



Transitional Justice and DDR: The Case of Colombia

Sergio Jaramillo, Yaneth Giha and Paula Torres

Research Unit
International Center for Transitional Justice

June 2009

Transitional Justice and DDR Project

This research project examines the relationship between disarmament, demobilization and reintegration (DDR) programs and transitional justice measures. It explores the manifold ways in which DDR programs may contribute to, or hinder, the achievement of justice-related aims. The project seeks not only to learn how DDR programs to date have connected (or failed to connect) with transitional justice measures but to begin to articulate how future programs ought to link with transitional justice aims. The project is managed by Ana Patel, Deputy Director of the Policymakers and Civil Society Unit at the ICTJ. For more, visit www.ictj.org/en/research/projects/ddr/index.html.

Acknowledgements

The International Center for Transitional Justice (ICTJ) wishes to thank the Federal Public Service of Foreign Affairs of the Government of the Kingdom of Belgium, the Ministry of Foreign Affairs of the Republic of Finland, the Ministry of Foreign Affairs of the Kingdom of the Netherlands, and the Ministry for Foreign Affairs of the Kingdom of Sweden, whose financial contributions made this research project possible.

About the Authors

Paula Torres Holguín is a lawyer who received her law degree and M.A. with honors from the University of Los Andes. She has experience in researching, teaching and presenting on topics such as constitutional rights, transitional justice, international litigation and judicial theory. Paula coordinates the pro bono department of the law firm of Gómez-Pinzón and Zuleta. She is an active member of the pro bono committee of the Chamber of Legal Services of ANDI and is working to implement the Pro Bono Declaration for the Americas Cyrus Vance Center for International Justice in New York in Colombia. Previously, she worked for the Fundación Ideas para la Paz and led the work on legal issues relations to conflict and peace negotiations.

Yaneth Giha Tovar is the Director of Information and Technology for the Colombian Ministry of National Defense, where she designs, manages and evaluates the defense and security policies regarding science and technology. She holds an M.A. in War Studies from King's College London and in Political Studies from Pontificia Universidad Javeriana, Bogotá, in addition to degrees in Conflict Resolution and Economics. As Post-conflict Director at the Fundación Ideas para la Paz Yaneth coordinated post-conflict projects, studies and research, including monitoring and analysis of reintegration processes. She has taught at Universidad de los Andes, in addition to publishing studies such as "El Dividendo de Paz" (The Peace Dividend) and "El Gasto Militar" (Military Expenditures).

Sergio Jaramillo Caro is Vice Minister of Defense in Colombia. He studied Philosophy and Philology at Trinity College and the University of Oxford. He has an M. Phil in philosophy from Cambridge University and was a doctoral candidate in Greek at the University of Heidelberg. He has been an adviser to the Ministry of Foreign Affairs, was in charge of diplomacy for peace (2000-2001), and was Political Counselor of the Embassy of Colombia in France (2001-2002). He was Adviser for Political and Strategic Affairs of the Ministry of Defence (2002-2003) and drafted the policy of Democratic Security. From 2004 to 2006 he served as director of the Fundación Ideas para la Paz.

About ICTJ

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit www.ictj.org.

© International Center for Transitional Justice 2009. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without full attribution.

Table of Contents

Introduction.....	4
What Transition?	5
The Fragmented Transition	7
Description and Assessment of the DDR Process in Colombia.....	9
Peace Negotiations.....	9
Political Integration.....	11
The Context of the Peace Agreements	12
The Government Response	13
Collective Demobilizations	13
Individual Demobilizations	14
Institutional Framework.....	14
Presence of Women in the Armed Groups	15
Minors in Conflict	16
Components of the Reinsertion Program	18
Financial Support.....	18
Reintegration and Employment	18
Educational Integration.....	21
Access to Health Care	21
Balance: From Reinsertion to Reintegration.....	21
Disarmament and Rearmament.....	23
Disarmament	23
Rearming of Demobilized Paramilitary Groups.....	24
Justice, Victims, Truth and Reparation	25
Justice	25
The Justice and Peace Law	26
Institutional Framework of the Justice and Peace Law.....	27
The Requirements of the Justice and Peace Law.....	28
List of Candidates	29
Criminal Sentencing	30
Alternative Sentencing.....	31
Centers of Confinement: Serving the Sentence.....	33
Advantages and Disadvantages of the Judicial Transition	34
The Truth	35
The Victims	37
Reparation	39
Reparation in the 1990s	39
The Concept of Reparations.....	40
Some Changes in Reparations	42
Conclusions	44

Introduction

Colombians have lived through more than sixty years of ongoing conflict that has only been exacerbated with time. Citizens have thus been, and still are, witnesses to and victims of the most terrifying crimes, including massacres, kidnappings, selective killings and torture, as well as many other atrocities. More than four armed groups fighting simultaneously in a conflict fueled by drug trafficking, extortion and corruption are responsible for this violence; there are therefore a large number of combatants in the country. The Colombian state currently faces the challenge of reintegrating into civilian life more than 43,000¹ members of armed groups who have demobilized as a result of several years of negotiations, a task that cannot be undertaken lightly.

The collective demobilization began in 2003, when the government signed the Santa Fé de Ralito peace agreement with acknowledged members of the paramilitary groups, assembled together with the specific purpose of peace negotiations in an organization known as the United Defense Forces of Colombia [*Autodefensas Unidas de Colombia*] (AUC). This collective process of demobilization ended in April 2006, and has been preceded, paralleled and followed by a national process of individual demobilization and reintegration of combatants who decide on their own to return to civilian life, without there being any peace agreement between the Colombian government and the armed group to which they once belonged. As a result, there is a dispersal of demobilized persons throughout the country.

This paper analyzes the current Colombian policy of disarmament, demobilization and reinsertion (DDR) in light of the principles of transitional justice—that is, a framework according to which justice, truth and reparations are crucial for achieving the transition to peace, democracy and national reconciliation. Additionally, this paper compares the current DDR program in Colombia with the program carried out in the 1990s—a program that was also carried out in the midst of the armed conflict. The armed conflict in Colombia and the strategy for demobilization have changed considerably since the 1990s, both in terms of the number of ex-combatants and of the mechanisms through which they have demobilized. From 1989 to 1994, the Colombian state signed separate peace agreements with nine guerrilla groups,² made up of approximately 4,700 combatants who

opted for demobilization and civilian reinsertion programs. Some also benefited from the 1991 constitutional reform that provided for the active participation in politics of the demobilized. At present, several members of those organizations continue to be active in politics and in public life, mostly in opposition political parties. Therefore, the peace process in the nineties and its political juncture represent a historical moment that is worth examining more closely, as the consequences of the measures adopted then continue to be an open wound in the country's history.³ It shows that, although there was a DDR process following negotiations in the 1990s, national reconciliation was not fully achieved regarding past events. This paper holds that this lack of reconciliation is partly due to the fact that initiatives aimed at ensuring truth, justice and reparations did not accompany the DDR process.

Besides the fact that it contemplates two separate mechanisms for demobilization, very large numbers of ex-combatants and an experience of demobilization in the recent past, any analysis of the DDR and transitional justice process must take into consideration basic conceptual problems that are key distinctive factors in the Colombian case. The main problem lies in the application of the instruments provided by transitional justice when it is not clear in what ways the case of Colombia may be conceived as a real "transition." This problem is twofold: the transition, from a *political-institutional* perspective, which amounts to both a theoretical and a practical problem in itself, as it refers to the *aims* used as parameters to judge the success of the transition; and the transition from a *temporal* perspective, that of the material limitations imposed by an unfinished transition.

What Transition?

The conceptual framework for transitional justice has been built on a series of paradigmatic transitions—first and foremost the transitions of the dictatorships in the Southern Cone, the communist regimes in Eastern Europe, and the apartheid rule in South Africa—which, while not covering all the relevant transitional situations, have shaped the terms of the debate. A recent study by Eric Posner and Adrian Vermeule, in which a considerable part of the main literature in the field is reviewed, helps to illustrate this point. Posner and Vermeule take as their point of departure a simple conceptual assumption: "Every transition creates a divide between the old regime and the new regime."⁴ They therefore expressly articulate the basic assumption of this discussion: that there was something before and that there is something institutionally different afterward. Some authors, including both Ruti Teitel and David Gray, even speak of an *ancien régime* to refer to the previous state of affairs.⁵ This rupture, characteristic of transitional justice, has led theoreticians to pose the following questions: What should the relationship and equilibrium be between the demands of justice vis-à-vis the previous state of affairs and the construction of a new institutional order? What types of transitional measures are best suited for constructing that new order? What is the relationship between ordinary justice and such measures?

It is not surprising that, for many authors, the type of order and institutions that arise from a transition become the measure of its success. Once again, Posner and Vermeule: "Every transition

seeks political reform, and the transition can be judged by the quality of the political reforms achieved.”⁶ Given that the debate around transitional justice is naturally focused on *justice*—and not, for example, on the political order—the “political reforms” that mark the success of the transition are frequently identified with the basic elements of modern constitutionalism. These elements include a constitution that guarantees citizens the fundamental rights violated under the ancien régime, with a constitutional court to undertake the safeguard of those rights through constitutional review and the decision of constitutional actions.⁷ Now, if this was the measure of a successful transition, one would have to say that Colombia has already achieved it, for it is hard to imagine a more progressive constitution than the one adopted by Colombia in 1991,⁸ or a more active Constitutional Court than the one established by that same instrument. Since its creation in 1992, the Court has studied no fewer than 4,082 cases in which plaintiffs challenged the constitutionality of legal statutes, and has reviewed 9,858⁹ *acciones de tutela*, or constitutional actions that protect fundamental rights, very likely an international record.

In the case of Colombia, the problem is that there is no transition under way from an ancien to a nouveau régime; rather, the nouveau régime has yet to take root.¹⁰ From this point of view it would be, rather, the *materialization* of the law—the effectiveness of the institutions, citizen culture and so on—and not the *advisability* of the institutional framework, where one would have to look for the similarities between the Colombian case and the paradigmatic cases of transitional justice. Gray, for example, distinguishes “pre-transitional” states from “stable” states precisely in that “in stable states there is a close identification between norms and the norm. Wrongs, as crimes, are the exception, perpetrated in violation of established and regularly enforced legal codes.”¹¹ It is no doubt true that in many rural regions of Colombia where the rights to life and property have been systematically violated, the “norm” is very far from the norms of society in general. Hence the similarity with the *material* situation of the cases mentioned: the volume of serious violations exceeds the capacity of the Colombian judicial system, just as it would have exceeded the capacity of the justice system in South Africa, had there been an effort to investigate all the violations perpetrated.¹²

The scandal the Colombian media refers to as “*parapolítica*,” wherein Colombian politicians have been questioned by judicial authorities regarding their close ties with illegal, primarily paramilitary but also guerrilla groups,¹³ is another way of showing that, in the case of Colombia, one could only speak of an adequate institutional framework in terms of form, but certainly not in terms of content. The regime, though institutionally democratic, is contaminated by the interests of the illegal groups: both those that are demobilizing and those continuing at war. This situation suggests some difficult questions currently in vogue in the country, including: Is institutional reform needed as an element of transitional justice? Should Congress be dissolved as part of this process? If Congress were to be dissolved, should this happen now, in the future, or once the investigation of all the *parapolíticos* have come to an end? Is a process of institutional vetting and a strict application of judicial standards the best way out of surviving institutional instability? In any event, and regardless of the answers one may give to these questions, the transition in Colombia should not try to propose measures aimed at creating a new “regime”; rather, its efforts should be aimed at consolidating the already-existing formal constitutional order.

Institutional capacity is exceeded—a circumstance typical of a de facto “transition”—above all due to the persistence of the armed conflict and the effects of a vast illegal economy with drug trafficking at its core. From that perspective, the Colombian transition should be seen not as an instrument for peacebuilding in the short term, but as the set of measures meant to articulate and accompany the end of the conflict. That is a reasonable position, yet it requires two caveats.

First, that the transition’s aim would be the proposal of a series of measures, leading not to the establishment of a new “regime” but to the consolidation of the existing constitutional order, creating, at the same time, a space for the integration of armed groups still outside its scope. The problem is that the political-military strength of each of these groups—and therefore their willingness to avail themselves of those measures—varies considerably. The question, then, is whether it is possible to carry out a transition with a “variable geometry” in which the transitional measures vary from group to group, even when they are guilty of the same type of violations—war crimes, crimes against humanity—and should therefore be covered by the same measures.

The second caveat is that, in Colombia, it is increasingly difficult to distinguish the activities of the illegal armed groups from those of common criminals. As will be discussed in sections below, the difficulty in drawing limits between political criminals and ordinary criminals with no political aims became evident in the recent negotiation with the paramilitaries. Yet, these groups are not the only ones including men whose behavior corresponds increasingly to that of major drug traffickers. In what sense could the latter be protagonists in a “transition”?

These considerations are important because, before establishing the possible links between the DDR process and transitional justice, one must ask *what the purpose of the transitional measures is*. In the case of Colombia, such measures have to be set forth in the context of a wider project for peacebuilding. This is not necessarily a contradiction: the lack of a “transition” in the classic sense from one regime to another would suggest that, if properly applied, transitional measures could help strengthen the constitutional order. More than “justice for transition,” Colombia appears to be in need of “justice for consolidation.”

The Fragmented Transition

If we accept this particular understanding of a transition in Colombia, we face a further challenge: it is a partial transition. Three major illegal groups operate in Colombia: the Revolutionary Armed Forces of Colombia [*Fuerzas Armadas Revolucionarias de Colombia*] (FARC), the National Liberation Army [*Ejército de Liberación Nacional*] (ELN), and the AUC. The FARC emerged in the mid-1960s and were based in Colombia’s periphery—the so-called agricultural frontier—where they slowly grew, with ties to the Communist Party. The FARC then made a qualitative leap in size in the 1980s because of the cocaine economy, kidnapping for ransom, and extortion, to become what it is today: a major rural army with sixty-nine fronts and 12,515 men.¹⁴ The ELN was created approximately at

the same time (1964). It followed the Cuban strategy of establishing “foci” in rural areas that expanded throughout the territory, but with less success than the FARC. The ELN practically disappeared in the 1970s, but recovered in the 1980s, thanks to the group’s new business of extorting multinational companies, diverting local government budgets and kidnapping for ransom, which it practices on a large scale. In 2002 alone, the ELN kidnapped 796 persons.¹⁵ Ransoms obtained through these kidnappings provided funds for the group to base itself in several rural communities, and to maintain a force of approximately 3,500 men. The AUC, on the other hand, is a confederation of disparate groups that emerged in the early 1980s from the intersection of drug-trafficking interests and the reaction of rural landowners to attacks and kidnappings perpetrated by guerrilla forces.¹⁶ In 1997, many of these organizations came together as a sort of federation under the umbrella of the AUC, although the composition of this group is quite fluid, depending mainly on the relationships among the commanders of the different divisions. In many cases, these commanders are also the leaders of drug-trafficking networks. The AUC had about 13,000 combatants representing divergent organizations scattered throughout the country at the beginning of the 2002 negotiation process, which will be discussed below.¹⁷

Of these three organizations, only the AUC have entered into a collective DDR process, based on negotiations with the government. These negotiations began with the Santa Fé de Ralito agreement, the first to include elements of transitional justice in a Colombian government negotiation with an armed group, elements that became evident and were debated around the Justice and Peace Law (see below). The fragmented character of the Colombian conflict was thus transferred to the DDR process and the measures adopted to meet the transitional justice standards, resulting in a DDR process that, for the most part, benefits former AUC combatants, but also individuals who decide to abandon active guerrilla groups. This poses huge challenges to the aims of transitional justice—for example, the fact that the different groups will negotiate separate agreements with the government. This means that there is no assurance that the basic principles of justice, truth or reparation will be recognized across agreements. On the other hand, there are certain practical circumstances derived from the continued conflict that make it impossible for any of the transitional justice measures to be fully implemented.

As Pablo de Greiff has noted,¹⁸ the task of reparations in this context faces an insurmountable obstacle. It is impossible to plan for administrative reparation programs if the universe of victims for which it is designed is open-ended, since the conflict continues and only one of the groups has demobilized. Moreover, as long as the program is restricted to the victims of that group, serious injustices would be made vis-à-vis the victims of other groups, distorting the purposes of reparations. The same argument holds for transitional measures aimed at truth: it is difficult to engage in a serious exercise of clarifying and reconstructing the historical truth of a conflict when it has not ended—that is, when armed groups continue to operate illegally and the national armed forces continue fighting. Both for reparations and truth, it would become impossible to “draw a line” demarcating acts of the past, which is certainly one of the aims of transitional justice.¹⁹ This line is particularly important in terms of reconciliation, for it is hardly realistic to ask people who see themselves as enemies to engage in a process of reconciliation. As for justice, responsibility cannot be

properly adjudicated if the facts are not clear, and if reparations are not guaranteed, the punishment has a limited purpose. If transitional justice is meant to be achieved in the broad sense, as the result of a holistic approach whereby a set of transitional measures are implemented, including prosecutions, truth-seeking, reparations and institutional reform, it cannot be attained in a comprehensive manner if the other measures are incomplete.

This is not an appeal to pessimism. Undoubtedly, implementing a whole series of measures—assistance programs to victims that support their participation in judicial proceedings, investigative commissions that collect information that may come up in connection with those proceedings, support for the forensic work of the Attorney General’s Office, among others²⁰—could very well help to lay the foundation for a transition. These measures have to be considered in addition to offering victims the support they urgently need. However, the point is that any transition process in Colombia will necessarily be *cumulative*; even inauspicious beginnings may later set important processes in motion. Nonetheless, one must also weigh the costs of a possible failure of the transition measures. A great deal now depends on implementation, both in the case of transitional justice and with respect to DDR programs. These two processes require a high level of sophistication, precisely because they unfold in the midst of conflict; and neither of these processes at present provide much of a basis for optimism. This leads to a final and difficult question: In such an uncertain scenario as that of Colombia, what is preferable, a poorly executed justice that can erode or undermine the basic principles of transitional justice—and that may also have harmful effects on the rest of the judicial system—or the absence of justice altogether? If, in addition, unsatisfied expectations exist with respect to DDR and transitional justice, the result may be the creation of a barrier not only to justice but also to peace.

Description and Assessment of the DDR Process in Colombia

As mentioned in the introduction, the current DDR process is not the first in Colombia, nor the only one to unfold amidst the conflict. There are important precedents from the previous decade that must be analyzed in order to understand the process today. We shall therefore briefly present an examination of the evolution of the DDR processes in Colombia, and an analysis of their implementation and outcomes, in light of the transitional justice elements of truth, justice and reparations.

