los guerrilleros hubiesen entregados sus armas, el Estado les ofrece la posibilidad juzgarlos mediante una justicia transicional. El pluralismo jurídico permite explicar por qué la "Jurisdicción Especial de Paz" (JEP) puede ser compatible con las normas internacionales. Este artículo propone explicar el dilema entre el derecho a la paz y el derecho a la igualdad ante la ley considerando las normas internacionales de los derechos humanos. El texto sugiere la utilización de los controles de constitucionalidad y de convencionalidad, pues la utilización correcta de estos dos mecanismos judiciales permite verificar la compatibilidad entre las normas nacionales frente a los principios internacionales relativos a los derechos humanos. Estos dos controles judiciales pueden ser utilizados para analizar la invalidez de una norma nacional que contraviene una norma internacional relativa a los derechos humanos basándose en el principio de la primacía del derecho internacional de tipo imperativo. Finalmente, se concluye que la igualdad ante la ley no es un criterio absoluto, y que la justicia transicional puede ser utilizada como el último recurso en caso de que la guerra permanente se presentaría como la otra única opción. La paz es considerada como un derecho fundamental en el orden jurídico internacional y nacional, pues la paz garantiza a todas las personas las condiciones necesarias para el respeto de los otros derechos, libertades y garantías fundamentales.

Palabras claves: Acuerdo de paz, Colombia, Principio de igualdad, Justicia transicional, Constitucionalidad, Convencionalidad, Compatibilidad, Invalidez, Derecho internacional.

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Introduction

Since the independence of the Republic in 1819[1], Colombia has been immersed in a succession of almost permanent internal wars. [2] The signing of agreements to calm rebel demonstrations was a well-established tradition in Colombia, even before independence.[3] Unfortunately, most of the agreements of the past were not fully respected by the ruling elite. [4] Once the goal of demobilizing the civil or military opposition was achieved, the country's top leaders usually found excuses for weakening the principle of *pacta sunt servanda* by breaching the agreement[5]. This also seems to be the case with the peace agreement of 2016. It is likely that the opponents of the agreement will break the commitments made between the Colombian state and the Revolutionary Armed Forces of Colombia - People's Army (FARC- EP). It could be argued that the problem of the peace agreement in Colombia is not the text of the agreement itself. On the contrary, the issue remains a question of good faith regarding the implementation of the 2016 peace agreement.[6]

In the past, Colombia has employed several methods of conflict resolution. To counter protracted armed conflict, Colombian governments in recent decades have resorted to partial transitional justice systems, amnesty grants and even a "plea bargain" system (negotiation and agreement to plead guilty).[7] The aim has been to "buy peace" by preventing the perpetrators of crimes against humanity from being

[1] Rafael Pardo Rueda, *La historia de las guerras*, Bogotá (Colombia), Vergara, 2004, at 139-170 [Pardo Rueda].
[2] Garcia-Godos, J., « Colombia: Accountability and DDR in the pursuit of peace? » dans Chandra Lekha Sriram et al, dir, *Transitional Justice and Peacebuilding on the ground: Victims and ex-combatants*, New York, Routledge, 2013, à la p 220; Pardo Rueda, *supra* note 1.
[3] Jesús María Henao et Gerardo Arrubla, *Historia de Colombia para la enseñanza secundaria*, 3e éd, Bogotá, Librería Colombiana - Camacho Roldan & Tamayo, 1920, at 216-224 [Henao and Arrubla].
[4] Pardo Rueda, *supra* note 1 at 82.
[5] Henao and Arrubla, supra note 3 at 227.
[6] United Nations – Verification Misssion in Colombia, Press Releases, Security Council Press Statement on Colombia, 30 November 20-17, para 5, en ligne : <https://colombia.unmissions.org>, <https://colombia.unmissions.org/en/security-council-press-statement-colombia> ; Naciones Unidas - Derechos Humanos – Oficina del alto comisionado – Colombia, Comunicado de prensa, 20 diciembre 2017, en ligne : <http://www.hchr.org.co/index.php>, <http://www.hchr.org.co/index.php/informacion-publica/comunicados-de-prensa/ano-2017/8855-onu-derechos-humanos-expresa-preocupacion-por-homicidios-estigmatizacion-y-hostigamientos-a-defensores-y-defensoras-de-derechos-humanos-en-colombia>.
[7] Pardo Rueda, *supra* note 1 at 583-585 and 602.

formally accused at the international level.[8] For a half-century, the Colombian government has resisted the establishment of a commission to reveal the full truth of the causes of the human rights violations that occurred during the internal armed conflict.[9] However, in 2001, Colombia partially ratified the *Rome Statute of the International Criminal Court*, and in 2009, the International Criminal Court acquired jurisdiction over all international crimes committed in Colombia.[10] Until the present, the International Criminal Court has launched no formal investigations into the Colombian situation, only preliminary examinations.[11]

Following the 2016 peace agreement, in April 2017, a constitutional reform creating the "Special Jurisdiction of Peace" ("SJP") was adopted by representatives of the House of Representatives and Senate. The reform provided for a truth commission and peace tribunals based on two fundamental pillars: (1) recognition of victims as citizens entitled to truth, justice and reparation for damages suffered during armed conflict; and (2) the importance of truth and the recognition of responsibility by all actors who have committed serious human rights violations in the context of the internal armed conflict.[12] For the first time in Colombian history, the truth will be part of the peace process in Colombia, because truth is considered a fundamental necessity for reaching justice and peace for a definitive resolution of conflict.[13] The question to ask is whether this constitutional reform is consistent with the *"Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of*

[8] Organisation des États américains, Commission Interaméricaine des Droits de l'Homme, *Rapport annuel sur les droits de la personne*, 2010, chapitre IV, Colombie à la p 382, aux para 92-93.
[9] Nelson Arturo Ovalle Diaz, « Le pluralisme juridique, la justice transitionnelle et alternative : Le cas du conflit armé interne colombien », Revue québécoise de droit international, Hors-série (mars 2015), at 309 [Ovalle Diaz, "justice transitionnelle"].
[10] *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, entry into force: 1 July 2002, online: UN <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_fr>, [*Rome Statute*].
[11] Cour pénale internationale, « *Enjeu : crimes de guerre prétendument commis depuis le 1er novembre 2009 et crimes contre l'humanité prétendument commis depuis le 1er novembre 2002 en Colombie* » (Examen préliminaire – phase 3 : Recevabilité), en ligne : CPI <https://www.icc-cpi.int/colombia?ln=fr>.
[12] Avocats sans frontières, « Colombie : création d'une juridiction spéciale pour la paix », nouvelles & articles (19 avril 2017), en ligne : <https://www.asfcanada.ca/medias-et-evenements/medias/nouvelles/> [Avocats sans frontières, "Colombie"].
[13] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 328.

