

Paramilitary Demobilisation in Colombia: Between Peace and Justice



Felipe Gómez Isa

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Felipe Gómez Isa

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Introduction

After the deep sense of crisis which Colombia experienced in the wake of President Pastrana's (1998-2002) failed peace process, the then candidate to the presidency Álvaro Uribe Vélez, in the midst of an election campaign, announced his intention to strengthen the workings of the democratic state to the utmost and declared his predisposition to open a dialogue with all the illegal armed groups provided there was an immediate cessation of hostilities. Since August 2002, when he took office, a dialogue process and subsequent demobilisation of paramilitary groups has taken place, within the framework of Uribe's new policy of *democratic security* which has led to 31,671 members of those illegal armed groups pledging to lay down their arms¹. Throughout this process, Colombia has been faced with the onerous task of tackling the dilemmas which any transitional justice process creates²: to pull off the ever precarious and unstable balancing act between the need for peace and the need for justice. In the words of President Uribe, the process should seek "as much justice as is possible, and as much impunity as is necessary". The truth is that this statement of intentions has marked, and continues to mark, the entire demobilisation negotiation process and the implementation of the agreements reached. One of the key elements in this game of call my bluff has been the intense pressure brought to bear by the paramilitary groups with baseline demands that they should not have to go to prison, or face possible extradition and trial in the USA, and also that they be

allowed to keep a significant part of what they have acquired through their illegal activities.

Besides the limitations that such a point of departure imposes, the process of negotiation, demobilisation and rehabilitation of the paramilitary structures has been opaque, led unilaterally from the highest echelons of the executive and without an effective participation by the victims of the violence. The absence of the victims in the process has been criticised as one of its main failures.

What in essence lies behind these criticisms is the danger that, under the official mantle of justice and the victims' rights to justice, truth and reparations, the process ends up becoming something which guarantees impunity and which does not ultimately lead to the effective dismantling of paramilitary structures of economic power and social control, thereby contributing to the legalisation and institutionalisation of the paramilitary phenomenon and its consolidation as a political project.

The Colombian state has limited room for maneuver when handling the process, and in fact a quite specific and sophisticated set of guidelines exists, both in terms of international law regarding human rights and Colombian legislation itself, along with internal and international jurisprudence. These guidelines in essence stipulate that, in line with international law, impunity is not an option for serious crimes, such as those carried out by the different participants of the armed conflict in Colombia.

As well as the global human rights treaties ratified by Colombia, the international context can count on the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* approved in December 2005 by the General Assembly of the United Nations³. These guidelines set out a clear road map in processes of transitional justice, in which

¹ These are official figures which are used by the Office of the High Commission for Peace (Oficina del Alto Comisionado para la Paz), in "Desmovilización de las Autodefensas. Balance de un proceso", Simposio de Evaluación y Balance: Dos años de Ley de Justicia y Paz, Universidad Santo Tomás, 25 July 2007, in www.altocomisionadoparalapaz.gov.co

² In any case, we are dealing with a process of transitional justice *sui generis*, given that there are no signs in Colombia which indicate a way to overcome the conflict, more so when the demobilisation process is faced in a context in which an armed group which is still active, with no sign the FARC is planning to change its course. We are dealing with a transitional justice without transition, something which could end up conditioning the whole process. See in this respect Uprimny, Rodrigo (Ed.) (2006): *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*, DeJusticia-Antropos, Bogotá.

³ Resolution 60/147, of the 16th of December 2005.

justice, the truth, wholesale reparations to the victims of gross violations of human rights and guarantees of non-repetition have to be respected.

Fully aware of the limitations which international law now imposes upon states, the Colombian Congress passed the *Justice and Peace Law (Ley de Justicia y Paz)* in June 2005⁴, after eventful negotiations, leading to severe criticism by some for what was considered an attempt to create a legal umbrella to shelter impunity. There have been different regulatory developments of the law, fashioning the basic legal framework within which the process of paramilitary demobilisation is to be conducted⁵.

The law itself is couched in the language of human rights and the rights of the victims in the framework of transitional justice, but leaves a lot to be desired with regards to the mechanisms and instruments needed to put the above mentioned principles into practice. Some see it as a *process of simulation*⁶, in which lip service paid to the language of international rights actually serves impunity. The law aims to strike a balance between peace and justice. And so it offers generous benefits in terms of sentencing to paramilitaries who demobilise with the intention that this will produce positive effects for the rights to truth, reparation for victims, as well as the establishment of guarantees of non-repetition of the atrocious crimes attributed to paramilitaries (including massacres, torture, abductions).