Peace Negotiations

Prior negotiations with armed groups constitute an essential framework for the current implementation of the DDR process. Throughout these negotiations, the government and dissident groups have established benchmarks and guidelines that will have an effect on the future conditions for the reinsertion and reintegration of armed groups.

Taking negotiations of the peace agreements as the point of departure, it is possible to identify divergences between these two DDR processes. In the 1990s, the government negotiated peace accords with guerrilla groups. These groups are completely different from the paramilitary groups that are the protagonists in the current negotiations. While there were ideological nuances among the guerrilla forces that demobilized in the nineties, all were leftist organizations that called for socioeconomic justice and the participation of marginalized sectors in the country's political life. These guerrilla groups spawned the creation of the paramilitaries currently engaged in the DDR process today. Specifically, the current illegal groups mostly came about as self-defense units to fight against the guerrilla actions in the country dating from the mid-twentieth century. These paramilitary groups were not necessarily created with a clear political ideology; rather, they came together to defend properties and businesses, licit and illicit, in areas of the country where there was an absence of state authority. One essential characteristic of these paramilitary groups is their close relationship with illegal drug trafficking: several members of these groups are alleged criminals sought for extradition to the United States on trafficking charges.

These qualitative differences among the armed groups are reflected in the respective negotiations. In the 1990s, the government solved the challenges of DDR by granting amnesties and pardons, after giving political status to the guerrilla groups with which it negotiated. Political recognition was a necessary step for negotiation, reaching agreement and signing a peace agreement. At that time, this requirement did not pose major problems, for it seemed relatively easy to accept the political status of guerrilla groups guided by political ideals, whose actions were generally crimes against the institutional structure, with the exception of the perpetration of several crimes against humanity. It was, therefore, easier to argue that the government's authorization of a normative mechanism for demobilization, established under Law 418 of 1997, applied only to those armed groups whose political status was recognized.

During the government's negotiations with the AUC, however, the need for political recognition that was required under Law 418 of 1997 for demobilization turned out to be a major obstacle. The debate in Colombia focused on the implications of eliminating the requirement to recognize the political status of the armed groups as a condition for beginning negotiations. Given the nature of the paramilitary groups, political recognition carries with it the possible perception of granting power to organized criminal groups. Nonetheless, there was an urgent need to put an end to the illegal activities and violence of the paramilitaries. The state decided to establish a new law, Law 782 of December 2002, making it possible to grant legal benefits to members of paramilitary groups without implying any recognition of their political status.

The problem of political recognition of the paramilitaries continues to be important, because the possibility of their receiving the benefits offered by the Colombian state to those who demobilize, and their extradition to the United States, depends on the definition of their illegal activities. Drug trafficking is, therefore, a critical factor in the current peace process. The threat of extradition to the United States has led several paramilitary leaders to participate in the peace process in Colombia, and to seek recognition as political criminals, as this protects them from extradition.

Political Integration

In the 1990s, the government decided to recognize the political nature of the armed groups that demobilized at the time, and adopted a policy of seeking peace through negotiations. One very significant gesture in this negotiation process was the proposal, presented in Congress in July 1988 by the Virgilio Barco administration, to reform the 1886 Constitution. The main purpose of this reform was to open up the political regime to the opposition parties, one of the main demands of demobilized groups. Although the reform was not adopted, this initiative succeeded in convincing the April 19th Movement [*Movimiento 19 de abril*] (M-19) to engage in a dialogue with the government in 1989 that culminated in the signing of a peace agreement the following year. This event contributed to the mobilization of civil society in favor of the approval of a new constitution through the election of a National Constituent Assembly [*Asamblea Nacional Constituyente*] (ANC). Other major factors contributing to this mobilization included an increase in political violence, which took the lives of several presidential candidates;²¹ the violent pressures of drug traffickers; and the urgency of moving forward with the dialogues that the government had initiated with other guerrilla groups, as well as the reluctance of Congress to adopt constitutional reforms. Although the decision to convene an ANC was never part of the formal agenda negotiated with the guerrilla groups, a favorable climate was created that enabled the César Gaviria administration (1990–1994) to continue the negotiations its predecessor had initiated, and to sign seven peace agreements from 1991 to 1994.

The legal mechanisms used to reinstate the guerrilla groups to legality—pardon and amnesty—led to granting the demobilized armed groups of the 1990s their main demand: space in the institutional regime for their political participation, given that previously the state had systematically excluded all expression of their points of view. Opening the system was, therefore, one of the fundamental motivations that drove armed groups to demobilize.²² For this reason, all the agreements signed by the demobilized groups and the government during the 1990s included a component of political benefits. These benefits included the possibility of: (1) participating in the ANC; (2) creating legal political movements with the support and guarantees granted by the government; and (3) political participation through the appointment of two representatives of the movement to Congress.²³ The political participation of reinserted armed groups in the 1990s has, however, been subject to internal criticisms. Specifically, for example, the fact that the government did not offer a system of benefits to level political imbalances and disadvantages faced by those, like the demobilized groups of the 1990s, that set out to build a new political project.²⁴ In addition, the government focused on building national political projects, when the demobilized groups had their greatest strength at the local level. Even so, albeit with certain limitations, the groups that demobilized in the 1990s have participated and continue to participate significantly in national politics. The democratic system became more inclusive, and leftist parties now participate, with extensive guarantees, in the political debate.²⁵

The Context of the Peace Agreements

It is clear that the interests of the parties to the different negotiations in Colombia have determined the content and, above all, the conditions for implementing the peace agreements. In the mid-1980s, after two decades of confronting the insurgent threat, the government decided to recognize the political nature of these groups and adopted a policy of peace-seeking through negotiations. The initiatives for dialogue led to the adoption of a law of amnesty and pardon, whose provisions the government amended over time. At first, these amnesties and pardons were broad, but later were limited exclusively to political and related offenses. Subsequent legislation explicitly excluded crimes against humanity, limiting the scope of pardon and amnesty. In general, these peace agreements took the form of documents whose contents were very similar and primarily political.²⁶

Unlike the demobilization of guerrilla groups from 1990 to 1994, the negotiations with the paramilitaries did not include specific agreements on how the reinsertion process would be implemented. The only document signed by the parties in which this issue was mentioned was the Santa Fé de Ralito agreement, which included the following: “The government shall pursue all actions necessary to reincorporate them [paramilitary members] into civilian life.” The agreements that resulted from the current negotiations were quite informal and general texts. The one exception was the document resulting from negotiations with the paramilitary group Cacique Nutibara Bloc [*Bloque Cacique Nutibara*] (BCN), which explicitly contemplates assigning specific tasks in the DDR process to regional authorities, such as the Office of the Mayor (*Alcaldía*) in Medellín.²⁷ As discussed below, this is an exception, insofar as the rest of the country’s regional authorities have seldom participated in establishing or implementing agreements, and have not been involved in the AUC negotiation and demobilization process. Thus, in this regard, the government was usually free to determine how the reinsertion process should be implemented. Finally, it was twofold: (1) the DDR process, provided to all ex-combatants demobilized from the AUC; and (2) a bill, submitted by the executive to Congress in 2003, on *alternatividad penal* (alternative criminal sentencing). The bill itself was the first step toward the adoption of the Justice and Peace Law (JPL).

The Colombian government’s process with the AUC is unique in that the conditions for demobilization do not appear in independent peace agreements, but in a body of statutes and bills subject to democratic debate by Congress, reviewed by the Constitutional Court²⁸ and regulated by the executive. Thus, although the proposed legislation originally introduced by the executive may have included the results of the negotiations with the AUC, it was significantly modified in such a way that even today there is no certainty as to the terms of the DDR process in Colombia, nor as to whether the paramilitaries will comply with conditions they did not agree to.

The Government Response

Collective Demobilizations

Those groups that demobilized as a unit (*bloque*) within the framework of the peace agreement between the Colombian government and the AUC are included in the collective demobilization process. In 2003, two large units demobilized collectively, the BCN and the Peasants Defense Forces of Ortega (*Autodefensas Campesinas de Ortega*). After a one-year period, during which the negotiations were broken off and restarted, demobilization resumed in 2004, culminating in August 2006, when a faction of the Elmer Cárdenas Unit demobilized. As a whole, from 2003 to 2006, thirty-nine demobilization ceremonies took place, in which 31,687 members of the defense forces abandoned their military activity, turning in more than 18,000 weapons.

A representative from each illegal armed group provided the High Commissioner for Peace with a list of group members and persons to be demobilized in the future. The combatants personally brought their weapons to specified locations in order to begin with the registration stage. Officials verified their identities²⁹ and combatants then provided information used to create individual profiles, as a basis for designing their future reinsertion and reintegration processes. The objective of this registration was not to verify the judicial or criminal record of the demobilized, but rather to create personal files so that the DDR programs could respond to their needs. The System for Accompaniment, Monitoring, and Evaluation (SAME) carried out the survey. SAME's work is predicated on a system developed and coordinated by the International Organization for Migration (IOM), which accompanies, monitors and evaluates the process of reincorporation at the regional level. The objectives of SAME are: (1) to establish and evaluate the degree of permanence of the beneficiaries in the program; (2) to evaluate the beneficiaries' progress; (3) to detect, through early warnings, specific difficulties in the process; and (4) to gather information on the beneficiaries' activities and milieu. In order to finish the procedure, demobilizing combatants were required to provide a free declaration before prosecutors in the area, in order to check if they had any outstanding arrest warrants or were involved in any kind of criminal proceedings. In most cases, authorities had no records thereof, nor had they initiated any proceedings against the demobilizing combatants.³⁰

The lists provided by the representatives of the armed group during demobilization were of great importance for the demobilized; their inclusion meant they were eligible to receive the benefits of the reinsertion program.³¹ Since no mechanism was designed to verify the information provided by the paramilitary's commanders, the lists were accepted at face value. Therefore, in collective demobilizations, all the members of the group received the benefits, regardless of the role they played within the armed group or the type of crimes they may have perpetrated.

Individual Demobilizations

Individual demobilizations are part of a broader government strategy, characterized by some as a counterinsurgency measure. This strategy, as conceived by the government, is an effective tool for dismantling armed groups from below, through attrition. Individually demobilized persons include those who belong to armed groups that are not currently involved in any collective negotiations with the government (mainly the FARC and ELN). Since 2002, individual demobilization has been a continuous process, although the number of persons demobilized from the guerrilla forces decreased between 2004 and 2005.³² Even with this decrease, the total figures remain relatively high due to massive individual demobilizations of the defense forces, in part because of Decree 128 of 2003, which gave de facto amnesty to those armed group members not under investigation for human rights violations, and because of the continuous desertion of the members of these armed groups.

Institutional Framework

Since September 2006, the Office of the High Commissioner for Social and Economic Reintegration of the Presidency of the Republic [*Alta Consejería para la Reintegración Social y Económica de la Presidencia de la República*] (ACRSE) took over all the tasks previously performed by the Program for Reincorporation to Civilian Life [*Programa para la Reincorporación a la Vida Civil*] (PRVC), which was part of the Interior and Justice Ministry. Nonetheless, the initiatives discussed below took place when ACRSE was just beginning its operations, thus the analysis here will focus on the role of the PRVC and does not include most of the reforms that the High Commission³³ is planning to implement. The PRVC was the entity in charge of facilitating and managing the design and implementation of programs for the reincorporation of demobilized adult combatants into civilian life. These programs grant five types of benefits: (1) monthly living expenses;³⁴ (2) affiliation to the subsidized health program; (3) basic and middle education and job training; (4) psychosocial care;³⁵ and (5) support for the development of a productive project.³⁶ The content of these benefits is the basis for creating five institutional areas within the PRVC: (1) humanitarian assistance; (2) integral education and training; (3) psychosocial support; (4) productive insertion; and (5) legal assistance, which is transversal to the other areas.³⁷

In order to bring reinsertion programs to its beneficiaries, especially in remote regions, the PRVC established Centers for Reference and Opportunities (CRO), which operate under its mandate. The CROs were responsible for ensuring access to health care, education, psychosocial care, job training and the different options for economic insertion offered to the demobilized seeking assistance.³⁸ As part of the PRVC, the CROs were not free to make strategic decisions; their scope of action focused on operational aspects at the regional level. SAME³⁹ supplemented the work of the CROs by recording the benefits received by the demobilized during the reincorporation process. Data collection adopted two mechanisms: visits to CROs by demobilized persons and calls made by SAME teams.

Centralization versus Decentralization

While Colombia is a unitary, politically centralized state, the executive administrative branch is decentralized. This is important to mention because it explains, to a large extent, the problems that have arisen in the implementation of DDR programs. While it is true that demobilizations, resulting from direct negotiations between the presidency and the armed groups, were a policy defined and executed at the central level, clearly the application of these programs is only possible with the cooperation and involvement of decentralized regional and local authorities, and it seems that this has yet to happen.⁴⁰

The general problem is, then, that the national government imposed reinsertion programs in the regions affected by conflict, with no previous contact and consulting with local authorities of places that are to receive the beneficiaries of these programs. The central government began to work only in two regions, usually with no involvement on the part of local authorities and actors. Several mayors and governors felt, therefore, that they were being excluded from the process. Although the problem is due in part to the government's unwillingness to involve them, local authorities have also decided to stay on the sidelines of their own accord, either because of lack of interest, lack of incentives to get involved or lack of resources to do so adequately. This situation is particularly unfavorable because, for the most part, the demobilized population lives in rural areas.⁴¹ It is worth noting the exception to this: Medellín. This is the only city where the local authorities have become directly involved, leading their own reinsertion program.

The active participation of local authorities is crucial in order to closely monitor the demobilized population. Neglecting this population is particularly dangerous, for it may be an incentive for their relapse into criminal conduct and organized crime. This situation has already arisen in many localities nationwide through emerging criminal bands, made up primarily of demobilized and remaining members of their former groups. The central government just recently decided to improve coordination with the regions. This was not the result of a strategy for integrating the localities to the reinsertion process, but rather as a way to solve practical problems, such as the affiliation of the demobilized populations to the health care system and their inclusion in education programs. The lack of a strategy for coordination between the central level and the regions has had a detrimental impact on the quality and coverage of the programs offered to the demobilized in their transition to civilian life.

Presence of Women in the Armed Groups

Men and women experience war and reintegration into civilian life very differently; also, their motivation for joining the armed struggle and for abandoning it are often not the same.⁴² For women, joining an armed group creates deeper identity problems than it does for men, for it implies not only changing their names, or behavior, but also profound changes in gender identity, since they are forced to adopt "the hegemonic culture present in the insurgent groups."⁴³ In chauvinistic societies, such as that of Colombia, women feel empowered by war, and frequently disempowered by

reintegration, since they lose the prerogatives that their “male assimilation” in the armed groups provided them with. It is precisely those women who are able to fully adopt an identity similar to manhood during their participation in the group who face greater difficulties when returning to civilian life. As indicated in a recent research study, “it is precisely those in whom such assimilation is greater who afterwards are hardest hit emotionally by their experience in the war, more ‘broken’ in terms of the construction-reconstruction of their identity as women.”⁴⁴

Currently, female combatants are far from being protagonists in the demobilization process. Women do not have a voice in the process, and during the peace negotiations they never had a voice or could vote.⁴⁵ Women account for 9 percent of the population participating in collective demobilization and make up 12 percent of the individually demobilized. Percentage wise, this appears to be a small population; in practice, however, there are 4,118 demobilized women,⁴⁶ and they must face the demobilization process in the same conditions as their male colleagues. The PRVC does not offer them differentiated alternatives addressing their special needs, although this began to change with the creation of the ACRSE.

Minors in Conflict

The demobilization of minors and their separation from the conflict is very different from that of adults. As stipulated under international law, children under the age of eighteen are not considered combatants, but victims of conflict.⁴⁷ As of 1997, the government entrusted the care and protection of minors in conflict to the Colombian Institute of Family Welfare [*Instituto Colombiano de Bienestar Familiar*] (ICBF).⁴⁸ The ICBF defines *jóvenes desvinculados* (“separated youths”) as all persons under eighteen who have participated in war actions directed by an illicit armed group, due to a political motivation, and who have been captured, have voluntarily surrendered, or were handed over to the state by the illicit group to which they belonged.⁴⁹ According to the ICBF, as of August 31, 2006, a total of 2,968 minors ceased participating in the armed conflict.

The program offered by the ICBF has two main aspects: prevention and care. The prevention aspect is coordinated with the ICBF’s regular projects and programs for child care and attention to minors, with an impact on populations affected by family violence in different regions of the country, and special emphasis in areas where there is high risk for recruitment. The care aspect includes protection in an institutional environment, and protection in the social/family environment. Institutional protection provides psychosocial care, schooling, job training and support for productive initiatives through the Centers for Specialized Care [*Centros de Atención Especializada*] (CAES) and the Youth Homes (*Casas Juveniles*), located in different regions of the country. Protection in the social/family environment can adopt one of two forms, depending on whether the minor in question has a family to return to. When this is the case, and the minor returns to his or her family, the ICBF ensures that his or her fundamental rights are not violated in the family context, and provides a subsidy, conditioned on the family meeting the minor’s needs. If the minor does not have any family, the ICBF selects a foster home (*hogar tutor*) trained to receive minors on a voluntary and temporary basis.

According to figures collected by the ICBF and IOM's information systems, the largest number of minors (757) joined the program in 2003. The following years, 2004 and 2005, showed a decrease in the number of children entering the program. Of the total population of minors separated from their respective illegal armed groups, 77.23 percent left voluntarily and 22.57 percent entered the program after being captured by the state. A significant percentage of these minors (39.82 percent) were seventeen years old when they entered the program, making it difficult to fully monitor their progress, for they were very close to reaching adulthood and thus leaving the program. In addition, it is important to recall that the level of education of these minors is low; on average these youngsters have only a fifth-grade education.

The ICBF program includes many more men than women, with women accounting for just 26.18 percent of the total program population. Armed groups recruit many girls through seduction and deceit, and, in many cases, forcibly hold girls as sex companions, under threat of violence to their families or themselves.⁵⁰ Although the percentage of women and girls in armed groups is large, and although their experiences of war are often diametrically opposed to that of men, they have not yet received differentiated attention. Another aspect deserving attention is the minors' groups of origin: most of them (1,477) belonged to the FARC, whereas 1,023 belonged to the AUC and 381 to the ELN.⁵¹

In general, programs provide differentiated and specialized care to minors according to their age. However, for many of them this is precisely the problem, since these minors are coming from groups in which they had adult status, and they expect similar treatment in reintegration programs. They feel discriminated against because of the different attention they receive. Their expectations for reintegration include the possibility of an income that the ICBF program does not offer, and this leads to a sense of disappointment. There are no proposals for work or job opportunities for those young people who, in many cases, provided for their families through their "work" in the armed groups. Moreover, since there are no national policies aimed at preventing child recruitment on the part of armed groups that coordinate all responsible entities, the cycle of violence continues, and minors are susceptible to being drawn once again into the conflict.