International Humanitarian Law,"[14] a resolution adopted by the United Nations General Assembly on December 16, 2005. This resolution states that

> victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.[15]

The new SJP is a variety of alternative ways of helping those whose grievances were not addressed by the Colombian state, or by the supra-state justice system of the International Criminal Court. All of the above raises the question of the conformity, or the legality of the domestic laws derived from the Colombian peace agreement with international law. Considering this question, it is essential to assess how this new transitional justice initiative will reconcile Colombia's general and specific rules with international standards on international humanitarian law and human rights.

I. What is the issue in dispute?

The final peace agreement,[16] signed in Bogotá on Thursday, November 24, 2016[17], proposes a stable peace with the FARC-EP, but appears to undermine the respect of the principle of equality before the law. The question here is how to resolve the dilemma between the right to peace and the right to equality before the law under international human rights standards.

A possible response to this question lies in determining if constitutionality and conventionality are appropriate mechanisms for verifying whether the laws and

[14] *Principes fondamentaux et directives concernant le droit à un recours et à la réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*, Rés AG 147, Doc off AG NU, 60e sess, Doc NU A/Res/60/147 (2005).
[15] *Ibid* at principle X.
[16] Le Monde, « Colombie : ce que prévoit l'accord de paix avec les FARC, et ce qu'il reste à mettre en œuvre », online : <http://www.lemonde.fr/ameriques/article/2016/12/01/colombie-ce-que-prevoit-l-accord-de-paix-avec-les-farc-et-ce-qu-il-reste-a-mettre-en-uvre_5041815_3222.html>.
[17] Colombia, Comisionado para la paz, *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, ((24 noviembre 2016), online: <http://www.altocomisionadoparalapaz.gov.co/Paginas/home.aspx> [*Acuerdo final*].

actions of the state comply with international human rights standards.[18] These judicial controls are part of an evolving legal field; indeed, they are even being used as part of a dialogue which is contributing to the creation of a common transnational framework between the member states, all of which have different and complex legal systems.[19] This transnational dialogue between legal systems cannot be advanced through recourse to the theory of natural law or the theory of legal positivism in the traditional manner. In my view, the only valid theoretical framework that can lead to a fruitful outcome is a new theory called legal pluralism.[20] Legal pluralism can be defined as "the coexistence, at the same time, of a plurality of organs producing legal norms, which are applied simultaneously or successively to the same individual, due to his/her multiple memberships in several states and non-state legal orders."[21]

In fact, several Latin American constitutions, including Colombia, have made remarkable progress in putting legal pluralism into practice.[22] A pluralistic interpretation of the law can reconcile the universal fundamental rights of the individual with local legal cultures or with norms derived from social subgroups since "law has become [a] symbol of planned change, [a] technique of social engineering, [and an] incentive or constraint in the accommodation of differences."[23] It is in this perspective that the SJP would allow the final Colombian peace agreement to be applied in accordance with international human rights standards. This pluralist approach to law is the one that is the most respectful of the "Third World Approaches to International Law," commonly known as TWAIL, which rejects international standards and rethinks about

[18] *Almonacid Arellano at al v Chile* (September 26, 2006), Inter-Am Ct HR (Ser C) No. 154 at para 124 [*Almonacid Arellano*]; *Cabrera García and Montiel Flores v Mexico* (November 26, 2010) Inter-Am Ct HR (Ser C) No 220, at para 225 [*Cabrera García and Montiel Flores v Mexico*]; *Gelman v Uruguay* (February 24, 2011) Inter-Am Ct HR (Ser C) No. 221, at para 193 [*Gelman v Uruguay*]; *Gomes Lund et al. ("Guerrilha do Araguaia") v Brazil* (November 24, 2010), Inter-Am Ct HR (Ser C) No. 219, at para 176.

[19] Nelson Arturo Ovalle Diaz, *La production pluraliste du droit transnational contemporain*, thèse de doctorat en droit, Université d'Ottawa, 2015, online : Recherche uO <https://ruor.uottawa.ca/handle/10393/32127>, à la p 8, 39 et 148 [Ovalle Diaz, *La production*].

[20] *Ibid* at 12-13.

[21] *Ibid* at 41.

[22] *Ibid* at 45.

[23] Jean-Guy Belley, « Le pluralisme juridique comme doctrine de la science du droit » dans Jean Kellerhals, Dominique Manaï et Robert Roth, dir, *Pour un droit pluriel : études offertes au professeur Jean-François Perrin*, Genève, Helbing & Lichtenhahn, 2002, à la p 150.

imperative standards in accordance with the local culture.[24]

II. The Elements of Transitional Justice and the Special Jurisdiction of Peace (SJP) in Colombia

The elements of the peace agreement signed in Colombia in 2016 go beyond justice, since this agreement also includes matters that are related to the economy, democracy, etc. The analysis discussed in this paper is limited to the specific elements of transitional justice. Transitional justice is here defined as:

> "[...] all the judicial and non-judicial mechanisms that make the criminal law applied to those responsible for international crimes more flexible in order to put an end to an internal conflict. Transitional justice seeks to promote the definitive transition from a situation of dictatorship, apartheid or internal armed conflict to democracy and lasting and stable peace. This model of justice includes all mechanisms for investigating, adjudicating and serving sentences for those responsible for serious crimes committed in connection with the armed conflict. Transitional justice also provides for mechanisms for restitution to the victims of armed conflict, for the search for historical truth, for guarantees of non-repetition, as well as for instruments of reconciliation between the various members and groups of society."[25]

The concept of transitional justice informed the creation of the 2016 peace agreement in Colombia. Thus, the new SJP in Colombia must be viewed in the context of transitional justice. By comparing the above general definition of transitional justice with the 2016 peace agreement, four distinguishing features stand out as essential. Transitional justice always involves transformation towards peace and democracy, flexibility of criminal law, temporary application of special rules, and a wider scope of action.

