

Transitional Justice and Colombia's Peace Talks

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Executive Summary

If the Santos administration and the Revolutionary Armed Forces of Colombia (FARC) are to lay the foundations for lasting peace as they continue to make headway toward successfully concluding talks underway since late 2012, they need to agree on a clear, credible and coherent plan for dealing with human rights abuses committed by all sides. This is not easy. Any sustainable agreement must be acceptable well beyond just the two parties. Finding common ground between the guerrillas, the government, the critics of the peace talks, victims and a public largely unsympathetic to FARC would be difficult at the best of times but will be even harder on the cusp of the 2014 electoral cycle. However, with courts, Congress and voters all having important roles to play in ratifying and implementing transitional justice measures, both parties' long-term interest in a stable transition should outweigh the costs of agreeing to a deal that goes beyond their own narrow preferences. Otherwise, flagging popular support, political controversy and legal challenges risk undermining both justice and peace.

Justice for victims of all the parties to the conflict, including the victims of state agents, is an essential part of any viable transitional justice regime. Those most responsible for the most serious crimes, from whichever side, need to be prosecuted and appropriate penalties imposed that can be reduced if stringent conditions are met. An amnesty can appropriately cover FARC's political crimes and offences related to political crimes but can never include war crimes and crimes against humanity. FARC members outside the most responsible category should be eligible for an administrative process that, under conditions linked to reconciliation, guarantees them reduced or suspended sentences if they are convicted of these or other conflict-related crimes outside the amnesty. The details of the transitional justice model for state agents should be left to Congress.

The above elements of the transitional justice model should be accompanied by truth-seeking and truth-telling, notably via an independent truth commission and grassroots memory initiatives. There must also be a renewed commitment to comprehensive reparation and a convincing plan for better governance, including strengthening institutions and establishing a credible vetting process, to help prevent a return to armed violence.

Agreeing on such a comprehensive transitional justice model will have costs for both parties. Attitudes towards wrong-doing during the conflict have begun to shift, but the government and FARC each still has much to do to fully acknowledge its respective responsibility for the many human rights violations. The negotiating agenda does not mention several critical aspects of an adequate transitional justice agreement, such as mechanisms for individual criminal accountability and reparation. Amid increasing pressure to conclude the talks before the 2014 presidential and legislative election campaigns begin, both sides may be tempted to settle for an expedient agreement that fails to meet domestic and international standards regarding victims' rights. An easy-to-reach solution might satisfy short-term political imperatives but would be a long-term mistake. It would not only risk legal challenges but also embolden the opponents of the peace talks, who couch much of their opposition as rejection of "impunity" for FARC.

Both parties thus have an interest in a survivable deal. The best way to generate sustainability is to respect Colombia's obligations under multiple human rights and international criminal law treaties. These and the country's implementing laws and jurisprudence are not obstacles to peace but rather the basis for an agreement in which all social sectors – even moderate critics of the negotiations – could feel represented and that could pass judicial scrutiny. The parties should not attempt to spell out every aspect of a transitional justice model themselves, but they must lay out provisions that create legal certainty for FARC members, ensure victims' rights and foster the social support that can prevent a transitional justice regime from unraveling in political and legal disputes.

Perhaps more than most countries emerging from conflict, Colombia is in a position to buttress its peace process with comprehensive transitional justice. Years of experience with demobilised paramilitaries under the 2005 Justice and Peace Law (JPL) have produced a wealth of lessons about what works or not. A mass reparations program for all victims is underway, and truth-seeking has advanced despite the conflict. Negotiators and policymakers still must take financial and administrative constraints seriously, however. They must avoid repeating the mistake of creating a regime that is ambitious in law but would struggle to uphold victims' rights in practice. Admission of a long-term challenge should be the starting point for sequencing transitional justice measures and prioritising between competing demands on state resources, including those derived from implementing the peace accord. The international community should give financial and logistical support to new and existing transitional justice institutions and help ensure the guarantees of non-repetition are met.

Ending the armed conflict is essential to move toward a more peaceful, just and democratic Colombia. But a stable future cannot be constructed without acknowledging the past. Over five decades, the conflict has claimed the lives of an estimated 220,000, displaced over five million and made refugees of nearly 400,000. Innumerable serious crimes have been committed, including massacres, extrajudicial executions, enforced disappearances, kidnappings, torture and sexual or gender-based violence. Revealing the perpetrators and networks, punishing those most responsible on both sides, providing adequate reparations to victims and putting in place a political and social regime under which such atrocities will not be repeated are all necessary steps toward lasting peace. The complete process will take decades. What the government and FARC must do now is agree on the roadmap for a long but definite transition to peace.

Recommendations

To reach a final peace agreement that is sustainable, socially and legally, in its treatment of matters relating to transitional justice

To the negotiating parties:

1. Include in the final agreement acknowledgement of responsibilities and apologies for human rights violations, commitment to upholding victims' rights and clear language affirming, in relation to transitional justice, that:
 - a) truth about the conflict should be known, particularly regarding enabling and support networks, and revealed via an independent, credible truth commission that considers all actors;
 - b) trials of the most responsible on both sides for serious international crimes (crimes against humanity and war crimes) are essential;
 - c) the 2011 Victims and Land Restitution Law reparations framework is a major advance but can be complemented by further measures; and
 - d) guarantees of non-repetition require institutional reforms, including robust vetting of officials for past human rights abuses.
2. Deal comprehensively with transitional justice in the final agreement but leave the design of specific measures to the appropriate institutions.
3. Commit to participating in truth commission proceedings; contributing to memory initiatives; providing answers about the dead or disappeared; and preserving and making available state archives and FARC records to the truth commission, prosecutors, judges and other public authorities.
4. Facilitate civil society's and victims' participation in the talks by advancing the public debate on transitional justice measures.

To ensure the implementation of a sustainable transitional justice regime

To Colombia's government, Congress and Attorney-General's Office:

5. Set up a truth commission strong enough to meet victims' expectations, build up the state's legitimacy in communities and establish a collective narrative about the conflict by:
 - a) creating mechanisms to consult, including with victims, prior to adopting legislation to establish the commission; and
 - b) giving the commission time to fulfil a mandate that allows it to examine all actors in the conflict and includes making recommendations to preserve memory, enhance reparation and develop institutional reforms to dismantle illegal networks and prevent repetition of violence.
6. Do not give the commission judicial functions.
7. Provide amnesty for all political crimes (and crimes connected to political crimes) committed by FARC members.

8. Facilitate prosecution of those – whether from FARC or the state – most responsible for serious international crimes committed during the armed conflict; ensure that the charges adequately capture the spectrum of crimes committed during the conflict and that gender crimes are appropriately represented; allow for flexibility on sentencing the most responsible that is conditional upon truth-telling, reparation and (for FARC members) dismantlement of armed structures.
9. Establish, for demobilised FARC members not among the most responsible an administrative process, linked with reintegration programs, to accord reduced or suspended sentences, subject to conditions such as truth-telling and reparation, in the event that they are tried and found guilty of offences relating to the conflict.
10. Exempt FARC members from extradition so long as they comply with specific conditions, including demobilisation and non-participation in new criminal activities.
11. Work towards timely implementation of the 2011 Victims and Land Restitution Law as an instrument for comprehensive reparation, by strengthening local institutions so they can be effective partners; making national institutions tasked with protecting victims' rights more responsive to local concerns and more present in the former areas of conflict; and helping develop the institutional capacity of victims' groups and human rights' organisations.
12. Obtain the deposit of FARC assets in the Reparations Fund for Victims (whether voluntarily by FARC or via confiscation by the state), so that the victims unit can draw on them to make compensation payments.
13. Ensure guarantees of non-repetition are met through effective measures for the reintegration of FARC members (including a comprehensive protection plan); greater efforts to fight new illegal armed groups; and comprehensive vetting of officials, including members of the security forces.
14. Redouble efforts to strengthen civilian institutions and democratic governance in conflict regions, drawing on lessons from previous efforts.

To the International Community:

15. Provide funding, technical support and advice to the truth commission and other relevant institutions and make available all relevant information about the armed conflict and serious crimes, particularly disappearances.
16. Give financial and logistical support, both to non-state organisations for community-based truth-seeking and memory initiatives and to new and existing transitional justice institutions; and oppose any obstacles to prosecutions carried out under the transitional justice framework.
17. Organise, with the government, a multi-year donor effort to help ensure that the peace agreement's guarantees of non-repetition are met, including by:
 - a) focusing on technical and financial cooperation to strengthen civilian authorities, prioritising local institutions, providers of social services and institutions tasked with protecting the rights of victims;

- b) encouraging and giving financial and technical support for civil society and private sector participation in community-based economic opportunities for reintegrating demobilised FARC members; and
- c) supporting the strengthening of civilian law enforcement, human rights and judicial institutions in the most conflict-affected areas.

Bogotá/Brussels, 29 August 2013

Transitional Justice and Colombia's Peace Talks

I. Introduction

Peace talks between the government and the Revolutionary Armed Forces of Colombia (FARC), the country's largest and oldest guerrilla group, began in Havana in October 2012.¹ These are not the first negotiations, and there is no guarantee that a half century of conflict will finally end. Ongoing hostilities could still derail the process; positions on key points remain far apart; there is strong opposition centred around ex-President Uribe (2002-2010); and there are continuing doubts whether the National Liberation Army (ELN), the other guerrilla group, will join. But initial optimism has so far been justified. A partial agreement was announced in May on "integral agrarian development", the first of five substantive agenda items. The speed of the negotiations suggests that reaching a final agreement by the end of 2013 or early 2014, as the government prefers, is difficult but not beyond reach.

With rural development, the problem at the origins of the conflict, seemingly resolved, finding common ground on transitional justice will be crucial for the sustainability of any peace deal. "Transitional justice" means "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses".² This requires confronting delicate issues, but both sides can reap substantial long-term benefits from a comprehensive process. Interconnected measures to uphold the rights to truth, justice, reparation and guarantees of non-repetition would create legal certainty for FARC members; facilitate reintegration and reconciliation with a society largely unsympathetic to the group; and legitimise the agreement, domestically and internationally. Acknowledgment of responsibility, dismantling of support networks and institutional changes would also contribute to preventing the recurrence of violence based on past grievances. Transitional justice measures alone cannot guarantee lasting peace but are a necessary part of a successful transition.

This report first analyses the legal and institutional context of existing transitional justice measures. It then explains the process of ratifying and implementing transitional justice rules in Colombia's highly polarised politics. Subsequent sections detail how victims' rights to justice, truth, reparation and guarantees of non-repetition can be satisfied. Incorporating field work in Eastern Antioquia and Urabá (in the depart-

¹ For previous analysis of the prospects of a peace agreement with FARC, see Crisis Group Latin America Reports N°45, *Colombia: Peace at Last?*, 25 September 2012; N°30, *Ending Colombia's FARC Conflict: Dealing the Right Card*, 26 March 2009; and N°1, *Colombia's Elusive Quest for Peace*, 26 March 2002. For ease of understanding, this report uses the terms "peace negotiations" or "peace talks", though what is being negotiated are the conditions under which the armed conflict will end. The joint construction of peace is to occur after the negotiations. For the approach underlying the Havana process, see Sergio Jaramillo, "Transición en Colombia ante el proceso de paz y la justicia", *El Tiempo*, 13 May 2013.

² "Report of the [UN] Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies", S/2004/616, 23 August 2004, para. 8.

ments of Antioquia and Chocó), two regions particularly affected by the armed conflict, the report is based on interviews with policymakers and officials, ex-guerrillas, prosecutors, judges, civil society representatives, academics, active and retired members of the military and victims of the guerrillas, paramilitaries and state agents alike.³

³ For background on these regions see Clara Inés García, *Urabá: Región, actores y conflicto, 1960-1990* (Bogotá, 1996); Mary Roldán, *Blood and Fire: La Violencia in Antioquia, Colombia, 1946-1953* (Durham, 2002), pp. 171-227; Clara Inés García de la Torre, Clara Inés Aramburo Siegert (eds.), *Geografías de la guerra, el poder y la resistencia: Oriente y Urabá Antioqueño 1990-2008* (Bogotá, 2011).

II. Transitional Justice in Colombia

Transitional justice has come far in Colombia since the drafts in 2003 of what two years later became the Justice and Peace Law (JPL) designed to deal with demobilised paramilitaries' serious crimes. Subsequent jurisprudence from national and regional courts, legal reforms and new measures, such as the 2011 Victims and Land Restitution Law (the Victims Law), the 2012 Legal Framework for Peace and "truth agreements" under Law 1424 (2010) have reshaped rules and practice. This has produced an increasingly dense network of laws and institutions and a wealth of experience, but has also restricted the margin for manoeuvre in the current peace process. Moreover, the 2012 reform of JPL revived worries that victims will receive the short end of the stick, and there is risk that ambiguities in the Legal Framework for Peace could be misused to foster impunity.

A. *The Framework*

The legal and institutional framework for transitional justice was overhauled in the run-up to the Havana peace talks, as the Santos government pushed the Victims Law and the Legal Framework for Peace through Congress. The latter is the main legal basis for the negotiations. It elevates transitional justice principles to constitutional rank and provides for the creation of measures aimed at facilitating the end of the armed conflict, while protecting "to the greatest degree possible, the rights of victims to truth, justice and reparation".⁴ It also envisages that Congress will pass a raft of related legislation, including on prosecution and punishment of crimes committed in the conflict, within four years from the enactment of the first implementing law. The framework allows differentiated treatment of FARC and ELN, as well as state agents in relation to their conduct in the conflict; and mandates the creation of a truth commission.⁵

Several provisions are highly controversial. Human rights advocates have in particular argued that a provision allowing for legislation to permit the "selection" of cases for prosecution, while granting a conditional waiver of prosecution to all not-selected cases, could contravene Colombia's obligations to investigate, prosecute and punish serious violations of international humanitarian law (IHL) and international human rights law.⁶ Concerns that this and other aspects of the framework might

⁴ "Acto Legislativo 01 de 2012", 31 July 2012, Article 1. Article 22 of the 1991 constitution states that "[p]eace is a right and a mandatory duty".

⁵ The framework specifies transitional justice measures only apply to "armed groups outside the law", which Colombian jurisprudence views as including the paramilitary United Self Defence Forces of Colombia (AUC), FARC and ELN, but not the new illegal armed groups (NIAGs) that have emerged after paramilitary demobilisation and are considered criminal. The definition of what constitutes a group outside the law is drawn from Article 1(1) of Additional Protocol II (1977) to the Geneva Conventions of 1949.

⁶ The Inter-American Commission on Human Rights (IACHR) has stated that it "considers the concept of selectivity and the possibility of renouncing the investigation and prosecution of serious human rights violations to be problematic insofar as these would be inconsistent with the obligations of the State". "IACHR'S Preliminary Observations on Its Onsite Visit to Colombia", press release, 7 December 2012.

open the door to impunity for state agents and illegal armed groups have prompted human rights defenders to challenge the constitutionality of parts of the law.⁷

The adoption of the framework followed on the heels of the 2011 Victims Law. This set up a scheme for comprehensive (collective and individual) reparation by the state, as well as land restitution. It created a unit in the new presidential Department for Social Prosperity tasked with executing the law and coordinating the National System for the Attention and Comprehensive Reparation of Victims, made up of more than twenty ministries and state agencies. It also established the Land Restitution Unit in the agriculture ministry and the Centre for Historical Memory (CMH) as a successor to the historical memory group of the National Commission for Reparation and Reconciliation (CNRR), originally created under the JPL.

B. *Trial and Error in the Justice and Peace Law*

This new set-up was accompanied by significant changes to the JPL regime reflecting lessons learned from eight years of applying the law, gaps in the legal treatment of rank-and-file paramilitary members and the need to prepare for a peace process with FARC. Under JPL, demobilised members of illegal armed groups who have committed serious crimes may receive alternative sentences of between five and eight years, in return for demobilisation and contributions to truth and reparation. (The harsher criminal code sentence is revived if the conditions are not met.) Around 4,800 ex-fighters, some demobilised guerrillas but mostly paramilitaries, have been identified as having committed serious crimes for which alternative sentences are available.⁸

JPL embodied a transitional justice model almost exclusively reliant on the judiciary to vindicate victims' rights, but its application has proven difficult.⁹ In eight years, only fourteen individuals have received final sentences.¹⁰ The rest are either in prison at various earlier stages of the process or remain at large. Prosecutors and judges have increasingly recognised that the law's original aspiration – to prove all crimes committed by those participating in the scheme – is beyond current institutional capacities and that trials on their own are ineffective for comprehensively upholding victims' rights.¹¹ Law 1592 (2012), therefore, re-focused prosecutorial efforts

⁷ "Demanda de inconstitucionalidad contra el marco jurídico para la paz", Comisión Colombiana de Juristas, December 2012. For a defence of the constitutionality of the framework, see "Intervención ciudadana en el proceso D0009499", Dejusticia, 4 March 2013.

⁸ By February 2013, 4,787 persons were registered, including 550 demobilised members from FARC, ELN, the People's Revolutionary Army (ERP), the Popular Liberation Army (EPL) and the Gueverista Revolutionary Army (ERG). "Informe de Gestión 2012-2013", Fiscalía General de la Nación, March 2013, p. 31.

⁹ For extensive analysis of the JPL, see Florian Huber, *La Ley de Justicia y Paz: desafíos y temas de debate* (Bogotá, 2007), "Diagnóstico de Justicia y Paz en el marco de la justicia transicional en Colombia", Misión de Apoyo al Proceso de Paz Colombia (Mapp-OEA), October 2011 and the yearly reports of the Observatorio Internacional DDR-Ley de Justicia y Paz of the Centro Internacional de Toledo para la paz (CITpax, since 2008).

¹⁰ Nine of fourteen have exhausted appeals, "Informe de Gestión 2012-2013", op. cit., p. 39.

¹¹ A magistrate said, "a transitional justice process is not a criminal trial, and thinking this was our most important error". Some courts are reportedly still slow to fully embrace differences between a transitional process and ordinary criminal trials, contributing to JPL delays. Crisis Group interviews, magistrate, Bogotá, 19 April 2013; prosecutors, Bogotá, 9 April 2013.

on those “most responsible” for serious crimes, so as to illustrate the macro-criminal structures of illegal armed groups.

The attorney-general’s office has already begun sixteen prosecutions of those determined to fall in the “most responsible” category, including three guerrillas.¹² The objective is to produce so-called macro-judgments for each accused, covering a large set of serious and representative crimes, including forced displacements, sexual offences and child recruitment.¹³ These judgments would then be applied without full trials to ex-fighters in the JPL system who were subordinate to the “most responsible”.¹⁴ Prosecutors hope this process will be completed by mid-2014, before high-profile paramilitary commanders leave prison, having served (without being sentenced) their maximum alternative eight-year terms.¹⁵

The second significant change to JPL concerns reparations. Slow progress in trials has limited their availability: only some 1,400 of the 410,000 victims registered under JPL have benefited from court-ordered measures.¹⁶ To overcome the bottlenecks, Decree 1290 (2008), introduced a state “administrative” scheme with fixed compensation payments according to type of harm. However, this first experience with a mass reparation scheme was not a happy one. It was based on a philosophy of “solidarity” with victims, rather than on recognition of state responsibility; it excluded victims of state agents; and, despite calling for a range of reparatory measures, including restitution and guarantees of non-repetition, the scheme remained confined to slowly disbursed compensation payments.¹⁷ Law 1592 ended the program, obliging victims eligible under JPL to seek reparations under the Victims Law instead.

JPL’s legacy is, however, not one of total failure. Contributions to truth have been significant. Eligible demobilised fighters take part in confessional hearings at which victims can participate. Many confessions are incomplete, but by December 2012 nearly 40,000 crimes had been acknowledged; by February 2013 nearly 77,000 victims had participated in hearings, and confessions had led to recovery of more than 5,000 bodies.¹⁸ Confessions helped expose the “parapolitics” scandal that has put over 100 politicians in prison for paramilitary links and implicated several thousand persons in alleged paramilitary activities.¹⁹ Truth-seeking has also progressed. An encompassing, JPL-mandated report on the evolution and development of illegal armed groups was released in July 2013.²⁰ In preparation, the CMH and its predecessor have produced nineteen extensive reports, focusing on emblematic events and broader themes, such as women and indigenous peoples.