One consequence of this situation is that minors are continually recycled between civilian life, crime and the armed groups still operating illegally. According to a recent study, minors require democratic and democratizing experiences about which to reflect upon and with which to compare to their own authoritarian and antagonistic ethical and political experiences in the conflict.⁵² The minors also need specialized psychological assistance to deal with the chronic traumas that affect them. To date, the training of teachers and persons to accompany minors through the reinsertion process seems to be insufficient.⁵³

Components of the Reinsertion Program

Financial Support

The benefits received by the demobilized population include financial support in the form of individual assistance or loans for implementing projects previously defined by the government. As part of the negotiations in the 1990s, the government granted a monthly living allowance to each demobilized person for six months, and a loan to be used in productive projects, housing or college. In the present reintegration process, the amount of the monthly allowance depends on whether the person has individually or collectively demobilized. The collectively demobilized, for example, receive a monthly allowance of CO\$358,000 (US\$161) and no additional sum for members of their families. Payments for those collectively demobilized are not conditioned on having attended the program's educational workshops. On the other hand, the payment of allowances for those individually demobilized is subject to their attending workshops and classes. In this regard, the mechanisms for verification and control of information on each demobilized person are greater for individuals, because only those who have perpetrated political crimes and those granted pardons receive the benefits of the program.

Reintegration and Employment

The national government has created a series of alternatives for income generation both for the individually and the collectively demobilized. Some of the options currently available are productive projects⁵⁴ for demobilized populations, with different specifications for each group, and direct employment, internships, or apprenticeships with companies that agree to hire former combatants.

Productive Projects

The peace agreements signed in the 1990s included support of productive projects for the demobilized as a way of guaranteeing their reintegration to civilian life.⁵⁵ However, some evaluations found that these projects rarely became a sustainable source of income for the demobilized.⁵⁶ There were several factors that limited the success and sustainability of these projects: (1) the seed capital was granted without previous studies regarding their technical or financial feasibility; (2) the resources granted by the government were given with the understanding that banks would match or double the funding so that the demobilized person could start the project; however, most of the demobilized were not able to ask for loans for lack of sufficient collateral; (3) an adequate articulation between the design and development of productive projects and a training plan to support the process was not achieved; (4) the private sector was not included in this process; and (5) many of the demobilized did not have the entrepreneurial profile required for assembling and implementing a project of this sort.⁵⁷

Despite the problems faced in the 1990s, the current labor reintegration strategy introduces few changes. Currently, individually demobilized and collectively demobilized populations receive different amounts of money for the implementation of productive projects. The Office of the High Commissioner for Peace [*Oficina del Alto Comisionado para la Paz*] (OACP)⁵⁸ grants a total of CO\$2 million (US\$850) per collectively demobilized person who participates in a productive project for peace.⁵⁹ This initiative, under the OACP, promotes the formation of associations among entrepreneurs, groups of demobilized persons, vulnerable populations and peasants for the implementation of agricultural projects in those areas where large-scale collective demobilizations have taken place. In contrast, association with other demobilized members of the group or with other communities is not promoted for the individually demobilized. They receive a total of CO\$8 million (US\$3,400) to set up their own projects.

Individually demobilized persons can use this money in one of the following areas: (a) development of a productive project; (b) investment in their own businesses; (c) housing; and (d) education and training. Before submitting a final project report, the demobilized person should study subjects related to the project. Although, in theory, this sequence seems logical, in practice there are a number of weaknesses in the program, primarily due to the lack of consistency between the areas of training and the productive projects. Specifically, the interests of the demobilized persons do not always coincide with the training offered by the National Learning Service [*Servicio Nacional de Aprendizaje*] (SENA),⁶⁰ and the educational programs fail to adequately prepare beneficiaries to deal with the challenges of starting and managing their own businesses. These programs should go beyond the formal compliance with the policy designed, and their content and implementation should receive greater attention.

The OACP is responsible for designing productive peace projects for those who have collectively demobilized. This office is also responsible for bringing projects to the regions and listing the collectively demobilized, vulnerable populations and peasants in each locality who will participate in a specific regional project.⁶¹ In addition to these tasks, the OACP should find an entrepreneur in each area able to direct a specific project and act as the legal representative of the demobilized association or associations. Due to the amount of money given to each demobilized person, and given the design of the program, its general objective is the creation of a collective project on the part of a group of demobilized people. The problem with this dynamic is that these projects cannot employ all the demobilized who have invested their money. Thus, although the demobilized find an investment that guarantees some income, they remain unemployed. This generates an unfortunate situation, for unemployment is one of the main causes for relapsing into illegal activities.

Other concerns associated with these collective projects are directly related to land use. Sometimes, there is no available land in areas where a large number of demobilized persons live. In other cases, although land is available, it is not possible to assign it to the project, for various reasons, including problems with titles, insecurity due to the continuation of the armed conflict with other illegal groups, or simply the fact that the land is not physically suited to host the project.⁶² Moreover, for many civilians, the thought of having to work with, or in some cases for, demobilized paramilitaries,

on lands that in many cases were stolen from local communities, may not be the best option or an option restoring their dignity.

Another problem with these collective projects is directly related to the fact that their design comes from administrators in Bogotá. Most of the projects created in Bogotá fail to take into account local dynamics, needs and opportunities of the regions in which they will be operating. The difficulties mentioned in the preceding paragraphs accumulate: important actors in each region (local governments, large companies and chambers of commerce) are not involved in the projects, and some of the projects designed in Bogotá turn out to be unfeasible in the regions where they are to be implemented. This is important to the extent that regional integration should be the first element considered when designing the projects if they are to be successful. In addition, the inverse is also true: productive projects and initiatives for generating income designed in the regions where they are implemented tend to face different obstacles when trying to go through the institutional procedures in Bogotá.

Labor Reinsertion and the Business Sector

As of January 2006, a presidential mandate assigned the Presidential Employment Bureau the lead role in implementing an employment strategy for demobilized populations. This entity is also charged with involving the business sector in the process of reinsertion and reintegration of demobilized populations into civilian life. The government has made a significant effort to involve the business sector in the program. The involvement of the private sector in an employment strategy was completely neglected in the 1990s.

However, employment or training opportunities for the demobilized in private companies have been rare, for several reasons. First, companies seem to have serious doubts about the way the current DDR process is unfolding and its capacity to resocialize the demobilized. In other cases, companies that wish to employ the demobilized find that the demobilized do not have the qualifications requested. On the other hand, some companies believe that offering employment to the demobilized is an unfair practice, given that so many people who have never committed a crime are also unemployed in Colombia.⁶³ In a society with few labor opportunities, such considerations may be legitimate; it is therefore crucial to strengthen the education level of demobilized youngsters, who can still be “legally competitive.”

Income-generation strategies need to be revised and complemented if they are to be an adequate and effective means for the demobilized to earn income in the medium and long term. Peace in Colombia requires that the demobilized reach a point of no return to violence and this, in turn, demands that the demobilized see more benefits in peace than in war.

Educational Integration

Going back to the comparative perspective and looking at the 1990s, the education and training program was, at that time, the most successful component of the DDR process.⁶⁴ At present, the Ministry of National Education is responsible for the support, design and implementation of basic, middle and higher education for the demobilized population. The SENA, on the other hand, provides technical and occupational training to the demobilized.⁶⁵ As mentioned above, part of this education and training is directed at strengthening productive projects. Jointly, SENA, the Ministry of the Interior and the Colombian National Police Forces set aside 48,907 training places for all those who demobilized from 2002 to 2006. Given that the number of places exceeds that of the demobilized, one may infer that many of the demobilized have had training courses more than once.

Access to Health Care

In the 1990s, the government provided quality medical care to the demobilized guerrillas and their families.⁶⁶ This arrangement was very useful and secured access to health services for all the demobilized guerrillas and their families. In addition, a special subprogram was included for those persons disabled by the war.⁶⁷ By way of contrast, the Psychosocial Care Program designed for treating traumas experienced by the demobilized was poor, yielding little in the way of results. The program was not a priority, and only gained relevance following problems experienced by some former M-19 fighters.⁶⁸ The government used different approaches in its effort to implement this component nationwide and subsequently at the local level, with the support of municipal and departmental health offices. However, the program was never consolidated and did not adequately meet its psychosocial care objective.

At present, the Ministry of Social Protection has established the mandatory and indefinite affiliation of the demobilized population and its families to the subsidized health system. This benefit is contingent on the economic conditions of the demobilized, for no one with enough income to pay for health care should be subsidized by the state, especially when such a large number of Colombians have no access to health services.

Balance: From Reinsertion to Reintegration

According to international literature on the subject, reinsertion is the name given to those short-term measures aimed at providing financial and material assistance to former combatants, so that they may satisfy their own and their families' basic and immediate needs. Reintegration, on the other hand, is a medium- and long-term process, aimed at facilitating the adaptation of former combatants and their families to civilian, economic, social and political life.⁶⁹ A program based on the concept of reintegration, and not on reinsertion, should accomplish three main objectives: (1) effectively return demobilized persons to civilian life; (2) break the cycles of violence; and (3) reconcile members of society.

Adequately achieving both reinsertion and reintegration is, therefore, a key requirement for attaining the objectives of peace in Colombia. In addition to the *humanitarian* component, which seeks to put an end to the systematic violation of human dignity of victims of the conflict, there are other important reasons to seek a successful reintegration process. First, reintegration may be understood as a way of breaking the country's cycle of violence that, according to international experience, tends to start again even after former combatants undergo reinsertion processes. Even if war does not reignite, crime and violence may remain. Second, reintegration can serve as an opportunity to strengthen institutions in areas where they have been absent or inoperative. The process of moving from transition to a postconflict stage will determine, to some degree, the nature of Colombian institutions in the future. This is why a strategy should be created that not only includes benefits for those who, having participated in the conflict, rejoin society, but also responds to the needs for regional development and the strengthening of democracy at the local and national level.

Decree 3043 of September 2006⁷⁰ and the 2006–2010 Development and Investment Plan⁷¹ reflect a significant change regarding the peacebuilding initiatives implemented in Colombia since 2002. In these documents, the government adopted the concept of reintegration, as opposed to reinsertion, which it had been formerly using. This, far from mere semantics, reflects a significant turn in the approach and scope of measures aimed at reintegrating more than 43,000 ex-combatants to civilian life.⁷² The formal definition of this new approach is: “Reintegration is understood to refer to all the processes associated with reinsertion, reincorporation, and social and economic stabilization of minors who have been separated and adults who have voluntarily demobilized individually and collectively. These processes include, in particular, establishing relationships with the receiving communities and the acceptance on their part of demobilized persons, as well as the active participation of society in general in the process of including them in the country's civilian and legal life.”⁷³ Although we have yet to see what the consequences of this change are, it is evident that efforts are being made to develop a program that truly reintegrates the ex-combatants, such that it is possible to interrupt—at least partially—the cycles of violence that the country has faced for so many years.⁷⁴

It is still premature to make an evaluation of the process at this time. Nonetheless, we may mention some aspects the government needs to incorporate for the successful implementation of these new measures. The improvisation and ad hoc approach that has characterized some of the measures adopted regarding disarmament and demobilization of members of illegal armed groups in recent years must be overcome. Similarly, the development of strategies to address the frequent breakdowns in the system of services for those who are trying to live as civilians in communities across the country is of the utmost importance.

In Colombia there are no specific interventions for different populations of ex-combatants; the PRVC offers the same *package*, with no consideration of the heterogeneity of the population it serves.⁷⁵ The concept of uniform reintegration programs for individually and collectively demobilized persons, regardless of the different paths they took to become ex-combatants, is

problematic. The populations of individually and collectively demobilized persons are very different. In terms of the motivation for abandoning the war, those who demobilize individually are risking their lives by demobilizing and “deserting” their groups—indicating a serious intention to change their lives. On the other hand, the collectively demobilized, in many cases, have only joined the DDR program following the orders of their groups’ commanders. A second difference between the two demobilized populations is location: while the individually demobilized are concentrated in the country’s large cities, the collectively demobilized are scattered across the nation, mainly in rural areas. Differences, however, are not limited to the individually and collectively demobilized. In general, the demobilized population is very diverse; there are differences in gender, level of education, rank within the armed group, place of origin and so on. The new strategy seeks to provide more options for the different kinds of beneficiaries.

Disarmament and Rearmament

Disarmament

Given that the individually demobilized are persons who abandon armed groups still at war, it is more difficult for them to relinquish their weapons, but they have done so when demobilizing.⁷⁶ These weapons, along with those handed in by collectively demobilized persons, bring the total number of weapons collected from May 2003 to May 2006 to 17,540, with a ratio of one weapon for every two combatants. Of all the weapons handed in, 76 percent are long weapons (rifles, shotguns and carbines), 17 percent are short weapons (submachine guns, pistols and revolvers) and 7 percent are support weapons (machine guns, grenade launchers and mortars).

Thus far, these weapons have been stored in battalions, for, in principle, they are evidence to be used in legal proceedings against demobilized persons. Recently, however, the National Commission on Reparation and Reconciliation [*Comisión Nacional en la Reparación y la Reconciliación*] (CNRR)⁷⁷ and the monitoring body of the Organization of American States [*Organización de los Estados Americanos*] (OEA), known by its acronym MAPP/OEA, have recommended that these weapons be destroyed. Both agencies have called into question the need to preserve them as physical evidence when information systems exist, such as the Integrated Ballistic Information System, making it possible to keep the weapons’ serial numbers and their “digital fingerprints” on file using computerized images, which can then be matched with other evidence found at crime scenes. In any event, since no record was kept during the demobilization process matching the combatants with their weapons, the ballistic analysis is useless for incriminating persons directly responsible for specific crimes. The analysis shall, however, be useful in holding particular groups or *bloques* responsible for crimes they perpetrated.

The High Commissioner for Peace has suggested keeping some of these weapons for a museum dedicated to the reinsertion process. The CNRR, on the other hand, has suggested casting the

weapons and building monuments in memory of the victims, creating works of art, tools, and using them for building infrastructure that can benefit victims, as symbolic measures of reparation.⁷⁸

Rearming of Demobilized Paramilitary Groups

Verifying the full dismantling of the demobilized groups' military structures is crucial for consolidating DDR. In the Colombian case, MAPP/OEA was initially responsible for this verification, but it had to be supported by other means, in the face of constant allegations that new structures were arising involving, in one way or another, former members of paramilitary groups. Indeed, when MAPP/OEA submitted its sixth report⁷⁹ and these phenomena became apparent, the national government entrusted the National Police Forces with "pursuing the criminal bands that have been identified in regions where paramilitaries had formerly operated"; monthly reports on this issue would be submitted.⁸⁰ The MAPP/OEA report identified three types of phenomena related to the rearming of demobilized groups: (1) the regrouping of individuals into criminal gangs that exercise control over specific communities and illicit economies (identified in seven parts of the country); (2) the remaining pockets of paramilitary groups that are not demobilized (in four departments or regions of the country); and (3) the emergence of new armed actors and/or the strengthening of existing ones in areas left by demobilized groups (in six departments).

This assessment was restated in the seventh MAPP/OEA report⁸¹ and further corroborated by findings registered in the second National Police Report on Control and Monitoring of Demobilized Combatants,⁸² in which the National Police Forces identify "18 criminal bands made up of common criminals and also by individuals who were among the demobilized."⁸³ The Human Rights Unit at the General Ombudsman's Office within the government identified at least ten emerging armed groups involved in drug trafficking and extortion in several regions of the country previously controlled by paramilitary groups. According to the General Ombudsman, Vólmar Pérez, the armed structures have more than 1,000 men, and some count former combatants of the AUC among their ranks.⁸⁴ This is extremely worrisome in light of the guarantees of nonrepetition the DDR and transitional justice processes are supposed to offer the victims and society in general.

Monitoring ex-combatants has not been an easy task in Colombia. The informality of the peace agreements, the volume of this demobilization and the former paramilitary combatants' behavioral setbacks have contributed to this.⁸⁵ It is easy to imagine how mid-level commanders reluctant to participate in a peace process would use possible failures in the reinsertion process to convince their troops not to demobilize. There is evidence that something along these lines is already happening. Since July 2006, the National Police Force has been submitting monthly reports on the situation of this population. In the February 1, 2007, report, the situation is as follows: "throughout the demobilization process, 542 former members of illegal armed groups have died and 78 have been wounded, due to causes related to illegal activities. . . . In all, 1,068 former members of the AUC have been captured by the authorities when involved in criminal activities."⁸⁶ As for the rearmament of some demobilized persons, the report indicates that since last June, some 882 arrests were made of

members of criminal organizations known as BACRIM, for *Bandas Criminales Emergentes* (Emerging Criminal Bands), in several regions of the country; 164 of these had previously demobilized.

This evidence indicating that some members of the armed groups collectively decided to engage in new criminal activities leads to problems of interpretation when analyzing compliance with the eligibility requirement for state benefits established in the JPL, since one of these requirements is that groups must have dismantled so that their members receive benefits. For the Inter-American Commission on Human Rights, the breach of this requirement on the part of some of the demobilized groups should have clear effects on the possibility of their members receiving alternative sentences.⁸⁷ However, Decree 3391 of 2006 solved the debate by determining that the isolated or individually considered behavior of some of the demobilized should not affect compliance with the eligibility requirements of the group to which they belonged as a whole. Those individuals directly responsible for criminal activities, however, would lose benefits contemplated in the JPL.

Justice, Victims, Truth and Reparation

Justice

One of the most difficult dilemmas in a transitional justice process is whether to press criminal charges against those who perpetrated atrocious crimes. This dilemma arises from a tension between the demands for justice on the part of society and victims, on the one hand, and the interests of the armed groups and practical aspects of peace negotiations, on the other. Solving this tension is crucial, because it is the basis for a strategy of reconstruction and social reconciliation. Nonetheless, there is no single or simple answer. Indeed, there are different opinions supporting positions that range from a policy of “forgive and forget” (*olvido y punto final*) to punishing each and every one of the human rights violators.⁸⁸

Those who defend the position of prosecuting all war criminals argue, among many other considerations,⁸⁹ that any democratic transition must judge the past, convicting those responsible for atrocious crimes, in order to restore the dignity of victims. They also argue that it is only possible to make a break with the past and guarantee civic trust in society when a fair and effective criminal justice system is established that shows a democratic commitment against impunity for the atrocities perpetrated during conflict.