The Colombian Constitutional Court itself has pronounced on various appeals which have been brought against the law on account of its supposedly unconstitutional nature, in May 2006 accepting alternative sentencing, provided that it works as a real

and effective incentive to the rights to truth, reparation, and non-repetition guarantees. The ruling has significantly amended key aspects of the Justice and Peace Law, turning it into an instrument with a better chance of making the process of demobilisation an effective means to the materialisation of justice, truth and reparation for victims.

In any case, the achievement of these goals does not rest exclusively with the good intentions of a legal framework brought more into line with international standards; the process will ultimately depend on the will and capacity of the Colombian state to change a situation which has seen the configuration of real economic, social and military power by paramilitary groups in vast areas of Colombia.

In those regions of the country the presence of the state has been all but absent and the enormous wealth generated by drug trafficking has been the essential sustenance of the outlawed groups⁷.

The following sections explore the international legal framework with regards to justice, truth and reparation and ask to what extent Colombia's very own tailor-made framework is in line with these parameters, especially in the light of the Constitutional Court's ruling on the Justice and Peace Law.

⁴ Law 975 of 2005. The law, passed on the 22 June,, was sanctioned by the President of the Republic on the 25 July,, *Diario Oficial* nº 45.980, 25 July 2005.

⁵ All the normative developments can be found in Interior and Justice Ministry (Ministerio del Interior y de Justicia (2007): *Normative compilation: Justicia y Paz. Proceso de desmovilización, reincorporación y reconciliación nacional*, Bogotá.

⁶ Valencia Villa, Hernando (2005): "La Ley de Justicia y Paz de Colombia a la luz del Derecho Internacional de los Derechos Humanos", Centre of Investigation for Peace Research, Madrid, p. 9.

⁷ Cubides, Fernando (2004): "Narcotráfico y guerra en Colombia: los paramilitares", in Sánchez, Gonzalo y Lair, Eric (Eds.): *Violencias y estrategias colectivas en la Región Andina*, Norma-IFEA-IEPRI, Bogotá, pp. 377-410.

The right to justice in the Colombian demobilisation process

The right to justice is recognised across all international law⁸, a recognition and development in which the United Nations has played a very important role. More specifically, access to justice occupies a very important place in the right to reparation as per the Basic Principles and Guidelines.⁹ This right implies, first of all, that states have the duty to create the legal framework required to allow accusations of human rights abuses to be made, investigated and tried; secondly, the right to justice means that states take the necessary measures to prevent flagrant, systematic and grievous human rights violations being met with impunity.

However, experience would suggest that justice is one of the more precarious stages in the process, with obstacles of all kinds which, on occasions, are very difficult to overcome. In the case of Colombia, we are dealing with chronic impunity with regard to crimes committed in the context of the military conflict,¹⁰ a burden which is not going to be easy to offload. In light of this, this document will now ask to what extent Law 975 complies with the minimum conditions demanded in terms of the right to justice.

⁸ Articles 8 to 11 of the Universal Declaration of Human Rights (1948) recognise the right of every person to an effective recourse before a national court with jurisdiction, the prohibition of arbitrary detention, the right to be heard by an independent and impartial court and the presumption of innocence, rights which have been widely developed by the International Covenant on civil and political rights and other international instruments and which constitute the basic guarantees of the democratic state.

⁹ The obligation to investigate, try and punish can be found in principle 4 of the Basic Principles and Guidelines on the right to reparation. For their part, principles 12 and 13 amount to an important complement to principle 4, enshrining equal access to effective judicial appeal, access to administrative and other organs, as well as procedures used in line with internal laws, and admitting in the same way collective demands from determined victims groups, respectively.

¹⁰ International Commission of Jurists (2005): *Colombia: socavando el Estado de Derecho y consolidando la impunidad*, Bogotá.

The “residual” nature of Law 975

The demobilisation process initiated by the Uribe administration enjoys a wide-ranging normative legal framework which began with Law 782 in 2002 and its statutory Decree 128, passed in January 2003. The application of these norms means that the Justice and Peace Law of 2005 has a residual nature, which is to say, it will only be applied to paramilitaries who cannot take advantage of the generous conditions offered by Law 782 and Decree 128. This situation has received harsh criticism from various quarters¹¹, the argument being that it amounts to a surreptitious way of guaranteeing impunity for the majority of those involved in the process¹². Indeed of the almost 30,000 paramilitaries who have demobilised, less than 10 percent of those claimed by the Government have sought protection under the Justice and Peace Law, the rest already being protected by Law 782 and Decree 128. This means that, in consequence, more than 90 percent of those who have opted into the process will not have to “appear before the law to provide spontaneous declaration, substantially reducing the possibilities of arriving at a truth which guarantees the rights of the victims”.¹³

To try and avoid this, it has been stressed that “the application of Laws 782 and 975 are not mutually exclusive”¹⁴. This means that if it can be proved that a demobilised paramilitary who has taken advantage of Law 782 and its decree has committed other crimes

¹¹ Decree 128 has been described as “impunity by decree” by the Latin American Institute for Alternative Legal Services (El Instituto Latinoamericano de Servicios Legales Alternativos, or ILSA (2006): *Verdad, Justicia y Reparación en procesos de paz o transición a la democracia. Informes y recomendaciones para Colombia*, Bogotá, p. 15.