¹² The three guerrilla cases are those of ERG leader Chucho and of FARC’s Karina and Martín Sombra. Crisis Group interview, prosecutors, Bogotá, 27 February 2013.

¹³ Crisis Group interview, prosecutors, Bogotá, 9 April 2013

¹⁴ Law 975 (2005), as modified by Law 1592 (2012), Article 18.

¹⁵ The eight years count from the August 2006 incarcerations in Las Cejas (Antioquia). Unless a commander also has a conviction outside the JPL or a pending prosecution, he then walks free.

¹⁶ Crisis Group interviews, prosecutors, Bogotá, 27 February 2013; transitional justice expert, Bogotá, 28 May 2013.

¹⁷ See “La Indemnización Administrativa en Colombia: Problemática y Perspectivas”, Procuraduría General de la Nación and GIZ, March 2012.

¹⁸ “Informe de Gestión”, op. cit., p. 32; “Estadísticas”, Unidad Nacional de Fiscalías para la Justicia y la Paz, 1 December 2012.

¹⁹ Confessions have implicated 14,250 people, including politicians, security forces and officials, in criminal activity. “Informe de Gestión”, op. cit., p. 35. Investigations from Colombian NGO Corporación Nuevo Arco Iris played a crucial role in uncovering the scandal.

²⁰ “¡Basta ya! Colombia: Memorias de guerra y dignidad”, CMH, July 2013.

Additionally, Law 1424 (2010) established an administrative-based “truth agreements” scheme for paramilitaries not covered by JPL. These had been plunged into a legal limbo after court rulings established that their crimes were not political (so could not be pardoned), and that prosecutors lacked discretion to end their prosecution.²¹ Under Law 1424, those who committed specified minor crimes are required to provide information about the structure of illegal armed groups, the general context of their participation in a group and facts they know as a result of their membership. Their contributions are analysed by a unit within the CMH. If the contributions to truth are judged sufficient and other conditions met, they are convicted but their sentences are suspended and, eventually, if certain conditions are met, the suspension is made permanent.²² In April 2013 this unit began receiving the contributions of demobilised paramilitaries, prioritising those in prison; it is expected that all contributions will be received by December 2014.²³

Reform of JPL serves a dual purpose. Trials, in particular those of guerrillas, will be a test run for those after a peace agreement.²⁴ They are also the last attempt to rescue the reputation of the JPL regime. Victims have long viewed the law as an effort to disguise impunity for paramilitaries with progressive, yet ineffectual language.²⁵ Acceptance of the law has gradually grown, however, with victims and human rights groups participating in hearings and using transitional justice language to frame demands. But sizeable mistrust remains, as is clear from continued references to transitional justice and JPL as “falsehood”, “mere discourse” or “the law of impunity”.²⁶ And at least for victims in advanced stages of trials under JPL, the sudden change of rules, including for reparations, has again deepened such sentiment.²⁷ Failure to produce the macro-judgments before paramilitary leaders are freed would, therefore, not just have repercussions for the legitimacy of JPL, but also place a heavy burden on future transitional justice measures.

C. *The International Legal Context*

The ascendancy of transitional justice measures in Colombia reflects an international context in which transitional justice is increasingly seen as an integral part of a broader agenda to promote the rule of law and democracy in post-conflict and post-authoritarian states; and in which domestic regimes that promote impunity for serious international crimes are now (at least theoretically) matters of international

²¹ See “C 936 de 2010”, Constitutional court decision, 23 November 2010; also, “Ley 1424 de 2010: antecedentes, contexto y aplicación en el ámbito de la Justicia Transicional”, Observatorio de Procesos de Desarme, Desmovilización y Reintegración, March 2012.

²² Law 1424 (2010), Articles 5 and 7.

²³ Crisis Group interview, Centre for Historical Memory, 24 April 2013. The exact number of those eligible for the scheme has not been finally determined.

²⁴ Crisis Group interviews, prosecutors, Bogotá, 27 February 2013, 9 April 2013.

²⁵ A prosecutor said, “this is our last chance to make Justice and Peace work. If we fail, we are done”. Crisis Group interview, Bogotá, 9 April 2013. See Rodrigo Uprimny, María Paula Saffon, “Usos y abusos de la justicia transicional en Colombia”, in Alfredo Rangel Suárez (ed.), *Justicia y Paz. ¿Cuál es el precio que debemos pagar?* (Bogotá, 2009), pp. 167-235.

²⁶ Crisis Group interviews, victims organisation, Eastern Antioquia, 26 November 2012; human rights lawyers, Medellín, 1 February 2012; women’s organisation, Quibdó, 14 February 2013

²⁷ Crisis Group interviews, transitional justice specialist, Bogotá, 22 May 2013; Bogotá, 28 May 2013. Court-ordered reparations under JPL were potentially more generous than the Victims Law, whose maximum (for murder) is capped at 40 times minimum monthly salary (some U.S. \$12,000).

concern. Under Article 93 of the constitution, “[i]nternational treaties and agreements ratified by the congress that recognise human rights and that prohibit their limitation in states of emergency have priority domestically”. And Constitutional Court jurisprudence has established that international law, coupled with domestic standards, forms a “bloc of constitutionality”, under which legislation and public policies are judged and evaluated.²⁸

Colombia has ratified all major human rights treaties and is party to the Rome Statute of the International Criminal Court (ICC), which has jurisdiction over genocide and crimes against humanity from 2002 and over war crimes from 2009. It has also ratified the Geneva Conventions of 1949 and their first two Additional Protocols and is party to other relevant treaties, as well as being bound by additional sources of international law, such as customary international law.²⁹ It is part of the Inter-American system, whose Commission on Human Rights and Court of Human Rights are the key institutions charged with promoting the observance and protection of human rights in the region.³⁰ In 1985, Colombia accepted the jurisdiction of the court, whose judgments are binding.

A growing number of international guidelines also carry increasing weight in establishing good practice on transitional justice. These include the 2005 Orentlicher principles for the protection and promotion of human rights through action to combat impunity and the UN General Assembly’s 2006 Basic Principles and Guidelines regarding remedy and reparation for serious breaches of international human rights law and international humanitarian law.³¹

International and regional bodies have proven to be important venues for protecting victims’ rights. The Inter-American Court has repeatedly awarded reparations to Colombians and reaffirmed the individual right to truth.³² International obligations also restrict what can be negotiated with guerrillas. In cases involving Peru, Chile, Brazil, and Uruguay, the Inter-American Court has since 2001 declared unlawful amnesties, pardons and other measures aimed at preventing prosecutors and judges from complying with the duty to investigate, prosecute and punish serious human

²⁸ Eg, Constitutional Court decisions “T-409 de 1992”; “C-574 de 1992” and “C-225 de 1995”.

²⁹ Among the ratified treaties are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1997 Anti-Personnel Mine Ban Convention; and others regulating means and methods of warfare.

³⁰ The commission receives and investigates individual petitions alleging human rights violations and reports on the situation in member states. Colombia has attracted its critical attention several times. From 2009 to 2011 it was the country with the most received petitions. “Annual Report of the Inter-American Commission on Human Rights 2011”, chapter IV, fn. 6. For many years Colombia was on a “black list” of member states whose human rights situations merited specific attention. The Commission may send unresolved cases to the jurisdiction of the Court.

³¹ “Report of the independent expert [on combating impunity] Diane Orentlicher: Addendum updated set of principles for the protection and promotion of human rights through action to combat impunity”, UN Human Rights Commission, 8 February 2005; “Basic 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 International Humanitarian Law”, UNGA, 21 March 2006.

³² The most recent is “Santo Domingo Massacre v Colombia (Preliminary objections, merits and reparations)”, 30 November 2012. For the right to truth see also “Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)”, 7 September 2004, para. 257; and “Bámaca Velásquez v. Guatemala”, 25 November 2000, para. 201.

rights violations and serious international crimes.³³ Extensive amnesties, such as those Colombia granted to guerrilla groups in the 1990s, might no longer be viable.

Nevertheless, there is growing recognition of a distinction between a transition from armed conflict via negotiated peace and a transition from authoritarianism. In a recent Inter-American Court judgment, its president, in an opinion adhered to by four of the seven judges, recognised that in the former the state might not be in a “position to implement fully and simultaneously, the various international rights and obligations it has assumed” and that the exercise of one right, eg, justice, cannot affect the exercise of others “disproportionally”.³⁴ This concurring opinion does not have the same precedential value as the main judgment, but it could indicate movement away from a strict interpretation of obligations to investigate, prosecute and punish serious human rights violations in post-conflict situations. Still, its recognition that not all obligations can be realised at once is not an endorsement of impunity in a negotiated peace;³⁵ rather, it implies the need for a comprehensive transitional justice regime.

³³ “Barrios Altos v. Peru (Merits)”, 14 March 2001, para. 41; also, “Rochela Massacre v. Colombia (Merits, Reparations, and Costs)”, 11 May 2007, para. 294; “Almonacid-Arellano et al v. Chile (Preliminary Objections, Merits, Reparations and Costs)”, 26 September 2006, para. 111; “Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil (Preliminary Objections, Merits, Reparations and Costs)”, 24 November 2010, para. 171; “Gelman v. Uruguay (Merits and Reparations)”, 24 February 2011. The state may have international responsibility when private actors commit human rights violations, “because of the lack of due diligence to prevent the violation or to respond to it”: “Velásquez Rodríguez v. Honduras”, 29 July 1988, para. 172.

³⁴ “Massacres of El Mozote and nearby places v. El Salvador (Merits, reparations and costs)”, 25 October 2012, concurring opinion of Judge Diego Garcia-Sayán, para. 38.

³⁵ This is also clear from the statement of the Inter-American Commission after the Mozote judgment: “The Commission and the [Court] ... have indicated that in case a person accused of a crime in this context were to request the application of an amnesty law, the court has the duty to investigate and clarify the situation, since pursuant to State obligations, laws or amnesty provisions may not be applied to serious human rights violations”. “Amnesty and Human Rights Violations”, press release no. 150/12, 26 December 2012.

III. The Politics of Transitional Justice

Recent progress in acknowledging responsibility for wrongdoing in the conflict has opened a window for a genuine transitional justice process. But this is unlikely to be the automatic consequence of bilateral negotiation dynamics. On both sides, the state of denial still runs deep, and the agenda of the peace talks both disperses relevant transitional justice issues across several items and ignores others. A deal that would reflect just the lowest common denominator between the two parties would risk difficulties in ratification and implementation and could further polarise the country ahead of the 2014 elections. It is, therefore, in the parties' own long-term best interests to agree on measures that go beyond their narrow preferences. A legally and politically viable transitional justice agreement could in turn help forge a sufficiently strong consensus to overcome legal and political challenges.

A. Attitudes to Wrongdoing

After decades of conflict, both sides have only relatively recently started to adjust their attitudes towards crimes committed. In July, in a substantial step forward, President Santos for the first time recognised the responsibility of state agents for violations of IHL and international human rights law.³⁶ This complemented the earlier recognition of the existence of an armed conflict (as distinguished from Uribe's notion of a battle against terrorists), a move that facilitated the talks with FARC. Santos has also apologised to indigenous communities and publicly sought forgiveness for several massacres, as well as the 1994 killing of Senator Manuel Cepeda of the left-wing Patriotic Union (UP).³⁷

FARC has remained more ambivalent, but the guerrillas have begun to use terms such as "reconciliation", "truth commission" and "non-repetition" that were not previously part of their rhetoric. In May, FARC negotiator and secretariat member Pablo Catatumbo agreed to review the group's responsibility for the 2007 killing of eleven Valle department assembly members and argued that discussions should cover all victims (including presumably FARC's).³⁸ Guerrilla leaders have also accepted the possibility, if certain conditions are met, of asking victims for forgiveness, a significant change from FARC's previous line, according to which the state is ultimately responsible for all victims and so it is the state that should seek forgiveness.³⁹

³⁶ "Intervención del Presidente Juan Manuel Santos en la Audiencia Pública del Marco Jurídico para la Paz", Sistema Informativo del Gobierno, 25 July 2013.

³⁷ See "Presidente Santos ofreció disculpas a víctimas de la masacre de El Tigre, Putumayo", Sistema Informativo del Gobierno, 23 January 2012; "Santos pidió perdón a los indígenas por el conflicto armado en Colombia", *El Espectador*, 15 August 2012. The apology for Cepeda's death was ordered by the Inter-American Court. "Manuel Cepeda Vargas v Colombia (Preliminary objections, merits, reparations and Costs)", 26 May 2010, p. 88.

³⁸ "Saludo a congresistas estadounidenses", Delegación de paz FARC-EP, 25 April 2013, and "Valoración de la posición del Consejo de Derechos Humanos de las Naciones Unidas", 30 April 2013. "Habla Pablo Catatumbo", *Semana*, 25 May 2013.

³⁹ Hernando Calvo Ospina, "Somos optimistas: es el momento para buscar la paz", *Rebelión*, 30 July 2013. But see also "We have not provoked this war. We are the victims of this war. And it is the Colombian state that is responsible for everything that has happened during this period [of war]", "FARC: 'Somos víctimas de esta guerra'", BBC, 13 September 2012. "Ask for forgiveness, this is a choir orchestrated from the mass media to those who legitimately took up arms against the institutional violence ... a calculation of perfidy to hide the true victimisers. A State that has heartlessly

But deep pockets of denial remain. Members of the military still insist that only individual soldiers were responsible for extrajudicial killings, known as “false positives”.⁴⁰ They maintain that accusations of human rights violations are part of a premeditated “legal war” meant to weaken the military campaign against the guerrillas.⁴¹ This stance extends beyond the security forces. In a recent Inter-American Court hearing, the government representative cast doubt on whether the 1985 recapture of the Palace of Justice in Bogotá after it was attacked and occupied by M-19 resulted in disappearances, in the face of domestic judgments and a 2005 truth commission confirming such cases.⁴²

FARC's recent openness to acknowledging wrongdoing also needs to be interpreted carefully. Despite the changed rhetoric, it largely remains within the narrow parameters of its longstanding discourse on the guerrillas' responsibility for victims. FARC recognises that its actions have caused civilian harm but argues these victims have been the unintended consequences of otherwise legitimate military operations or the result of errors.⁴³ It does not acknowledge a broader pattern of how its operations may have harmed civilians.⁴⁴

These attitudes are deeply rooted. In the government's case, powerful interests in the security forces and some political groups that are risky to alienate amid ongoing hostilities oppose acknowledging more than isolated individual wrongdoing. FARC's denial may in part be tactically motivated, as it may feel that recognising its responsibility for crimes committed during the conflict would weaken its bargaining position. But its discourse on victims also reflects its strong founding narrative, according to which the insurgency was sparked by state aggression in 1964, when the army attacked communist-inspired peasant communities in Tolima and Cauca departments.⁴⁵ Under this logic, FARC's military campaign is framed as one of legitimate

suppressed so many human beings with its economic policy should implore forgiveness”. “Finaliza octavo ciclo en la mesa de diálogos en La Habana, Cuba”, Delegación de paz FARC-EP, 3 May 2013.

⁴⁰ Crisis Group interview, retired officer, Bogotá, 15 April 2013. Then-UN Special Rapporteur (extrajudicial executions) Philip Alston, noted: “... the explanation favoured by many in Government – that the killings were carried out on a small scale by a few bad apples – is ... unsustainable”. “Statement by Professor Philip Alston ... Mission to Colombia 8-18 June 2009”, press release, Office of the UN High Commissioner for Human Rights, (UNHCHR), 18 June 2009.

⁴¹ 13,000 soldiers reportedly cannot be used in combat because they are under investigation for human rights abuses. Crisis Group interview, retired officer, Bogotá, 15 April 2013.

⁴² See Juanita León, “Defensa del Palacio de Justicia: ¿qué verdad pueden esperar las víctimas del gobierno de Santos?”, *La silla vacía*, 19 February 2013.

⁴³ “In our revolutionary activity, we are not exempt from committing errors, and we are willing to accept constructive criticism”, “Comunicado del Frente 33 de las FARC”, FARC-EP, 10 November 2006; “We lament the death and injuries of civilians, as well as the other damages caused as collateral effects of the combat. We signal the Colombian state as uniquely responsible for the damages because it maintains military staff and infrastructure amid the civilian population”, “A la población del municipio de Toribio”, FARC-EP, 16 July 2011.

⁴⁴ “We have committed errors, some severe, that it true. But whatever the propaganda says, the aggression against the population has not been a strategy of FARC”. Pablo Catatumbo, quoted in Hernando Calvo Ospina, “Somos optimistas”, op. cit.

⁴⁵ FARC emerged amid perceptions of the Communist Party that a military coup was imminent. The appearance of competing groups, such as ELN and EPL also contributed to its formation. Eduardo Pizarro Leongómez, *Las Farc (1949-2011): de guerrilla campesina a máquina de guerra* (Bogotá, 2011), pp. 168-170.

self-defence.⁴⁶ The guerrillas have also invoked the “right to rebellion” as an additional justification for their insurgency.⁴⁷ Likewise, the strong ideological conviction of FARC commanders might also limit their acceptance of responsibility.⁴⁸

Despite recent progress, the attitudes of both parties still cast doubt upon their willingness to accept political responsibilities and individual criminal liability for serious crimes committed during the conflict, as well as their commitment to contribute toward revealing truth. A mutual pardon is an unlikely outcome, but it remains an open question whether both parties are prepared to accept the political costs of a strong, independent truth commission, prosecution of the most responsible and other mechanisms to recognise individual criminal responsibility. They may prefer instead to resort to legal technicalities to minimise their exposure or pay lipservice to transitional justice, while failing to state unambiguously how the complex issues are to be tackled.

That those dangers are real is clear from the gaps in the talks' agenda. The term transitional justice is not part of the September 2012 pre-agreement that set the agenda, and the agenda point on “victims” is the shortest and least detailed of the five substantial issues under negotiation.⁴⁹ Its purpose is described as “to compensate”, but without elaboration beyond reference to “human rights of the victims” and “truth”, the only components of transitional justice explicitly referred to. Neither accountability through prosecutions nor reparations are mentioned. This brevity contrasts with the first agenda point – rural development – that contains some twenty sub-points.

These gaps should not pose insurmountable obstacles for a genuine transitional justice process, however. Mention of victims and their rights is in fact innovative compared to previous peace talks. Further, the agenda commits the parties to clarify the paramilitary phenomenon, agree on reintegration of FARC combatants, fight criminal violence, dismantle the support networks of criminal groups and combat corruption and impunity. There is also explicit reference to the institutional reforms necessary to support a peacebuilding process. Combined with increasing public expectations regarding victims' rights, this should encourage negotiators to work on all components of transitional justice.

But risks remain. That some key elements are absent, and the elements that are present are spread over points unlikely to be negotiated simultaneously, could become an obstacle for a comprehensive and coherent proposal. Other points, notably political participation (under discussion since June), have a bearing on transitional justice measures, since under existing laws, convictions and sentences have implica-

⁴⁶ “The truth is very different: they [Santos and the ‘oligarchy’] are the aggressors, the thieves and the violent people”. “Declaración Pública sobre la situación actual del país y las tareas que demanda”, Secretariado del Estado Mayor Central de las FARC-EP, 22 July 2012. “Manuel Vivo”, FARC-EP, 26 March 2013 and FARC leaders quoted in Alfredo Molano, “Las Farc dicen que no fueron a La Habana a entregar las armas”, *El Espectador*, 12 May 2013.

⁴⁷ “We embody the universal right that helps people all over the world to rise up against oppression”. “Presidentes, Primeros Ministros y Jefes de Estado del Mundo”, FARC-EP, 1 March 2007. See also “Ronda de preguntas: ‘la rebelión es un derecho universal, no un delito’”, *Semana*, 18 October 2012; and Marco León Calarcá, “Intentos de hechizar”, Bloque Iván Ríos y Martín Caballero de las FARC-EP, 4 February 2013.