However, not everyone supports this position. Those who oppose it believe that trials divide societies and create the mistaken image of a few guilty individuals and an *innocent* majority. This fails to acknowledge the collective nature of the violence that characterizes internal armed conflicts. Other reasons include the coercive capacity of war criminals to manipulate or influence institutional decisions, as well as the sheer volume of cases in need of prosecution by weak, traumatized institutions.

Developing a process of transitional justice to deal with a past of violence in a democratic society is no easy task, as it must be done in light of the principles that are essential to this model. This entails limiting “the possibility of adopting formulas which, though they may be implemented politically, with the support of the majority or of power groups, may be unacceptable in the normative spectrum of a democracy.”⁹⁰ Thus, there is a growing tendency to limit political maneuvering in relation to defining the contents of transitional justice. This tendency is evident in the minimal criteria used to examine the consistency of the transitional justice process with the principles of international law. Is it possible then to grant political benefits (that is, amnesties or pardons) to groups that participate in peace negotiations today? In all likelihood, the answer is no, given the existence of international principles that promote the reparation of victims to help remedy their suffering. However, in practical terms, it is difficult to fulfill all expectations of justice when the negotiations occur in the midst of conflict. This reintroduces the political element in an important way. Just as one of the negotiating cards in the 1990s was the guarantee that the state would provide opportunities to guerrilla groups for political participation, today the state guarantees the members of the armed groups—who are key links in the chain of drug trafficking—that they will not be extradited to the United States.

The legal solutions chosen by the Colombian state include different considerations. The peace agreements of the 1990s were based on the fundamental requirement of amnesty and pardon for the members of the armed groups.⁹¹ Given that the Colombian state may only grant amnesty and pardon for political crimes,⁹² some demobilized individuals were subject to criminal proceedings.⁹³ Nonetheless, the overall policy of the 1990s regarding justice may be characterized as a policy of “forgive and forget.” By way of contrast, the current policy is more focused on trying to prosecute human rights violators among the demobilized. As of this writing, 2,695 demobilized individuals have applied for the benefits created by the exceptional procedural framework designed for that purpose, the Justice and Peace Law.

The Justice and Peace Law

Law 975 of 2005, better known as the Justice and Peace Law (JPL),⁹⁴ exists for one simple reason: the basic legislation on peace negotiations before 2003 expressly excluded those people who had committed atrocious, ferocious or barbaric crimes from receiving benefits.⁹⁵ However, the ordinary criminal procedure did not appear to be a viable card at the negotiating table. The AUC leaders were not interested in subjecting themselves to criminal proceedings in exchange for demobilizing, especially when there had not been a military defeat. The question then was: How can the members of armed groups who are guilty of such crimes be demobilized? To answer this question, a legal framework was constructed that served as the basis for the Justice and Peace Law. This framework was structured on two formal objectives: to facilitate the peace processes and the reintegration to civilian life of the members of the illegal armed groups; and to guarantee the victims’ rights to truth, justice and reparation. In its wording, the JPL attempts to reconcile the interests of all the parties

involved in the process: it regulates, under a special procedure, the investigation, criminal sentencing and the granting of judicial benefits for the demobilized individuals convicted of atrocious crimes, while also seeking to include elements of transitional justice and protecting victims' rights.

The process of framing a legislation that is both applicable to the members of demobilized armed groups and seeks to respond to the victims' claims has had, thus far, five important moments. The first came in 2003, when the government introduced the first bill in this regard, called the bill on *alternatividad penal*,⁹⁶ or alternative criminal sentencing. Both Colombia and the international community rejected this bill for blatantly ignoring victims' rights and disproportionately favoring the demobilized. In 2005, the government promulgated the Justice and Peace Law,⁹⁷ together with its first regulatory decree.⁹⁸ The third moment in creating legislation for both armed groups and victims was the period from May 2006 to July 2006, when the Constitutional Court ruled on several actions⁹⁹ against the content of the JPL, and introduced substantial changes in light of the principles of transitional justice.¹⁰⁰ A fourth moment, from August 2006 to September 2006, came when the government issued a second regulation of the JPL after the Constitutional Court's rulings.

Finally, the fifth and current moment in this process is the enforcement and implementation of the legal framework, a task that will no doubt grow in quantity and complexity. However, this latter phase of implementation is probably the most important. The formal acknowledgment of the importance of transitional justice, victims' participation, or guarantees of strict compliance with the conditions preceding and following alternative sentencing does not by itself achieve peace and reconciliation; there is a further need to develop an institutional system based on which of those in charge of implementing the provisions can give the process direction, in fulfillment of these principles.

Institutional Framework of the Justice and Peace Law

The following is a list of the most important institutions created by the JPL and their functions:

- The National Attorney General's Unit for Justice and Peace (*Unidad Nacional de Fiscalía para la Justicia y la Paz*), responsible for conducting investigations and preparing indictments before the courts in the cases of those demobilized under the JPL;¹⁰¹
- The General Ombudsman for Justice and Peace, responsible for guaranteeing the victims' rights and due process of law for perpetrators;¹⁰²
- The CNRR,¹⁰³ mandated to develop strategies for protecting victims' rights to reparations and fostering reconciliation;

- The Regional Commissions for the Restitution of Assets, which, under the coordination of the CNRR, is responsible for facilitating procedures related to claims to property and unlawful occupation or possession of assets;¹⁰⁴
- The Fund for the Reparation of Victims, a special account created to hold the assets handed over by the demobilized, resources from the national budget and national and international donations for the reparation of victims;¹⁰⁵ and
- The Justice and Peace Chambers (*Salas de Justicia y Paz*), eight legal chambers within the Superior Courts of the Judicial Districts of Barranquilla and Bogotá, which shall prosecute the demobilized under the JPL.¹⁰⁶

The Requirements of the Justice and Peace Law

The eligibility requirements are those conditions of the JPL that collectively and individually demobilized populations must meet in order to have recourse to the law. These two kinds of demobilized persons share some requirements, such as: (1) inclusion in the list of proposed candidates submitted by the national government to the Office of the Attorney General (see List of Candidates below); (2) handover of all property resulting from the crimes perpetrated; and (3) abstaining from all illegal activities.

Those collectively demobilized have additional requirements: (1) the demobilization and dismantling of the armed group to which they belonged, pursuant to a peace agreement with the government; (2) the handover to the ICBF of all minors who had been recruited by the group; and (3) the liberation of all kidnapped persons in their custody and information regarding the whereabouts of the disappeared.

Individually demobilized persons must (1) sign a written commitment with the government, which serves the same purpose as the peace agreement signed by the collectively demobilized groups; (2) provide information on and collaborate with the dismantling of the group to which they belonged; and (3) guarantee that their activities within an armed group were not related to drug trafficking or illicit wealth. This latter requirement also holds for the collectively demobilized, insofar as they must show that the purpose of the creation of their group was not the perpetration of said crimes. This provision, which was subjected to difficult legislative debates, was a way to strike a delicate balance between screening out common criminal groups focused exclusively on such purposes—groups that, in principle, should not benefit from peace agreements—and the reality of the illegal armed groups' involvement in activities associated with these crimes.

Although these requirements may be met before different authorities, and at different stages—transferring property to the Fund for the Reparation of Victims and releasing minors to the ICBF, for example—the verification of compliance pertains to the Justice and Peace Unit of the Office of the Attorney General and the Justice and Peace Chambers. The Justice and Peace Chambers preside

over hearings involving the demobilized, and it is at the trial stage when the prosecutor must demonstrate whether the demobilized individuals satisfied these requirements. The judge shall then decide whether an alternative sentence is applicable.

List of Candidates

The list of candidates contains the names of those who have demobilized collectively and individually and who wish to benefit from the JPL. The demobilized individuals must state in writing their interest in being included and swear under oath their commitment to abide by the conditions established under the JPL. The most important condition for inclusion on this list is having demobilized. While disarmament is one of the obvious requirements for access to the benefits of a transitional justice program, it is a difficult objective to attain, as discussed in the first part of this essay, given the challenges of rearmament in a scenario of continued conflict, as is the case in Colombia.

There are serious legal and practical challenges concerning this list and the problem of determining who is eligible for JPL benefits. In some cases, it is not clear whether those who have rearmed were granted pardon and subsequently relapsed into criminal activity, or whether they are demobilized persons who are still candidates for the Justice and Peace Law but have infringed the requirements for its application. As the government itself stated in February 2007, it is uncertain as to the whereabouts of 4,700 demobilized persons. This official statement reveals a problem with the implementation of the reinsertion processes, but also indicates an absolute lack of rigor in the legal monitoring of demobilized individuals who remain at large in the country. It is hoped that this situation will change in the near future.

Persons already imprisoned for belonging to an armed group, which is in itself an illegal act, and who now are willing to demobilize, pose another challenge in determining eligibility for JPL benefits. The JPL allows benefits only to those imprisoned individuals who belong to a group that has collectively demobilized, when the sentencing demonstrated membership in the illegal group. Yet, one of the latest decrees issued by the government contemplates the possibility of allowing prisoners who belong to groups that have not collectively demobilized to demobilize as individuals. This is problematic for two reasons: first, because it is regulating a situation not contemplated by the JPL, and second, because the original intent of granting the benefit of alternative sentences to persons already detained by the authorities was to provide incentives for the demobilization of the group, not to release the persons individually considered.¹⁰⁷ This new possibility seems to be related not so much to the peace process with the AUC but with providing mechanisms for developing possible peace negotiations with other illegal armed groups, especially in light of current debates regarding a possible humanitarian agreement with FARC.

The JPL explicitly states that the inclusion of a person in the government's list does not mean that he/she complies with the requirements established for its application, and, therefore, it does not guarantee that the benefit will be granted, because this duty is vested in the judicial branch.¹⁰⁸

Nonetheless, the decision as to who is included in the list sent to the Office of the Attorney General is the responsibility of the Office of the High Commissioner for Peace, in the case of the collectively demobilized, and of the Ministry of Defense, for the individually demobilized. These institutions must submit lists to the Ministry of Interior and Justice, which has the final say on the universe of possible beneficiaries. Based on that list, the judge determines the application of the benefits. The lists of candidates presented to date by the government have given rise to serious debates, since they include alleged drug traffickers. This issue has even led to a confrontation between the High Commissioner for Peace and the MAPP/OEA mission in the cases involving “El Tuso” and “Jhony [sic] Cano.” Juan Carlos Ramírez, alias “El Tuso,” who was included in the list, received the benefit of suspension of the U.S. request for extradition, despite public statements by the MAPP/OEA mission that it had not verified his presence in the demobilizations.¹⁰⁹ The debate intensified with the publication of the list, because it included the name of Jhon [sic] Eidelber Cano Correa, alias “Jhony Cano,” a drug trafficker facing an extradition order who had been arrested on October 29, 2005—and who, apparently, is part of the criminal organization of Diego León Montoya, alias “Don Diego.” In the published list, the paramilitary chief Hernán Giraldo identifies “Jhony Cano” as the person financially responsible for his organization. Finally, on September 10, 2004, President Uribe authorized Cano’s extradition, while “El Tuso” should offer his free declaration under the JPL in the near future (see below).

Regardless of these debates, it is important to emphasize that the design of the JPL makes it an exception to ordinary criminal law, insofar as its enforcement is discretionary in two ways. First, the government has the faculty to decide whether to include a possible beneficiary. If the government does not include an individual in a list submitted to the Office of the Attorney General, this person is not even a candidate who can meet the requirements for access to the benefit.¹¹⁰ However, being a candidate does not determine the person’s participation in the process; a second expression of will on the part of the demobilized person is required—that is, the demobilized person’s ratification of his intent to abide by the requirements of the JPL at the start of his/her free declaration. A victim’s report or the authorities’ cognizance of a crime does not automatically lead to this criminal procedure; rather, it is the accused himself/herself who takes the initiative to set in motion the proceedings required by the law against him.

Criminal Sentencing

As mentioned above, the legal evolution of the current peace process, as compared to the peace process of the 1990s, lies in the creation of a special legal procedure. One of its main features is the creation and enforcement of alternate sentences in the prosecution of those who have perpetrated atrocious crimes. Although this is a major difference regarding the process in the 1990s, it is clearly not a change that applies to all cases. Pardon¹¹¹ is still possible for those demobilized persons who have not committed atrocious crimes. It is important to note that the process contemplates two different legal regimes for the demobilized, depending on the crimes they committed. If the person has committed atrocious crimes, he/she must submit to the JPL if he/she wishes to demobilize and

receive the benefits of the alternative sentencing provision. If the person did not commit a crime, or believes no evidence exists connecting him/her to a criminal act, he/she may present a statement to a representative of the prosecutor's office and is then eligible for pardon.

Legal prosecution of demobilized individuals shall only take place in a few cases. At present, there are 2,695 ex-combatants who are eligible for prosecution under the Justice and Peace Law. Where are the rest? As discussed in the first section of this study, there are 43,000 demobilized persons in Colombia, but only 5 percent of them shall be prosecuted by the special "justice and peace" jurisdiction and receive sentences that may include time in prison. The rest of them shall receive a de facto amnesty. Without making a value judgment, it is worth at least mentioning that "truth, justice and reparation" will not be offered by all the demobilized, but only by this small percentage of them who acknowledge committing crimes and seek alternative or reduced sentences under the JPL. This minimal subgroup will have to make reparations, serve prison sentences and undergo a special criminal procedure.

It may be asked, why not imprison the rest of them as well? It is impossible to imprison, investigate and obtain confessions from 43,000 individuals, especially within the context of weak criminal justice institutions. At the same time, there is a major drawback to prosecuting only a few ex-combatants: there is no strategy for identifying the mid- and lower-level commanders who are "betting on a pardon," trusting that they will not be easily implicated in legal proceedings due to lack of evidence. These are precisely the ones who more easily relapse into delinquency and organized crime. These people are no longer in the public eye, are seldom subject to rigorous surveillance, and their legal status is not clear. It is not easy to obtain access to pardon records, and is therefore hard to know exactly how many or on what basis these pardons were granted. How can one be sure that those granted pardons did not commit atrocious crimes and are not enjoying impunity? Have all the free declarations by ex-combatants under the JPL led to prosecutions in ordinary criminal courts? If evidence is later found linking pardoned ex-combatants to atrocious crimes, what happens to the pardon previously granted? To this day, these questions do not have any clear answers in the legislation.

Alternative Sentencing

The alternative sentencing system is the incentive offered by the state to the combatants for their demobilization and contribution to national reconciliation. This alternative criminal sentencing system presupposes that, through the JPL proceedings, the demobilized individual shall be legally convicted and sentenced. Thereafter, the courts suspend enforcement of the imposed sentence, and replace it with an alternative sentence that entails imprisonment for at least five and no more than eight years.¹¹² The judge determines the final time of the alternative sentence¹¹³ based on two criteria: the seriousness of the crimes committed, and the degree of cooperation on the part of the demobilized person regarding the investigation of those crimes. The possibility of having recourse to an alternative sentence depends on the subsequent demonstration that the person has genuinely collaborated with judicial authorities, has made reparations to his/her victims and has been

adequately resocialized. The ruling should determine the main sentence and the accessory sentences that would apply if the defendant does not comply with the requirements for benefiting from this alternative sentence. This is important because, in the event that the demobilized individual fails to meet the above conditions, there is no need to begin new proceedings; instead, the main sentence, which may be up to sixty years in prison, would automatically apply.

When Colombia's Constitutional Court considered the JPL, one of the points under discussion was whether the extension of the alternative sentence—from five to eight years—was actually a hidden pardon, given that it is hardly proportionate to the cruelty of the crimes committed. However, the Court rejected this argument and analyzed why the benefits contemplated under the JPL did not amount to a pardon. First, the Court considered that the JPL does not abolish the criminal action, but rather creates an exceptional procedure for describing the serious violations perpetrated by the demobilized, “which is why it is clear that the state did not decide, through this law, to forget about the criminal actions.”¹¹⁴ In addition, it considered that the JPL does not exempt the demobilized person from having to serve the criminal sentence. First, because it does not eliminate the sentence imposed under the standards of ordinary criminal procedure: the sentence continues in force until the end of the period of conditional freedom. Second, because significantly reducing the prison sentence in exchange for certain conditions is not, in the court's opinion, equivalent to releasing the demobilized individual from having to serve the sentence.¹¹⁵

On the extension of the alternative sentence, the Constitutional Court recalled that the legislator has the faculty to determine the penalty deemed appropriate for the conduct investigated. Its analysis focused on the fact that the demobilized are, in any event, subject to the ordinary sentence, which would be enforced if the exceptional conditions contemplated in the JPL are not met.¹¹⁶ Accordingly, in the Court's opinion, although the sentence may be minimal, it symbolically guarantees the victims' right to justice, because the demobilized are subject to a judicial proceeding resulting in the imposition of a prison sentence, conditioned on good conduct and forfeiture of their assets.

Once the beneficiary serves the alternative sentence, and meets the conditions imposed in the ruling, he/she becomes eligible for probation for a period equal to half the alternative sentence served. In other words, if convicted and given an alternative sentence of eight years of imprisonment, the demobilized individual's probation would last four years. During this time, he/she must commit to not repeating the crimes for which the courts convicted him/her, report periodically before the Justice and Peace Chambers and report any change in residence.¹¹⁷ If the demobilized individual meets these obligations, and those established in the ruling, he/she acquires the right, after serving the sentence and at finalizing probation, to apply for a declaration expunging the main sentence and receive unconditional freedom. A failure to meet these obligations entails the revocation of the benefit and the reinstatement of the ordinary sentence.¹¹⁸

In its constitutional review of the JPL, the Constitutional Court determined that losing the benefit of the alternative sentence due to perpetrating again crimes for which the demobilized person was

convicted was not unconstitutional. The Court explained that the perpetration of a crime does not mean the immediate loss of the benefits; in each case, the judge must analyze the import and circumstances of the new crime committed, so as to determine whether the victim's right to nonrepetition of abuses has been violated. This possibility of evaluating the seriousness of the criminal offenses committed anew by the demobilized is detrimental to the seriousness of their commitment to legality and to the rights of future victims, and does not establish specific criteria to guarantee that all judges will issue similar decisions on these matters.