A. Transformation**:** Transitional justice aims to promote the definitive transition from a situation of dictatorship, apartheid or internal armed conflict to a lasting and stable democracy and peace.[26] The model of transitional justice in

[24] Gallié, M., « Les théories tiers-mondistes du droit international (TWAIL) : Un renouvellement ? » (2008) 39 : 1 Études internationales 17, à la p 27.
[25] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 333-334.
[26] Renée Fregosi et Rodrigo España, *Droits de l'homme et consolidation démocratique en Amérique du Sud*, Paris, L'Harmattan, 2009.

Colombia makes it possible to facilitate the end of the internal armed conflict; it is under the commitments of the peace agreement of 2016 that the FARC-EP handed over their weapons to the delegates of the UN Security Council.[27] If the legal rules that flow from this same agreement are finally adopted, they will also have the effect of widening the democratic possibilities for those who oppose the ruling class as well as for the victims and the inhabitants of the historically neglected regions.[28]

B. Flexibility**:** Transitional justice is used to end an internal armed conflict by creating a set of judicial and non-judicial mechanisms that avoid the strict application of the criminal regime for international crimes.[29] Under the terms of the final peace agreement signed on November 24, 2016, in Bogotá, Colombia's *Criminal Code* and *Code of Criminal Procedure* will not apply to participants in the internal armed conflict since provisionally more flexible rules apply to them, provided that they definitely stop their participation in the internal armed conflict. [30]

C. Temporary Measures**:** Transitional justice includes all mechanisms for investigating, adjudicating and serving sentences for those responsible for serious crimes committed in the context of armed conflict. [31] Therefore, the SJP has a provisional duration; ten years to start the investigation procedures, five additional years to complete the judgments, and with the possibility of additional time if necessary, and if a new law allows such an extension.[32]

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[27] Resolution 2261 (2016), Security Council, identical letters dated 19 January 2016 from the Permanent Representative of Colombia to the United addressed to the Secretary General and the President of the Security Council, adopted by the Security Council at its 7609th meeting, on 25 January 2016, S/Res/2261 (2016); Resolution 2366, Security Council, 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, adopted by the Security Council at its 7997th meeting, on 10 July 2017, S/Res/2366 (2017).

[28] *Acuerdo final*, *supra* note 17 at item 2.3.6, at 54 of 310.

[29] Noémie Turgis, *La justice transitionnelle en droit international*, Bruxelles, Bruylant, 2014.

[30] Avocats sans frontières, "Colombie", *supra* note 12.

[31] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 334.

[32] *Acto Legislativo No. 01 (4 abril 2017)*, Congreso de Colombia, online: JEP <https://www.jep.gov.co/Paginas/Normativa/Acto-Legislativo.aspx>, Artículo transitorio 15 (However, in the latter case, the SJP must first request it) [*Acto Legislativo No. 01 (4 abril 2017)*].

D. Wider Scope**:** Transitional justice provides mechanisms for restitution to victims of armed conflict, investigation for historical truth, guarantees of non-repetition, as well as instruments of reconciliation between various members and groups of society.[33] The system of transitional justice adopted in Colombia in the constitutional 1st Act of April 4, 2017,[34] provides, inter alia, for a Special Peace Jurisdiction (SJP) to investigate and punish those responsible for the most serious crimes during the internal armed conflict. A truth commission was also established as an integral system of truth, justice, reparation and non-repetition. The mandate of this commission is to search for people who went missing during the armed conflict and to provide both remedial measures for the construction of peace and guarantees of non-repetition.[35]

III. Justification and usefulness of constitutional and conventional judicial reviews to ensure respect of human rights

As mentioned earlier, the 2016 Colombian Final Peace Agreement created an apparent conflict between the right to live in peace and the right to be treated equally before the law as a citizen of Colombia. Specifically, individuals in the internal armed conflict who committed crimes before 1 December 2016 (in particular, crimes constituting grave breaches of international humanitarian law or serious human rights violations) will be judged by the new SJP, a jurisdiction of preferential and exclusive authority.[36] How can one justify the fact that most citizens of Colombia will continue to be subject to the rules of the *Criminal Code* and *Criminal Procedure Code*, while others will be subject to exceptional legislation and jurisdiction? Which provides the lesser punishment? Indeed, the difference in treatment presents a

[33] Barbara Cassin, "Removing the perpetuity of hatred: on South Africa as a model example" (June 2006) International Review of the Red Cross, Volume 88 Number 862, p 235-244.
[34] *Acto Legislativo No. 01 (4 abril 2017)*, *supra* note 32.
[35] Avocats sans frontières, "Colombie", *supra* note 12.
[36] Avocats sans frontières, "Colombie", *supra* note 12.

potential dilemma: the right to peace versus the right to equality before the law. As discussed below, I will suggest that the theory of the two judicial controls (constitutional and conventional) can resolve this conflict of legal rules.

First of all, it should be noted that article 93 of the 1991 Colombian Constitution states very clearly that:

> Treaties and international conventions ratified by the Congress, which recognize human rights and prohibit their limitation in the event of a state of emergency, prevail in the internal order. The rights and duties enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia.[37]

In other words, this constitutional provision is a mechanism aimed at harmonizing Colombian national legislation with international human rights standards. This device is known in jurisprudence and doctrine as the constitutionality block[38], because it helps to constitutionalize international human rights standards. In the same vein, article 27 of the Vienna Convention on the Law of Treaties ("Vienna Convention") states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[39] Indeed, the 1969 Vienna Convention is the normative source of conventional control[40]. Thus, the Colombian Constitutional Court has jurisdiction, through the mechanisms of constitutional review and conventionality control, to rule on conflicts between national rules and international human rights obligations.

According to inter-American jurisprudence, the control of conventionality operates automatically. For example, in *Almonacid Arellano et al.* v. C*hile*[41], the Inter-American

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[37] *Constitución Política de Colombia 1991*, Actualizada con los Actos Legislativos a 2016, online : Corte Constitucional <http://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf>, article 93, [*Constitución Política de Colombia*].

[38] Caldera Infante, Jesús Enrique. "El bloque de constitucionalidad como herramienta de protección de los derechos fundamentales", dans Eduardo Andrés Velandia Canosa, dir, *Derecho Constitucional*, Bogotá, VC Editores, 2012, aux pp 223-255.