⁴⁸ A senior ex-ELN commander said it took him years to acknowledge his responsibility for victims, as he thought he was “fighting for a just cause”. Crisis Group interview, Antioquia, November 2012.

⁴⁹ See the “General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace” in Crisis Group Report, *Colombia: Peace at Last?*, op. cit., pp. 34-36.

tions for the eligibility of FARC leaders to join democratic politics. The structure of the talks implicitly favours a limited, disconnected outcome rather than an overarching concept of transitional justice and commitment to victims' rights.

B. *Risks for Sustainability*

Agreeing on the lowest common denominator would serve the parties' short-term interests, but both need to be aware that any seemingly easy solution could come at a potentially high cost. This is because implementation and ratification of transitional justice measures will involve additional actors, including Congress, the Constitutional Court, voters and possibly the ICC or the Inter-American system. Given the lack of trust between FARC and the government after decades of conflict, any concern that Congress or the courts could revise agreements regarding legal benefits for FARC members or that the peace deal could fail to protect guerrillas from international prosecution could destabilise or derail the transition, independent of whether such risks ultimately materialise. Moreover, a narrow agreement could further increase polarisation during electoral campaigns in which transitional justice issues look set to be fiercely contested.

Other actors hold considerable sway over transitional justice provisions. Congress will need to pass statutory legislation, without which key provisions in the Legal Framework for Peace cannot be applied.⁵⁰ Work on this legislation is to begin in earnest only once a final peace agreement is signed, in line with the central philosophy of the talks that "nothing is agreed until everything is agreed".⁵¹ The term of this Congress, in which the government has an almost unassailable majority, does not end until 20 June 2014, but with elections dominating the political climate, a final deal in Havana would probably need to be reached not later than early 2014 to guarantee that the current set of legislators decide the transitional justice legislation.⁵² Otherwise, changed majorities might complicate passage of implementing laws.

Before entering into force, statutory legislation must be reviewed by the Constitutional Court. Unlike its restricted review of the Legal Framework for Peace (focused on whether the reform was "substituting" the constitution), the court will need not just to examine the legislation's procedural aspects, but also to review whether each provision is substantively consistent with the constitutional order.⁵³ Past rulings suggest it does not shy from intervening in transitional justice rules. This is perhaps most clearly seen from its review of JPL that strengthened the rights of victims by, inter alia, expanding their participation and conditioning alternative sentences on complete confessions and full disclosure of assets.⁵⁴ Such precedents do not mean it

⁵⁰ Statutory laws are legislative measures that regulate matters of personal fundamental rights and their protection, the administration of justice and others issues mentioned in Article 152 of the 1991 constitution. Their adoption follows a more demanding procedure than that of ordinary laws, including special majorities in Congress and mandatory Constitutional Court review (Article 153).

⁵¹ Crisis Group interviews, senior government officials, Bogotá, 18, 25 February 2013.

⁵² See the comments by the president of Congress, Juan Fernando Cristo, in "Conviene cuatro años más de Santos", *El Espectador*, 22 July 2013.

⁵³ Crisis Group interview, senior official justice ministry, Bogotá, 18 February 2013. See also Article 241.8 of the 1991 constitution and "C-011 de 1994", Constitutional Court decision, 21 January 1994.

⁵⁴ "C-370 de 2006", Constitutional Court decision, 18 May 2006, para. 6.2.2.1.7.2. For analysis of how the court has shaped JPL, see Rodrigo Uprimny, "Las leyes de Justicia y Paz", in Elvira María Restrepo, Bruce Bagley (eds.), *La desmovilización de los paramilitares en Colombia* (Bogotá, 2011), pp. 99-105; and Alejandro Guerrero Torres, "Análisis constitucional de la Ley 975 de 2005 a

will necessarily be similarly bold in the case of a peace agreement with FARC but suggest that neither the government nor FARC can assume unconditional approval.

Another domestic actor to watch is Inspector-General Alejandro Ordóñez, a well-known critic of the talks. He has repeatedly said he is keeping a close eye on them and that peace should not come “at whatever price”.⁵⁵ While he lacks power to veto transitional justice measures, he can submit legal opinions to the Constitutional Court on implementing legislation, and he could bring disciplinary procedures against officials involved in the negotiations for actions he considers illegal. He also exercises considerable political influence.⁵⁶

An accord not compliant with international norms, in particular prosecution of the most responsible from both sides for serious international crimes, might spark adverse findings under the Inter-American human rights system and even lead to ICC investigation. Colombia is one of sixteen situations into which the ICC prosecutor's office is known to be conducting a “preliminary examination”, the stage prior to investigation. In November 2012, the office said it was monitoring developments, including “follow-up on the Legal Framework for Peace and other relevant legislative developments”.⁵⁷ The ICC will only intervene, however, if Colombian authorities prove unwilling or unable to prosecute those accused of the gravest international crimes. Even the opening of a formal investigation would not necessarily be a point of no return, as Colombia could challenge this under Article 19 of the Rome Statute.

Contrary to claims often made by critics of the peace talks that an ICC investigation would be almost inevitable if an agreement fails to provide for prosecution of every FARC member, the opening of an investigation depends on multiple legal, political and resource considerations.⁵⁸ A visit to Colombia by the prosecutor's office in April 2013 to conduct further inquiries suggests that the preliminary examination continues, but not that an investigation is necessarily afoot. However, contrary to what FARC appears to believe, obligations under the Rome Statute are not a government ploy.⁵⁹ The possibility of ICC prosecution should at least persuade the parties to take the state's international obligations seriously.⁶⁰

The exact form by which a final peace agreement will be ratified is unclear. FARC argues for ratification by a Constituent Assembly (a body to rewrite the constitution)

través de la Sentencia C-370 del 2006”, in Andreas Forer, Claudia López Díaz (eds.), *Colombia: un nuevo modelo de Justicia Transicional* (Bogotá, 2012), pp. 179-200.

⁵⁵ “La paz no se puede pagar a cualquier precio”: procurador Ordóñez”, *Semana*, 30 August 2012. Ordóñez's arguments are in “Concepto sobre demanda de inconstitucionalidad contra algunas expresiones del Acto Legislativo 01 de 2012”, Procuraduría General de la Nación, 2013.

⁵⁶ Crisis Group interview, legal expert, Bogotá, 20 February 2013. A well-placed politician ranked him among the top threats to peace. Crisis Group interview, February 2013.

⁵⁷ “Report on Preliminary Examination Activities: Situation in Colombia, Interim Report”, ICC, November 2012, p. 28.

⁵⁸ Crisis Group interview, Uribe supporter, Bogotá, 16 April 2013; Guillermo Otálora Lozano, “El proceso de paz y la Corte Penal Internacional”, Universidad de los Andes, February 2013.

⁵⁹ FARC lead negotiator Iván Marquéz told *Semana's* María Jimena Duzán, the “state is confused over the Rome Statue. They say they fear there will be judicial action if there is no compliance with some minimal legal requirements, but we do not believe this is case ... to the contrary, these unfounded fears are being used to impose a rhythm with the aim of getting an easy agreement”. “Deseo hacer política de manera abierta y legal”, *Semana*, 23 February 2013.

⁶⁰ See Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (New York, 2009), p. 76, noting that “it would seem prudent for any state party to the Rome Statute to presume that a national amnesty encompassing any of the treaty's crimes will attract the critical scrutiny of the ICC prosecutor”.

that should also be tasked with reviewing problems not resolved in the negotiations or which are outside the Havana agenda.⁶¹ The government rejects this but has instead proposed a referendum to be held alongside the 2014 elections.⁶² Popular ratification would increase the cost of contesting the agreement in the political arena or attacking it in the courts, but it would not rule out court action. The Inter-American Court ruled that Uruguay's amnesty was unlawful, even though domestic opponents had failed to overturn it in two referendums.⁶³ In particular, popular ratification could not make the blanket amnesty FARC desires lawful. Renouncing major human rights treaties is not an option realistically open to Colombia, a fact FARC fails to appreciate because its vision of absolute state sovereignty is flawed.⁶⁴

A weak agreement on transitional justice also risks creating political problems. Despite broad support for the peace process, including from the Catholic Church, mainstream political parties and businesses, issues regarding guerrillas' legal treatment, reintegration benefits and contribution to reparation are highly divisive. Tensions over them could grow, as conservatives around former President Uribe and his new Democratic Centre movement attempt to exploit deep scepticism about FARC ahead of the 2014 elections. These critics increasingly rally around the demand for a "just peace" or "peace without impunity".

Uribista support for victims' rights may not be credible to the large majority of victims, who do not regard the Democratic Centre as their legitimate champion.⁶⁵ But the rejection of impunity taps into widely shared attitudes among those who see FARC's activities through the lens of criminality and want its members to go to prison.⁶⁶ How many votes the Democratic Centre can win with this strategy is an open question at this stage. Uribe himself is barred from seeking a third presidential term and despite Santos's comparatively modest approval ratings, no Uribista candidate looks likely to mount a successful electoral challenge (in particular if Santos achieves a

⁶¹ "Propuesta para aplazar el calendario electoral por un año", Delegación de paz de las FARC-EP, 11 June 2013. See also León Valencia, "Nos deben una Constituyente", dicen las Farc en La Habana", *Las2Orillas*, 23 Julio 2013.

⁶² "Radican proyecto de ley estatutaria que permite refrendar el día de elecciones posibles acuerdos con la guerrilla", Sistema Informativo del Gobierno, 22 August 2013. See also Rodrigo Uprimny, "La refrendación democrática de la paz", *UN Periódico*, no. 166 (May 2013), p. 5; and "Rutas Jurídicas: Refrendación ciudadana de acuerdos de paz", Misión de Observación Electoral, August 2013.

⁶³ *Gelman v Uruguay (Merits and Reparations)*, 24 February 2011.

⁶⁴ "The creative or constituent power is fundamental for peace. Despite all the worshippers of the International Criminal Court, international norms are not beyond the constituent power, because the country has not gifted away its self-determination or the sovereignty which resides in the people". "La Constituyente es la llave de la paz", Delegación de paz de las FARC-EP, 9 July 2013.

⁶⁵ Crisis Group interview, victims NGO leader, Bogotá, 25 February 2013. Juan Diego Restrepo, "Víctimas de las FARC: ¿botín electoral?", *Semana*, 30 April 2013. Victims, however, are not a homogenous group and do not have a unified political project. Their most significant political leadership is probably from the National Movement of Victims of State Crimes (MOVICE). Uribe himself and some supporters have repeatedly insisted they are victims of the guerrillas.

⁶⁶ In a 2012 survey, 82 per cent of the population and 84 per cent of victims considered that "guerrilla groups are simple criminals". Only 13 per cent of the population and 12 per cent of victims agreed that they "represent revolutionary ideals". This explains why 91 per cent of the population and 92 per cent of victims expect many FARC members to be convicted and imprisoned. "¿Qué piensan los colombianos después de siete años de Justicia y Paz?", Centro de Memoria Histórica, September 2012, pp. 23, 81. In April 2013, 69 per cent rejected the proposition that FARC members should avoid prison after demobilisation. "Hay mejor ambiente para la paz", *Semana*, 20 April 2013.

peace deal).⁶⁷ But if the popular Uribe runs for the Senate, he will be a force to be reckoned with. If laws to implement the Legal Framework for Peace are not adopted before the new Congress convenes in July 2014, he and allied legislators might at least complicate their passage. The absolute majorities statutory laws require increase opposition bargaining power.

In such circumstances, even popular approval of the peace agreement is not without risks. The question is not so much whether a referendum could be won. Despite scepticism about FARC, Colombians favour a political endgame, and the government could mobilise significant resources.⁶⁸ But approval of the peace accord might deepen polarisation if the agreement fails to take account of the impunity concerns voiced by the critics. Overriding these concerns might further radicalise their opposition. Those around Uribe have economic and political power, often in conflict-affected regions. In a land that has long failed to control local elites with historic proclivity for using violence to defend their interests, such radicalisation could further complicate implementation of the accords.

C. *Towards a Viable Transitional Justice Agreement*

These risks are real, but negotiators have the means to minimise them. Just as a weak transitional justice agreement would increase concerns over sustainability, a politically, legally and administratively viable model could contribute to reducing tensions and boost the long-term stability of peace. It would need to satisfy four distinct core demands:

- First, it would need to be based on a realistic assessment of administrative and financial capacities. Colombia has substantial existing capacity in government institutions that enables it to implement a more demanding and complete transitional justice model than most post-conflict countries. But the JPL experience shows that an essentially unenforceable model risks producing de facto impunity, thus violating victims' rights. Likewise, transitional justice measures would need to compete with a host of other important spending priorities, partly derived from implementing the peace accords.
- Secondly, it must produce, as far as possible, legal certainty for FARC members. They need clarity about the way forward, if the largest possible number is to be convinced to lay down arms. This is particularly important since settlements in the region that have included amnesties have been seen to erode, albeit with substantial time lags, for example in Argentina.⁶⁹ As is clear from their insistence

⁶⁷ The Democratic Centre has five pre-candidates: ex-Vice President Francisco Santos, ex-Interior Minister Carlos Holmes Trujillo, ex-Finance Minister Óscar Iván Zuluaga, Senator Juan Carlos Vélez; and former Antioquia Governor Luis Alfredo Ramos. Santos is the best known. The candidate will be chosen in a primary at the same time as the March 2014 Congressional elections.

⁶⁸ In February 2013, 54 per cent of respondents preferred negotiations, while 42 per cent preferred attempts to defeat the guerrillas militarily. "Encuesta No. 93", Gallup, p. 128. Since 2003, a consistent majority has favoured a negotiated settlement, peaking in September 2006 at 68 per cent. Polling, of course, is sensitive to timing and the wording of questions, but the Gallup poll has the advantage of having asked the same question since 2001.

⁶⁹ Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America", *Journal of Peace Research*, vol. 44, no. 4 (2007), p. 443: "... while trials were considered impossible in many transitional countries immediately after transitions, with the passage of time conditions changed and trials became not just possible but likely".

that a Constituent Assembly could override international and domestic legal norms (and thus solve their legal problems), the guerrillas are acutely aware of the necessity to produce a mechanism with predictable outcomes that are unlikely to be reversed.

- Thirdly, it should specify rules for different, but not overly dissimilar treatment of guerrillas and state agents. They cannot be treated in a completely symmetric way; state agents cannot be entitled to the same (conditional and unconditional) benefits as guerrillas. But equally, concentrating criminal responsibility on state agents and all benefits on FARC would risk a political backlash. Treatment of the guerrillas should also differ from that of the paramilitaries, but their benefits should not be disproportionate. Otherwise, pressures will intensify to extend them to paramilitaries, and possibly to state agents as well.⁷⁰ That would be ethically questionable, politically controversial and in the long run not conducive to reconciliation.
- Fourthly, it must respect Colombia's international and domestic human rights obligations and uphold victims' rights to truth, justice, reparation and guarantees of non-repetition. Otherwise, it would face strong risks of being struck down or modified either by voters or the courts, or eroding over time.

Not all these demands can be realised perfectly and simultaneously. Finding a viable transitional justice model requires hard choices, careful sequencing and sensible prioritisation. The gap between Uribe's most radical supporters and FARC may be impossible to bridge, but a transitional justice model rooted in international obligations and with clear and balanced rules outlining the parties' obligations could become a shared reference point that might accommodate – to a reasonable degree – the demands of victims, the narrow preferences of the negotiators and the core concerns of moderate critics. An agreement grounded in such broad support would stand a good chance of providing the stable base needed for an implementation process that will likely take decades.

Given the increasing pressure to wrap up the talks before the electoral campaigns gear up, the parties would not need to spell out all the rules and conditions in the peace accord. Full formulation of the model should be left to implementing legislation. But the accord would need to be sufficiently detailed to give FARC reasonably certain legal guarantees, assure victims of both sides that their rights would be protected and lay out a vision of the transition that a large majority of voters would endorse; the following sections outline what such a model might look like.

The possibility that the negotiators will agree to such a deal may appear remote. It is feasible, however, precisely because the challenges of ratification and implementation pose a credible threat to the sustainability of any agreement that does not respect legal obligations and a spectrum of preferences beyond those of the negotiating

⁷⁰ “A reconsideration of the processes of the paramilitaries cannot be totally discarded. Likewise, more than 4,000 soldiers linked to crimes related to the conflict could take advantage of the benefits of transitional justice and elude the indictments of international tribunals. In an ambience of national reconciliation it is possible to imagine judicial proceedings that before appeared impossible”. León Valencia, “¿Por qué Simón Trinidad?”, *Semana*, 6 October 2012; and the proposal of a Spanish conflict resolution specialist: “If within a year there is an agreement with FARC, and if there is a pardon, it would be natural to revise the sentences against the ‘paras’”. “Antes de Cuba, Chávez se reunió 8 horas con Timochenko”: Vicenç Fisas”, *El Tiempo*, 29 September 2012.

parties. This threat is particularly credible as transitional justice issues are likely to be prominent during the 2014 electoral cycle.

In the short run, a viable transitional justice deal would be costly for both sides, but shared long-term interests in a stable transition should have more weight. Paradoxically, given its state of denial, FARC in particular could expect substantial gains. Acknowledgement of responsibility, unconditional collaboration with truth-seeking and reparation efforts, as well as acceptance of individual liability for war crimes and crimes against humanity, among others, would improve its standing. The scepticism that the overwhelming majority of Colombians feel toward the guerrillas is likely to continue after a peace deal to limit their prospects of winning elections outside their strongholds. Acceptance of a meaningful transitional justice model is, therefore, a more promising long-term strategy for eventually reducing that scepticism than continuing to blame all atrocities on the state.

Beyond self-interest, outside influence could have some effect on both sides, though the Havana format's reliance on direct and discreet bilateral talks offers few formal channels for other actors. Civil society participation is largely restricted to submitting proposals via the internet and forums organised by the National University and the UN. Congressional "peace commissions" are organising regional events, whose results are given to the delegations; the last round of these focused on victims' rights and truth.⁷¹ But this is not to say third parties have no clout. As is clear from Santos's July acknowledgment of state responsibility, following a recommendation in CMH's report on the conflict,⁷² at least the government is, within limits, susceptible to such influence.

As the prospect of a peace accord has become more tangible in recent months, discussions on transitional justice have gained importance. These are unlikely to lead to a broad consensus, but it is crucial for society to better understand which concessions are acceptable to a substantial majority in return for the conflict's end. This in turn would put pressure on the delegations to embrace a viable transitional justice model. A more unified civil society message might well make uncomfortable reading for both parties, but the considerable influence that voters, Congress and the Constitutional Court could wield over the final shape of a transitional justice regime suggests they should face up to what sustainability requires sooner rather than later. The parties should, therefore, facilitate civil society participation by advancing the public debate on victims' rights – ideally in a way that brings together diverse participants, including the Uribista critics who have rejected participation in previous forums.

⁷¹ "Concluyen las mesas de trabajo regionales para contribuir al fin del conflicto", press release, UNDP, 12 July 2013.

⁷² Santos mentioned this explicitly in his speech. "Intervención del Presidente", *op. cit.*

IV. Justice

Thousands of serious crimes have been committed by all the protagonists: the state, paramilitaries and guerrillas. The challenge for the negotiators is to devise a system that balances the incentives for ending the conflict with the need to establish accountability for the most serious offences within the capacities of the state. Amnesties and pardons that might have been acceptable in earlier decades, in Colombia and elsewhere, have been barred by constitutional and international jurisprudence that assigns higher priority to victims' rights, but such instruments as alternative and suspended sentences leave room for a deal promoting both justice and peace. The strategy requires three elements: prosecution of those most responsible for serious international crimes; amnesty for FARC's political crimes; and measures to deal with guerrillas and state agents not in the most responsible category. For guerrillas in the last category, there should be a certification process, linked with truth-telling and reparation, to accord them suspended or alternative sentences in the event that they are prosecuted.