¹² As has been pointed out in this respect, Decree 128 only establishes an administrative verification procedure of the demobilised paramilitaries’ judicial situation. According to figures of the Colombian Justice Administration, of the more than 20,000 demobilised paramilitaries who have taken advantage of the provisions of Decree 128, “less than 50 have judicial cases pending”, which ends up looking like a real “situation of impunity, in large part attributable to the incompetence of the judicial system”, in Romero, Marcos Alberto (2006): “Desplazamiento forzado, paz y reforma social”, en *Tierra y Desplazamiento en Colombia. Crisis Humanitaria por el control del territorio*, Taula Catalana per la pau i els drets humans a Colombia, Barcelona, p. 105.

¹³ Gallon, Gustavo., Reed, Michael., y Lleras, Catalina., (Eds.) (2007): *Anotaciones sobre la Ley de Justicia y Paz, Una mirada desde los derechos de las víctimas*, Comisión Colombiana de Juristas, Bogotá, p. 14.

¹⁴ *Recomendaciones para la Reglamentación y Aplicación de la Ley de Justicia y Paz*, Document CITpax n° 3, 10th of November 2005, pp. 14 y 15.

which are not pardonable under their provisions, he should be submitted to the processes of the Justice and Peace Law, the intention being to avoid impunity for serious offences committed by paramilitaries. As a consequence, different state organisms competent in the matter "ought to play an active role in ensuring that all of those who have taken advantage of the demobilisation process and the benefits contemplated in Law 782 be investigated for other possible crimes which should then be dealt with in conformity with Law 975 or by normal procedural measures".¹⁵

Alternative sentencing in the Justice and Peace Law

As we have already pointed out on several occasions, the fundamental objective of the Justice and Peace Law is to strike a balance between peace and justice, offering *alternative sentencing* to paramilitaries who are willing to lay down their arms, end hostilities and cooperate effectively with the Justice Department. After an intense debate in which the paramilitaries obviously didn't want to contemplate serving any kind of prison sentence, however short, and in the wake of pressure from the international community and Colombian civil society, a consensus was reached regarding alternative prison sentencing which called for a minimum of five years to a maximum of eight years behind bars, "according to the gravity of the crime and the effective co-operation provided in the clarification of the same" (Article 29).

The fact is that the excessive leniency of the sentences has been criticised, leading some to describe the situation as "something like a disguised general amnesty"¹⁶. Besides, the already reduced sentences

can be further lightened by work and good behaviour. From some quarters, it is claimed that this flexibility and generosity is acceptable if it fosters the right to truth, reparation and non-repetition of terrible crimes, which is to say, if alternative sentencing really is an effective way of bringing about peace and reconciliation.¹⁷

The Constitutional Court ruling in May 2006 set about interpreting some of the more controversial aspects of the Law from the standpoint of the right to justice, decisively contributing to a minimum protection of this right when carrying out the demobilisation process. The Court is well aware of the dilemmas which a transitional justice process throws up, creating evident tensions between two values which have a constitutional weight in Colombia: peace and justice. Faced with this dilemma, the Court has underlined the need to apply the method of *ponderación*, or due consideration, which is to say, "to weigh up the constitutional rights which are in conflict, with the aim where possible of reaching a harmony between them, or deciding which of the two ought to prevail". Applying the method of due consideration to this question, the Constitutional Court reached the conclusion that:

"... the attainment of a lasting and stable peace... by means of the demobilisation of the outlawed armed groups may involve certain restrictions in terms of the objective value of justice and the correlative rights of the victims to justice, given that if this were not the case, peace would be an unrealisable ideal due to the judicial and factitious situation of those who have taken part in the conflict; this has been demonstrated by the historical experience of different countries which have overcome internal armed conflicts".

¹⁵ *Recomendaciones para la Reglamentación y Aplicación de la Ley de Justicia y Paz...*, *op. cit.*, p. 15. According to this same source, this seems to be the interpretation which the Attorney General's Office is giving to these kinds of cases. Citing information which appeared in *El Tiempo* on the 13 October 2005, in spite of the fact that Jairo Andrés Angarita had been demobilised under Law 782, when it was discovered that he had possibly been the author of grave, non-pardonable crimes, the Attorney General's Office opposed his election to Congress and he must either seek relief through the provisions of Law 975 or be tried under normal criminal procedures., *op. cit.*, nota 6, p. 15.