[39] *Vienna Convention on the Law of Treaties*, adopted 23 may 1969, UNTS vol 1155 at 331, art 27, online <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf> [*Vienna Convention*].

[40] Ovalle Diaz, *La production*, *supra* note 19 at 207-208.

[41] *Almonacid Arellano*, *supra* note 18.

Court of Human Rights ("the Inter-American Court") declared the invalidity of a Chilean amnesty law stating that "insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, it has no legal effects."[42] This same case law, with regard to the obligation of the national judge to exercise control over conventionality, has been followed by the Inter-American Court on several occasions.[43] As another example, in European case law, the Court of Justice of the European Communities confirmed in CJE *Flaminio Costa v. ENEL*[44] the principle of the primacy of international law over the national laws of the member states.

Accordingly, Colombian judges (including those of the SJP) may apply, the exception of non-conventionality or unconstitutionality in any case before them to exclude or clarify the application of the national law when it violates a right recognized in a fundamental international norm.[45] In short, all international standards ratified by Colombia in the area of human rights are part of the Constitution and therefore, in case of incompatibility between international human rights standards and the law or any other legal standard, the international human rights provisions will prevail.

A. What does the judicial review of constitutionality mean? It is the authority of the judicial branch to declare unconstitutional the laws and the regulations made by the legislative or the executive branches.[46] In the exercise of their power, a judge will have to assess whether a law or regulations violate a rule or a general principle

[42] *Ibid* at 3 of the results of the judgment.
[43] *Boyce et al v Barbados* (November 20, 2007), Inter Am Ct HR (Ser C) No 169, at para 75-80; *Radilla Pacheco v Mexico* (November 23, 2009), Inter Am Ct HR (Ser C) No 209, at para 337-342; *Gelman v Uruguay*, *supra* note 18, at para 230-246; *Gudiel Álvarez et al ("Diario Militar") v Guatemala* (November 20, 2012), Inter Am Ct HR (Ser C) No 253, at para 326-330; *Santo Domingo Massacre v Colombia* (November 30, 2012), Inter Am Ct HR (Ser C) No 259, at para 141-153; *Gelman v Uruguay* (March 20, 2013) (Monitoring Compliance with Judgment), Inter Am Ct HR, at para 59-90; *Liakat Ali Alibux v Suriname* (January 30, 2014), Inter Am Ct HR (Ser C) No 276, at para 112-125.
[44] CJE *Flaminio Costa* c. *ENEL*, C-6/64 [1964] Rec CE I-1194.
[45] Rocha, D., «De dónde venimos y hacia dónde vamos en materia de control de convencionalidad» dans Francisco Javier Diaz Revorio et al, dir, *Reflexiones sobre la Justicia Constitucional en Latinoamérica*, Cuenca (España) Ediciones de la Universidad de Castilla- La Mancha, 2013, à la p 76.
[46] G.A. Beaudoin, « Le contrôle judiciaire de la constitutionnalité des lois », (2003) *Revue de droit de McGill*, Vol. 48, à la p 328 [Beaudoin].

of the constitution.[47] In Canada, section 52 of the *Constitution Act*, 1982[48], declares that the Constitution of Canada is the supreme law of the land and renders inoperative the inconsistent provisions of any other law. Therefore, if a court finds that a legal provision does not respect the Constitution, the judge will declare that legal rule of no force and without effect, and this infra-constitutional legal rule will lose all its legal validity.[49] Thus, one of the elements of the rule of law manifests itself in the principle of the supremacy of the constitution. In the context of Colombia, this principle is explicitly recognized in article 4 of the Political Constitution of Colombia.

B. What does the control of conventionality mean? The control of conventionality is the assessment of the compatibility of a domestic law or a national action in the light of international human rights standards.[50] For example, the power to interpret the *Canadian Charter of Rights and Freedoms* give a Canadian judge broad jurisdiction to look at diverse sources of international human rights law. The Chief Justice of Canada states in 1987: "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions."[51] In the opinion of García Ramírez, which constitutes the judicial precedent at the Inter-American Court of Human Rights, if the national court finds that there is indeed an incompatibility between the two, the domestic legal rule or the national action will be declared unconventional and will cease to have legal effects.[52]

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[47] Beaudoin, *supra* note 46 at 329.
[48] *Loi constitutionnelle de 1982*, art 52, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c.11.
[49] Beaudoin, *supra* note 46 at 334.
[50] P. Gaïa, « Le contrôle de conventionnalité », *Revue française de droit constitutionnel*, (2008), Issue 5, à la p 201.
[51] *Re Public Service Employee Relations Act* (Alta), [1987] 1 SCR 313, at para 57 (in this same judgment, justice Dickson clarifies the exact scope of international human rights law in Canada, "I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions" at para 60).
[52] Sergio García Ramírez, "El control judicial interno de convencionalidad" (2011) 5:28 IUS, Revista del Instituto de Ciencias Jurídicas de Puebla 123, at 126, 145 et 151-153.

C. Who exercises the control of conventionality? As a last step, the ultimate determination of compliance with a conventional norm or principle may be exercised by international organizations, for example, by the Inter-American Court of Human Rights or the International Criminal Court.[53] This is what occurred in *Almonacid Arellano et al*. v. C*hile*, *2006* in which the assessment of conventionality of a standard, by the national judiciary, refers to the compatibility:

> […] between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention."[54]

However, when the state has ratified an international human rights standard, domestic control of conventionality must be exercised primarily by national jurisdictions.[55] National judges can thus legitimize their recourse to international law or to foreign jurisprudence in order to justify their judgments made using cross interpretation[56]. Nowadays, national judges are not limited to the application of domestic law because, according to inter-American jurisprudence, national judges have the obligation to exercise the control of conventionality generally as well as on a case-by-case basis[57].

[53] Ovalle Diaz, *La production*, *supra* note 19 at 208 and 209.
[54] *Almonacid Arellano*, *supra* note 18 at para 124.
[55] *Cabrera García and Montiel Flores v Mexico*, at para 225 ("But, when a state has ratified an international treaty such as the American Convention, all its institutions, including its judges, are also bound by such agreements, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end. The Judiciary, at all levels, must exercise *ex officio* a form of "conventionality control" between domestic legal provisions and the American Convention").
[56] Ovalle Diaz, *La production*, supra note 19 at 208.
[57] *Gelman v Uruguay*, supra note 18 at para 193.