"Serious international crimes" as used in this report are war crimes committed in a non-international armed conflict, genocide and crimes against humanity, as defined in the Rome Statute of the ICC. A crime against humanity is an act, such as murder, committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

A. *Amnesty for FARC's Political Crimes*

A general amnesty for political crimes and crimes connected to political crimes should be put in place for all demobilised FARC members.⁷³ Under the constitution, amnesty is only available for political crimes.⁷⁴ FARC members have committed the political crime of rebellion and possibly other political crimes.⁷⁵ FARC, as well as the general population, needs to recognise that an amnesty will not resolve all its members' juridical problems, because it will apply only to a narrow sub-set of their crimes. For example, someone who committed both crimes connected to political crimes and war crimes would remain liable for the latter.

Congress will need to enact a law that specifies which offences may be considered connected to rebellion or other political crimes (as well as the criteria to determine whether an offence is connected), so as to clarify the amnesty's scope. Consistent with

⁷³ "Amnesty" is used here to mean "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law". Mark Freeman, *Necessary Evils*, op. cit., p. 19. Amnesties include removing criminal liability for actions for which a person has been tried and convicted. This latter action, often called a general pardon, differs from an individual pardon a head of state (in Colombia, the president) may grant, which ends execution of the penalty but leaves the conviction (and any civil consequences) in place.

⁷⁴ Congress, by two-thirds majority, may legislate an amnesty or pardon for political crimes if there is an important public interest: 1991 constitution, Article 150(17).

⁷⁵ The main criterion for determining whether a crime is political is whether it was committed "exclusively for political motives or for the public interest": Carlos Lozano y Lozano, *Elementos de Derecho Penal* (Bogotá, 1961), pp. 148-149, quoted favourably by the Constitutional Court in "C-456 de 1997", 23 September 1997. The criminal code lists three purely political crimes: rebellion, sedition and riot, Title XVIII (crimes against the legal and constitutional order).

international norms, Colombia's courts have favoured an interpretation that precludes many serious offences from being connected, including war crimes, crimes against humanity and serious human rights violations.⁷⁶ However, they may have narrowed the concept too much: existing jurisprudence has been interpreted to conclude that homicide in combat, even if in accordance with international humanitarian law (IHL), cannot be considered political.⁷⁷

Congress should be guided by Additional Protocol II (1977) to the Geneva Conventions of 1949, which encourages amnesty after a non-international armed conflict for actions committed by armed groups that breached domestic criminal laws but not IHL. That would mean FARC members would not be criminally liable for actions that would be lawful if done by the military. The relevant provision encourages only this limited type of amnesty, which cannot cover violations of IHL.⁷⁸ To make the amnesty as effective an instrument for transition as possible, the courts should be prepared to accept a broadening of the concept of crimes connected to political crimes to encompass actions not inconsistent with IHL.⁷⁹ Lawmakers may also include other crimes, but not serious international crimes or serious human rights violations (such as torture).⁸⁰ The shift in international opinion against amnesties or other measures to eliminate responsibility for such crimes precludes their inclusion.⁸¹

⁷⁶ Constitutional Court's decisions "C-986/10", 2 December 2010; "C-370 de 2006", op. cit.; "C-578 de 2002", 30 July 2002; "C-695/02", 28 August 2002; "C-456 de 1997", 23 September 1997.

⁷⁷ Crisis Group interview, academic, 16 April 2013; Decision "C-456/97", op. cit.; Ricardo Posada Maya, "Aproximación al concepto jurídico delito político" in *Delito político, terrorismo y temas de derecho penal* (2010, Bogotá), p. 69. See Iván Orozco Abad, *Combatientes, rebeldes y terroristas* (Bogotá, 1992), pp. 126-182, for history of the political crime concept in Colombia.

⁷⁸ Article 6(5): "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". The International Committee of the Red Cross (ICRC) and academic commentators have clarified this is intended to provide only retrospective "combatant immunity" (which formally exists only for combatants in international armed conflicts, who may lawfully carry out actions consistent with IHL). Article 6(5) includes a general pardon within its use of "amnesty". Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. 1 (Cambridge, 2005), rule 159. Jessica Gavron "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", *The International and Comparative Law Quarterly*, vol. 51, no. 1 (2002), p. 103.

⁷⁹ Crisis Group interview, academic, Bogotá, 16 April 2013.

⁸⁰ "Serious human rights violations", as used in this report, are those that cannot be limited even during national emergency according to international obligations. They may sometimes also be crimes against humanity, but the concepts are not coextensive: for example, torture is a serious human rights violation but is only a crime against humanity if it is carried out as part of a widespread or systematic attack on a civilian population.

⁸¹ See "The rule of law and transitional justice in conflict and post-conflict societies", S/2011/634, 12 October 2011, para. 67: "The Security Council is encouraged to reject any endorsement of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights and to support the implementation of transitional justice and rule of law provisions in peace agreements". This echoes an earlier call in "The rule of law and transitional justice in conflict and post-conflict societies [2004]", op. cit. The Inter-American Court has consistently reiterated that it is impermissible to renounce investigation of serious human rights violations. In "Barrios Altos v. Peru (Merits)", 14 March 2001, para. 41, it stated that it "considers all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations". There is a misperception that it has only considered "self-amnesties" (where members of authoritarian regimes grant themselves immunity). However, in "Gelman v. Uruguay",

Problematically, ambiguity regarding the treatment of crimes against humanity in Colombia's criminal justice system could be manipulated to promote impunity or allow inconsistent prosecution of such crimes. The criminal code has no crimes labelled "crimes against humanity" (though several acts that could constitute such crimes, such as forced displacement, are in it, without being so termed). Whether a particular crime is labelled a crime against humanity in a particular case depends on the sentencing judge making this determination, on the submission of the prosecutor.

As a result of this system, the attorney-general's assertion in April that no member of the FARC Secretariat has been convicted of a crime against humanity may well be factually correct.⁸² However, this should not detract from the reality that FARC leaders have almost certainly committed acts that meet the definition of such crimes under international law. Implementing legislation needs to be explicit that an amnesty for FARC cannot cover conduct that amounts to a crime against humanity under international law – nor any other serious international crime or serious human rights violation – even if that conduct has not been labelled as such by a Colombian judge.

Offering an amnesty, even on the above restricted terms, would build trust between the negotiators, show good-will toward FARC and allow it to claim recognition of its status as a political and military actor, a central tenet of its ideology.⁸³ Indeed, the fact that FARC leaders are negotiating policy changes and reintegration into politics with the government could be seen as an implicit acknowledgment of the movement's political character. Still, resuscitating the concept of political crime and granting FARC members a limited amnesty is bound to be controversial. Critics of the peace talks insist FARC be treated like the paramilitaries, who were not considered to have committed political crimes,⁸⁴ but there are two reasons for differentiation.

The first is that the movements are broadly different in origins, social base and goals. FARC traces its roots to communist-inspired peasant communities; while it has changed considerably since the 1960s, marginalised constituencies in periphery areas have remained its most important social base. Paramilitaries, by contrast, were sponsored by large land owners, business elites, parts of the security forces and drug traffickers affected by intensifying guerrilla violence, giving them social power that guerrillas have consistently lacked.⁸⁵ While FARC has fought to install a radically different political system, the paramilitaries have worked closely with state security

op. cit., it affirmed (para. 229) that "incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated 'self-amnesties'".

⁸² "No hay condenas a guerrilleros de Farc por delitos de lesa humanidad", *El Tiempo*, 12 April 2013.

⁸³ FARC describes itself "as the highest expression of the revolutionary struggle for national liberation" and "a military-political movement which develops its ideological, political, organisational, propaganda and armed guerrilla actions in accordance with the tactics of ... mass struggle for power to the people ... FARC-EP is above all a revolutionary organisation. Each Squad or Basic Unit is at the same time a political cell". *Estatutos*, 1993, pp. 2-3.

⁸⁴ Crisis Group interview, political analyst, Bogotá, 26 February 2013. JPL Article 71 expanded sedition, a political crime, to include formation of a paramilitary group, but the Constitutional Court declared Article 71 unconstitutional ("C-370 de 2006", op. cit.); a later Supreme Court decision (Sala de Casación Penal, "Proceso no. 26945", 11 July 2007) clarified that paramilitary organisation membership entails aggravated conspiracy, a crime precluded from being connected to a political crime.

⁸⁵ Carlos Medina Gallego, *Autodefensas, paramilitares y narcotráfico en Colombia* (Bogotá, 1990); Mauricio Romero, *Paramilitares y autodefensas, 1982-2003* (Bogotá, 2003); Alejandro Reyes Posada, *Guerreros y campesinos* (Bogotá, 2009), pp. 85-110; Camilo Echandía, "Narcotráfico: génesis de los paramilitares y herencia de bandas criminales", *Fundación Ideas para la Paz*, January 2013.

forces and forged links with emerging local and national politicians, something FARC has almost completely failed to achieve.⁸⁶

The increasing importance of the drug economy and the conflict's degradation since the 1990s have led to an interpretation of the struggle as apolitical, driven by the greed of armed groups motivated by extending their control over Colombia's vast illegal economies.⁸⁷ But the core of FARC's leadership retains an intensely political discourse, and there are indications that members remain committed to the group's political goals; there is little evidence to suggest that (on the whole) they have sought personal enrichment through the conflict, for example.⁸⁸ It is thus appropriate to recognise FARC as politically motivated, even though a significant number of members may have committed crimes unconnected or disproportionate to its political motives.

The second reason is strategic. FARC leaders are unlikely to accept being handled under the JPL or something they consider inspired by it. They have consistently dismissed that law as an attempt to guarantee impunity for paramilitaries and their networks.⁸⁹ FARC considers amnesty and pardons the only instruments for dealing with a guerrilla force that sees itself as an undefeated political organisation in arms.⁹⁰ Its aspiration for impunity goes beyond what the government can fully satisfy, politically or legally, but offering something it values highly could help to overcome its denial of responsibility for crimes and strengthen the prospects of the peace process.

Once the amnesty is in effect, the authorities should examine judgments against FARC members to determine those within its scope. Those of current prisoners should be prioritised; some 600 of 2,300 FARC prisoners are said to have been convicted solely for rebellion.⁹¹ If they have not committed other crimes, they could be released, as could civilians imprisoned as FARC supporters. Sentence revision considerations should include prosecutorial strategies: over the last decade, FARC members and supporters have increasingly been charged with conspiracy or terrorism-related offences rather than those that can be connected with political crimes under existing jurisprudence.⁹²

⁸⁶ Crisis Group Latin America Report N°37, *Cutting the Links between Crime and Local Politics: Colombia's 2011 Elections*, 25 July 2011.

⁸⁷ Analysed in Francisco Gutiérrez Sanín, Gonzalo Sánchez Gómez, "Prólogo", Instituto de Estudios Políticos y Relaciones Internacionales (ed.), *Nuestra guerra sin nombre* (Bogotá, 2006), pp. 16-18.

⁸⁸ See Francisco Gutiérrez Sanín, "Telling the Difference: Guerrillas and Paramilitaries in the Colombian War", *Politics & Society*, vol. 36, no. 1 (2008), p. 14.

⁸⁹ "Comunicado de los prisioneros de guerra de las FARC-EP", 2 December 2009 ("the already failed 'Justice and Peace Law', as a project for the legalisation of paramilitarism"); "Entrevista al Comandante Alfonso Cano", 13 August 2009 ("it was a farce. The real paramilitary chiefs have remained hidden"); "Violaciones de los DDHH en el Norte Del Cauca", 26 June 2005 ("the so-called Justice and Peace Law which guarantees impunity to paramilitary criminals"); "Comunicado de los Bloques Oriental y Sur de las FARC-EP", 1 June 2005 ("This law is called Justice and Peace? And paradoxically, in its content, it does not express one or the other, but quite the opposite, impunity and war").

⁹⁰ "Fin de la guerra requiere cambios para el pueblo: Pablo Catatumbo", *Prensa Latina*, 26 June 2013. "We have to arrive at a realistic point in which we, the actors in the war, are amnestied". See also Gabriel Ángel, "Los impedimentos de la justicia internacional", FARC-EP, 12 June 2012: "... the first gesture of the national government towards effective peace should be to propose to Congress a general amnesty law without conditions for the insurgents in arms FARC-EP is a revolutionary guerrilla group, ready to fight, proudly combative and invincible".

⁹¹ "Gobierno y expertos afirman que guerrilleros no son presos políticos", *El Tiempo*, 9 April 2012.

⁹² Crisis Group interview, transitional justice expert, 7 June 2013.

A revision of existing sentences would also respond to concerns over the fairness of FARC members' trials, in particular those conducted in absentia.⁹³ This would increase the group's confidence in the justice system, whose jurisdiction it currently rejects.⁹⁴ If convictions for crimes outside the scope of the amnesty are upheld, the transitional justice model would need to ensure members with such existing convictions do not end up worse off than those handled through the new system. This also holds true for the several hundred already demobilised FARC members under the JPL regime. Review, however, would not preclude fresh trials for different conduct. The attorney-general's office has the institutional experience necessary to make necessary determinations, and a FARC representative could be given a voice in this review.

B. *Prosecution of the Most Responsible in FARC*

A high priority following a peace agreement must be to identify those in FARC most responsible for the most serious crimes and to initiate investigations with the aim of prosecution. Meaningful trials would show the state's commitment to holding the worst offenders to account, rank notwithstanding. Contrary to perceptions, earlier amnesties for both M-19 and EPL also made exceptions for atrocious crimes, and members of both groups were excluded from legal benefits.⁹⁵ The Legal Framework for Peace allows for statutory law to outline criteria with which to select for prosecution those most responsible for genocide, crimes against humanity and war crimes perpetrated in a systematic manner and specifies that the gravity and representativeness of cases should be considered.⁹⁶ The attorney-general would determine the criteria for prioritising selected cases.

The most responsible must be prosecuted and their cases prioritised; failure to do so could be challenged in courts, delegitimise transitional justice, trigger international condemnation and fray the fabric of a peace deal. Charges must include the

⁹³ Crisis Group interview, human rights lawyer, Bogotá, 26 February 2013. This may mostly concern the leaders of FARC. For example, between 2003 and 2010, FARC leader Timochenko and FARC's chief negotiator in Havana, Iván Márquez, were respectively convicted *in absentia* on sixteen counts of murder, abductions, hostage-taking, forcible displacement and child recruitment, and given sentences ranging up to 40 years. "Situation in Colombia, Interim Report", ICC, op. cit., p. 70.

⁹⁴ See "Farc dicen que la justicia no tiene la competencia para juzgarlos", *El Espectador*, 30 April 2013. For a criticism of judicial "corruption", see "Señores revista SEMANA y directores de medios en general", *Delegación de paz de las FARC-EP*, 18 June 2013. A scheme for vetting judicial officials (see Section VII below) would also send a clear signal that their concerns over the impartiality of the justice system are taken seriously.

⁹⁵ Crisis Group interviews, DDR expert, Bogotá, 7 November 2012; former EPL leader, Medellín, 13 November 2012; human rights activist, Bogotá, 26 February 2013. The numbers of those excluded from the benefits of such amnesties is unknown. For examples of exceptions to amnesty, see 1991 constitution, transitional Article 30: "The national government is authorised to grant pardons or amnesties for political crimes and crimes connected to political crimes, committed prior to the enactment of the present constitution, to members of guerrilla groups who return to civilian life under the terms of the policy of reconciliation This benefit may not extend to heinous crimes or murder committed outside combat or taking advantage of the state of defencelessness of the victim". Law 418 of 1997, Article 50: "The provisions of this title shall not apply to those who [engage in] atrocious acts of ferocity or barbarity, terrorism, kidnapping, genocide, homicide committed outside of combat, or by placing the victim in a state of defencelessness". For a succinct summary of all amnesties and pardons, see "Amnistía e indulto en Colombia: 1981-2010", *Fundación Ideas para la Paz*, November 2011.

⁹⁶ Perpetration in a systematic manner is not an obligatory element of a war crime. The inclusion of this limitation was a policy choice by the Congress.

most serious crimes that each selected person committed. Trials that neglect significant facets of serious criminal activity would fail to serve justice and thus undermine the transition. Gender crimes, including rape and sexual violence, should be a specific focus. As the Constitutional Court has noted, “sexual violence against women is a habitual, widespread, systematic and invisible practice in the context of the Colombian armed conflict”.⁹⁷ In trying the most responsible, prosecutors must ensure that such crimes are not “made invisible” as they have been under the JPL.⁹⁸

Selecting and prioritising the most responsible for prosecution mirrors the practice of international tribunals.⁹⁹ While it is appropriate that prosecutors draw on their experience, the functions of domestic and international courts should not be conflated. International courts are a last resort if domestic authorities are unable or unwilling to act and are intended to deal with only the gravest cases. In a domestic system, the most responsible should be the first but not the only ones held accountable. Prosecutors should not foster an impunity gap by ignoring serious crimes committed by those not among the most responsible.¹⁰⁰

To identify the most responsible in FARC, implementing legislation can use the criteria already developed by the attorney-general's office.¹⁰¹ Directive 001 of October 2012, which draws on the work of international courts, places two groups in the “most responsible category”: those within the command and control structure who knew (or could reasonably be expected to have known) that crimes would result from implementation of the organisation's plans; and those who committed particularly notorious crimes, regardless of their position. It also outlines objective, subjective and complementary criteria used by international criminal tribunals for prioritisation.

All trials or other proceedings within the framework of the peace process should be the responsibility of domestic bodies. FARC is unlikely to accept an accord without non-extradition provisions;¹⁰² moreover, the negative experience with extradition of paramilitaries to the U.S., suggests that trials must be in Colombian courts if the

⁹⁷ “Auto 092/08”, 14 April 2008. “Colombia: Hidden from justice”, Amnesty International, October 2012; “This is what we demand, Justice!: Impunity for Sexual Violence against Women in Colombia's Armed Conflict”, Amnesty International, September 2011; Andrés Zambrano, “El expediente de los crímenes sexuales de las Farc”, *El Tiempo*, 6 June 2013.

⁹⁸ Crisis Group interviews, prosecutors, Medellín, 16 November 2012; Bogotá, 9 April 2013.

⁹⁹ The ICC prosecutor's office thus “[focuses] its efforts on the most serious crimes and individuals who bear the greatest responsibility for those crimes”: “Prosecutions”, ICC.

¹⁰⁰ “Situation in Colombia, Interim Report”, ICC, op. cit., p. 63.

¹⁰¹ There is no specific definition of “most responsible” in international law, but in discussing the concept in the context of the Special Court of Sierra Leone, the UN Secretary-General noted: “While those ‘most responsible’ obviously include the political or military leadership, others in command authority down the chain of command may also be regarded ‘most responsible’ judging by the severity of the crime or its massive scale. ‘Most responsible’, therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime”. “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone”, 4 October 2000. The jurisprudence of international courts, such as the International Criminal Tribunal for the Former Yugoslavia, as well as the ICC prosecutor, has advanced the concept. Xabier Agirre Aranburu, “Gravity of Crimes and Responsibility of the Suspect”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Oslo, 2010), p. 223.

¹⁰² Article 35 of the constitution permits extradition for offences committed abroad (including international drug trafficking) except political crimes. Whatever exemption is created, the need to prosecute or extradite perpetrators of certain international crimes (eg, genocide) must be observed. If the system suggested in this report is adopted, the duty to extradite would not arise.

right to truth is to be upheld.¹⁰³ Exemption from extradition however, should be conditioned on measures such as effective demobilisation and non-participation in criminal activities, to prevent FARC members from taking up arms again.

The Legal Framework for Peace envisages a range of punishments and provides for statutory law to set requirements and conditions under which a suspended sentence, extrajudicial sanctions, alternative sentence or other special forms of sentence would be appropriate. These could cover FARC members already convicted and sentenced as well as convictions in cases selected for prosecution. An alternative sentence should be available for the most responsible in FARC if that person complies with conditions such as recognition of harm caused, demobilisation and substantial contributions to truth and reparation. The sentence would be “alternative” because (in line with the JPL norm) the criminal code sentence would apply if the conditions were not met. To strengthen incentives for cooperation with the truth commission and reparation, the mechanism to enforce conditionality needs to be credible.¹⁰⁴ Alternative sentences might also follow the JPL norm: five to eight years rather than the 40 plus years to which many would otherwise be subject.