Centers of Confinement: Serving the Sentence

In order to facilitate the peace negotiations and demobilization, the national government reached an agreement with the representatives of the illegal armed groups around 2002 on the creation of special areas known as temporary placement areas (*zonas de ubicación temporal*) or concentration areas (*zonas de concentración*). These areas were established in parts of the country where the demobilized voluntarily gathered. Initially, the JPL allowed the demobilized the right to add up to eighteen months of the time spent in one of these areas as part of time served for the alternative sentence imposed.¹¹⁹ The Constitutional Court rejected this provision as unconstitutional. In its opinion, the voluntary gathering of demobilized people in these areas could not be interpreted as an exercise of the *ius punendi* (or the state's legal faculty to impose punishment), for the eighteen months of voluntary gathering were not the result of a judge's decision, or of the execution of a sentence by the prison authorities. Thus, it could not compare to the institutional decision to impose a sentence with the consequent restriction of the defendant's fundamental rights. Despite this analysis, the last decree issued by the government to regulate the JPL restated the possibility of counting those eighteen months as part of the alternative sentence, based on the argument that the Court failed to give retroactive effect to its decision.¹²⁰

In 2005, President Uribe ordered the National Police to bring the leading commanders of the AUC to the closest police stations, and to make an appeal to the paramilitaries to come before the authorities at the shortest possible time.¹²¹ This was done both to guarantee that former AUC combatants began their procedures under Law 975 of 2005 and in response to criticisms published in the national and regional press, according to which known human rights violators were enjoying apparent freedom in these areas.¹²² Although gradually many of the former commanders went before the authorities, to date major former paramilitary chiefs have yet to do so. In addition, there are approximately 348 persons who demobilized collectively whose legal situation has not been defined, and who are living in different regions of the country.¹²³ This situation undoubtedly indicates worrisome gaps and shortcomings in the ordinary legal system, such that well-known paramilitaries remain free due to the lack of allegations and investigations against them.

After presenting themselves to the police stations, the paramilitary chiefs who have recourse to the JPL are then held at a third location: the maximum-security prison at Itagüí. The former paramilitary chiefs arrived at the maximum-security prison on December 1, 2006. The order came from the minister of the interior, who stated that he based his decision on the discovery of possible

escape plans from their previous location. However, there are different hypotheses in this regard.¹²⁴ Regardless of the reasons for the transfer, it has had a significant consequence: given that it is a maximum-security prison, it meets the Court's requirements as a place where ex-combatants can serve their sentences. Accordingly, as of December 2006, the time the demobilized spend there until convicted by the Justice and Peace Chambers will count as time served. Given the time the trials will take, and the short length of alternative sentences, it is likely that they will have to spend little time, if any, in prison after conviction.

Advantages and Disadvantages of the Judicial Transition

The effort to prosecute those responsible for perpetrating atrocious crimes is, no doubt, one way of complying with the state's international obligations regarding the investigation and prosecution of individuals responsible for violations of international law. The Inter-American Court of Human Rights, on seven separate occasions,¹²⁵ has ordered the Colombian state to pay reparations to victims of paramilitary groups and the armed forces of the state. These decisions not only serve a practical function, to repair victims, but also have great symbolic value, since they represent the political will not to forget atrocious crimes perpetrated against civilians and previously ignored by local authorities. These decisions, together with the many more cases still pending before the Inter-American human rights system and jurisdiction of the International Criminal Court for 2009, certainly put pressure on Colombian institutions to implement legal proceedings in cases of human rights violations.

However, many difficulties arise from efforts to apply justice to cases involving systematic violence following the precepts of ordinary criminal law. As Teitel notes, "often, the attempt to obtain accountability for predecessor wrongdoing stretches domestic law systems to their limits. These responses to extraordinary political violence test core rule-of-law principles of security and general applicability of the law."¹²⁶ In times of transition, trials are of crucial importance for upholding the rule of law; nonetheless, the imprecise and inappropriate use of legal rules may further erode their legitimacy. Sadly, this seems to have been the case regarding current Colombian peace negotiations. Although Colombia has designed an exceptional legal procedure for responding to the special characteristics of the peace process, it is hard to draw a clear line separating the new procedure from ordinary criminal proceedings. As ad hoc measures intertwine with legal institutions that have preexisting and fixed meanings in the legal system, they become distorted when included in the context of the JPL. In the long term, this might erode the confidence ordinary people have in existing legal institutions that are currently being used for different purposes in peace negotiations.

A legal perspective has, on the other hand, certain advantages. For example, it entails the legal recognition of victims' rights; thus, their claims cease to be mere requests for charity and become binding agreements, having specific legal consequences. However, trials also have drawbacks: the focus of traditional criminal proceedings is not on the victims and their suffering, but on the perpetrators of the criminal conduct. The perpetrator is the one subject to the power of the state,

whereas the victims are, in general, the ones who are conspicuously absent from the proceedings. If they participate, they shoulder a heavy burden, for the courts cannot simply believe them from the outset; there must be a process of legally proving what really happened: “Victims and other witnesses undergo the ordeals of testifying and cross-examination, usually without a simple opportunity to convey directly the narrative of their experiences. The chance to tell one’s story and to be heard without interruption or skepticism is crucial to some people, and nowhere more vital than for survivors of trauma.”¹²⁷ The courts do not provide the forum for an empathetic hearing of the victims’ stories, a forum that victims deserve and desire. As Judge Albie Sachs said regarding the South African Truth and Reconciliation Commission, “Tutu cries. A judge does not cry.”¹²⁸ As a result, regardless of whether the imposition of criminal sentences hinders a peace process or not, it is not clear that the legal procedure by itself is capable of serving the victims’ fundamental interests (such as being heard). Nor is it clear that this procedure is the best instrument for serving the general public’s interest in getting to the truth.

The Truth

Seeking the truth through the legal system has the symbolic advantage of setting aside rumors, myths and false ideas about the past. At the same time, it is wrong to think that the right to truth can be exclusively satisfied through the legal system. When evaluating the capacity of legal proceedings to adequately reconstruct what happened in a prolonged armed conflict like Colombia’s, one inevitably concludes that it is insufficient, for the purpose of information in such proceedings is not to tell a complete story but to determine what criminal acts were perpetrated by a given individual. Communication among the courts is minimal, and most view the participation of witnesses, victims or other persons as merely incidental within the process, without any intrinsic value: “For judges at trials, such histories are the by-product of particular moments of examining and cross-examining witnesses and reviewing evidence about the responsibility of particular individuals.”¹²⁹

For this reason, it is important to note that determining what happened is not an easy or “peaceful” task, insofar as it involves a political struggle not only over the meaning of what happened but also over the meaning of memory itself.¹³⁰ Reconstructing the truth is a complex matter, for it has different and often contradictory sources; it is not easy to articulate the different versions of what happened without rendering invisible those who take issue with the hegemonic version: “The task of recounting history is not . . . a task that corresponds to the government, or exclusively to professional historians. Most authors agree that this function should be undertaken by all citizens, and especially by the victims, who are the witness of that terrible past.”¹³¹

One of the alternatives for collectively clarifying the past is instituting a historical or social truth commission. The advantage of such an approach is that truth commissions often have a much broader mandate to investigate what happened during a conflict. In the criminal justice system, the purpose of the trial is to find out whether the defendant is guilty or innocent; the victim, in this type of proceeding, plays an “instrumental” role. In the context of a transition, however, victims need a

space unencumbered by any type of procedural restriction to be able to reconstruct the truth; in such a forum, the offender could confess the crimes he committed directly before his victims or their next of kin.¹³²

In Colombia, unlike most countries that have gone through a transition, no historical or nonlegal truth commission was created in the context of the JPL. Independently of the explanation given for this decision,¹³³ clearly a transition in the midst of conflict imposes huge obstacles to a complete recounting of the truth, and significantly hinders the implementation and work of such a commission. The Colombian Congress opted for two solutions to satisfy this right: (1) to have a legal reconstruction of the truth as part of the prosecutions of demobilized individuals; and (2) to include among the duties of the CNRR the creation of a public report on the causes of the emergence and expansion of illegal armed groups. The CNRR is by no means a truth commission as understood in the context of transitional justice. Given that international precedent indicates that these elements—legal examination and academic investigation—for reconstructing what happened are insufficient for an adequate recounting of the truth, the JPL specifies that a legal investigation of the facts does not foreclose the possibility of implementing, in the future, nonlegal mechanisms for reconstructing the truth. This caveat opens the door to the creation of such a truth commission in the future.

The tensions implicit in truth reconstruction are not only a theoretical problem; in Colombia today they represent primarily a practical problem, as is shown by the free declarations or statements made by demobilized individuals before the authorities to qualify for JPL benefits. There was a public debate both about the convenience of publicizing the content of these declarations and the means by which to do so. On the one hand, those in favor of making such declarations public argued that it was the right of victims to participate in legal proceedings against the perpetrators, and the right of Colombian society to know the truth by opening the proceedings up to the press. On the other side, the argument focused on the importance of sealing the record of information provided at the investigative stages of the legal proceedings, in an effort to preserve the perpetrators' right to privacy and right to a reputation, as well as to guarantee the security of those involved in the events of a conflict that is not concluded. This debate finally led to the question: How does making the paramilitaries' statements public help reconstruct the truth?

President Uribe gave one answer when he took a stand in favor of making these statements public. He said that only in this way would society have “access to the truth.”¹³⁴ However, it is quite dangerous for a society to think that statements made by demobilized combatants and their leaders constitute “the truth,” especially when made in the context of the investigative stage of legal proceedings implemented against them. In theory, the investigative stage is where the prosecutor and his staff collect information and build enough intelligence to obtain a solid basis for indicting the defendant. While at this procedural stage certain information can be released to the public, only a minimal amount should be publicized, not only because it may stand in the way of a successful trial outcome, but also because it may violate the fundamental rights of the parties to the proceedings and third persons mentioned in their statements. The responsible handling of the information provided

by the demobilized at this stage of the investigation will safeguard those rights, among other things. Thus, while it is important to guarantee victims' participation in the process, it is equally important to keep a certain distance regarding the real meaning of "the truth" so as to construct, define and take cognizance of it at the appropriate time and in the most appropriate way.

As a reflection on this issue, one may consider how the government dealt with uncovering the truth during the 1990s peace process with guerrilla movements. Was there recognition of the truth? What have the consequences been? In fact, the truth was a major element absent from the peace process and agreements signed by the government and armed groups in the 1990s. It is only now, ten years later, that specific steps are being taken to clarify what happened during the conflict of the 1990s. Efforts to reconstruct and explain the causes behind the rise of the armed groups have been made mainly in the academic realm. In the few legal proceedings that are successfully concluded, it was not possible to collect sufficient information to build a significant historical memory. Cases as important as the takeover of the Palace of Justice in November 1985 are still in need of clarification.¹³⁵

The Victims

One could argue that the role of the victims in the peace processes in Colombia has evolved to the point that today, in contrast to the processes of the 1990s, they have been expressly included in all aspects of the procedures to prosecute perpetrators. In the current process, the JPL gives an explicit definition of "victim." This definition contemplates three classifications for victims:

1. A person who has suffered direct harm to his or her personal and emotional integrity, or suffered financial losses, or whose fundamental rights were violated as a consequence of the criminal acts of organized illegal groups, is considered a victim.
2. It is presumed that the next of kin within the first degree of consanguinity or civil relation to the person assassinated or disappeared are victims, although following the decision of the Constitutional Court, other family members who prove that they suffered harm may also be considered victims.
3. The JPL considers as victims the members of the army and National Police who have suffered physical and psychological harm due to the actions of members of the illegal armed groups.

The definition of victim does not depend on the identification, capture or prosecution of the direct perpetrator, or on any possible family tie between the perpetrator and the victim.

The fact that members of the army and the police force were included in the definition of victim has been controversial. The first point of contention is that this definition fails to acknowledge the

difference between members of the army who continue to confront illegal armed groups in combat, and the civil society members of the army and police who have no reason to suffer the consequences of the conflict. Second, it implies replacing the existing system of paying compensation to the family members of army and police personnel.¹³⁶ Given that this compensation is paid by the state—it is included in the budget and follows certain basic criteria for calculating its amount—and has already been adopted and applied in several cases, it might mean an unnecessary burden on the scarce funds collected in the context of the JPL. Thus, it is not clear whether the symbolic recognition of the police and soldiers as victims within the system of the JPL, which has not defined the amount of reparations to be delivered and depends on the transfer of assets on the part of the demobilized, is a benefit for them and their families or not. However, in many cases, the crimes perpetrated against the members of the armed forces, including being kidnapped and chained to trees in the middle of the jungle for more than ten years, clearly merit special attention and reparation, including not only economic benefits but also elements of justice and truth.¹³⁷

The victims' involvement in the JPL process has grown gradually, and has been crucial, not only in designing the provisions that regulate their participation, protection and reparation, among others. Victims have also come to play an important role in the media and, to that extent, have played an important role in guiding the implementation of the JPL. Through their participation in public forums, victims have succeeded in promoting public debate on their right to participate directly in parts of the procedure that are usually held behind closed doors, such as the free declarations given by the demobilized persons when seeking to benefit from the JPL.

Nonetheless, while the victims have now taken on considerable importance in the peace process as compared to their role in the 1990s, their current situation is still quite problematic. As mentioned earlier, victims must prove their status as victims to the authorities¹³⁸ in order to be able to participate in the process. This situation, although coherent at the theoretical level, is a limitation for those who have no official way to show the harm they have suffered. The red tape victims must face to be able to participate in the process may be too much of a burden for persons who have suffered large-scale human rights violations, and who in the past have generally been marginalized from institutional processes. The very formal and technical language used by authorities to call on the victims to participate in the proceedings has not contributed to a clear dissemination, through the media, of the content of the JPL and its respective institutions; the language used may be incomprehensible to victims. Those who have suffered harm or violation of their rights need a friendly institutional framework that reflects the technicalities of the JPL while “translating” and implementing its content in a way that is accessible to all.

The victims' legal representation is another aspect on which there has been little clarity in this process. While the Ombudsman's Office for Human Rights has issued regulations in this regard, its capacity is clearly exceeded by the number of victims. Furthermore, this office must also provide free representation to those demobilized who require their services, as well as to the vast Colombian population that needs legal assistance in proceedings unrelated to the armed conflict.

Another issue of crucial importance that poses major practical problems is security for the victims. The assassination of several victims' representatives, particularly those who decided to participate in JPL proceedings, evidences the lack of effective protection for victims, which the state should be providing. There are many unfortunate consequences of such assassinations. In many cases they leave victims' groups that had previously had solid representation disjointed;¹³⁹ it also generates a generalized fear that does not allow for broad and inclusive victim participation in the process. In this regard, it is urgent that the Attorney General's Office implement its victim protection program, particularly so that victims have access to institutionally backed professionals who will properly defend them from those demobilized individuals or groups and other criminals who wish to block the reparations process.

Reparation

Reparation in the 1990s

From the standpoint of transitional justice, one can compare the regional development component included in all the peace processes and agreements that took place during the 1990s with what experts today call collective reparation. The demobilized were aware from the outset that one of the fundamental dividends of peace had to be the economic and social development of the areas where they had operated illegally. Accordingly, the emphasis for development centered on recovering the physical, institutional and social capital of those areas.¹⁴⁰ Nonetheless, this initiative was weak in the following respects: (1) only "brick and mortar" infrastructures received resources, and this hindered investment in sectors such as health and education;¹⁴¹ (2) only in a few cases were projects cofinanced with public and private funds, despite a recognition from the outset of the process of the need to secure such joint funding commitments; and (3) the continuation of the conflict with other armed groups that did not participate in the peace processes of the 1990s (FARC, ELN and others) made it difficult to implement many of the regional investment projects.

Aside from proving to be relatively ineffective in producing regional development, another weakness of the 1990s reparation process was the absence of the victims' consideration or involvement. Although proponents argued that these regional development initiatives were a form of collective reparation, the initiatives actually responded to the social claims that the armed groups sought to secure through violence. For this reason, watered-down versions of the reparatory nature of these measures were agreed upon, especially in view of their similarity to long due state obligations. The impact of the measures adopted was not significant, nor did they succeed in alleviating the effects of violence in these regions. Apart from this regional development component, neither the state nor the armed groups were concerned with reestablishing the dignity of the victims or in repairing them for the harm inflicted. Peace negotiations at the time did not lead to the creation of an administrative reparations' program, nor were victims individually repaired.

The approach to reparations has considerably evolved since the 1990s, not only with respect to the issue of victims but also in regards to reparations. The result of the first peace process did not explicitly include any individual or collective reparations programs. At present, the obligation to repair the victims is explicitly contemplated in the JPL and is a very important part of the process.

The Concept of Reparations

Several authors consider three main objectives for reparations policies in the context of transitional justice:¹⁴²

1. They are a form of economic compensation for the loss or harm the victim has suffered;
2. they officially acknowledge the victims' suffering; and
3. they serve as a deterrent to repeating the same atrocities in the future.

International law has established five minimal components that should be included in reparations programs: (1) rehabilitation; (2) compensation; (3) restitution; (4) satisfaction; and (5) guarantees of nonrepetition.¹⁴³ It is worth noting that all of these components are not necessarily included in the reparations programs implemented in different countries where transitional justice measures have been adopted in postconflict settings.

Formally, the JPL includes these five forms of reparations. Under the JPL, rehabilitation includes actions aimed at the victims' recovery of their mental and physical health.¹⁴⁴ The JPL grants compensation for damages caused to victims by criminal acts. Restitution includes actions directed at restoring victims to their status prior to the commission of crimes against them.¹⁴⁵ Satisfaction, which the JPL defines as a form of moral compensation, includes actions directed at reestablishing the victims' dignity and publicizing the truth. Finally, the guarantee of nonrepetition is expressed primarily in the demobilization and dismantling of the armed groups. There are different types of reparations as well: they may be individual or collective, material or symbolic.¹⁴⁶

This legal formulation is important, insofar as it represents progress on the issue of reparations with respect to the 1990s, when the government implemented no reparations program for the victims of the demobilized armed groups. Although the legal proceedings are still at the investigative stage, and therefore no decisions as to the amount or type of reparations have been made, the legal document itself already represents a major step forward. The law recognizes the importance of victims and the obligation of the state to ensure compensations and restore their dignity.

Thus, at least in the text of the JPL, reparations comply both with the standards of transitional justice and with international standards regarding reparations. Reparations, regardless of their type, should be granted to the entire universe of victims. In practice, however, this does not appear to be

the case in Colombia, insofar as reparations procedures depend on the prosecution of the perpetrator or of the *bloque* to which he/she belonged. These reparations procedures do not include victims of the guerrilla groups or those groups that continue to operate illegally in the country.