IV. How do the judicial reviews of constitutionality and conventionality work in the peace agreement in Colombia?

With regard to the 2016 peace agreement in Colombia, the concomitant judicial controls of constitutionality and conventionality operate automatically. This is because articles 4, 93, 241 and transitional article 4 of the Constitution of Colombia provide for the exercise of the authority of the judicial branch to assess whether a domestic law meets the human rights international standards. For example, article 93 of the Constitution of Colombia states that international human rights standards take precedence in domestic law. In addition, article 4 of this constitutional text states that "in all cases of incompatibility between the Constitution and a piece of legislation or other rules, the constitutional provisions shall apply."[58] In other words, the control of constitutionality and conventionality is exercised simultaneously when the Constitutional Court of Colombia performs the abstract test of compatibility of the norms of the peace agreement of 2016 in the light of international standards relating to human rights. However, the implementation of a judicial review of the domestic laws derived from the 2016 peace agreement and the SJP, an exceptional and transitional jurisdiction, poses several problems of interpretation. A non-exhaustive list of some interpretative challenges follows:

a) Resolution of conflicts between general domestic laws and transitional special laws arising from the 2016 peace agreement.
b) Resolution of conflicts between applicable domestic laws and international norms relating to international humanitarian law, such as the *Rome Statute of the International Criminal Court* of 1998,[59] the four *Geneva Conventions* of August 12, 1949,[60] and the two *Additional Protocols* to the 1977 Geneva

[58] *Constitución Política de Colombia*, *supra* note 37 art 4.
[59] *Rome Statute*, *supra* note 10.
[60] *Geneva Conventions*, 12 August 1949, entry in force: 21 October 1950, online: <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

Conventions.[61]

c) Resolution of conflicts between applicable domestic laws and the norms originating from the inter-American system for the protection of human rights, such as the *American Convention on Human Rights* of 1969 ("American Convention").[62]

d) Resolutions of normative conflicts between different international treaty rules, such as between general human rights norms and special international norms of international humanitarian law.

V. How do universal principles of human rights resolve normative conflicts?

Normative conflicts can be resolved by taking into consideration a new paradigm in the hierarchy of legal categories in the interpretative exercise of contemporary transnational law. In this new hierarchical prototype, the seven universal principles of interpretation of human rights are above the legal norms. These widely recognized general principles of international law are derived from jurisprudence, doctrine, and international treaties, including the *International Covenant on Civil and Political Rights,*[63] the *Statute of the International Court of Justice* [64] and the *American Convention on Human Rights.* [65]

[61] *1977 Additional Protocols to the Geneva Conventions of 1949*, entry in force: 7 December 1978, online: <https://www.icrc.org/en/document/additional-protocols-geneva-conventions-1949-factsheet>.
[62] *American Convention on Human Rights* (Pact of San Jose, Costa Rica), 22 November 1969, OAS, Treaty Series, No. 36, online: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm> [*American Convention*].
[63] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 15.2 and 41.1.c (entered into force 23 March 1976, accession by Canada 19 May 1976, online: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [*International Covenant on Civil and Political Rights*].
[64] Statute of the International Court of Justice, art 38.c, online: <https://www.icj-cij.org/en/statute>.
[65] *American Convention*, *supra* note 62, art 46.a, "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

These are the seven general principles of international human rights law:

A. Public order;
B. Universality;
C. Oneness;
D. Irreversibility;
E. Progressivity;
F. Maximization (interpretation favourable to rights and freedoms); and
G. The limited power of authorities as well as the restricted scope of the rules of administrative, fiscal, disciplinary, penal, criminal and penitentiary law.

These seven principles can be applied by judges in the context of constitutional and conventional review in specific cases.

A. Public order

Hard law regarding human rights rules exists for the benefit of all human beings. These fundamental rights are imperative. "Where the guarantee in question is of public order or otherwise benefits the whole of society, derogation from a fundamental right is not a possibility";[66] because fundamental human rights are part of the imperative law (*jus cogens*). For this reason, fundamental rights are not negotiable. In other words, in a peace agreement, the parties can negotiate their political and economic interests, for example, but the parties cannot negotiate fundamental rights.[67]

B. Universality

All human beings should be entitled to the same protection of fundamental rights and freedoms on a global scale (*jus cogens*). For this reason, a rule of domestic law can never be an excuse for denying a fundamental right or freedom to an

[66] Hugo JEAN, *Contentieux constitutionnel*, feuilles mobiles (consultées le 9 janvier 2018), Juris Classeur Québec – Collection Droit Public, Montréal, Lexis Nexis, 2018, fascicule 4, page 4/20, para 24.
[67] *American Convention*, *supra* note 62, art 27; *International Covenant on Civil and Political Rights*, *supra* note 63, art 4.

individual.[68] This explains why the mechanism of the control of conventionality exists. In order to ensure that the principle of universality is respected, the judicial system must apply the control of conventionality evaluating domestic rules through the lens of international human rights standards.

C. Oneness

Fundamental rights and freedoms are indivisible and interdependent. This is the understanding of the international community, as evidenced in the United Nations statement that "human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[69] A person is the beneficiary of all fundamental rights and freedoms, because they cannot be split or divided. The wholeness of fundamental rights is associated with the recognition that every human being is unique and indivisible.

D. Irreversibility

The observance of human rights improves the quality of life and well-being of individuals and communities. On the other hand, the violation of rights and freedoms often generates the worst tragedies and human suffering. So, it is logical to argue that one of the main tasks of humanity is never to let go of the achievements in human rights.[70] Any government project that diminishes the protection of individuals must be seen as unnatural and irrational. The principle of the irreversibility of fundamental rights "prohibits the State, in the absence of compelling reasons, from diminishing the highest level of protection conferred on these rights from the time when the international or constitutional norm which enshrines such rights was imposed on the state."[71] It is the duty of the judges, the guardians of our rights, to refrain from applying domestic reforms that do not recognize essential rights and freedoms that have already been recognized internationally.

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[68] *Vienna Convention*, *supra* note 39, arts 27, 53 and 64.
[69] *Vienna Declaration and Programme of Action*, 25 June 1993, art 5, online: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.
[70] *International Covenant on Civil and Political Rights*, *supra* note 63, art 5.
[71] Isabelle Hachez, *Le principe de standstill dans le droit des droits fondamentaux : une irréversibilité relative*, Bruxelles, Bruylant, 2008, at 4.