The guerrillas have made clear they will not accept conventional imprisonment. In the context of fighting that still costs civilian lives daily, the government should be prepared to make some concessions on this to a weakened but not defeated armed foe. However, complete lack of punishment for the most responsible would be contrary to Colombia's international obligations and send the unfortunate political and moral signal that perpetrators of serious crimes can escape punishment. Instead of using existing prisons, alternative facilities placing meaningful restrictions on liberty might be built, again taking into account the severity of crimes, or special areas might be designated in which FARC members could live and work under strict curfews and probation-like restrictions.

C. *The Remaining Cases*

The remaining cases comprise FARC members who committed non-political crimes but are not among the “most responsible”. This is not a homogeneous group, because crimes not covered by the amnesty would range from extremely serious (eg, crimes against humanity) to relatively minor (eg, theft not connected to political crime).

The problem is that a potentially large number of FARC members have participated in the former. The ICC prosecutor's office says there is a reasonable basis to believe that, from 2002 to 2012, FARC committed the crimes against humanity of murder; forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; and rape and other forms of sexual violence; and from 2009 to 2012, the war crimes of murder and attacking civilians; torture and cruel treatment

¹⁰³ Some 29 paramilitary leaders were extradited to the U.S. from 2006 to 2009. In August 2009 the Supreme Court of Justice halted the extradition of those in the Justice and Peace system because of the detrimental effect on victims' rights. “Truth Behind Bars”, International Human Rights Law Clinic, University of California, Berkeley, February 2010, pp. 12-15. There are indications the U.S. would accept a government-FARC non-extradition agreement. “Colombian government seeking peace with FARC rebels”, Reuters, 27 August 2012.

¹⁰⁴ Exclusion from JPL's benefits because the demobilised person has continued in criminal activity has required a court sentence. To save the law's legitimacy, the attorney-general has increased efforts to enforce conditionality. Crisis Group interviews, prosecutors, Bogotá, 9 April 2013; high-court magistrate, Bogotá, 19 April 2013. “Diagnóstico de Justicia y Paz en el marco de la justicia transicional en Colombia”, MAPP-OEA, October 2011, pp. 97-102.

and outrages upon personal dignity; taking of hostages; rape and other forms of sexual violence; and conscripting, enlisting and using children to participate actively in hostilities.¹⁰⁵

Policies on kidnapping and child recruitment are particularly problematic. From 2000 until February 2012, FARC openly pursued a policy of kidnapping civilians for ransom.¹⁰⁶ According to defence ministry statistics, from 1996 to April 2013 it was responsible for kidnapping 7,197 people.¹⁰⁷ Such acts arguably constitute crimes against humanity, as they were part of a systematic or widespread attack on a civilian population.¹⁰⁸ The high number of cases over a long period means that a considerable number of FARC members could have contributed to, and thus be criminally responsible for them. This is true even though since the height of the kidnappings (1998-2002), the group has experienced a significant loss (and turnover) of personnel that may have reduced the number of currently active members who have been involved in these crimes.

Additional Protocol II (1977) to the Geneva Conventions of 1949 prohibits parties to an internal armed conflict from recruiting children below fifteen or using them in hostilities. Doing so is a war crime.¹⁰⁹ In accordance with this norm, FARC's internal rules state that children may only join from the age of fifteen,¹¹⁰ but the organisation has not observed this rule. About half its adult combatants are estimated to have entered as children, and more than 40 per cent of its forces are reportedly children or adolescents.¹¹¹ The UN Secretary-General has listed FARC as a persistent violator of the rights of children in armed conflict.¹¹² Since 2005, Colombia has been party to

¹⁰⁵ "Situation in Colombia, Interim Report", ICC, op. cit., pp. 2-3. Many more such crimes may have been committed during the conflict. ICC research has been limited to periods for which it has the possibility of exercising jurisdiction.

¹⁰⁶ See "Ley 002: Sobre la Tributación," Estado Mayor Central de las FARC-EP, March 2000. This "law" formalised FARC's stance on kidnapping, in which it has been involved since the 1980s. It was repealed in February 2012: "Sobre Prisioneros y Retenciones", Secretariado del Estado Mayor Central de las FARC-EP, 26 February 2012. FARC has also kidnapped security force members. It alleges this is permitted by IHL, characterising them as prisoners of war.

¹⁰⁷ Information provided to Crisis Group by the Presidential Program on Human Rights and International Humanitarian Law, 15 May 2013. For a breakdown of general kidnapping statistics see, "Una Verdad Secuestrada: Cuarenta años de estadísticas de secuestro, 1970-2010", Centro de Memoria Histórica, June 2013.

¹⁰⁸ Article 7(1)(e) of the ICC's Rome Statute, "Crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". The ICC prosecutor's office has cited kidnappings under FARC's policy as evidence of the crime against humanity of imprisonment: "Situation in Colombia, Interim Report", ICC, op. cit., pp. 22-23.

¹⁰⁹ Article 8(2)(e) (vii) of the ICC Statute, "War crime of using, conscripting and enlisting children [in a non-international armed conflict]".

¹¹⁰ FARC has stated that membership is "personal, voluntary and conscious" for those between fifteen and 30: rule cited in "Beligerancia", Suplemento Resistencia, Comisión Internacional FARC-EP, 2000, p. 8.

¹¹¹ Natalia Springer, *Como corderos entre lobos: del uso y reclutamiento de niñas, niños y adolescentes en el marco del conflicto armado y la criminalidad en Colombia* (Bogotá, 2012), pp. 27-30. FARC's extensive child recruitment suggests some children will almost certainly have committed serious justiciable crimes. The Constitutional Court noted in "C-203 de 2005", being the victim of child recruitment does not preclude a child from also being a perpetrator of crimes (and, by extension, an adult who committed crimes as a child). It is a matter of applying the relevant criminal law. See "Through a New Lens: A Child-Sensitive Approach to Transitional Justice", ICTJ, August 2011, p. 24; also, Article 40(1) of the Convention on the Rights of the Child.

¹¹² "Children and armed conflict", UN Secretary-General report, 15 May 2013, paras 172-182.

the Optional Protocol to the Convention on the Rights of the Child, which sets the minimum recruitment age (for both the state and armed groups) at eighteen, a standard FARC does not even purport to meet.

It is unrealistic and undesirable to demand prosecution of an unknown, potentially high number of FARC members involved somehow in serious international crimes and serious human rights violations. The JPL experience shows it would be beyond the capacity of the relatively strong judicial system to try large numbers of FARC members expeditiously and rigorously.¹¹³ Moreover, while trials of the most responsible would reveal patterns of violence and vindicate calls for justice, trials of thousands of members over many years would not serve these purposes. The truth sought in criminal trials is narrowly confined to establishing elements required to prove a crime, not satisfying victims' rights and revealing systematic wrongs; reparations tend to be limited to financial compensation of individual victims and rely on the financial capacity of the perpetrator, which rarely exists. Nonetheless, prosecuting only the most responsible would fall far short of domestic and international legal obligations and victims' expectations. A system that ignored the remaining cases would be as unviable as one that tried to prosecute them all.

Recognising these limitations, the remaining cases should be handled in a certification process run by an administrative body that could be either independent or connected to the truth commission. This would require FARC members to comply with truth-telling and reparation requirements. To be eligible, participants would need to register by a fixed date, set according to when they demobilised. Taking into account information received from victims and victims' organisations, the administrative body would certify that a participant had met the requirements of the process. This certification would guarantee that if a FARC member were to be prosecuted for crimes relating to the armed conflict, he/she would receive a conditional suspended or alternative sentence, depending on rank.¹¹⁴ Entry into the certification process would automatically grant a conditional suspension of any pending (or future) arrest warrant for conduct relating to the conflict. Conditions would include demobilisation and refraining from crime.

This certification process is partially inspired by the existing "truth agreements" scheme under Law 1424 (2010) for demobilised paramilitaries. As under this law, information collected from participants would be kept anonymous and could not be used against them or other FARC members in trials. It could however, be used to start investigations into other third persons, such as political leaders implicated in serious crimes. But unlike Law 1424, not every participant in the scheme would necessarily receive a conviction. Decisions over whom to prosecute beyond the most responsible would be left to the attorney-general. Based on rigorous prioritisation,

¹¹³ Even prosecuting the "most responsible" in FARC would imply roughly tripling the staff of the attorney-general's office that is currently dedicated to JPL. Crisis Group interview, prosecutors, Bogotá, 9 April 2013. The UN Secretary-General has observed: "[i]n the end, in post-conflict countries, the vast majority of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically". "The rule of law and transitional justice in conflict and post-conflict societies [2004]", *op. cit.*

¹¹⁴ Those above a certain rank would be eligible, based on the severity and number of crimes for which they received convictions, for either alternative sentences on the same terms as the most responsible or suspension of sentence. Below a certain rank, suspension of sentence would be available for all crimes related to the conflict. At some point, suspension of the sentence might be made permanent.

prosecutors would focus on those within the remaining cases category who have committed the most serious crimes.

These additional prosecutions would be initiated through the ordinary criminal justice system and only once trials of the most responsible were completed. The judgments resulting from those trials would be an important tool for identifying the second group; the “macro-judgments” model currently being piloted in the reformed JPL regime might prove transferable. Ideally, there would not be an overwhelming number of additional prosecutions, but the exact number would depend on such factors as the relative success or failure of the trials of the most responsible, political will and the availability of resources. That prosecutions beyond the most responsible would not be completed quickly would be made known up front, so victims and society would have realistic expectations.

This model has the advantage of facilitating demobilisation – and hence in effect an end to the conflict – because it would give FARC members legal certainty regarding the length and scope of their punishment if they received conflict-related convictions.¹¹⁵ The scheme would also be tightly integrated into the reintegration process and tied to other transitional justice components, while leaving intact the core of the state’s obligations under IHL and international human rights law. Additionally, it would respond to a need for clear prioritisation of tasks, concentrating justice resources on the trials of the most responsible before decisions would need to be made on resources for additional proceedings. The certification process would require a limited investment of resources: the administrative part of the Law 1424 scheme, for example, is handled by some 120 people. And overall, it should be an acceptable compromise for both FARC and the government.

There are also drawbacks. It would not meet the expectations of the many victims who seek individual truth about the harms they have suffered, and it would set perpetrators of serious crimes free in the community. Further, the assumption inherent in providing for high-ranking FARC members to receive alternative sentences in certain circumstances but not low-ranking members (who would all receive suspended sentences) is that the lower ranks are less culpable. While generating reassurance for lower-ranking members and reflecting the need for administrative efficiency, this could produce injustice in individual cases; for example, if lower-ranking FARC members committed atrocious crimes but were not prosecuted among the most responsible, their punishment would be a suspended sentence only.

Nonetheless, seen together with other components of transitional justice, this scheme presents a viable balance between victims’ rights, resource constraints and reconciliation needs. It would provide truth, reparation and a measure of justice more effectively than a mass of delayed trials weighed down with unrealistic expectations; give the large majority of FARC members a fair chance of reintegrating into society; and provide certainty to FARC members by removing the lingering threat of imprisonment. Success, however, would largely depend on credible prosecutions of the most responsible, as well as collective and individual recognition and acknowledgement. If prosecutions of the most responsible did not reach FARC’s leadership and target the group’s most serious crimes, or if FARC members failed to acknowledge their responsibility for causing harm during the conflict, the system as a whole would lack legitimacy.

¹¹⁵ See fn. 114 above.

D. *State Agents*

Members of the security forces are not criminally liable for the legitimate, proportionate and legal use of force against illegal armed groups. Nonetheless, this immunity from prosecution for actions that would be criminal if done by private citizens does not encompass acts prohibited by IHL, such as deliberately killing civilians. Some members of the armed forces and other state agents have committed a variety of crimes for which they must be held accountable. The ICC prosecutor's office considers that, from 2002 to 2012, there is a reasonable basis to believe state organs have committed, at a minimum, the crimes against humanity of murder and enforced disappearance; and from 2009 to 2012, members of state forces have committed the war crimes of murder, attacking civilians, torture and cruel treatment and outrages upon personal dignity, and rape and other forms of sexual violence.¹¹⁶ Some have been convicted for such crimes, but this is only the starting point for dealing with unlawful conduct within the military.¹¹⁷

State agents should not receive the same benefits that might eventually be granted to FARC members. They ought to be held to stricter standards, both because the state defines itself as democratic and because of its international obligations. Under relevant human rights treaties, for example, Colombia is obliged to punish torture and enforced disappearance, defined in those texts as crimes that are committed by (or with the acquiescence) of state agents.¹¹⁸ Mirroring the strategy applied to FARC, however, the immediate focus for prosecutions should be on the "most responsible", rank or role notwithstanding, though this should not mean existing investigations or proceedings are suspended.¹¹⁹

In line with the framework of transitional justice, it is appropriate that state agents benefit from alternative sentences if they make substantial contributions to truth and reparation. However, recognising the higher responsibility of the state, they should not be eligible to serve sentences in alternative facilities. Awarding any transitional justice benefits to some state agents is controversial, as the state is not negotiating, at least not formally, with its own armed forces. Nonetheless, alternative sentences for state agents can be justified. First, a substantial asymmetry in legal accountability with FARC could easily become politically unsustainable, since the military is held in high regard, and a strong political opposition is ready to capitalise on disparities.¹²⁰ Prosecuting the most responsible in both FARC and the state, cou-

¹¹⁶ "Situation in Colombia, Interim Report", ICC, *op. cit.*, pp. 35, 46. Inter-American Court cases have also established state responsibility for serious human rights violations, most recently, "Santo Domingo Massacre v Colombia", *op. cit.*

¹¹⁷ From January to November 2012 there were "convictions against 70 members of the security forces accused of extrajudicial killings, including two majors, three captains, four lieutenants, five sub-lieutenants, eight sergeants, seven corporals, and 41 lower-ranking soldiers". In November 2012, the attorney-general's office was investigating 1,726 cases of extrajudicial killings by the armed forces since 1985. "Colombia 2012 Human Rights Report", U.S. State Department, April 2013. Some consider these killings may implicate up to 10,000 members of the armed forces. Crisis Group interview, human rights lawyer, Bogotá, 21 February 2013.

¹¹⁸ Inter-American Conventions to Prevent and Punish Torture 1987, Articles 6, 8; and Forced Disappearance of Persons 1996, Article 1(b); International Convention for the Protection of All Persons from Enforced Disappearance 2010, Article 11(1).

¹¹⁹ "Colombia: Correct Serious Flaws in Transitional Justice Bill", Human Rights Watch letter to presidents of the Chamber of Representatives, Senate and its First Commission, 1 May 2012.

¹²⁰ Crisis Group interviews, human rights lawyer, Bogotá, 21 February 2013; transitional justice expert, Bogotá, 25 February 2013; retired military officer, Bogotá, 15 April 2013. In February 2013,

pled with the possibility of alternative sentences, is critical for generating the political equilibrium needed for a sustainable outcome.

Secondly, transitional justice benefits for state agents could lead to better outcomes for society and the transition than ordinary criminal procedures. The “most responsible” would have an incentive to cooperate in revealing truth, including in relation to criminal actors’ support networks. By contrast, the defence strategy today for many soldiers faced with allegations of human rights violations is to deny responsibility, thus restricting the possibility they might reveal involvement by more senior personnel.¹²¹ The more complete picture transitional justice measures might produce would also provide a base for vetting officers as part of security sector reform, an essential step to prevent repetition of abuses.

Devising a regime that recognises the state’s responsibilities for its agents’ conduct is not an issue for the negotiations. Rather, a nationwide discussion should take into account the views of victims of state violence. Nonetheless, it is clear that civilian, not military, authorities need to investigate and prosecute serious international crimes and serious human rights violations regardless of the perpetrator. This is essential, though members of the armed forces have long voiced doubts about receiving fair treatment in civilian courts, which they consider ignorant of the dynamics of warfare.¹²² The national debate should also consider recent military jurisdiction reforms that some believe have reduced accountability for serious crimes by security forces.¹²³

The military should not be made the scapegoat for human rights violations for which politicians and others may bear responsibility, however. The truth commission should be the forum to discuss political responsibility for military actions. Where politicians or others enabled or were involved in human rights violations committed by the military, they must be prosecuted.¹²⁴ Identifying systematic wrongdoing and networks requires giving investigators access to sources, including classified materials. Mapping connections between state agents and illegal armed actors, establishing the existence of criminal state policies and attributing responsibility to specific officials needs coordination between truth-seeking mechanisms and criminal investigations, not merely trials.

80 per cent of Colombians had a favourable opinion of the military, 69 per cent of the police. “Gallup Poll No.93”, pp. 109-110. There is strong resistance in the military to an accord that would concentrate all benefits on FARC. “Acción penal real y efectiva contra quienes se desmovilicen”, press release, Asociación Colombiana de Oficiales en Retiro, 22 March 2013.

¹²¹ Crisis Group interview, human rights lawyer, Bogotá, 21 February 2013. In some cases, lax prison conditions for soldiers sentenced for human rights abuses may reflect a bargain between them and higher-ranked officers allegedly implicated in serious crimes. “Tolemaida Resort”, *Semana*, 2 April 2011.

¹²² Crisis Group interview, retired military official, 15 April 2013.

¹²³ “Preliminary Observations on Its Onsite Visit to Colombia”, IACHR, December 2012; Crisis Group Report, *Colombia: Peace at Last?*, op. cit., pp. 20-21; Michael Reed Hurtado, “El fuero: derecho penal por militares, para militares”, *razonpublica.com*, 8 April 2013.

¹²⁴ A recent example is the March 2013 conviction of ex-Congressman César Pérez for orchestrating a 1988 massacre of 43 people, for which he received a 30-year jail sentence: “En masacre de Segovia, justicia tardó 25 años”, *El Tiempo*, 18 May 2013.

V. Truth

Transitional justice measures for post-conflict Colombia need to be centred on a credible truth-seeking, truth-telling process that builds shared memory about the conflict and its patterns of violence. No single mechanism satisfies the right to truth; the most wide-ranging effort should come via a truth commission, as required by the Legal Framework for Peace, that would create a public space in which to construct an official account through a broad inquiry encompassing the conflict's central aspects, all its actors and the connections between illegal armed groups and their enabling networks. Given the relatively strong and independent judiciary, links between the commission and prosecutions should be largely indirect, so that the commission is not diverted from its main goals. Complementary official and civil-society memory initiatives are also needed.

A. A Truth Commission

Uncovering truth regarding the conflict is both a central demand of victims and a right guaranteed internationally and domestically.¹²⁵ As a community leader said, truth is “the entrance to the rights of victims”. Victims have repeatedly emphasised the importance of knowing what occurred.¹²⁶ A truth commission should produce a widely trusted collective narrative that brings together the experiences of those who testify before it and situates them within the social and historical context, not just relating facts, but also explaining their causes.

Colombia has already made strides toward satisfying the right to truth. Despite shortcomings, the JPL has contributed to revealing partial truth about paramilitary crimes.¹²⁷ Truth-seeking by civil society, government, academia and investigative commissions has accompanied much of the evolution of violence. The most significant early example – a half-century ago – was the ground-breaking, two-volume report *Violence in Colombia*.¹²⁸ Other efforts have analysed conflict dynamics in specific regions or clarified the circumstances of single events, including a civil society exploration of the 1994 La Chinita massacre by FARC; the report of a Supreme Court-appointed truth commission into the events that occurred during the 1985 military

¹²⁵ Eg, victims have “the right to know the truth regarding the circumstances of the enforced disappearance ...” (International Convention for the Protection of All Persons from Enforced Disappearance, Article 24). Diane Orentlicher, *op. cit.*, principle 2: “[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes”. The Constitutional Court has similarly observed that “access to the truth is closely linked to respect for human dignity, to memory and to the reputation of the victim”. “C-370 de 2006”, *op. cit.*, para. 6.2.3.2.1.6.