The government and the institutions involved in the JPL process have created great expectations regarding reparations for the victims of the conflict. This policy translates, clearly, into the creation of the CNRR, which, although not responsible for reparations to individuals, should make recommendations to the courts in the Justice and Peace jurisdiction regarding the criteria they should establish for reparations. The creation of an institution responsible for establishing criteria for reparations indicates the political importance the government has attributed to this issue. However, although it has led to a wide political debate, little has been done in the way of reparations in practice, or regarding the legal application of the principle. In addition, the CNRR has made public its intention to ensure that not only the victims of the “contemporary conflict” receive reparations, but also those victims of Colombia’s “historical conflict”—that is, the victims since 1964. Although praiseworthy, this is still a “promise” of the government and CNRR that suggests that Colombia is on the verge of a turning point,¹⁴⁷ marked by a clean break with the violence of the past. Nonetheless, is it a real turning point? Or is it rather a promise that, instead of making reparations for the debts of the past, protects the government against future proceedings before international courts?

In practice, the process of repairing victims depends to a large extent on the properties and funds the authorities are able to collect from the assets legally or illegally obtained by the perpetrators of human rights abuses. The lands and money delivered by the perpetrators shall go into the National Reparations Fund for allocation to the victims. This arrangement presents several practical difficulties. The first of these includes not knowing a priori the total amount of money the authorities will have for distribution in the form of reparations. This amount will depend on the asset forfeitures and surrenders required of the demobilized persons within the JPL process. Recovering such assets is not only subject to slow legal proceedings but also to political interests that seek to thwart those expropriations in benefit of the demobilized, allowing them to keep properties they took by force from the population.

Not having made a prior calculation or projection of the expenditures earmarked for reparations shall be reflected in an uncertainty whose only solution will be, once again, improvisation. While the CNRR will soon submit its recommendations regarding reparations to the judges of the Justice and Peace jurisdiction, Colombia faces an additional problem. Not only is it impossible to define the amount of resources available for making reparations, but it is also not possible to define the entire universe of beneficiaries. The JPL has defined the concept of victim, but this definition does not allow it to establish the exact number of victims in the country. Although this peace process applies mostly to the AUC and their victims, it is also open to the victims of guerrilla forces as well—insofar as perpetrators of these groups have demobilized. There are thus so many victims, who have been abused by different armed groups, that it is extremely complex to determine precisely how many there are; it is a population that grows daily, and is, therefore, indeterminate.

The JPL contemplates that the victims, if they so wish, may file claims before civil courts for reparations. However, the criteria used in civil jurisdiction are very different from those that apply in the case of massive and systematic human rights violations. The principle of *restitutio in integrum* (restoration to original condition) is an example thereof. The problem is that this will likely give rise to significant differences between those victims who opt for the civil jurisdiction and those who opt for the Justice and Peace Chambers rulings.

This is not the only plurality in reparations procedures in Colombia. Under the JPL, the CNRR should make recommendations to the judges of the Justice and Peace Chambers on the form of reparations and the priorities in distributing the assets available. What would happen if these recommendations were to differ from the specific content of a given reparations award in a court decision? This inconsistency might not only occur between the CNRR recommendations and the decisions of the Justice and Peace Chambers, either. Where do the decisions of the Inter-American Court of Human Rights—which has ordered the Colombian state to repair the victims of massacres perpetrated by the same paramilitary forces that today have had recourse to the JPL—fit in this process? What about the decisions issued by the civil jurisdiction for those victims who choose to take their cases to civil court—will those criteria change, or would that change the nature of the jurisdiction as such?¹⁴⁸

Some Changes in Reparations

Assets Available for Reparations

Some aspects of reparations as contemplated in the current process have undergone important changes over time. These changes have benefited the victims. The Colombian Constitutional Court played an important role in this regard. For example, the Court decided explicitly that the payment of economic reparations pertained to the members of armed groups who had been tried, and not to the national budget, whose resources could only be used for reparations residually.¹⁴⁹ In addition, and with this same objective in mind, the Court established a type of joint and multiple liabilities among members of the same illegal group. If the assets of the person directly responsible for a crime, in a given legal proceedings, would not suffice for the payment of reparations, any member of the same armed group should be liable for them.¹⁵⁰ This rule applies in the case where the harm suffered by the victim resulted from an act perpetrated by all members of the armed group.

Surrender of Lands: An Element of Both Compensation and Restitution

Several major problems arise in relation to the surrender of lands as part of reparations. The first has to do with a practical consideration: pooling the assets armed groups lawfully obtained with those unlawfully obtained in a single Fund for Reparations may have negative consequences. For example, the assets of displaced families, illegally obtained, could eventually be sold at public auction to a

third party before the real owners are able to claim them legally. At present, this situation is not merely a theoretical exercise, but a practical possibility.¹⁵¹ Given the character of the National Reparations Fund, it is quite likely that confusion between restitution and reparation shall affect all the proceedings. These two elements of the JPL are completely different from one another, although land distribution is a common feature in both. A victim receiving the plot of land from which he or she was displaced is restitution of something that originally was solely his or hers, whereas compensation represents a form of monetary or nonmonetary recognition whose objective is to restore, in one way or another, the victim's right that was violated. After the proceedings, the displaced person may find himself or herself (1) without restitution (without the land) but with compensation (economic or other) or (2) with restitution but not compensation. Either of those outcomes will not restore the victim to his or her former status. So what benefit, in terms of reparation, is there for the victim?

An analysis of the order established by the most recent governmental decree allocating the assets of the Reparations Fund shows inconsistencies between assets earmarked for restitution and those assigned for compensation. The present order is: (1) illegal properties handed over by the armed groups; (2) lawfully owned assets subject to preliminary injunction or surrendered by demobilized persons already convicted; (3) lawfully owned assets of the members of the same group as the convicted person, based on joint and multiple civil liability; and, residually, (4) resources from the national budget. This order means that it shall be difficult to deliver to the same victim assets as restitution and assets as compensation, for, in principle, they come from different sources.¹⁵²

Considering this situation, it is quite inconsistent for the Regional Commissions for the Restitution of Assets to be “loose wheels” within the institutional framework. These institutions do not have clearly defined responsibilities at this time, given that they are not the agencies responsible for adjudicating land to their rightful owners; this adjudication is supposed to be the result of a legal process and pertains to the judges of the Justice and Peace jurisdiction. However, these commissions could already play a significant role, in coordination with the Office of the Attorney General's protection program, in identifying the owners of properties through summons or nonlegal mechanisms in order to inform and facilitate the process after the trials. In addition, it would be important for these commissions to have regional networks that could respond adequately to the local issues of each community. Forced displacement, combined with the traditional informality of property arrangements in Colombia, make it even more complex to search for owners of properties that should be restituted.

The Use of Straw Men and the Principle of Opportunity

Another problematic situation associated with lands surrendered by the demobilized is that, often, before this takes place, the property is transferred to a third party who was not demobilized, and is, in general, close to if not related to the perpetrator. This simulated ownership, known in Colombia as *testaferrato* (“use of straw men”), has been a criminal offense since 1989, and it entails a sentence of up to fifteen years in prison. Thus, if a demobilized person performs his/her duty under the JPL

to confess to properties usurped from civilians, he/she would really be accusing, before the courts, close friends or relatives who participated in a criminal act by aiding and abetting the illegal seizure of land. This third party shall therefore receive significantly heavier sentences than the perpetrator, who benefits from alternative sentencing under the JPL. This is clearly not an incentive for the demobilized to confess.

To address this situation and the reluctance of several members of the AUC to turn over their properties, the government, when regulating the JPL, contemplated the possibility of applying the principle of opportunity¹⁵³ to the crime of *testaferrato*, thereby offering an incentive to the demobilized to hand over illegally obtained properties.¹⁵⁴ However, the application of the principle of opportunity to crimes such as drug trafficking or terrorism changes the essence of this principle, defended before Congress for its possible application to crimes causing minimal harm (*delitos de bagatella*).¹⁵⁵ This issue is not settled, and it certainly creates tension among several important aspects. Indeed, this measure is an incentive for those who committed acts of *testaferrato* to turn over property without being prosecuted. This would facilitate the recovery of most of the illegally obtained property, and would therefore provide a broader base for reparations for the victims, assuming that the cost of returning land to victims is greater than the cost of allowing paramilitary collaborators to enjoy impunity.

Conclusions

The events described and analyzed here were unfolding at the time this paper was being written. Many of the elements of the transition process are still under discussion, and while formally established, in practice they may remain the same, change or even disappear. However, given the fact that this process is still under construction, this type of analysis allows for a “real time” reading, pointing out potential strengths and weaknesses, so that its future implementation can meet the expectations of society at large. Having studied the disarmament, demobilization and reinsertion processes of the past and those unfolding at this time in Colombia, we would like to conclude with some general comments.

Reconciliation is extremely hard to define. Nonetheless, if it is understood as the sum of the investigations and prosecutions, allocation of reparations to victims, truth-telling and the reform of institutions, or at least as a process that cannot be attained unless these conditions are met,¹⁵⁶ it is clear that in Colombia there has not been a process of reconciliation. What has arisen after the peace processes of the 1990s is not a coordinated national process, based on the work of victims and perpetrators, but a process of ever-greater tolerance that has developed gradually with the integration of the demobilized combatants into public and private spaces.

In the 1990s, the government made an effort to achieve reconciliation, conceived as the reform of state institutions in the context of a political process directed at attaining social justice.¹⁵⁷ Its intention was to reform not only the democratic regime but also the structure of the state, creating

opportunities for inclusion of the underprivileged. The definition of Colombia as a Social State of Law, adopted by the 1991 Constitution, provided for extended citizen participation, giving priority to “groups manifestly disadvantaged.”¹⁵⁸

Nonetheless, Colombia is indebted to the victims of the 1990s conflict and their history, for the past is crucial for understanding the roots of the current state of affairs. The new system for dealing with issues of demobilization and justice has positive aspects, insofar as it formally acknowledges the importance of transitional justice. However, it also has serious deficiencies in terms of the institutional tools needed for the adequate implementation of this conceptual framework. We still have time to acknowledge these difficulties, and to find ways to address the practical challenges of prosecuting more than 2,500 individuals for atrocious crimes, and guaranteeing more than 25,000 victims respect for their rights. Striking a balance among truth, justice and reparations in a process of this magnitude is no easy task. However, in implementing the process, the content of the institutional framework, created on an exceptional basis, may eventually consolidate something that, in itself, would represent major progress.

Colombia is one of the few countries that attempted to prosecute most of those responsible for perpetrating atrocious crimes during the conflict in the context of a peace negotiation.¹⁵⁹ The legal approach adopted in the Colombian process has largely absorbed the other components of this transitional justice process. In contrast to other countries’ experiences, truth and reparations have not been approached from an extrajudicial or administrative perspective; rather, these two elements of transitional justice are conceived within the context of legal proceedings.

Therefore, this effort to fully satisfy the right to justice leaves serious doubts as to the process’s prospects for success. In other parts of the world, justice has been set aside, not necessarily in an attempt to foster impunity, but to respond to an unavoidable practical problem: the investigation and prosecution of systematic acts violence exceeds the capacity of any legal system, however sophisticated it might be.¹⁶⁰ For the Colombian legal system, characterized by high levels of impunity and inefficiency, effectively prosecuting the demobilized poses a difficult challenge. Nonetheless, the legal transition is a reality today. Making the most of its advantages shall exclusively depend on the different actors involved in its implementation.

In the introduction to this case study, we formulated a question that has a difficult answer: *In such an uncertain scenario as that of Colombia, what is preferable? A poorly executed justice that can erode or undermine the basic principles of transitional justice—and that may also have harmful effects on the rest of the legal system—or the absence of justice altogether?* At present, the government made an effort to implement the transitional justice machinery through a complex legal framework that may be subject to different interpretations. The government explicitly adopted some mechanisms traditionally found in transitional justice, such as a Commission on Reparation and Reconciliation, and these mechanisms have been subject to constant reinterpretation in the process of adapting them to the Colombian context. This has its advantages and disadvantages. The existence of such mechanisms indicates an interest on the part of the state to live up to international models for protecting victims’

rights and meeting the minimal conditions that historical analysis has shown are necessary for consolidating a postconflict situation. Yet, they may give rise to expectations, which, without adequate implementation, will be hard to satisfy. It all depends on the practical application of this model, and that stage is just now getting under way.

* The authors would like to express special thanks to Luisa Cruz for her timely and invaluable support in drafting this document. We would also like to thank Gerson Arias, Juan Sebastián Ospina, María Lucía Méndez, Martha Maya and Juanita Goebertus, members of the Ideas for Peace Foundation [*Fundación Ideas para la Paz*] (FIP) at the time this document was written, for their various contributions in the course of its research. Lastly, they would like to thank Magdalena Holguín's timely and impeccable assistance to the translation of the paper.

¹ As of January 2007, there were 43,193 demobilized combatants in the country; 73 percent had demobilized collectively and 27 percent demobilized individually. An average of 213 persons demobilized individually per month. These numbers are based on data collected, analyzed and consolidated by FIP from sources provided by the Program of Humanitarian Attention to the Demobilized of the Ministry of Defense [*Programa de Atención Humanitaria al Desmovilizado*] (PADH), the Office of the High Commissioner for Peace, the National Police and the Office of the High-level Adviser for Reintegration.

² The April 19th Movement [*Movimiento 19 de abril*] (M-19), Workers' Revolutionary Party [*Partido Revolucionario de los Trabajadores*] (PRT), Popular Liberation Army [*Ejército Popular de Liberación*] (EPL), Quintín Lame Armed Movement [*Movimiento Armado Quintín Lame*] (MAQL), Commando Ernesto Rojas [*Comando Ernesto Rojas*] (CER), Current Socialist Renewal [*Corriente de Renovación Socialista*] (CRS), Popular Militias of Medellín [*Milicias Populares de Medellín*] (MPM), the Francisco Garnica Front [*Frente Francisco Garnica*] (FFG) and the Independent Movement-Armed Comandos [*Movimiento Independiente-Comandos Armados*] (MIR-COAR).

³ In recent political confrontations, members of the former guerrilla groups, now political actors, have been named "terrorists in civilian clothes." *El Tiempo*, "Presidente Uribe rechazó acusaciones del ex presidente César Gaviria de laxitud con los 'Paras,'" February 5, 2007.

⁴ Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," Public and Legal Theory Working Paper No. 40 (Chicago: University of Chicago, 2003), 4.

⁵ See Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), passim; and David Gray, "An Excuse-Centered Approach to Transitional Justice," *Fordham Law Review* 74, no. 5 (2006): 2624.

⁶ Posner and Vermeule, "Transitional Justice as Ordinary Justice," 6.

⁷ In a critique of a dozen new publications, David Dyzenhaus states: "many within the transitional justice debate take it almost for granted that judicial review on the basis of a liberal democratic constitution is an indisputable marker of a successful transition." See David Dyzenhaus, "Transitional Justice," *International Journal of Constitutional Law* 1, no. 1 (2003): 165.

⁸ Colombia's Political Constitution of 1991 (*Constitución Política de Colombia 1991*), www.archivogeneral.gov.co/index.php?option=com_content&view=article&id=35&Itemid=38; hereafter Constitution of 1991.

⁹ Number of judgments received by the Office of the Rapporteur of the Colombian Constitutional Court, as of September 2006.

¹⁰ Although this description is not itself entirely precise; while the Constitution of 1991 represents a radical change with respect to the foundations of the 1886 Constitution, the period prior to 1991 did not constitute an ancien régime in the same terms in which it is used by theoreticians of transitional justice.

¹¹ Gray, "An Excuse-Centered Approach," 2631.

¹² This was one of the arguments used to justify the creation of the Truth and Reconciliation Commission in South Africa. See Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 661.

¹³ At the time of the drafting of this document, nine senators had been called before the authorities for charges related to their illegal ties to paramilitary groups.

¹⁴ Ministry of National Defense (*Ministerio de Defensa Nacional*), *Logros y Retos de la Política de Defensa y Seguridad Democrática* (Bogotá: Ministerio de Defensa Nacional, 2006).

¹⁵ Statistic from the Free Country Foundation (*Fundación País Libre*).

¹⁶ For a complete history of the paramilitary groups and the AUC, as well as for a detailed follow-up of the process today, see www.verdadabierta.com.

¹⁷ Luis Carlos Restrepo (High Commissioner for Peace), interview by Caracol Radio, July 16, 2003.

¹⁸ See Pablo de Greiff, “Elementos de un Programa de Reparaciones,” in *Justicia, Verdad y Reparación en Medio del Conflicto*, ed. FIP (Bogotá: FIP / Semana / Legis, 2005), 13.

¹⁹ FIP, *Ilusiones Surafricanas*, Siguiendo el Conflicto: Hechos y Análisis de la Semana, no. 30 (Bogotá: FIP, 2005), 1–7.

²⁰ Ibid.

²¹ Carlos Pizarro, leader of the M-19; Bernardo Jaramillo, leader of the Patriotic Union (*Unión Patriótica*); and Luis Carlos Galán, leader of the Liberal Party (*Partido Liberal Colombiano*).

²² Fernando Uricoechea, “Perspectiva Institucional de los Procesos de Reinserción,” in *La Dinámica Organizacional de los Procesos de Reinserción de las Armas a la Democracia*, ed. Fernando Urioechea (Bogotá: Instituto Luis Carlos Galán para el Desarrollo de la Democracia, 2000), 2:67.

²³ This was only incorporated in the negotiations with the CRS group.

²⁴ Otty Patiño, “Armas versus Política,” in *La Dinámica Organizacional de los Procesos de Reinserción de las Armas a la Democracia*, 1:93.

²⁵ The leftist political party, the Alternative Democratic Pole [*Polo Democrático Alternativo*] (PDA), has a far-reaching participation in national politics. The mayor of Bogotá, Luis Eduardo Garzón, and the governor of the Valle department, Angelino Garzón at the time of the drafting of this document, are both members of the PDA. In the 2006 elections, the PDA won eleven seats in the Senate, and its presidential candidate, Carlos Gaviria, was runner-up in the last presidential elections, winning more votes than the traditional Liberal Party’s candidate.

²⁶ The peace accords between the government and the M-19 group explicitly supported a constitutional reform.

²⁷ This was the only process in which a peace accord was signed, specifically stating that “the political responsibility for reincorporation lies with the national government” and, in the same document, that “the Government of the city of Medellín shall help develop the programs for reincorporation and especially in developing the model for verification, monitoring, and follow-up of the demobilized and the communities.” See Peace Agreement between the National Government and the Reincorporated Persons from the Cacique Nutibara Block of the United Self-Defense Forces of Colombia—AUC. La Ceja, Antioquia, December 16, 2003, www.altocomisionadoparalapaz.gov.co/bl_nutibara/dic_10_03_in.htm.