E. Progressivity

The implementation of human rights eliminates individual and collective suffering and increases the material and spiritual satisfaction of human beings. This explains why states have an international obligation "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization of the rights."[72] Additionally, each nation-state must "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized."[73] Authorities have a fiduciary mandate to work diligently, loyally, and in good faith, and always to offer more rights and freedoms to citizens. The contrary, obstructing the progress of human rights, is an express demonstration that the government has become arbitrary, dictatorial and anti-democratic.

F. Maximization

It is the duty of all state authority, and ultimately of judges, to declare the *pro homine* principle. That is, the implementation of rights and freedoms requires a favourable interpretation of their purpose and scope. The *pro homine* principle is an interpretive criterion derived from article 29 of the *American Convention on Human Rights*. By virtue of this principle, the legal interpretation must always be that which is the most favourable to the human being by applying the wider and more appropriate piece of legislation among the set of rules offered by the different legal orders in force.[74] The maximization of the notion of rights and freedoms results above all from activism by the social forces that advance humanity. However, it is up to legislators and judges to adopt the legislative or jurisprudential changes necessary to meet the demands of society.

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[72] *American Convention*, *supra* note 62, art 26.
[73] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol 993, p 3, art 2.1 (entry into force: 3 January 1976), accession by Canada 19 May 1976), online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>.
[74] *American Convention*, *supra* note 62, art 29.

G. The limited power of authorities as well as the restricted scope of the rules of administrative, fiscal, disciplinary, penal, criminal and penitentiary law

The authority imposing a restriction on rights and freedoms is subject to a negative obligation; this obligation requires the authority not to unreasonably infringe upon fundamental legal guarantees. The negative obligation imposes on the authority the duty of non-interference in the exercise of fundamental rights in general and of the rights to individual liberty in particular.[75] The most important rule in law is that "everything is allowed when the law does not prohibit it,"[76] in a clear and express way. The legal rules that limit rights and freedoms must not be ambiguous or contradictory, because in the event of doubt about the intention of the legislator, the judge must choose the interpretation that least restricts rights and freedoms. The judge must apply the principles of legality and retroactivity.[77] The Supreme Court of Canada applies these principles: "But when dealing with a penal statute the rule is that, if in construing a statute there appears any reasonable ambiguity, it is resolved by giving the statute the meaning most favourable to the person liable to penalties."[78]

VI. Justification of an exceptional legal order to put an end to an armed conflict

The official version of the history of humanity and nations is the story of winners [79]. Victors have historically been able to eliminate, colonize or judge conquered enemies. In other words, victory allows dominant groups to impose their values and interests on dominated groups; this privilege is never a right, but it is an

[75] *International Covenant on Civil and Political Rights*, *supra* note 63, arts 5, 9, 10, 18, 21 and 22.
[76] André Émond, *Introduction au droit canadien*, Montréal, Wilson & Lafleur, 2016, p 16.
[77] *International Covenant on Civil and Political Rights*, *supra* note 63, art 9.
[78] *Paul v La Reine*, [1982] 1 RCS 621, at 633.
[79] Daniel Pastor García et Celada Antonior, « The Victors Write History, the Vanquished Literature: Myth, Distortion and Truth in the XV Brigade » (2012) *Bulletin of Spanish Studies*, vol. 89, no. 7-8, aux pp 307–321.

undeniable historical fact. However, the lack of final victory for one of the actors in armed conflict generates a state of permanent war, in which violence manifests itself in the persistent, widespread and systematic violation of human rights and international humanitarian law.[80] Indeed, the Colombian Constitutional Court has established that the internal armed conflict in Colombia has created a permanent state of unconstitutionality with respect to the issues of forced displacement .[81] The UN High Commissioner for Refugees said in a report that Syria, Colombia and Afghanistan are among the countries with the highest number of displaced people in 2016 due to armed conflict.[82]

In situations of permanent armed conflict accompanied by constant violations of the rights of the victims of the conflict (such as the situation of prolonged internal armed conflict in Colombia)[83], the state loses control of criminal prosecution. [84] The actors in an armed conflict do not feel that they are subject to the criminal and prison justice system, since the only real regime applicable to them is that of the state of war.[85] Only the state of war affects the situation of the armed conflict, and only the victory of one of the warring parties can stop the constant violations of the rights of the victims of the armed conflict.

We could also say that the state of permanent armed conflict has created a favourable climate for armed actors and armed allies since, as is widely recognized, armed conflicts generate significant direct and indirect economic benefits for combatants and allies.[86] This is why the actors in the armed conflict of Colombia never

[80] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 308.
[81] Sentencia de Tutela nº 025/04, Corte Constitucional, 22 enero 2004, magistrado ponente Manuel José Cepeda Espinosa ; Human Rights Watch, « War without Quarter: Colombia and International Humanitarian Law », New York, Human Rights Watch, 1998, au para 168.
[82] Haut-Commissariat des Réfugiés des Nations Unies, « Le nombre de personnes déplacées atteint son plus haut niveau depuis des décennies », en ligne : <http://www.unhcr.org/fr/news/stories/2017/6/5943f3eca/nombre-personnes-deplacees-atteint-haut-niveau-decennies.html>.
[83] Pardo Rueda, *supra* note 1 at 423-621.
[84] Ovalle Diaz, *La production*, *supra* note 19 at 167.
[85] Sassoli, M., Bouvier A., Quintin A., avec la collaboration de Juliane Garcia, « Un droit dans la Guerre? » Vol I, Présentation du droit international humanitaire, Seconde Édition, CICR, Chapitre 2, à la p 3.
[86] Audrey Aknin et Claude Serfati, « Guerres pour les ressources, rente et mondialisation », *Mondes en développement*, vol 143, numéro 3, 2008, pp 27-42, DOI : 10.3917/med.143.0027, en ligne, CAIRN : <https://www.cairn.info/revue-mondes-en-developpement-2008-3-page-27.htm>.

wanted to address the root causes of the war, because they received international funding to continue fighting, and derived financial advantages from its continuation.[87]

Society is therefore forced to cede certain legal advantages to armed actors who agree to give up their weapons and to end the armed conflict. Ceding legal advantages, even though it looks like disguised amnesty, is the price that must be paid for an incomplete political peace.[88] For example, in 2002, the President of Colombia, Alvaro Uribe, passed a new law that opened the door to the use of all kinds of legal mechanisms, such as denunciations of suspect behaviour, rewards, cooperation with non-state forces, as well as the granting of individual amnesties or anticipated pardons to any member of an armed group who chose to surrender his weapon.[89]