¹²⁶ Crisis Group interviews, victims organisation leaders, Bogotá, 7 November 2012, Medellín, 23 November, Eastern Antioquia, 26 November; religious leader, Bogotá, 29 November 2012. This demand is backed by the Victims Law, which explicitly mandates Congress to create a truth commission.

¹²⁷ Crisis Group interviews, leader of victims group, NGO leader, Bogotá, 7 November 2012. “¿Qué piensan los colombianos después de siete años de Justicia y Paz?”, Centro de Memoria Histórica, September 2012, p. 41; Roberto Vidal-López, “Truth-Telling and Internal Displacement in Colombia”, ICTJ/Brookings Institute, July 2012, p. 10.

¹²⁸ Germán Gúzman Campos, Orlando Fals Borda, Eduardo Umaña Luna, *La Violencia en Colombia* (Bogotá, 1962/1964). Another example is Comisión de Estudios sobre la Violencia, *Colombia: Violencia y Democracia* (Bogotá, 1987). For other efforts see also Natalia María Springer, *Sobre la verdad en los tiempos del miedo* (Bogotá, 2002), pp. 128-135.

recapture of the Palace of Justice in Bogotá;¹²⁹ and CMH investigations, most notably the report on the armed conflict released in July.

These initiatives have made valuable contributions but by definition are piecemeal, so provide an insufficient base for the society-wide acknowledgement process that must be an integral part of any transition toward sustainable peace. By learning the truth, societies build collective memory that helps ensure what happened cannot be denied and is less likely to be repeated.¹³⁰ Catalysing such a process and making recommendations with significant political force would be the principal tasks of a truth commission.¹³¹ It might be situated in a reformed CMH, or the CMH could be disbanded and its staff moved to the commission.

The most significant added value of a truth commission would be to reveal the thick web of connections between armed groups, economics, politics and violence. It would reveal new facts about atrocities, about which much, but by no means all, is already known.¹³² It could not do this during ongoing conflict, not least due to the risk of retributive violence and the prospect that the commission might be diverted or misused to serve political ends in negotiations between actors in the conflict. Additionally, the difficulty in addressing the crimes of active groups would militate against a broad enquiry. If the peace talks fail or the conflict with ELN continues, therefore, the commission's timing should be reconsidered.

Unlike trials, in which victims testify about limited events concerning a defendant, victims' experiences must be the central focus in a commission hearing.¹³³ A truth commission interprets facts from a human rights perspective, rigorously verifying information and listening to all voices, but particularly allowing victims to be widely heard – something that earlier truth-seeking mechanisms in Colombia were not designed to achieve. The resulting collective narrative would concern not only violence, but also wider socio-economic harms.

Because creation of a truth commission should mark the start of a transition to peace, it should be empowered to consider all aspects of the conflict.¹³⁴ Substantial

¹²⁹ See Centro de Investigación y Educación Popular, *Masacre de la Chinita* (Bogotá, 1994); Jorge Aníbal Gómez Gallego, José Roberto Herrera Vergara, Nilson Pinilla Pinilla, *Informe final de la Comisión de la Verdad sobre los hechos del Palacio de Justicia* (Bogotá, 2010). Larger civil society projects include Colombia Never Again (documenting crimes against humanity in several regions). "Proyecto Colombia Nunca Más: Memoria de Crímenes de Lesa Humanidad", Colombia Nunca Más, www.movimientodevictimas.org/~nuncamas/.

¹³⁰ Diane Orentlicher, op. cit., principle 3: "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures ...".

¹³¹ Understood as an official authority that establishes the "patterns, causes and consequences of political violence", and that meets the following criteria: "[It] (1) is focused on the past, rather than on-going, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the state under review". Priscilla Hayner, *Unspeakable Truths* (New York, 2010), pp. 2 and 13.

Portions of conflict history

¹³² Portions of conflict history that require additional scrutiny include gender crimes, enforced disappearances, massacres of indigenous and Afro-Colombian communities, the responsibility of civilian and political elites and conflict dynamics in the under-examined 1980s.

¹³³ Hayner, *Unspeakable Truths*, op. cit., p. 22.

¹³⁴ There are several valid options regarding the period to be covered by the commission. FARC's 1964 founding is commonly cited as the conflict's start, but this date might wrongly suggest FARC has principal responsibility; in fact the conflict emerged after a prolonged period of intense partisan

restrictions on the time period or the actors it can examine would disappoint victims' expectations, deny truth to society at large and bode ill for the transition.¹³⁵ They would also lead to an incomplete, fragmented account of the conflict. In the context of a decades-old conflict that has touched most regions of the country, it is not uncommon for one person, family or community to have suffered at the hands of several actors.¹³⁶ To examine only harm done by a specific actor during a particular period would create an undesirable hierarchy of victimisation in the official account. Further, the commission should not be precluded from naming individuals involved in events as part of the historical narrative.

While the Legal Framework for Peace gives Congress the last word on the truth commission's "purpose, composition, attributes and functions", its fundamental aspects are likely to be negotiated between the government and FARC. Both may well perceive a strong body as contrary to their interests, as it presupposes recognising the harm each has caused. To facilitate a swift negotiation, they may be tempted to opt for a weak entity, with a short life, limited powers to compel testimony, insufficient resources or a contentious membership. This is clear from the comment of a well-connected politician that, given the many intricacies of the conflict, its objective should be the strategic "omission of truth".¹³⁷

Subordinating the truth commission to political goals would be a mistake. Both sides need to realise that a strong and credible body serves their long-term interests. On the government side, it would cater to a significant constituency of victims and those who support them, allowing claims to be advanced in a non-partisan environment. It could also assist in dismantling FARC structures, by identifying patterns of violence and victimisation. Simultaneously, a strong commission would give FARC a public forum in which to argue why it considers that its struggle has been just, and it has been a victim of the state, but one where its narrative would be open to debate, with mechanisms to prevent misuse for propaganda purposes that could lead to re-victimisation.

Such a wide-ranging, balanced process might also help shift FARC attitudes toward victims. Recognising its own responsibilities is likely to be easier for the group in a context that includes other actors in the conflict. A reciprocal gesture by the state, including acknowledging its links to paramilitary activities, should be part of the arrangement. Inclusion of other guerrilla groups would also facilitate an encompassing account of the conflict. This would be broadly in line with the Victims Law, which obliges demobilised guerrillas to collaborate in dignifying victims by symbolic reparation.¹³⁸ Encouragingly, the prospect of an end to the conflict appears to have

violence. Alternatively, the commission might cover the period since the late 1970s, when current actors emerged, or focus on crimes since 1991, when the current constitution was formed, but with background information starting at an earlier date. Crisis Group interview, CMH, Bogotá, 26 February 2013.

¹³⁵ Crisis Group interviews, victims group leaders, Eastern Antioquia, 26 November 2012; Apartadó, 21 November 2012; Medellín, 23 November 2012; see also "La paz se construye sin crímenes de estado", Movimiento Nacional de Víctimas de Crímenes de Estado, March 2013.

¹³⁶ Crisis Group interview, members of a victims group, Medellín, 23 November 2012.

¹³⁷ Crisis Group interview, October 2012.

¹³⁸ Article 196; the obligation refers to members of an illegal armed group who have benefited from measures such as pardons and amnesties as a result of a peace process. Crisis Group interview, DDR expert, Bogotá, 7 November 2012.

increased the willingness of some ex-guerrillas to contribute to truth-telling. As one said, “we all owe a little part of the truth”.¹³⁹

Given the conflict's length, complexity and regional particularities, the truth commission will need several years to work, not months, a fact that political actors must accept. It must also be demonstrably independent from government, so victims can trust its integrity. However, with both the negotiating parties and Congress involved in setting up the commission, there are risks of politicisation. A body created in haste by Congress, with little consultation beyond elite circles, would struggle to establish the necessary legitimacy and societal consensus. To minimise this danger, legislation should specify only the general nature of the mandate, while authorising the commission to define competences, organisation and methodology itself. Consultation mechanisms should be established prior to drafting so that the broadest range of views is considered. Victims will need to be active and visible in both the commission's design and operation to foster acceptance in communities with little confidence in government initiatives.

To strengthen the commission's independence and capacity, the international community should give political, technical and financial aid.¹⁴⁰ Policymakers could explore the advantages and disadvantages of foreign members: greater international legitimacy and possibly greater domestic standing in regions where the state lacks credibility, versus the risk that the body might seem overly influenced by outsiders, thus undermining society's appropriation of its report. Regardless, all members must be vetted to ensure none have links to illegal armed groups or are subject to criminal investigations. The chairperson should be of recognised integrity and authority.¹⁴¹ Investigators will be needed who can work with different social groups, such as indigenous and Afro-Colombian communities.¹⁴² The commission should have offices around the country, particularly in areas most affected by the conflict. To present the broadest picture, local stories should be incorporated into a final report that also builds on the factual base developed by the CMH.

Independence must not mean inadequate resources or limited powers. Congress should be prepared to fund the commission throughout. Multi-year funding at an early stage is crucial to ensuring it can carry out its mandate. The government must provide security so it can work effectively throughout the country, ensuring case selection is not skewed and allowing victims to present their histories in public hearings without fear. Commissioners and staff must be guaranteed immunity from prosecution or civil action in relation to their work. The commission should have broad recommendatory powers, particularly regarding the reparations framework and identification of collective damage. It should also be able to make recommendations on vetting officials for corruption or abuse and on guarantees of non-repetition, including necessary institutional reforms.

¹³⁹ Crisis Group interview, former EPL leader, Medellín, 13 November 2012.

¹⁴⁰ A consequence may be that a truth commission receives a concentration of funds and political support, to the detriment of rights NGOs and victims' organisations. The state and donors must ensure that the latter receive the necessary support to continue and expand their work.

¹⁴¹ This reflects an emerging consensus in civil society groups. Crisis Group interview, CMH, 26 February 2013.

¹⁴² “Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource”, ICTJ, May 2012, p. 50.

The commission must be alive to the gender aspects of the conflict and so adopt a gender-inclusive methodology.¹⁴³ Government should guarantee that women participate meaningfully in its design and are adequately represented as members and staff, but this is not enough. Women's groups have described the importance of telling their own stories.¹⁴⁴ A gender-inclusive methodology needs to be part of an overall post-conflict strategy empowering women as citizens and change agents, not solely victims. Congress should explicitly direct the commission to address gender crimes and the gender aspects of the conflict's causes and consequences, as well as women's roles as social leaders and combatants.¹⁴⁵ In particular, given cultural barriers to speaking openly on the subject and victim-blaming behaviour, the commission should explore ways to capture the prevalence of gender crimes and ensure their victims can testify.¹⁴⁶ Hearings reserved for women (including staff) or the creation of particular protective measures should be considered.

The mandate should be ambitious but expectations tempered by what is achievable: the report will not end all disputes around collective memory but should be an important step toward a more comprehensive social process and the start of long-term discussion. Positioning the commission as the sole mechanism for vindicating victims' rights would risk worsening social tensions.¹⁴⁷ It cannot itself create the conditions for reconciliation; it is a vehicle through which various sectors of society might achieve these goals, so should be situated within broader transitional justice measures designed to work in an interconnected fashion.

B. *The Connection between a Truth Commission and Prosecutions*

The long time required for the commission's operation suggests trials should start before it has completed its work, as waiting would not be politically or legally feasible. Unlike some countries emerging from conflict, Colombia has a judiciary not dependent on a truth commission report to begin work. Trials, or other accountability measures, should proceed in stages, in light of analysis by the commission and prosecutors, starting with trials of the most responsible for serious international crimes. This sequencing would provide context and background for possible later trials and centre transitional justice measures on victims.

It would compromise the goal of establishing a shared narrative about the conflict if the commission became implicated in the polarising debate over bringing FARC members to justice. If it were to recommend prosecutions directly – a possibility opened up by the Legal Framework for Peace – there would be a risk of diverting its focus toward narrow, prosecutorial ends, as well as of politicisation.¹⁴⁸ Impartiality and autonomy require moral authority, with certain legal powers – eg, ability to

¹⁴³ "Truth Commissions and Gender: Principles, Policies, and Procedures", ICTJ, July 2006.

¹⁴⁴ See "Memoria para la vida: Una comisión de la verdad desde las mujeres para Colombia", Ruta Pacífica de las Mujeres, April 2013.

¹⁴⁵ Crisis Group interview, leader of women's organisation, Bogotá, 18 February 2013.

¹⁴⁶ "Mujeres y guerra: víctimas y resistentes en el Caribe colombiano", Grupo de Memoria Histórica, 2011, pp. 207-222; Crisis Group interview, women's group, Quibdó, 14 February 2013.

¹⁴⁷ T. Olsen, L. Payne, A. Reiter, "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy", *Human Rights Quarterly*, vol. 32 (2010).

¹⁴⁸ The Legal Framework for Peace envisages the mandate "could include the formulation of recommendations for the application of the instruments of transitional justice, including the application of the criteria for selection [for prosecution]" (Temporary Article 66). This could be interpreted as enabling specific recommendations for prosecution and alternative penalties.

compel appearances and access public and private documents, including those considered classified – but not prosecutorial functions.

Instead, the connection should be indirect. The commission might pave the way for an improved prioritisation process, building on work already underway in the attorney-general's office, by producing a preliminary report on the general patterns of violence. Its final report could highlight information that merits special consideration by the attorney-general. For example, it might point to events it considers should receive further attention from prosecutors. It would not, however, recommend prosecution of specific individuals or analyse the choices made by prosecutors. This strict separation would ensure that its truth-seeking mandate remained uncompromised, while allowing prosecutors to draw on its findings in assessing, for example, patterns of offending by particular groups.

Integrating the certification process described in the previous section into the truth commission could create risks for the latter. Though the certification process would not impact on decisions whether to prosecute, it would grant legal benefits to FARC members that could prove controversial if, for example, it appeared that a participant had not met all requirements. Such controversy could then affect public perceptions of the commission's impartiality. Further, time and resources spent on the certification process could detract from the commission's main purpose of producing a historical narrative. Some institutional separation between the certification process and the commission, however, would minimise these risks. For instance, certification might be administered by a sub-unit of the commission with its own staff. Additionally, there would be significant advantages in connecting the certification process to the truth commission. Information gathered by the commission from victims could be more easily cross-referenced against FARC contributions in the certification process and those contributions used for commission reports.

C. *Truth and Memory*

A truth commission is not sufficient to satisfy the right to truth.¹⁴⁹ Because the conflict has been so long, involved so many actors and had such a wide geographic scope, a commission cannot hope to provide the definitive account of all that happened; that would take decades. Nor can it reveal every truth, particularly in a local context. It can, however, reveal larger truths about the conflict's patterns, using selected cases to illustrate trends and highlighting incidents of violence that demand society-wide acknowledgement. Its most important contribution would be to "[record] a hidden history", especially regarding the networks that enabled the operation of armed actors.¹⁵⁰

This history, as well as more discrete local and personal histories, must be preserved and disseminated. Museums, archives and other forms of memorialisation can also do much to preserve truth and disseminate it to present and future generations. The Museum of Memory will open shortly in Medellín; the Centre for Memory, Peace and Reconciliation has already been established in Bogotá. Additional memory and truth-seeking efforts will be undertaken at more local levels, as civil society rather than state initiatives. Grassroots and other civil society organisations have already established a number of local memory initiatives. However, truth should not "only

¹⁴⁹ Crisis Group interview, leader of victims organisation, Bogotá, 7 November 2012.

¹⁵⁰ Hayner, *Unspeakable Truths*, op. cit., p. 20.

exist in a book” or a museum.¹⁵¹ It should be understood as a social process in which citizens, particularly victims, empower themselves, establish a narrative and extract conclusions and recommendations.

Recovery and preservation of memory both respond to the demands of victims to remember and commemorate and help guarantee non-repetition. Such initiatives also help shift public perceptions of the conflict by challenging received knowledge and revealing hidden histories, including institutional dimensions. They are also a powerful tool with which to combat historical revisionism.¹⁵² Grass-roots truth-seeking and memory initiatives, such as the Hall of Never Again in Granada (Antioquia), are especially meaningful in the many areas where the state is weak or discredited.¹⁵³ Victims often fear that transition means consigning the past to oblivion.¹⁵⁴ A commitment to supporting local initiatives is one way for the state, particularly local government, to rebuild trust. This could include facilitating networks of victims’ organisations and disseminating best practices for operational work. Donors should give non-state groups the financial and technical support they need to undertake community-managed initiatives.

The conflict’s violence has been mostly localised, intense in some areas at certain times but never experienced across the entire country at once. Fighting has often been concentrated in marginal rural areas far from state control.¹⁵⁵ The process of memorialisation reflects this fragmentation. Local initiatives, while strong in specific areas, do not exist in many places.¹⁵⁶ A concerted state and civil society effort is needed to conserve memory, locally, regionally and nationally, including measures to preserve the archives of the state, armed actors and NGOs. There is no one model, however, and this cannot be forced; victims should be empowered to participate in initiatives if they choose, in their own time.

¹⁵¹ Crisis Group interview, victims’ representative, Bogotá, 7 November 2012.

¹⁵² Diane Orentlicher, op. cit., principle 3.

¹⁵³ The project, which has received international donor support, is described in Gabriel Ruiz Romero, “Voices Around Us”, *The International Journal of Transitional Justice*, vol. 6 (2012).

¹⁵⁴ “Nobody wants to forget – their children, their lands, the war; memory is very important for us”. Crisis Group interview, victims group leaders, Eastern Antioquia, 26 November 2012.

¹⁵⁵ Crisis Group Latin America Report N°40, *Moving Beyond Easy Wins: Colombia’s Borders*, 31 October 2011.

¹⁵⁶ A variety of existing initiatives are described in “Memorias en tiempo de guerra”, Grupo de Memoria Histórica, 2009. See also Elizabeth Jelin, “Public Memorialization in Perspective”, *The International Journal of Transitional Justice*, vol. 1 (2007), p. 156.

VI. Reparation

The 2011 Victims and Land Restitution Law, signed into law in the presence of UN Secretary-General Ban Ki-moon, has created a generally appropriate framework for realising central aspects of the right to reparation for the conflict's some five million victims.¹⁵⁷ Progress has been made, but for many victims the promise of comprehensive reparation is yet to be fulfilled. Given high expectations and the law's ambitious objectives, some disenchantment was perhaps unavoidable, and in a post-conflict scenario, other transitional justice elements, including justice and truth-telling, will contribute toward comprehensive reparation. But the government needs to address implementation problems with the Victims Law, allowing new institutions and processes to become settled and effective. How FARC members can individually and collectively make reparation should be explored following a peace agreement.

A. *The Victims Law: An Unfulfilled Promise*

The Victims Law (in force since 2012) aims to provide comprehensive reparation: not only financial compensation from the state, but also other measures, collective and individual, including land restitution. Victims can seek reparation for harms that occurred after 1985 and land restitution for acts that occurred after 1991.¹⁵⁸ The law's comprehensive approach is broadly in line with UN guidelines that understand reparation as "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition".¹⁵⁹ Reparations are mainly for the benefit of victims but have wider effects, for instance by helping to reestablish essential social norms, weakened during conflict.¹⁶⁰

The victims unit, a central government body created by the law and charged with many aspects of its implementation, is off to a fast start, at least in terms of compensation payments from the state ("administrative reparations"). Some 157,000 victims received these in 2012, exceeding the unit's goal for the year of 110,000 and comparing favourably to the old administrative reparations program; the aim for 2013 is to compensate a further 260,000 victims.¹⁶¹ The other area of good progress is reparation for groups, including indigenous communities and political or social organisations.¹⁶² There has been also been an advance in land restitution. By February 2013, the agriculture ministry's land restitution unit had received 32,688 claims

¹⁵⁷ "Gobierno cifra en al menos 5 millones las víctimas del conflicto", *Efe*, 17 January 2013.