²⁸ Judgment C-370 of 2006, File D-6032 (Constitutional Court of Colombia, 2006).

²⁹ By taking fingerprints, examining dental records and administering DNA tests.

³⁰ According to the Director of the Justice and Peace Unit of the Office of the Attorney General, proceedings are presently carried against only 300 demobilized persons. See María Isabel Rueda, “¿Es usted el dueño de este ‘chicharrón’?” *Semana*, October 22, 2006.

³¹ As will be analyzed further, the demobilized combatants’ inclusion on these lists also has consequences in terms of receiving benefits from the Justice and Peace Law.

³² The total number of demobilized members of the Revolutionary Armed Forces of Colombia [*Fuerzas Armadas Revolucionarias de Colombia*] (FARC) and National Liberation Army [*Ejército de Liberación Nacional*] (ELN) in the last five years has been the following: 668 in 2002, 1,781 in 2003, 1,663 in 2004, 1,436 in 2005 and 1,917 in 2006. These figures were consolidated by FIP.

³³ With the appointment of Frank Joseph Pearl González, the former president of the private investment firm Valorem SA, as High-Level Advisor, the government sent two very clear signals: first, that it seeks to give ministerial rank and introduce managerial know-how to the direction of the reinsertion; and second, that it wants to establish a more direct channel of communication with the private sector that can translate into their active participation in this process.

³⁴ CO\$537,000 (US\$241) for demobilized individuals and CO\$358,000 (US\$161) for those who collectively demobilized.

³⁵ Through collective workshops or, in cases of drug addiction and/or psychiatric disorders, through individual therapy.

³⁶ Equivalent to CO\$8 million (US\$3,600) for the individually demobilized and CO\$2 million (US\$900) for the collectively demobilized.

³⁷ Figures above provided by the National Planning Department (*Departamento Nacional de Planeación. Dirección de Justicia y Seguridad, Grupo de Estudios de Gobierno y Asuntos Internos*), *Política de desmovilización y reincorporación de miembros de grupos armados al margen de la ley: diagnóstico y retos para el futuro Bogotá, January 2006*. National Planning Department Directory of Justice and Security, Government and Internal Affairs Study Group, *Policy for Demobilization and Reincorporation of Members of Illegal Armed Groups: Diagnosis and Challenges for the Future*.

³⁸ At present there are eleven CROs nationwide, eight of which are “fixed” and three of which are mobile. The fixed CROs are located in Montería, Turbo, Cúcuta, Cali, Sincelejo, Santa Marta, Valledupar and Medellín. The three mobile CROs cover several departments or regions at the same time: the first covers Cundinamarca, Sur de Bolívar, Guajira and Santander; the second covers Tolima, Huila, Caquetá and Putumayo; and the third covers Atlántico, Arauca, Bogotá, Meta and Casanare. Fixed CROs have four staff members and mobile CROs have two.

³⁹ This system of accompaniment, monitoring and evaluation (SAME) was developed by the International Organization for Migration (IOM) with resources from USAID through the U.S. embassy. Each CRO thus has the assistance of personnel linked to SAME, financed by the IOM.

⁴⁰ The analysis presented here excludes close examination of Medellín, where the city government’s Program for Peace and Reconciliation has been spearheading the reinsertion process.

⁴¹ As of 2006, productive projects were located as follows: 63 percent in Cundinamarca, 7.52 percent in Antioquia, 6.08 percent in Huila, 3.68 percent in Meta, and 3.2 percent in Quindío. According to the IOM, 70 percent of the collectively demobilized are spread across five regions: Antioquia (32 percent), Córdoba (14 percent), Cesar (10.5 percent), Magdalena (8.6 percent), and Santander (4.8 percent). The leading receiving municipalities are Medellín (13.1 percent), Montería (6.5 percent), Valledupar (5.7 percent), Santa Marta (4.4 percent), Barranquilla (3.4 percent), Cauca (2.9 percent), and Tierralta (2.2 percent). These figures indicate that nearly 40 percent of all demobilized persons are concentrated in just five municipalities. Information presented by IOM at the workshop “Reinserción y Ciudades,” March 28, 2006, organized by FIP, *Semana* magazine and UNDP, www.ideaspaz.org/new_site/secciones/publicaciones/download_tallecon/presentacion_distribucion_geografica.pdf.

⁴² Luz María Londoño and Yohana Nieto, *Historia de Mujeres no Contadas: Procesos de Desmovilización y Retorno a la Vida Civil de Mujeres Combatientes en Colombia* (Medellín: Universidad de Antioquia, 2005), 71.

⁴³ María Eugenia Vásquez, “La Vida se Escribe en Borrador y se Corrige a Diario: El Efecto del Conflicto Armado en Mujeres Desmovilizadas” (mimeo, paper presented at the Género, Conflicto y la Construcción de la Paz Sostenible workshop, Bogotá, May 2000), 3.

⁴⁴ Londoño and Nieto, *Historia de Mujeres no Contadas*, 71.

⁴⁵ *Ibid.*, 172.

⁴⁶ 1,265 individually and 2,852 collectively demobilized women.

⁴⁷ Minors involved in conflict were explicitly given a victim status under Colombian Law 418 of 1997.

⁴⁸ As of 2001, this responsibility was delegated to the ICBF’s Program of Attention to Victims of Violence. This program was established by Resolution 0666 of April 2001.

⁴⁹ Interior and Justice Ministry, *Política de Reincorporación a la Vida Civil, 2003–2006: Una Mirada Institucional*, “Darle la Mano a un Reincorporado es Ser Protagonista de la Paz” (Interior and Justice Ministry, Bogotá, August 2006), 15, www.mininteriorjusticia.gov.co/adminFiles/Documento%202006%205%20septiembre.pdf.

⁵⁰ Angela María Estrada, *Moralidad y Cultura Política: Contexto de Socialización e Identidad Social de Niños/as y Jóvenes Desvinculados del Conflicto Armado Colombiano*, Final Research Report (Bogotá: Universidad de Los Andes-Colciencias / Colombian Institute of Family Welfare [*Instituto Colombiano de Bienestar Familiar*], 2006).

⁵¹ In addition, forty-nine minors belonged to other groups, including the EPL, Guevarist Revolutionary Army [*Ejército Revolucionario Guevarista*] (ERG), People's Revolutionary Army [*Ejército Revolucionario del Pueblo*] (ERP) and various urban militias. Another thirty-eight minors did not specify group affiliation.

⁵² Estrada, *Moralidad y Cultura Política*.

⁵³ ACR Informe de gestión, June 2008, includes the overall information regarding this issue, www.reintegracion.gov.co/app/ReintegraciónenColombia/PresentacionOficialdeLaACR/tabid/109/Default.aspx. Similar information is also available at www.reintegracion.gov.co/app/ServiciosdelProceso/ReintegraciónSocialyEconómica/tabid/136/Default.aspx.

⁵⁴ High Commissioner for Peace: Bulletin on the Productive Projects for Peace (February 2008), www.altocomisionadoparalapaz.gov.co/noticias/2008/abril/abril_04_08a.htm.

⁵⁵ The resources granted for reintegration were for four purposes: (1) a monthly basic individual allowance for six months; (2) a loan for economic insertion (including funding for productive projects, purchasing homes, or tuitions for education); (3) purchase of land for those demobilized individuals who proposed to carry out agricultural projects; and (4) job placement. The amount of economic insertion loan money varied depending on the demobilized individual's group affiliation, with members of the M-19 receiving CO\$1.5 million (US\$2,727), members of the EPL, PRT and MAQL groups receiving CO\$2 million (US\$3,636) and members of the CRS receiving CO\$4 million (US\$7,272). The U.S. dollar figures were calculated using the average representative market exchange rate for December 1990. For more information, see Yaneth Giha, "Evaluación de los Procesos de Reinserción Colectivos de la Década de los Noventa" (unpublished FIP report, Bogotá, 2006).

⁵⁶ More than 80 percent of the projects failed; the remainder survived, but with difficulty.

⁵⁷ Carlos Franco, "Apuntes a la Reinserción Económica: Diez Años de Sobrevivencia a la Crisis de la Economía y de la Paz," in *La Dinámica Organizacional de los Procesos de Reinserción de las Armas a la Democracia*, 1: 97–156.

⁵⁸ The Office of the High Commissioner for Peace [*Oficina del Alto Comisionado para la Paz*] (known by the Spanish acronym OACP) is entrusted with paying program beneficiaries their monthly humanitarian aid, as well as coordinating productive projects for peace. For a general overview on the subject, see María Lucía Méndez and Ángela Rivas, *Alternativas de generación de ingresos para desmovilizados: El Programa de reinserción a la vida civil y la Alta Consejería para la Reintegración*, Informes FIP No. 5 (Bogotá: FIP, 2008).

⁵⁹ The projects are focused generally on the following areas: livestock, timber, fish farms, growing and harvesting crops (including cassava, cacao, plantains, acacia and rubber), and supervising the rejected surplus of bananas, among others.

⁶⁰ Individually demobilized persons, closed focus group interview by FIP members in Bogotá to members of the National Association of the Demobilized [*Asociación Nacional de Desmovilizados*] (ANDES), focus groups carried out in Bogotá, August 25, 2006, and December 12, 2006.

⁶¹ According to the OACP, as of November 2006, 127 productive projects for peace had begun. Of these, 106 were in the consolidation phase and the remaining twenty-one projects were under way.

⁶² For specific cases and testimonies, see "Primer Encuentro Regional de Reinserción en la Zona de Urabá, Apartadó" (unpublished FIP report, Bogotá, 2006).

⁶³ María Piedad Velazco, *Participación del Sector Empresarial en la Reinserción: Precepciones y Oportunidades*, Informes FIP No. 2 (Bogotá: FIP, 2006).

⁶⁴ The model used for the education and training program was designed and developed by the Universidad Pedagógica Nacional. It was eighteen months long and aimed at teaching literacy or

validating primary and secondary schooling, which many ex-combatants lacked. There were also educational and training programs provided by the Superior School of Public Administration [*Escuela Superior de Administración Pública*] (ESAP) and the National Learning Service [*Servicio Nacional de Aprendizaje*] (SENA).

⁶⁵ SENA usually saves places for demobilized individuals in courses given on a regular basis. In addition, depending on the demand, SENA also holds specific courses for the demobilized population.

⁶⁶ The government signed an agreement with the Social Security Institute (*Instituto de Seguros Sociales*) to provide health care to the reinserted population.

⁶⁷ A total of 189 war-wounded ex-combatants who belonged to different armed groups were served by this subprogram, with positive outcomes in most cases.

⁶⁸ Presidencia de la República, Plan Nacional de Rehabilitación, Programa de Reinserción, “Informe de Gestión 1990–1994” (Bogotá, 1994), 28. A report issued by the presidency to account for the Plan Nacional de Rehabilitación, which was a public policy aimed at ending the so-called historic roots of the conflict, and focused on providing institutions and solutions for public welfare, security, schooling and social guarantees in general.

⁶⁹ See, among others, Colin Gleichmann and others, *Disarmament, Demobilisation, and Reintegration: A Practical Field and Classroom Guide* (Eschborn, Germany: GTZ / NODEFIC / PPC / SNDC, 2004); Jeffrey Isima, “Cash Payments in Disarmament, Demobilisation, and Reintegration Programmes in Africa,” *Journal of Security Sector Management* 2, no. 3 (2004), 1–10; and Sigrid Willard, “Does Money Work? Cash Transfers to Ex-combatants in Disarmament, Demobilization, and Reintegration Processes,” *Disasters* 30, no. 3 (2006): 316–39.

⁷⁰ By which the Colombian government established the Office of the High-level Advisor for the Social and Economic Reintegration of Persons and Groups in Arms, and defined the functions of that new entity. See Presidency of the Republic, Decree 3043/06,

www.presidencia.gov.co/prensa_new/decretoslinea/2006/septiembre/07/dec3043070906.pdf.

⁷¹ Bill 201-07 of the House of Representatives, by which the following was issued: Communitarian State: Development for All National Development and Investment Plan 2006–2010, 2006, www.dnp.gov.co/PortalWeb/PND/PND20062010/tabid/65/Default.aspx.

⁷² See FIP, *De Excombatientes a Ciudadanos*, Boletín Siguiendo el Conflicto, no. 47 (Bogotá: FIP, 2007).

⁷³ Frank Pearl, “Reto Social Empresarial: Apoyo a Desmovilizados,” *Portafolio* (September 25, 2006).

⁷⁴ Ibid. In terms of budget, the national government has already invested approximately CO\$700 billion, a little over US\$300 million, into the program. The government has also scheduled expenditures totaling CO\$800 billion (US\$320 million) for the 2007–2010 period.

⁷⁵ At present, the Office of the High Commissioner for Social and Economic Reintegration of Armed People and Groups (*la Oficina del Alto Comisionado para la Reintegración Social y Económica de Personas y Grupos Alzados en Armas*) is designing differentiated packages based on the type of demobilized person, but these specialized programs had not materialized as of January 2007.

⁷⁶ For this reason, the Ministry of National Defense is giving a bonus to those who, upon demobilizing voluntarily, hand in weapons. See Ministry of Defense, Directiva Permanente No. 16, Bogotá, July 2007.

⁷⁷ Established by Law 975 of 2005; this law will be analyzed in the sections that follow. See note 96.

⁷⁸ In this regard, the CNRR recommended that “the smelting of the weapons be a national and public ceremony, with the accompaniment of the international community, and with the broad participation of the victims and their representatives, designed as a guarantee of non-repetition of violations of human rights.” CNRR, communiqué, August 28, 2006.

⁷⁹ Mission to Support the Peace Process in Colombia, *Sixth Quarterly Report of the Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia (MAPP/OEA)*, OEA doc. 4075/06.

⁸⁰ “Operational Plan of the Police Against Criminal Bands.” See Decree 3391/06, art. 3, of September 29, 2006, published in the *Official Gazette* on September 29, 2006.

⁸¹ Mission to Support the Peace Process in Colombia, *Seventh Quarterly Report of the Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia (MAPP/OEA)*, OEA doc. CP/doc.4148/06.

⁸² National Police Force. *Second National Police Report on Control and Monitoring of Demobilized Combatants* (Bogotá: National Police Force, 2006).

⁸³ *Ibid.* Among the names taken by these new criminal bands are United Self-Defenses from Valle [*Autodefensas Unidas del Valle*] (AUV-machos), Popular Peasant Rounds [*Rondas Campesinas Populares*] (RCP-rastrojos), the Varelas (*Los Varelas*), Central Block (*Bloque Central*), Common Social Front for Peace (*Frente Social Común por la Paz*), United Self-Defense Forces from Northern Valle [*Autodefensas Campesinas Unidas del Norte del Valle*] (ACUN), Black Eagles (*Águilas Negras*), Blue Eagles (*Águilas Azules*), Golden Eagles (*Águilas Doradas*), New Generation Organization (NGO) [*Organización Nueva Generación*] (ONG) and the Druglords (*Los Traquetos*).

⁸⁴ Reuters, “Colombia Detecta Nuevos Grupos Armados Ilegales,” July 31, 2006.

⁸⁵ As of February 2006, the MAPP/OEA warned of the reactivation of illegal armed groups in areas that formerly had a paramilitary presence, and noted the possible participation of demobilized persons in these illegal activities. At the time, many in Colombia and in the international community denounced the rearmament of several mid-level commanders of the former AUC. Subsequently, and in the face of much criticism for their lack of commitment to their reclusion and the persistence of violence, President Uribe ordered on August 16, 2006, the leading former military commanders to be held at the main offices of Prosocial, a tourist recreational center located in the municipality of La Ceja, Antioquia. They were gradually captured and some presented themselves voluntarily. Later, and after the decision of the Constitutional Court was issued regarding the need for the paramilitary leaders to be held in prisons and not any ordinary concentration centers, fifty-seven of the former paramilitary chiefs were transferred from Prosocial to the high-security prison at Itagüí.

⁸⁶ National Police Force, *Eighth National Police Report on Control and Monitoring of Demobilized Combatants* (Bogotá: National Police Force, 2007).

⁸⁷ Inter-American Commission on Human Rights, communiqué, August 1, 2006. The Inter-American Commission on Human Rights issued this communiqué shortly after the Constitutional Court’s judgment and before the government issued new regulations for the JPL. It urged authorities to clearly define the effects of the breaching of the individual obligations for demobilization with respect to the rest of the members of the collectively demobilized group. This was important to the Commission because the requirements for collective demobilization set “obligations incumbent on the demobilized group—aside from the fact that criminal proceedings may be individual—as well as the criminal law benefits that may be granted in each case.” In the Commission’s opinion, failure to carry out those obligations should result in “barring, in principle, access to those legal benefits by all members of the demobilized group as a whole.”

⁸⁸ This would also include members of society who actively or otherwise collaborated in the conflict.

⁸⁹ Camila Gamboa de Tapias, “Perdón y Reconciliación Política: Dos Medidas Restaurativas para Enfrentar el Pasado,” *Revista Estudios Socio-Jurídicos* 6, no. 1 (2004): 24.

⁹⁰ *Ibid.*, 21.

⁹¹ Transitorial Article 30 of the Constitution of 1991 authorizes the government to grant legal benefits (i.e., pardons, amnesties, etc.) for crimes committed before the new constitution by members of armed groups who chose to demobilize.

⁹² Political crimes are those committed against the institutional regime. They include rebellion (*rebellion*), sedition (*sedición*) and mob violence (*asonada*). Transitorial Article 30 of the Constitution of 1991 clarified that legal benefits could not be granted for atrocious crimes, homicides committed outside the framework of the conflict, and crimes committed taking advantage of victims’ defenselessness. Furthermore, Law 40 of 1993, known as the “anti-kidnapping law,” expressly prohibited pardons or amnesties for this crime.

⁹³ Presidencia de la República, Plan Nacional de Rehabilitación, 28. At the end of 1993, for example, thirty-nine members of the M-19 were pardoned, while forty-four members were denied the benefit; eighty-three members received the benefit of amnesty and the remaining twenty-one members did not.

⁹⁴ Law 975 of 2005 Justice and Peace Law (*Ley de 975 de 2005 Ley Justicia y Paz*), 2005, www.altocomisionadopalapaz.gov.co/justicia_paz/documentos/Ley1_975.pdf; hereafter JPL.