If a society is able to make the transition from war to peace using a transitional justice model, the net collective gain is likely to be greater than the relative and transient personal gain accorded to the actors of the armed conflict who abandon the war. From this point of view, the implementation of the new SJP (or Transitional Exceptional Legal Order) is generally considered internationally as a good initiative by the Colombian Government, especially if it means the final cessation of an armed conflict when there is no other alternative.[90]

In situations of internal armed conflict, there are at least three legal orders: state law, state law of armed conflict under international humanitarian law, and de *facto* order imposed by armed actors.[91] Insurgent forces gain *de facto* recognition as soon as they exercise effective control over the territory or country where they are fighting, because "the recognition of belligerency allows them to be accorded the international status of a local de facto government."[92] Thus, final victory can eliminate

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[87] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 318 et 319.
[88] Ovalle Diaz, "justice transitionnelle", supra note 8 at 322.
[89] *Ley 782 de 2002* [2002], Congrès de Colombie, Journal officiel 45.043, online: Bogotá Jurídica Digital <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6677> ; *Decreto numero 128 de 2003* [2003], Président de la Colombie, Journal officiel 45.073, online: Bogotá Jurídica Digital <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=7143>.
[90] Organisation des Nations Unies, 2 décembre 2016, communiqué de presse, « Colombie : l'ONU se réjouit de la ratification de l'accord de paix entre le gouvernement et les FARC », 2 décembre 2016, en ligne : ONU <https://news.un.org/fr/story/2016/12/348592-colombie-lonu-se-rejouit-de-la-ratification-de-laccord-de-paix-entre-le>.
[91] Ovalle Diaz, *La production*, *supra* note 19 at 260.
[92] Nguyen Quoc Dinh et al, *Droit international public*, 8e édition, Paris, LGDJ, 2009, à la p 632.

parallel non-state legal orders and impose a single legal order throughout the state.

The absence of a definitive victory between two parties justifies the negotiation of the end of the armed conflict. In order for this negotiation to be attractive, it is necessary to offset the advantages of the permanent state of war with equivalent advantages in a stable and lasting state of peace. These advantages translate into an exceptional transitional legal order. Transitional justice is the only legal model in which punishment of those responsible for international crimes is harmonized by the need for reconciliation and full reparation of victims.[93] Indeed, paragraph 5 of article 6 of the *Protocol (II) Additional to the Geneva Convention* of 12 August 1949 states that "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[94]

Finally, while it is true that the exceptional transitional legal order is not a perfect legal regime, it is still the only legal order capable of putting an end to armed conflict. It is therefore necessary, in the negotiation of the termination of the conflict, to accept the parallel coexistence of an existing general legal order and an imperfect transitional legal order, because the latter is the only one that can enable the withdrawal of actors from the armed conflict.

VII. Between the right to peace and equality before the law: A difficult choice for Colombia

Peace is a necessary but not sufficient condition to achieve the full enjoyment of all rights and freedoms in a society.[95] Without peace, armed conflict leads to the most serious violations of rights and freedoms. Similar systematic and widespread

[93] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 327.
[94] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, entry in force: December 7 1978, art 6.5, online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>.
[95] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 327.

violations of human rights can also occur in situations of absolute dictatorship and apartheid.[96] Fortunately, one of humanity's overriding goals has always been the creation of conditions to overcome or avoid situations of armed conflict and to maintain a stable and lasting peace.[97] For this reason, the *Charter of the United Nations* establishes in article 1 that it is important to maintain peace and international security and for this purpose aims:

> […] to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[98]

It is important to stress that peace is a fundamental right in the international legal order and has the same value in all national legal systems. For this reason, the Political Constitution of Colombia states in article 22 that "peace is a right and a duty of obligatory fulfillment."[99]

On the other hand, the equality of all before the law is also a universal standard laid down in various international texts. For example, the *American Convention* (1969) states in its first article

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[100]

Equality before the law does not require that all people be subject to the same piece of legislation, but rather that all human beings are subject to a just and not

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[96] Ovalle Diaz, "justice transitionnelle", supra note 9 at 332.
[97] Ovalle Diaz, *La production*, *supra* note 19 at 33.
[98] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 1.1, online: <http://www.un.org/en/charter-united-nations/>.
[99] *Constitución Política de Colombia*, *supra* note 37 art 22.
[100] *American Convention*, *supra* note 62, art 1.

arbitrary legal order.[101] In addition, the legal standard specific to each person may vary according to the particular status of a legal subject, the time and the territory in which he or she finds himself or herself.[102] This is why minors are not subject to the same penal norm as adults;[103] why, at the time of sentencing, Aboriginal adults benefit from specific principles of sentencing under the *Criminal Code*;[104] why new offences do not have retroactive effect on actions that were later defined as crimes (principle of freedom from ex post facto laws);[105] why certain behaviours that are prohibited in public are allowed in private, and why Colombian women have access to pension plans at a younger age than men.[106] There are countless other examples of laws that recognize differential rights, freedoms and obligations.

Since international and national standards constantly make such distinctions, it can be inferred that equality before the law is not an absolute right .[107] For example, international human rights law prohibits unjustifiable discrimination that affects human dignity.[108] Indeed, respect for human rights is a necessary condition for any "political regime to be eligible as a respectable member of a just political society of the people."[109] In order to promote substantive equality, rather than simple formal equality, international human rights standards therefore recommend the creation of special measures or "positive discrimination" measures to favour the most vulnerable groups. Two such measures are article 1.4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*[110] (1965) and article 4 of the *Convention on the Elimination of All Forms of Discrimination against Women*[111] (1979).

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[101] Lussier, S., « Primauté du droit, Égalité devant la loi et autres principes non écrits de notre constitution », (2013) *Revue de droit de McGill*, Vol. 58, à la p 1031 [Lussier].
[102] *Ibid*, at1036.
[103] *Youth Criminal Justice Act*, SC 2002, c 1.
[104] *Criminal Code* (RSC, 1985, c C-46), art 718.2, e); *C169 – Indigenous and Tribal Peoples Convention*, adopted 27 June 1989, entry into force: 5 September 1991, art 10.
[105] *American Convention*, *supra* note 62, art 9.
[106] *Régimen de la Seguridad Social en Colombia (Ley 100 de 1993)*, art 33.1 et 65.
[107] Lussier, *supra* note 101at 1037.
[108] Ovalle Diaz, *La production*, *supra* note 19 at 153.
[109] John Rawls, *Le droit des gens*, Paris, éditions esprit, 1996, à la p 88.
[110] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 (entry into force: 4 January 1969), art 1.4, online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en>.
[111] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entry into force: 3 September 1981), art 4.