¹⁵⁸ The Constitutional Court accepted the constitutionality of the temporal limitations. "C-250/12", 28 March 2012. Victims of acts prior to 1985 have the right to truth, symbolic reparation and guarantees of non-repetition (Victims Law, Article 3(4)).

¹⁵⁹ Principle IX, "Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (Echoed in Victims Law, Article 25).

¹⁶⁰ "Rule-of-Law Tools for Post-Conflict States, Reparations programmes", UNHCHR, 2008, pp. 2-3.

¹⁶¹ Crisis Group interview, senior victims unit official, Bogotá, 4 April 2013; "Gobierno espera reparar en 2013 al menos 260 mil víctimas", *El Espectador*, 12 April 2013. The bulk of payments have been for claims filed under the old reparations scheme, Decree 1290 (2008), now integrated into the Victims Law. Andreas Forer, "Ley de víctimas: primeros resultados", *El Espectador*, 15 March 2013.

¹⁶² The CNRR elaborated an earlier pilot plan for collective reparations that proved insufficient. Crisis Group interview, senior victims unit official, Bogotá, 4 April 2013.

covering 2.3 million hectares.¹⁶³ By June, there had been 77 judgments covering some 10,000 hectares.¹⁶⁴

These achievements have not diminished many victims' deep scepticism about the government's commitment to comprehensive reparation, however. For many, implementation has seemed like a continuation of the previous practice of doling out financial compensation without sufficient attention to other aspects of reparation, such as psycho-social care; they have long seen the payments as reducing the idea of reparation to financial compensation.¹⁶⁵ A victims' representative compared a compensation cheque to charity, rather than the expression of victims' rights.¹⁶⁶ The victims unit's efforts to go beyond payments, eg, providing personalised letters meant to dignify victims, have not shifted the perception that comprehensive reparation will not be forthcoming.

State reparations make sense in Colombia. As the JPL experience suggests, relying on courts to order perpetrators to pay compensation directly to victims in individual cases is not a viable alternative to a mass program, given delays in legal proceedings, the large number of victims entitled to reparations and perpetrators' limited capacity to pay. Likewise, considerations of resource constraints are, in principle, legitimate in the context of a mass reparations program. What is problematic is reducing reparation de facto to a cheque rather than incorporating payments into a coordinated and broader transitional justice program that comprehensively upholds victims' rights.

The implementation record of the first year has increased doubts that it will be feasible to achieve the law's goals by 2021, as required by its provisions. Even officials recognise this schedule may be too ambitious, not least because the peace process may stimulate registration of new claims.¹⁶⁷ The number of victims entitled to reparations could also grow if the negotiations lead to changes to the 1985 and 1991 cut-off dates.

B. *Obstacles to Comprehensive Reparation*

Problems in delivering on the ambitious goal of comprehensive reparation are partly explained by the time required to set up and staff the new institutions created by the law, which, an observer said, caused an "institutional earthquake".¹⁶⁸ Without the instruments and institutions to deliver swiftly, victims' high expectations, which have been disappointed before, always risked being disappointed again.¹⁶⁹ But there are also signs that some difficulties are linked to deeper-rooted problems that, if left

¹⁶³ "Solicitudes de Ingreso al Registro de Tierras Despojadas y Abandonadas Forzosamente", agriculture ministry, February 2013. This is not the total area to be returned; some claims refer to the same land; others are in protected areas, eg, national parks.

¹⁶⁴ Yamile Salinas Abdala, "A dos años de las leyes de víctimas", Indepaz, June 2013, p. 1.

¹⁶⁵ Crisis Group interviews, community organisation, Quibdó, 13 February 2013; local official, Bogotá, 19 February 2013; human rights lawyers, Medellín, 1 February 2013; women's organisation leader, Eastern Antioquia, 27 November 2012; victims organisation leader, Bogotá, 25 February 2013.

¹⁶⁶ Crisis Group interview, victims organisation leader, Bogotá, 25 February 2013.

¹⁶⁷ Crisis Group interviews, *ibid*; transitional justice expert, 28 May 2013.

¹⁶⁸ Crisis Group interview, international organisation representative, Bogotá, 18 February 2013; see, for instance, Andrés Bermúdez Liévano, "La restitución de tierras es una lección para ordenar la casa": Ricardo Sabogal", *La silla vacía*, 2 March 2013.

¹⁶⁹ Crisis Group interviews, senior official, victims unit, Bogotá, 4 April 2013.

unchecked, will continue to impede a truly comprehensive reparation scheme. Much of what jeopardises implementation mirrors what affected reparations under JPL.¹⁷⁰

Victims organisations need to be strengthened. Many are active and highly professional, but particularly local ones operating in conflict regions lack knowledge about the complex legal instruments for securing victims' rights, are financially and organisationally weak and face security threats.¹⁷¹ A minority of leaders may misuse their positions for personal gain.¹⁷² Organisational weakness reduces their capacity to be effective advocates for victims' interests and to shape the law's implementation. Securing effective participation is particularly important for preventing victims from seeing reparation policy as bureaucratic and unrelated to the harm they suffered, a danger that is growing with the concentration on state reparations.¹⁷³ A protocol outlining the conditions and incentives for victims' participation in the law's implementation was issued in May, but without stronger capacity, many organisations cannot fully reap its benefits.¹⁷⁴

More broadly, institutions tasked with protecting victims' rights must become more responsive to their needs. The process for making individual claims under the Victims Law is complex, and there are continuing problems with lawyers and others who ask for a fee to file them.¹⁷⁵ Additionally, victims reportedly sometimes do not receive a response or must petition officials to learn their claim's status.¹⁷⁶ Senior victims unit officials admit that training front-line workers adequately has been a challenge.¹⁷⁷ The unit itself is viewed as having overly centralised procedures, with decisions referred back to Bogotá.¹⁷⁸

Coordination problems within central government as well as local governments and authorities limit progress. The victims and land restitution units exercise strong leadership nationally, but many other institutions do not keep pace. Local capacity and commitment are problematic. Many conflict-affected municipalities lack technical or financial resources to carry out their obligations, including implementing plans to serve victims.¹⁷⁹ Local ombudsman offices in particular struggle to serve as the one-stop-shop for victims the law envisages.¹⁸⁰ In some municipalities, commitment to or familiarity with the law among officials is absent; in others, there is cultural resistance to recognising victims, either because that entails admitting that the

¹⁷⁰ See Crisis Group Latin America Report N°29, *Correcting Course: Victims and the Justice and Peace Law in Colombia*, 30 October 2008.

¹⁷¹ Crisis Group interviews, leader of victims organisation, Eastern Antioquia, 26 November 2012; victims organisation, Quibdó, 12 February 2013; local official, Bogotá, 19 February 2013.

¹⁷² Crisis Group interview, local official, Bogotá, 19 February 2013. Also, "¿Intereses por incentivos económicos obstaculizan protocolo de participación?", Instituto Popular de Capacitación, 24 April 2013.

¹⁷³ Crisis Group interview, human rights lawyer, Bogotá, 19 February 2013.

¹⁷⁴ Resolution 388, victims unit, 10 May 2013; Andrés Bermúdez Liévano, "Las víctimas y el dilema de la participación", *La silla vacía*, 16 April 2013.

¹⁷⁵ Crisis Group interview, victims organisation leader, Eastern Antioquia, 27 November 2012.

¹⁷⁶ Crisis Group interview, human rights lawyers, Medellín, 1 February 2013; religious organisation, Quibdó, 14 February 2013; victims' leader, Eastern Antioquia, 26 November 2012.

¹⁷⁷ Crisis Group interview, senior victims unit official, Bogotá, 4 April 2013.

¹⁷⁸ Crisis Group interviews, human rights lawyers, Medellín, 1 February 2013; NGO, Medellín, 23 November 2012.

¹⁷⁹ Victims Law, Articles 173 and 174.

¹⁸⁰ Crisis Group interview, ombudsman federation, Bogotá, 28 May 2013.

municipality is affected by the conflict or because political actors are linked to illegal armed groups.¹⁸¹

In some areas, the state struggles to provide efficient public services that, under Colombia's decentralised system, often depend on local and regional authorities. Health, education and housing needs thus often go unmet. Access to education and health services is every citizen's right, so allocations in those areas should not be included in budgets as part of reparation policy.¹⁸² But without social services and, more broadly, strong and efficient local institutions, comprehensive reparation efforts will almost inevitably be compromised. Even progress in restoring land to the displaced will be incomplete if communities lack social services. What the state must guarantee beyond access to land is its effective use, which is impossible without functioning education, health and housing services.¹⁸³ A long-term program to substantially improve access to such services is needed.

Paying close attention to community preferences is critical. Bellavista (Bojayá), probably the most ambitious collective reparation effort to date, is illustrative. Following its near destruction in a 2002 FARC-paramilitary confrontation that led to the deaths of some 80 people sheltering in the church, the village was rebuilt a kilometre from its original site on land less susceptible to flooding, with concrete houses, paved roads, electricity and continuous police presence. But this process was largely top-down. State officials implemented plans they had designed without sufficient community buy-in.¹⁸⁴ The idea for relocation, for example, is said to have come from then-President Andrés Pastrana (1998-2002).¹⁸⁵ These efforts had limited reparatory effects. Some community members reportedly now live in the departmental capital, Quibdó, their houses in the new village empty.¹⁸⁶ "Reparation", the community considers, "is more than a house".¹⁸⁷

Finally, the official focus on monetary compensation has shaped victims' expectations in a way that undermines the demand for comprehensive reparation. Some victims believe they cannot expect anything further from the state. The idea that a cheque "pays" for a killed family member has gained currency, a focus that puts memory initiatives at risk.¹⁸⁸ Some victims have also struggled to make good use of payments that can cause family disputes over who is entitled to compensation.¹⁸⁹

¹⁸¹ Crisis Group interviews, victims organisation leaders, Eastern Antioquia, 26 November 2012; NGO, Medellín, 23 November 2012; local official, Medellín, 14 November 2012.

¹⁸² Much Victims Law financing is drawn from mandatory central government transfers to departments and municipalities and is not an additional specific allocation. "Primer informe de seguimiento y monitoreo de los órganos de control a la Ley 1448 de 2011 de Víctimas y Restitución de Tierras", Contraloría General de la República, Procuraduría General de la Nación, Defensoría del Pueblo, August 2012, pp. 17-20.

¹⁸³ Crisis Group interviews, social leaders, Lower Atrato region, March 2013.

¹⁸⁴ "Bojayá: La guerra sin límites", Grupo de Memoria Histórica, 2010, p. 13; "Informe de la Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos sobre su Misión de Observación en el Medio Atrato", OHCHR, May 2002. Crisis Group interviews, victims unit; local official; Bellavista community leader; Quibdó, 12-15 February 2013.

¹⁸⁵ "Bojayá: La guerra sin límites", op. cit., p. 188.

¹⁸⁶ Crisis Group interviews, religious organisation, Quibdó, 14 February 2013.

¹⁸⁷ Crisis Group interview, Bellavista community leader, Quibdó, 14 February 2013.

¹⁸⁸ Crisis Group interviews, local official, Bogotá, 19 February 2013; victims organisation leader, Eastern Antioquia, 27 November 2012.

¹⁸⁹ Crisis Group interviews, Medellín, 14 November 2012; Victims Unit, Quibdó, 15 February 2013; leader of victims organisation, Eastern Antioquia, 26 November 2012; leaders of victims organisation, Eastern Antioquia, 26 November 2012.

There have also been unconfirmed reports of the extortion of victims who have received cheques.¹⁹⁰

C. *Reparation by FARC*

FARC and its demobilised members should be prepared to contribute meaningfully to repair harms they caused, in line with citizens' expectations that armed groups should contribute to reparations.¹⁹¹ Collective acknowledgement of its victims should be the first step; a public apology on behalf of the organisation should be a subsequent part of the process. It must also be prepared to contribute materially. Any reparation scheme should take account of the fact that FARC controls considerable territory, particularly in its eastern plains and southern strongholds and including properties owners had to abandon in the conflict.¹⁹² How much is unknown, but according to agriculture ministry figures, some 37 per cent of all land restitution claims indicate FARC as the responsible actor, even more than the paramilitaries (33 per cent).¹⁹³ It also derives significant revenue from drug trafficking, illegal mining and extortion. Investigations into its financial interests reportedly continue.¹⁹⁴

To demonstrate willingness for peace and a commitment to victims' rights, after signing an agreement with the government FARC should voluntarily disclose not only drug routes, but also the entirety of its assets, including land, cash and investments. The government should confiscate those assets and deposit them in the Reparations Fund for Victims, so that the victims unit could draw on them to make compensation payments.¹⁹⁵ Given the symbolic importance of connecting perpetrators to reparations, such a policy should be pursued, even though efforts under JPL to use paramilitary assets for victims' compensation have been ineffective. The state must remain committed, under the Victims Law, to giving FARC's victims adequate compensation, whether using its assets or public resources. The efforts to seize and use FARC property for this purpose should be complemented by a drive to identify and seize the assets of drug traffickers and paramilitaries.

Reparatory measures can also have a largely symbolic character, such as through contributions to memory initiatives. The existing scheme for reintegrating ex-combatants, designed primarily for demobilised paramilitaries, requires that each demobilised person complete 80 hours of community service. Following a peace

¹⁹⁰ Crisis Group interview, religious organisation, Quibdó, 14 February 2013.

¹⁹¹ "¿Qué piensan los colombianos después de siete años de Justicia y Paz?", op. cit., p. 51.

¹⁹² FARC roundly denies responsibility for displacements and land grabs. Crisis Group interviews, rural development expert, Bogotá, 15 August 2012; land leader, Bogotá, 15 April 2013. See the comments of FARC negotiator Jesús Santrich in "Farc no reconocen despojo de tierras", *Verdad Abierta*, 28 January 2013.

¹⁹³ "Número de solicitudes según Actor Causante del Abandono o Despojo de la Tierra", agriculture ministry, 31 March 2013. Jineth Bedoya Lima, "El país aún no tiene idea del despojo de tierras cometido por las Farc", *El Tiempo*, 7 January 2012. FARC has accused the agriculture ministry of promising faster restitution if claimants state FARC seized their land. Hugo Mario Cárdenas López, "'Gobierno no tendrá foto de entrega de armas': Andrés París, vocero de las Farc", *El País*, 16 June 2013.

¹⁹⁴ On drug and other illegal income, see Crisis Group Report, *Colombia: Peace at Last?*, op. cit., pp. 10-11. "Bienes de las FARC serán usados para reparación a sus víctimas", *El Universal*, 17 September 2012.

¹⁹⁵ This fund was originally established under JPL to administer assets of demobilised paramilitaries. The victims unit now administers it. Victims Law, Article 33.

accord, a similar requirement might be established for FARC members, with their service to benefit communities affected by their actions. This could include collaboration in demining (following training).¹⁹⁶ Given FARC's extensive recruitment of children, service aimed at giving children safe environments might be prioritised. More broadly, local initiatives might become mechanisms for FARC members to acknowledge, apologise and contribute to reconciliation.

¹⁹⁶ Crisis Group interview, DDR expert, Bogotá, 18 February 2013.

VII. Guarantees of Non-Repetition

Guarantees of non-repetition require putting in place measures and social and institutional reforms to ensure that past abuses are not replayed.¹⁹⁷ The efforts to provide truth, justice and reparation outlined above would collectively help to prevent a return to armed conflict but would not guarantee non-repetition unless accompanied by broader measures to improve the rule of law and foster respect for human rights.¹⁹⁸ Effective guarantees require incentives for reintegration of FARC members into society and combating continuing security threats from new illegal armed groups (NIAGs) and other criminal groups, as well as ELN if it does not join the peace talks. To build trust in the state, these should be complemented by vetting and a new drive to improve governance in conflict regions.

A. *Incentivising Reintegration*

Ending the conflict with FARC requires organised measures for the disarmament, demobilisation and reintegration (DDR) of some 8,000 fighters and an estimated three times that number of civilian-clad militias. Fears this process could fail are widespread among victims, who have experienced paramilitary rearmament and the emergence of NIAGs,¹⁹⁹ but ensuring demobilisation and reintegration of FARC members is central to preventing a recurrence of human rights violations. This will not be easy. Full demobilisation on the secretariat's orders cannot be assumed, though, organisationally, FARC is in better shape than often assumed.²⁰⁰ It has a reasonably intact command-and-control structure and a strong hierarchical culture. However, many rank-and-file members may question whether demobilisation would improve their lives. In particular, units deeply involved in the drug economy, illegal mining or extortion may prefer a relatively stable known business to the vagaries of the formal economy.²⁰¹

FARC members attempting reintegration will face stigmatisation, threats and poor job prospects. Society is much less predisposed to welcoming them back than it was for M-19.²⁰² According to survey data, only a third of the population would accept

¹⁹⁷ See Principle IX, UN guidelines, *op. cit.*

¹⁹⁸ Diane Orentlicher, *op. cit.*, principle 35.

¹⁹⁹ Crisis Group interviews, victims' leaders, Eastern Antioquia, November 2012.

²⁰⁰ FARC has repeatedly said it will not demobilise, which it considers "treason against the popular cause". Alfonso Cano, "Pautas para la negociación con el gobierno de Juan Manuel Santos", in *FARC: Por qué nos rebelamos contra el estado colombiano* (Bogotá, 2013), p. 51. It is unclear whether this is a semantic issue or reflects unwillingness to lay down arms until all agreed reforms are implemented. The comments of negotiator Andrés Paris that there would be no weapons-handover ceremony, suggest it may be a substantive problem. The government wants demobilisation and disarmament immediately after an agreement.

²⁰¹ The numbers who may not demobilise are largely speculative. FARC's Southern Block, a prime candidate to defy demobilisation, said in April it would comply "to the letter" with any peace agreement. Joaquín Gomez, "Comunicado", Bloque Sur FARC-EP, 9 April 2013. See also "The FARC, the Peace Process and the Potential Criminalisation of the Guerrillas", *Insight Crime*, May 2013; and Gustavo Duncán, Juan David Velasco, "Revolucionarios pasados por coca", *razónpública.com*, 6 June 2013.

²⁰² Crisis Group interviews, inter-governmental organisation representative, Apartadó, 20 November 2012; victims' leader, Apartadó, 21 November 2012; local official, Medellín, 14 November 2012; former guerrilla, Bogotá, 12 June 2013.

an ex-guerrilla as a neighbour.²⁰³ Prospects for formal employment are dim. Despite the efforts of the Colombian Agency for Reintegration (ACR) to improve links with the private sector, the unemployment rate of demobilised fighters is more than 8 per cent higher than the national average.²⁰⁴ Lack of jobs and stigmatisation will likely remain drivers of violence, as ex-fighters return to the conflict or become criminals, as 10-15 per cent have done to date.²⁰⁵

Negotiators and policymakers, therefore, need to explore ways to minimise these problems. The ACR scheme, which already includes some 27,000 ex-paramilitaries as well as guerrillas (who demobilised individually), is a strong institutional base on which to build,²⁰⁶ and such cities as Medellín and Bogotá run their own reintegration schemes. Programs for reintegrating FARC must learn from all these and take account of the high percentage of women among its combatants, members' overwhelmingly rural background and extensive child recruitment. The peace accord itself may incentivise reintegration.

Despite tensions between (security-focused) DDR and (accountability-focused) transitional justice measures, reintegration may benefit from transitional justice, just as it is crucial to helping the latter achieve its goals.²⁰⁷ Credible and sustainable rules for the legal treatment of FARC members that concentrate the burden of accountability on the most responsible in the organisation would facilitate demobilisation. Many victims also condition the possibility of reconciliation on acknowledgment of responsibility, truth and justice. This is why the certification process for FARC members who are not among the most responsible should be linked to reintegration, reparation and reconciliation, for instance through obligatory community service. More broadly, the reintegration of ex-fighters should be facilitated by the society-wide process of acknowledgment that underpins all transitional justice measures.