⁹⁵ Law 782 of December 23, 2002, published in the *Official Gazette* on December 23, 2002. Law 782 of 2002 was used prior to the signing of the Santa Fé de Ralito agreement and excluded the following crimes for receipt of legal benefits: terrorism, kidnapping, genocide, homicide outside of combat, massacres and torture, among others.

⁹⁶ “Bill issuing provisions seeking the reincorporation of members of armed groups who effectively contribute to attaining national peace,” Draft Regulatory Law 085 of 2003 Senate (*Proyecto de Ley Estatutaria 085 de 2003 Senado*), published in the *Official Gazette* on August 27, 2003, 3–6.

⁹⁷ July 25, 2005.

⁹⁸ December 30, 2005.

⁹⁹ In all, twenty-two actions were filed against the JPL.

¹⁰⁰ International organizations, such as Human Rights Watch and the Inter-American Commission on Human Rights, which responded unfavorably to the terms of the JPL prior to its constitutional review, have come out in support of the changes made to the law by the Constitutional Court. In the words of the Inter-American Commission on Human Rights, “The Constitutional Court decision substantially improves the balance originally established in the Justice and Peace Law. . . . The decision of the Court is an essential tool for the legal framework to be implemented consistently with the State’s international obligations.” Inter-American Commission on Human Rights, *Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia*, OEA doc., OEA/Ser/L/V/II.125, doc. 15, 19.

¹⁰¹ The team of twenty prosecutors set out to receive training on international humanitarian law, international human rights law and the participation of victims in transitional justice processes, among other areas. Each was assigned a paramilitary unit (*bloque*) to make the investigation process more efficient in determining units’ origins and crimes committed.

¹⁰² From the issuance of the Justice and Peace Law, the Ombudsman’s Office (*Procuraduría*) has prepared itself to be a party to the Justice and Peace court proceedings. While the official creation of the Justice and Peace Law office within the National Ombudsman’s Office awaits the release of funds, authorized by the Finance Ministry for 2007, the Procuraduría temporarily created a working group from personnel already on staff to take charge of its role in the Justice and Peace proceedings.

¹⁰³ The National Commission on Reparation and Reconciliation [*Comisión Nacional en la Reparación y la Reconciliación*] (CNRR) is mixed with members coming from state and executive levels of government, civil society and victims’ groups. CNRR members from the state include the Defensoría del Pueblo and the Ombudsman or their delegates. The Commission requires the involvement of four members from the executive government: the Office of the Vice-President of the Republic, the Interior and Justice Minister, and the Minister of Finance, or their respective delegates, and the director of the Presidential Agency for Social Action and International Cooperation (generally known as *Acción Social*), who serves as the Commission’s Technical Secretary. The president appoints five civil society members to the CNRR. Last, the remaining members of the Commission select two representatives of victims’ organizations needed for the CNRR.

¹⁰⁴ To date, these commissions have not yet been implemented. Nonetheless, it should include one representative from each of the following bodies: CNRR, municipal or district Ombudsman’s office (depending on the location of the commission), Office of the Defensoría del Pueblo, and Interior and Justice Ministry. The functions of these commissions include collaborating in the implementation of programs for property restitution, providing guidance to victims and to answer their questions regarding the enforcement of court rulings that order the restitution of property. Despite their title, these commissions will not undertake the restitution of assets directly, because the Justice and Peace courts

have the assignment to adjudicate the restitution and charge it to the Fund for the Reparation of Victims. The government has the authority to create the commissions and to determine how they are to be distributed across the country.

¹⁰⁵ The fund is ascribed to Acción Social. As the agency responsible for managing the fund's expenditures, it may calculate and pay the compensation that has been ordered judicially, administer the fund and carry out any other acts of reparation included in administrative programs.

¹⁰⁶ After the Superior Judicial Council (*Consejo Superior de Judicatura*) issued a public notice on May 4, 2006, the Supreme Court selected the eight judges who will serve the two Justice and Peace courts. The judges were trained by the National Ombudsman's Office on truth, justice, international humanitarian law, international human rights law and transitional justice doctrine.

¹⁰⁷ Paragraph 2 of Article 5 of Decree 3391/06 presents other difficulties as well. First, the article is headed "evaluation of eligibility requirements for being proposed," unlike the following article "on the persons deprived of liberty addressed by Article 10 of Law 975 of 2005," which appears to hide the intent to regulate something that is not previously established in the JPL. Second, in order to be proposed, one must verify that the prisoner has a CODA certificate, and it is not clear how it is possible for a person deprived of liberty to have been certified as an individually demobilized person.

¹⁰⁸ This is a very significant change with respect to the original bill on alternative criminal sentencing (*alternatividad penal*), which authorized the president of the republic to grant legal benefits. It is also one of the main reasons why the process is now considered to be judicial and not political.

¹⁰⁹ Executive Resolution No. 200 of 2006, Diario Oficial, August, 18, 2006. MAPP/OEA affirmed that it had not verified Sierra's demobilization. See Comunicado de Prensa, MAPP/OEA, August 22, 2006; and Office of the High Commissioner for Peace, "Aclaración del Alto Comisionado para la Paz al 'Comunicado de Prensa' de la MAPP/OEA de fecha 22 de agosto de 2006," Office of the High Commissioner for Peace,

www.altocomisionadoparalapaz.gov.co/noticias/2006/agosto/documentos/ACLARACION%20AGOSTO%2023-2006.pdf (accessed August 23, 2006).

¹¹⁰ Luis Carlos Restrepo (High Commissioner for Peace), press conference regarding the drafts of what would relate to the Justice and Peace Law, August 29, 2006. Transcript from SNE with same date. The case of the drug trafficker Jhony Cano is an example of this.

¹¹¹ Judgment C-370/06, considerations 3.3.2 and 3.3.3. Granting a pardon is a power of the president of the republic that does not preclude or interrupt a criminal proceeding, nor does it expunge the crime; rather, it exonerates the criminal from paying the criminal sanction imposed for his/her conduct. Accordingly, amnesty and pardon are different, both in terms of the authority entitled to grant them and in their legal consequences.

¹¹² The court ruling in which a demobilized person is convicted of a crime and then granted an alternative sentence should contain the following obligations on the part of the convicted: (1) the moral and economic reparations that must be given to the victims of the specific crime; (2) the obligation to observe good conduct and refrain from future criminal activities; and (3) the order to confiscate their assets for the purpose of giving reparations to his/her victims. It is important to note that confiscation here is used exclusively in the English context of the "seizure of private property as a consequence of the commitment of a crime." In Colombia the term is *extinción de dominio*, because *confiscación* is in itself a penalty banned by the Constitution.

¹¹³ The final conviction cannot be subject to other criminal provisions, additional benefits or supplementary reductions.

¹¹⁴ Judgment C-370/06. Although the Constitutional Court does not make explicit reference to Article 2 of the JPL on this point, one should recall that it defines the scope of the JPL, which includes investigation, prosecution, sanction, and granting of legal benefits to the demobilized. This bolstered the argument that the criminal action is not extinguished, but that it is given exceptional treatment.

¹¹⁵ Ibid. In the words of the Constitutional Court, "While it is true that he is subjected to less rigorous criminal justice than what one finds in the Criminal Code—if the transgressor meets certain requirements

regarding the victims' reparations and collaboration with the administration of justice, what is clear is that even then, the penalty does not disappear. It is imposed upon the criminal, but the defendant may . . . obtain a benefit that could reduce the time of imprisonment, without it disappearing."

¹¹⁶ *Ibid.*, paragraph 6.2.1.4.9. For the Constitutional Court, "the so-called alternative sentence, as a mechanism aimed at attaining peace, is constitutional," as it "does not entail a disproportionate detriment to the value of justice, which appears to be preserved by the imposition of an original sentence (principal and accessory) under the framework of the Criminal Code, one which is proportional to the crime for which the person has been convicted, and which must be served if the demobilized person breaches the commitments under which he was granted the benefit of the suspension of said sentencing."

¹¹⁷ Conditional release may be granted to individuals only if the following requirements are met: (1) surrender of assets to the Fund for the Reparation of Victims; (2) perform acts of reparation imposed by the court in a satisfactory manner; (3) cooperate with the CNRR and carry out the agreement signed with the Superior Judicial District Court that sees to enforcement of the reparation obligations; (4) publicly recognize their crimes and do so in a way that shows repentance and reestablishes, satisfactorily, the dignity of the victims and their families; (5) request pardon and commit to not repeating crimes; (6) work effectively to locate kidnapped or disappeared persons and victims' corpses; and (7) help bury victims' bodies according to family and community traditions.

¹¹⁸ JPL, art. 29; and Decree 4760/05, art. 8.

¹¹⁹ JPL, art. 31.

¹²⁰ Decree 3391/06, art. 20. In this regard, see FIP, *¿Favorabilidad de Quién? Siguiendo el Conflicto: Hechos y Análisis de la Semana*, no. 45 (Bogotá: FIP, 2006).

¹²¹ The National Police issued their first appeal on August 16, 2006. The appeal was ignored by, among others, "Jorge 40," Vicente Castaño, Ramiro Vanoy, Miguel Mejía Múnera (the "Mellizo" ["twin"]), the Alemán ("the German guy"), "Jorge Pirata" (Pirate George), "Cuchillo" (Knife), "Daniel" and "Botalón." Subsequently the police confined commanders at the offices of Prosocial, a former tourist center that was adapted to keep the paramilitary leaders. This happened after they were criticized for not complying with the obligation to remain within the concentration zones.

¹²² See *El Tiempo*, "Así es la Vida de Tres Poderosos Ex jefes 'Paras': Disfrutando de su Libertad y sus Fortunas," July 23, 2006.

¹²³ National Police Force, *Third National Police Report on Control and Monitoring of Demobilized Combatants* (Bogotá: National Police Force, 2006).

¹²⁴ The recent assassinations of several paramilitary lieutenants and the perpetration of various crimes suggest that the commanders may have been ordering the crimes from La Ceja, prompting the interior minister to transfer them to a maximum-security prison.

¹²⁵ *Caballero-Delgado and Santana v. Republic of Colombia*, December 8, 1995, ruling; *Las Palmas (Hernán Javier Cuarán and others v. Republic of Colombia)*, December 6, 2001, ruling; "19 Merchants" (*Alvaro Lobo Pacheco and others v. Republic of Colombia*), July 5, 2004, ruling; *Gutiérrez Soler v. Republic of Colombia*, September 12, 2005, ruling; *Mapiripán Massacre v. Republic of Colombia*, September 15, 2004; *Pueblo Bello Massacre v. Republic of Colombia*, January 31, 2006; and *Ituango Massacres v. Republic of Colombia*, July 1, 2006.

¹²⁶ Teitel, *Transitional Justice*, 39.

¹²⁷ *Ibid.*, 58.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 60.

¹³⁰ Elizabeth Jelin, *Memorias de la Represión*, vol. 1, *Los Trabajos de la Memoria* (Madrid: Siglo XXI, 2002), 5–6.

¹³¹ Gamboa de Tapias, "Perdón y Reconciliación Política," 29. On this point, the following are often cited: Tzvetan Todorov, *Hope and Memory: Lessons from the Twentieth Century*, trans. David Bellos (Princeton: Princeton University Press, 2003); and Pablo de Greiff, "La Obligación Moral de Recordar," in *Justicia, Verdad y Reparación*.

¹³² Pablo de Greiff, “La Obligación Moral de Recordar,” in *Justicia, Verdad y Reparación*.

¹³³ FIP, *Ilusiones Surafricanas*, 4.

¹³⁴ *El Tiempo*, “Fuerte Discurso de Uribe en Costa Rica sobre la ‘Para-política,’ ” January 26, 2007.

¹³⁵ Recently, the Supreme Court of Justice established a Truth Commission on the Palace of Justice Holocaust of November 6 and 7, 1985. In November 2006, it submitted a preliminary report on the events of the famous takeover by the M-19. The members of the Truth Commission are all ex-leaders of the Supreme Court, meaning that its members, though representatives of state institutions, were also direct and indirect victims of the episode they seek to reconstruct. See www.verdadpalacio.org.co/.

¹³⁶ Law 987 of September 9, 2005, published in the *Official Gazette* on September 9, 2005; Law 447 of July 21, 1998, published in the *Official Gazette* on July 23, 1998; Decree 4433/04 of December 31, 2004, published in the *Official Gazette* on December 31, 2004; Decree 2070/03 of July 25, 2003, published in the *Official Gazette* on July 28, 2003; and Decree 1211/90 of June 8, 1990, published in the *Official Gazette* on June 8, 1990.

¹³⁷ We are thankful to Luisa Cruz for noting the importance of this comment.

¹³⁸ The Interior and Justice Ministry regulated the participation of the victims through Decree 315 of 2007, in which it included certain requirements before people are recognized as a party within the proceedings.

¹³⁹ On January 31, 2007, Ms. Yolanda Izquierdo, leader of the People’s Organization for Housing (*Organización Popular de Vivienda*) and a leading advocate for victims of forced displacement, was assassinated in Sincelejo, a city in northern Colombia. At the time, Izquierdo was in the process of recovering the land of more than 1,000 peasants (*campesinos*) who were displaced by the AUC in the Tierralta and Valencia municipalities of the upper Sinú River valley in Córdoba. Her death took place just two days after the assassination of Freddy Abel Espitia, president of the Committee for Displaced Persons (*Comité de Desplazados*). Although Ms. Izquierdo’s death has been particularly emblematic given her importance in the milieu of victim representation, three other victims’ representatives have been assassinated since the spontaneous declarations of former combatants began.

¹⁴⁰ Pablo Tatty, “Objetivo de las Inversiones Regionales,” in *La Dinámica Organizacional de los Procesos de Reinserción de las Armas a la Democracia*, 2:115. Accordingly, the resources earmarked for recovering the physical, institutional and social capital benefited works, most of them related to physical infrastructure, in Cauca, Caquetá, Córdoba, Huila, Sucre, Bolívar, Atlántico, Magdalena and Urabá Antioqueño. Presidencia de la República, Plan Nacional de Rehabilitación, 77.

¹⁴¹ Other than the construction of buildings.

¹⁴² Neil Kritz, “The Dilemmas of Transitional Justice,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 3, *Laws, Rulings, and Reports*, ed. Neil Kritz (Washington, D.C.: United States Institute of Peace Press, 1995).

¹⁴³ Gamboa de Tapias, “Perdón y Reconciliación Política,” 32.

¹⁴⁴ In terms of rehabilitation, the JPL argues that the health and psychological care intrinsic to this right should be financed through the Victims Reparation Fund. Later, however, it also states that this right includes the social services already provided by the government to citizens in accordance with the general laws and regulations currently in place.

¹⁴⁵ The JPL defines the right to restitution as the reestablishment of victims’ personal liberty, return to their place of residence and return of their property.

¹⁴⁶ The JPL defines symbolic reparations as those actions carried out to benefit the victims or the community in general, and which are aimed at preserving historical memory, nonrepetition of the victimizing acts and restoring victims’ dignity. Specific measures of symbolic reparation include recognizing that one has committed crimes and publicly asking for forgiveness. Collective reparation, as defined by the JPL, includes all actions aimed at the psychosocial reconstruction of the populations affected by violence and, in particular, of the communities affected by systematic violence.

¹⁴⁷ Eduardo Pizarro León Gomez, *Una Democracia Asejada: Balance y Perspectivas del Conflicto Armado en Colombia* (Bogotá: Norma, 2004).

¹⁴⁸ On this point, we are grateful for Luisa Cruz’s comments on the importance of this issue.

¹⁴⁹ Judgment 370/06, “to cover the rights of the victims, especially those who do not have a judicial decision that sets the amount of compensation to which they are entitled . . . and in the face of the possibility that the perpetrators’ resources prove insufficient.”

¹⁵⁰ *Ibid.*, para. 6.2.4.4.7, “not only among those criminally liable, but also with respect to those who have been convicted through judicial decisions as members of a specific armed group.” The Constitutional Court notes that joint and several liability in making reparations to victims is exceptional and answers to the specific and particular nature of the JPL. At the same time, the Court notes that the extension of civil liability from a crime from the individual who perpetrated it to a larger group of people indirectly involved in the crime is not foreign to the Colombia legal tradition. Accordingly, the criminal legislation makes reference to what is called the “third party civilly liable” and the responsibility of paying reparations that attaches itself to those who have benefited from illicit enrichment as the result of a crime having been committed. Colombia Criminal Code, Law 599 of July 24, 2000, art. 96, published in the *Official Gazette* on July 24, 2000.

¹⁵¹ To better understand the operation of the National Reparations Fund, see FIP, “Comisión Nacional de Reparación y Reconciliación (CNRR)” in *¿En qué va la Ley?* No. 2 (Bogotá: FIP, 2007).

¹⁵² The property that can be given in restitution is from the ill-gained assets of ex-combatants, while the property earmarked for compensation comes from perpetrators’ lawfully obtained holdings.

¹⁵³ “The Attorney General of the Nation may suspend, interrupt, or waive the criminal prosecution . . . in application of the principle of opportunity,” for example, “when the criminal prosecution of a crime entails more significant social problems, so long as there exists and comes about an alternative solution that is in line with the victims’ interests.” Law 906 of August 31, 2004, art. 323.15, published in the *Official Gazette* on September 1, 2004.

¹⁵⁴ Decree 4760/05, art. 13.

¹⁵⁵ Crimes of *bagatella* are those in which the illegal nature of the conduct is called into question (i.e., those crimes in which the protected legal interest is not seriously violated and therefore, in some cases, the cost of prosecution is disproportionate in institutional terms, in light of the damage caused). In the realm of copyright law, for example, it is the offense of downloading a single song, sporadically, from the Internet; or in terms of property, for instance, the theft of a razor blade from a supermarket chain.

¹⁵⁶ As necessary but not sufficient conditions. See Pablo de Greiff, “The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted,” in *The Age of Apology: Facing Up to the Past*, ed. Mark Gibney et al. (Philadelphia: University of Pennsylvania Press, 2007).

¹⁵⁷ Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (New York: Oxford University Press, 2000), 377.

¹⁵⁸ See, among others, Judgments T-422/92, C-022/96 and T-592/2002 of the Colombian Constitutional Court.

¹⁵⁹ Recently in Uganda a proceeding has begun to prosecute the leaders of the Lord’s Resistance Army (LRA), making use of the jurisdiction of the International Criminal Court, the entity that has formally accused them.

¹⁶⁰ As Richard J. Goldstone recalls, “It should be recognised that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence. There are simply too many victims and too many perpetrators. Even the most sophisticated criminal justice system would be completely overwhelmed.” Richard J. Goldstone, “Prologue,” in Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).