Another example is the inter-American jurisprudence in the case *Villagran Morales et al v Guatemala* (which dealt with extrajudicial executions of homeless children), where the Inter-American Court recognized that article 19 of the *American Convention* includes many special protections for street children, such as the right to protection against discrimination, special assistance for children separated from their family environment, the right to adequate living conditions, and the social rehabilitation of abandoned or exploited children.[112] The framework of Colombia's peace agreement also allows for the implementation of certain special measures to favour, for example, minors who participated in the internal armed conflict (child soldiers) and women who were victims of the armed conflict.[113]

On the other hand, the principle of equality before the law states that in order to ensure rights and freedoms, all people must obey certain rules of behaviour.[114] However, in a free and democratic society, people who do not respect their obligations and who violate the rights of others do not lose their fundamental rights. Even the worst criminals have the right to a fair trial and judicial guarantees. This principle also applies to war criminals, even if they have committed unimaginable crimes.[115]

The implementation of an exceptional transitional model of justice represents the best available tool to deal with the conflict between the right to peace and equality before the law. Transitional justice is an example of different application of justice to a particular group of people, otherwise of people identifies as criminals, where standards of equality before the law must be balanced with the right to peace. Society grants a benefit to alleged war criminals who have not been defeated in combat but who agree to surrender their weapons and to be tried in a transitional justice system.

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[112] Case of the « street children » v Guatemala (Villagran Morales et al) Judgment of 19 November 1999, Series C, No 63, au para 191 and 196.
[113] *Acto Legislativo No. 01 (4 abril 2017)*, supra note 32 at artículo Transitorio 1, parágrafo 1.
[114] Lussier, *supra* note 101 at 1028.
[115] Gasser, H-P., « Respect des garanties judiciaires fondamentales en temps de conflit armé : le rôle du délégué du CICR » dans *RICR*, n 794, mars-avril 1992, à la p 129 à 152.

Conclusion

Transitional justice regimes should never be the rule, but the exception in cases of overwhelming circumstances. In other words, they must be used as a last resort, if and only if, the only other alternative is permanent war. Transitional justice therefore seeks to transform a permanent armed conflict into a lasting and stable peace. While it is true that the decision to negotiate a transitional justice mechanism to put an end to an armed conflict is a purely political debate, the content of the political negotiation that results in the domestic pieces of legislation is rather a question of constitutional justice. Colombian courts therefore have the jurisdiction and the obligation to rule on the constitutionality and the conventionality of the domestic laws derived from the 2016 peace agreement, both in general and on a case-by-case basis. More specifically, if the Colombian judiciary exercises constitutional and conventional controls appropriately, it will be able to prevent international justice from exercising, in a supplemental manner, its jurisdiction over the peace agreement. Otherwise, the international bodies could declare that Colombia has violated its international obligations and could take charge of the jurisdiction of a case. For example, if the Colombian justice system makes a mistake or lacks the will to prosecute, the inter-American system for the protection of human rights and the International Criminal Court may intervene.[116] Article 44 of the *American Convention on Human Rights* and articles 15.2, 15.3 and 19.3 of the *Rome Statute of the International Criminal Court* authorize any person or group of people (especially conflict victims) to file motions or reports of human rights violations. These complaints will be heard according to the rules of procedure of the inter-American system for the protection of human rights or the International Criminal Court.

International humanitarian law, international human rights law, exceptional transitional justice (transitional legal order), the general law of Colombia (the permanent legal order) and indigenous jurisdiction (ancestral legal order) are the

[116] *Rome Statute*, *supra* note 10, art 17 b).

five main legal orders in force in Colombia.[117] The control of conventionality is a complex interpretive exercise that favours the resolution of conflicts between different legal orders and legal rules belonging to the same legal system. This exercise of interpretation can be carried out by applying the theory of legal pluralism, since this school of thought accepts the coexistence of several competing legal orders. Indeed, legal pluralism does not seek to establish hierarchies between the different legal orders. Rather, legal pluralism treats each legal order as an equally important potential source of rules that can be applied to a specific case. It is the responsibility of the national judge to choose and apply the most appropriate and useful rules to resolve conflicts of law. At the same time, the choices must respect the universal principles of law that favour the maximum recognition of rights and freedoms. In other words, the respect for human dignity, which is a source of legitimacy of the law, must be upheld.[118]

The control of conventionality as a judicial mechanism, legal pluralism as a new general theory of law, and universal interpretative principles for the realization of human rights constitute a toolbox that international law offers to judges in Colombia to successfully implement the 2016 peace agreement. However, the inoperability or misuse of these tools will allow survivors of Colombia's internal armed conflict to use international law to complain to international authorities. The inter-American system provides an alternative to individuals whose human rights have been violated: When states fail to provide the appropriate protection, domestic litigants may initiate international judicial remedies for the protection of human rights as needed. This is how in the past, the survivors of the dictatorship in Chile[119] and the internal armed conflict in El Salvador [120] used the inter-American system of human rights protection.

In general, the 2016 Colombia Peace Agreement appears to be consistent with international human rights standards. The legal rules derived from this agreement

[117] Ovalle Diaz, "justice transitionnelle", *supra* note 9 at 329.
[118] Ovalle Diaz, *La production*, supra note 19 at 153.
[119] *Almonacid Arellano*, *supra* note 18.
[120] *Rochac Hernández et al v El Salvador* (October 14, 2014), Inter-Am Ct HR (Ser C) No 285.

are subject to judicial review to confirm or invalidate their constitutionality and their conventionality. The most significant challenges of implementing the peace process in Colombia are not of a legal nature; because judicial review of constitutionality and conventionality has the ability to address all of the legal issues. However, the principal challenge to the implementation of this peace agreement is political: the ruling class of Colombia does not now appear to be willing to shoulder the responsibility that history has conferred upon it to fulfill the agreement.