Prospects for reintegration will, however, differ across regions. Risks of stigmatisation, security threats or communal tensions are probably lowest in FARC's historical strongholds, including parts of the eastern plains, Caquetá and Putumayo, where it has often been important in structuring daily life and resolving conflicts, and where there are frequently family and social ties between communities and guerrillas.²⁰⁸ Elsewhere, reintegration will require consultation with communities to prepare for the arrival of demobilised guerrillas, then dialogue with them, including through local truth-telling and memory initiatives.²⁰⁹ This is particularly necessary, as

²⁰³ "¿Qué piensan los colombianos después de siete años de Justicia y Paz?", op. cit., p. 98.

²⁰⁴ Crisis Group interviews, ACR staff, Bogotá, 17 April 2013. Only 6,767 of the 22,864 participants classed as employed, held formal jobs.

²⁰⁵ Crisis Group interview, local official, Medellín, 15 November 2012. As of 31 December 2012, 4,719 (8.5 per cent) had been convicted of a crime after demobilisation. Of the 55,308 demobilised to January 2013, according to ACR statistics, 2,858 have been murdered. Crisis Group interviews, ACR staff, Bogotá, 17 April 2013.

²⁰⁶ As of January 2013, the scheme had 27,311 active participants from a total of 30,593, of whom 818 had completed the requirements. ACR's goal for 2013 is to have a further 1,500 complete these. Of 55,308 demobilised fighters, 9,395 never entered the scheme. Of those that did, some 15,320 are no longer active. Crisis Group interviews, ACR staff, Bogotá, 17 April 2013.

²⁰⁷ Lars Waldorf, "Linking DDR and Transitional Justice", in Ana Cutter Patel, Pablo de Greiff, Lars Waldorf (eds.), *Disarming the Past* (New York, 2009), pp. 22-24. Detailed discussion of how a complete DDR program for FARC should be designed is beyond the scope of this report.

²⁰⁸ Crisis Group interviews, community members, Caquetá and Putumayo, 2012.

²⁰⁹ Crisis Group interview, inter-governmental organisation representative, Apartadó, 20 November 2012.

some victims resent the official attention and money directed at ex-fighters, which they view as comparatively generous.²¹⁰ Policies should thus focus not only on reintegration of individual fighters, but also on changing broader dynamics at the community level.²¹¹

Policymakers must also take specific measures to foster reintegration, including for women ex-combatants. Their numbers are unknown, but the substantial proportion of women in FARC is a distinctive feature compared to the paramilitaries.²¹² Demobilisation statistics bear this out. Some 18.5 per cent of the 23,400 demobilised guerrillas are women, compared to 6 per cent of the demobilised paramilitaries.²¹³ Reintegration programs for FARC should thus have a strong gender component, with projects specifically directed at women guerrillas and developed in cooperation with them. The need for a gender-sensitive approach is clear from previous efforts in which women felt sidelined in the design of guerrilla reintegration projects that largely reproduced gender stereotypes.²¹⁴

Given the rural background of many FARC members, the agricultural development aspects of a peace agreement could be part of the solution to job problems, particularly in traditional FARC strongholds. The government needs to ensure that opportunities for rural development benefit demobilising combatants as well as rural victims. Nonetheless, many ex-fighters may move to cities, necessitating increased capacity on the part of municipal authorities to manage the influx and provide innovative solutions to the problems of security and jobs.

Another option might be to offer some individual FARC members the possibility to join a new rural police force. This would need to be subject to rigorous training, as well as eligibility criteria that excluded those directly responsible for serious international crimes. There is some support for this, but with only limited precedents for integrating guerrillas into the security forces from previous peace agreements, the idea will spark strong resistance, not least within existing security institutions and among political conservatives.²¹⁵ Its feasibility would need to be explored with these actors. A rural guard under the existing police would, however, not only create jobs for some FARC, reducing risks of violence and re-armament, but also contribute to filling the security void in the countryside and increasing the security forces' legitimacy in traditional guerrilla areas.

In addition to a shortage of employment opportunities, many FARC members may also lack skills to succeed in the formal economy and struggle with traumatic

²¹⁰ Crisis Group interviews, community leader, Eastern Antioquia, 27 November 2012; NGO leader, Medellín, 13 November 2012; demobilised combatants (guerrillas and AUC), Chigorodó, 20 November 2012.

²¹¹ Crisis Group interview, DDR specialist, Bogotá, 7 May 2013.

²¹² Francisco Gutiérrez Sanín, "Telling the Difference", *op. cit.*, p. 11.

²¹³ "Desmovilización, desvinculación y reintegración de mujeres en Colombia, 2002-2011", Observatorio de Procesos de Desarme, Desmovilización y Reintegración de la Universidad Nacional, May 2011, p. 5, 9.

²¹⁴ See "Aportes desde las mujeres excombatientes de la insurgencia al proceso de paz", Red Nacional de Mujeres Excombatientes, Geneva Call and Colectivo de Mujeres Excombatientes, June 2013.

²¹⁵ Crisis Group interviews, retired senior military officer, Bogotá, 17 July 2012; politician, Bogotá, 30 November 2012. Some EPL and M-19 guerrillas joined the (now abolished) presidential security agency, DAS. They had previously worked beside agents to protect senior guerrillas during negotiations and were subject to career restrictions in it. The conflict limited the scope for broader integration of guerrillas. Crisis Group interviews, demobilised EPL member, Chigorodó, 20 November 2012; DDR expert, Bogotá, 24 April 2013.

experiences of combat and violence.²¹⁶ Recruited young, many may also be functionally illiterate. Under the existing reintegration program, assistance to demobilised fighters includes education, psychological help and preparation for finding a job or starting a business.²¹⁷ FARC child combatants are looked after by the Colombian Institute for Family Welfare.²¹⁸ As well as psychological aid, they will need civilian role models and experiences based in democratic settings to help them integrate into civilian life.²¹⁹

B. *Combating Continuing Violence*

The armed conflict with FARC is at the core of violence in Colombia.²²⁰ Its resolution should broadly set the country on a sustainable path toward reduced violence. However, as happened in El Salvador and Guatemala, there is substantial risk that public security will deteriorate after a peace deal.²²¹ Much depends on how fully FARC demobilises, the behaviour of possible splinter groups and whether FARC's demise creates an opportunity for other illegal armed actors to grow. Combating the likely multiple sources of post-conflict violence is important for both minimising new victims and improving security for demobilised fighters.

In August, President Santos confirmed contacts had been established with the main other illegal armed group, ELN, but talks have not yet officially begun, and ELN has made clear that it is ready to continue fighting if the door to a political end-game does not open.²²² Failure to link it to the current talks would not only cast doubt on post-conflict rhetoric in the wake of a peace agreement with FARC, but could also push the group to ramp up violence in an effort to force the government to initiate talks.²²³ With some 2,500 fighters, ELN's threat is confined mainly to specific areas, including parts of Arauca, Nariño and Norte de Santander.²²⁴ But its capacity could increase if it gives a home to FARC members who refuse to demobilise. The groups overlap in several regions, and their relations, military and political, have improved since they reached a mutual ceasefire in 2009.

More broadly, peace with FARC might fail to end violence in regions where armed actors can extract rents from both legal and illegal economic activities. Particularly at risk are coca cultivation zones, drug-trafficking corridors and mining regions. In

²¹⁶ Crisis Group interviews, demobilised FARC members, 2012.

²¹⁷ Crisis Group interview, ACR staff, Bogotá, 17 April 2013.

²¹⁸ From 1999 to 31 December 2012, 5,075 children and adolescents have been managed by the institute's program for children and adolescents who were in illegal armed groups; the aim is to re-establish their rights and support their family, community and social integration: "Análisis de Tendencias de los Beneficiarios del ICBF", *Observatorio del Bienestar de la Niñez*, no 8. (December 2012), p. 3.

²¹⁹ Sergio Jaramillo, Yaneth Giha, Paula Torres, "Transitional Justice and DDR: the Case of Colombia", ICTJ, June 2009, p. 17.

²²⁰ Crisis Group interview, religious leader, Bogotá, 29 November 2012.

²²¹ Carlos Nasi, *Cuando callan los fusiles* (Bogotá, 2007), pp. 115-119.

²²² "Declaración Política del ELN", Comando Central, 4 February 2013; Crisis Group interview, former ELN commander, Bogotá, 28 February 2013.

²²³ There are some signs this may be happening. In January, ELN kidnapped six Canadian mining company workers, one of whom, a Canadian national, remains hostage; in May ELN killed ten soldiers and kidnapped one in one of its biggest ambushes in years. See also Carlos Arturo Velandia J., "La paz con los eleden", *Semana*, 26 November 2012.

²²⁴ See Santiago Millán, "Variaciones regionales de la presencia del ELN", in David Aponte, Andrés R. Vargas (eds.), *No estamos condenados a la guerra* (Bogotá, 2011), pp. 111-173.

most of these areas, including Antioquia's Bajo Cauca and large parts of Chocó and the Pacific coast, economic incentives for illegal armed actors co-exist with a lack of effective state control and civilian institutions.²²⁵ This configuration looks set to favour NIAGs already heavily involved with drugs and extorting mining operations. Depending on their military strength, these groups might face competition from FARC dissidents who refuse to demobilise.

Post-conflict violence will pose substantial operational and humanitarian challenges. Recognising them as the main threat to public security, the Santos government has intensified the fight against NIAGs. The strategy of targeting leaders has destabilised the groups and reduced their numbers, but also made them more violent.²²⁶ Though they have heavy weapons, fighting them ought to remain primarily a police task, especially as military law-enforcement operations should gradually shrink in a post-conflict environment. However, simply targeting NIAG leaders to provoke organisational collapse has had mixed results; police operations need to be supported by better and more comprehensive criminal investigations and trials aimed at dismantling the underlying support networks NIAGs enjoy in local politics, the business sector and the security forces.²²⁷

NIAG actions have a significant humanitarian impact. They are estimated to be responsible for over 40 per cent of forced displacements nationwide and up to 80 per cent in Antioquia, as well as 30 per cent of human rights violations reported to ombudsman offices in 2012.²²⁸ But this impact has remained largely invisible. Often unclear command and control structures make it hard for communities to negotiate with them. Humanitarian access is stymied, as intermediaries do not know with whom they are dealing.²²⁹ Since the government considers NIAGs to be criminals, not part of the armed conflict, victims have access to humanitarian assistance but are excluded from Victims Law benefits.²³⁰

This is slowly changing. In May the Constitutional Court declared victims of forced displacement by NIAGs within the law's ambit.²³¹ Extending its benefits to the potentially high number of NIAG victims could further increase pressure on the

²²⁵ See Juan Pablo Guerrero Home, "Obstáculos que impiden el fin del conflicto en el Chocó", *Cien días* 77, December-February 2013, pp. 42-47.

²²⁶ The number of groups has fallen from 33 in 2006 to four (Urabeños, Rastrojos, ERPAC, and Renacer). Following surrender and capture of several Rastrojos leaders, the Urabeños appear the strongest (some 2,370 members). Crisis Group interview, police intelligence, 20 June 2013.

²²⁷ See Crisis Group Latin America Report N°41, *Dismantling Colombia's New Illegal Armed Groups: Lessons from a Surrender*, 8 June 2012.

²²⁸ Crisis Group interview, humanitarian organisation, Medellín, 22 November 2012; "La crisis humanitaria en Colombia persiste", Codhes, May 2013, p. 43. "Bandas criminales entre los principales causantes de los hechos victimizantes en el país", Federación nacional de personeros de Colombia, April 2013. According to the ICRC, NIAGs cause at least as many deaths, threats, displacements and disappearances as the guerrillas. "Situación humanitaria", April 2013, p.1.

²²⁹ Crisis Group interview, humanitarian organisation, Medellín, 1 February 2013.

²³⁰ Crisis Group interview, victims unit, Quibdó, 15 February 2013; international agency, Medellín, 22 November 2012; victims' organisation, Quibdó, 12 February 2013. Article 3 (Law 1448, 2011) states "those who have suffered damage to their rights as a consequence of acts of common criminality shall not be considered victims".

²³¹ "C-280 de 2013", noted in "Comunicado no. 19", 15-16 May 2013. The wider implications, eg, regarding which groups' victims will be recognised, will become clearer when the full decision is eventually released. Lower court decisions have also extended benefits under the law to NIAG victims. "Ordenan primera restitución a víctima de bandas criminales", *El Tiempo*, 20 May 2013.

law's budget.²³² There are, however, few viable alternatives. Such an extension would not necessarily imply the existence of an armed conflict between the government and NIAGs but simply ensure equitable treatment for victims of organised armed groups that carry out large-scale operations and cause harms that are quintessentially associated with conflict, such as collective displacement.

Continuing violence would not only produce new victims, but could also jeopardise the transition. Violence against land restitution and human rights leaders by armed actors operating in NIAG structures or independently is a portent of the security problems that may endanger a peace accord's land reform component. Such violence has been on the rise since 2011, in an apparent effort to frustrate land restitution.²³³ Despite the government's protection attempts, the increasing attacks reveal a lack of effective state control over regional political and economic actors who oppose changes to the status quo. Violence will also likely remain an obstacle to victim participation in transitional justice mechanisms. Threats may keep victims from remote areas out of court or truth commission proceedings, hampering evidence-gathering by prosecutors and commission investigations.²³⁴

C. *Strengthening Governance*

Implementation of an agenda of institutional change is also required, involving at a minimum a vetting scheme for public officials and renewed efforts to strengthen civilian institutions. These are mid- or long-term goals, but "strengthening legitimate institutions and governance" is a necessary step toward the broader objective of "breaking cycles of violence".²³⁵

Credible, independent vetting of officials, including members of the security forces, should protect human rights and assist in rebuilding trust in public institutions.²³⁶ Some military units have already been vetted as a condition for certain U.S. military aid, but vetting as part of a transitional justice regime should be uncompromised by previous exercises and institutionally separate from existing domestic institutions such as the inspector-general's office (which can discipline public officials). The vetting authority should focus on identifying the worst human rights abusers but also be able to investigate links between security forces and criminals that remain deeply entrenched, a major reason why communities distrust the security forces.²³⁷ It should

²³² See Jorge Restrepo, Juan David González, Pablo Ortega, "Todas las víctimas del conflicto", *razón pública.com*, 26 May 2013.

²³³ Crisis Group interviews, victims' organisation leader, Quibdó, 12 February 2013; journalist, Bogotá, 18 February 2013; "Restitución: el nuevo conflicto" *Semana*, 23 February 2013. See also "Report of the [UNHCHR] on the situation of human rights in Colombia", 2013, paras 21, 37-41; "Héroes Anónimos", Sistema de Información de Agresiones contra Defensores de Derechos Humanos, August 2013.

²³⁴ Crisis Group interviews, conflict victim, Apartadó, 21 November 2012; attorney-general's office, Medellín, 16 November 2012.

²³⁵ "World Development Report: Conflict, Security, and Development", World Bank, 2011, p. 2.

²³⁶ "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines", UNDP, 2006, p. 9. Vetting is "a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary", "The rule of law and transitional justice in conflict and post-conflict societies [2004]", *op. cit.*, para. 52; Roger Duthie, "Introduction", in Pablo de Greiff, Alexander Mayer-Rieckh (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York, 2007); "Rule-of-Law Tools for Post-Conflict States: Vetting: an operational framework", UNHCHR, 2006.

²³⁷ Crisis Group interviews, social leaders, Lower Atrato region, March 2013.

start in the security forces, in preparation for security sector reform (SSR) over the mid-term.²³⁸ It should then gradually be extended to the judicial branch and other relevant institutions, such as the offices of the comptroller-general and the inspector-general.

Civil society, including victims, should be involved early in designing vetting procedures and could give valuable information on which the vetting authority might begin investigations.²³⁹ The truth commission could also help identify people or institutions to target. Vetting must be case-by-case and abide by principles of procedural fairness, including appeal rights. It should not amount to a general purge. While not a substitute for formal justice, if prosecutions and investigations are proceeding slowly, vetting may “help to fill the ‘impunity gap’ by ensuring that those responsible for past abuses at least do not continue to enjoy the rewards and privileges of public office”.²⁴⁰

Guarantees of non-repetition should involve strengthening institutions, especially those charged with defending victims’ rights and providing social services. Successful administrations have recognised in principle the need to extend the state’s presence in peripheral regions, but most efforts have fallen short. The government’s “consolidation policy” aims to establish rule of law in several strategically important conflict zones by a gradual approach that proceeds from winning military control, to installing civilian governance, then delivering social services.²⁴¹ But military to civilian transitions have made insufficient progress due to dominance of military actors, weak civilian agency and ministry ownership and minimal departmental and local government involvement in policy design and implementation.²⁴²

Conditions to strengthen civilian institutions should improve in a post-conflict environment and much of what the parties are negotiating in Havana can be understood as an agenda of institutional change in the regions most affected by the conflict. But with violence likely to continue in several conflict-affected areas, lessons from implementation of the consolidation policy – such as need to ensure post-conflict reconstruction is civilian-led – should inform any new efforts to provide democratic governance and improved services. Policymakers and donors may be tempted to focus on extraordinary, temporary institutions such as the truth commission, victims unit or possible special prosecution units, but making civilian law enforcement, municipal and state agencies and national ministries effective and responsive to the needs of victims and the population in regions battered by decades of violence would also be a vitally important contribution to peace. Post-conflict international technical cooperation should thus focus on helping extend the full range of government institutions to these areas.²⁴³

²³⁸ FARC has tried to include this issue in the talks, but the government will almost certainly continue to block it. SSR details should not be discussed there but rather result from a national debate involving military and police leaderships. Given continuing security threats, including from possible FARC splinter groups and potentially ELN, there is no rush to overhaul security institutions immediately after a peace accord. But over the medium-term SSR is imperative.

²³⁹ “Vetting Public Employees”, UNDP, *op. cit.*, p. 19.

²⁴⁰ *Ibid.*, p. 9, 19; “The rule of law and transitional justice in conflict and post-conflict societies [2004]”, *op. cit.*

²⁴¹ A review of the consolidation policy under Santos cut the municipalities in which it is being implemented from 101 to 51, in seven regions (formerly fifteen). Crisis Group Latin America Reports N°34, *Colombia: President Santos’s Conflict Resolution Opportunity*, 13 October 2010, pp. 10-12;

²⁴² Crisis Group Report, *Moving Beyond Easy Wins*, *op. cit.*, p. 24; Adam Isacson, “Consolidating ‘Consolidation’”, Washington Office on Latin America, December 2012, pp. 14-15.

²⁴³ Crisis Group interview, transitional justice specialist, Bogotá, 18 February 2013.

VIII. Conclusion

Negotiators need to agree on the outlines of a legally, politically and administratively viable transitional justice regime to uphold victims' rights. This requires prosecution of those most responsible on both sides for the worst crimes; a strong, independent truth commission; comprehensive reparation for all victims that extends beyond financial compensation; and measures to guarantee non-repetition. The prospects for this are gradually improving. As the talks have gained momentum, and the idea that the conflict could reach a negotiated end has become a realistic proposition, both parties have made progress in recognising responsibility for crimes committed during the conflict. But reaching a sustainable agreement on transitional justice is not a given. The growing time pressure, absence or dispersal of transitional justice issues across the agenda, and remaining doubts about whether the parties will acknowledge their responsibilities and allow prosecutions, all pose risks this opportunity could be squandered.

The negotiators face a clear choice: to pay the political costs for peace now or risk a stalled, even aborted transition. In a democracy, no peace agreement is immune to legal and political challenges, but one that does not plainly respect victims' rights risks being caught in a vicious cycle of social and political polarisation ahead of the 2014 elections, lengthy legal scrutiny and difficult legislative battles. By contrast, a comprehensive transitional justice agreement could foster a virtuous cycle of broad popular support, reasonably stable expectations about its legal viability, swift Congressional implementation and a credible path to reconciliation. That would not just serve the long-term interests of both the government and FARC. It would also be a significant step toward lasting peace.

Bogotá/Brussels, 29 August 2013

Appendix A: Map of Colombia



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