¹⁶ Gonzalez Bustelo, Mabel., (2005): "Las encrucijadas de Colombia", *Papeles de Cuestiones Internacionales*, nº 91, p. 135.

¹⁷ This is the opinion of Rodrigo Uprimny, for whom the model of *responsibilising pardons* such as that followed in post-apartheid South Africa "is the one which respects democratic principles and the victims' rights the most, and is the most fitting to the Colombian context". This model demands that the concession of penal benefits is always directed by the principle of *proportionality*, which has as its corollary that "the pardon of the perpetrators of the violations is only justifiable when it constitutes the only existent measure available to achieve peace and reconciliation, and when it is proportional to the seriousness of the crimes committed by the accused, his rank in the organisation and the contribution he makes to justice". Uprimny, Rodrigo. (2006): "Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano", en Uprimny, Rodrigo (Dir.): *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*, DeJusticia-Antropos, Bogotá, pp. 28 y 29.

That being said, the Court goes on to add in a very considered statement: “Peace does not justify everything. The value of peace cannot be conferred an absolute importance, because it’s also necessary to guarantee the materialisation of the essential content of the value of justice and of the victims’ right to justice, as well as the other rights of the victims...”.

First of all, the Court asks itself if, seemingly, a punishment which ranges between five and eight years in prison as established in Article 29 of the Justice and Peace Law does not seem “disproportionately lenient when dealing with serious criminal offences”¹⁸. Finally, after an exhaustive study of all of the legal dispositions which might affect the right to justice, the Court concluded that Article 29 was constitutional, provided it guaranteed the basic rights to justice, the right to the truth, the right to reparation of the victims and that effective guarantees were put in place to ensure that there would be no repetition of the crimes. In this sense, the Court has maintained the symbolic role of the main sentence which would be given to paramilitaries and which, on occasions, can stretch to up to 60 years in prison. In consequence, the paramilitaries who benefit under the Justice and Peace Law are to be condemned as established in the Penal Code, something which takes on an enormous importance as much for the victims as for society at large who see the perpetrators of the crimes receiving a sentence befitting the seriousness of their behaviour. The alternative sentencing enshrined in Article 3 of the Justice and Peace Law consists of the main punishment in the sentence being suspended “replacing it with an alternative sentence which is granted to the beneficiary in aid of the attainment of national peace, cooperation with the law, the reparation of the victims and an adequate reinsertion (into society)”. This article has been declared constitutional by the Court “on the understanding that cooperation with the Administration of justice be directed towards bringing about the effective enjoyment of the victims’ rights to truth, justice, reparation and non-repetition”.¹⁹ As can

be seen, the granting of the alternative sentence is not something which is automatic, but rather a decision which the corresponding court takes, based at all times on the attitude which the demobilised paramilitary shows, and whether this attitude is likely to contribute meaningfully to the rights of the victims.

The reduced investigation period

Another aspect of the Justice and Peace Law which raises problems from the perspective of the right to justice is the amount of time given to the Attorney General’s Office to investigate crimes. The truth is that without a reasonable amount of time, the working capacity to carry out systematic and serious investigations into something as complex as paramilitary activity is severely limited, something which could end up affecting the victims’ right to justice and truth. In this sense, Article 17.4 of the Justice and Peace Law establishes that “the demobilised paramilitary will be placed at the disposition of the Magistrate who will act as a control guarantee... within the period of the following 36 hours, the Magistrate will denote and carry out a hearing wherein the charge will be formulated, if the Attorney General who is dealing with the case has previously requested it”. For those who claim Law 975 to be unconstitutional, this amount of time is so short that it “does not constitute an effective remedy”. After an examination of the totality of Article 17, and not only of paragraph 4, the Constitutional Court reached the conclusion that “the norm which has been challenged establishes, in general terms, reasonable criteria to ensure a rapid, impartial and exhaustive investigation”. In this respect, it’s essential to take into account paragraph 3 of article 17, where the minimum basic requirements of an investigation of this kind are laid out. Article 17.3 calls for:

“the spontaneous declaration of events given by the demobilised paramilitary and the other actions...will immediately be placed at the disposition of the Attorney General’s Office (Unidad Nacional de Fiscalías de Justicia y Paz) with the aim that the delegated Attorney General and the Judicial Police assigned to the case elaborate and

¹⁸ Constitutional Court, Sentence n° C-370/2006, 5.4. y *op. cit.*, 5.5.; y 6.2.1.4.4.

¹⁹ Constitutional Court..., *op. cit.*, VII, second.

develop the *methodological programme*²⁰ to begin the investigation, check the truth of the information provided and clear up the facts of the same and of all others which they have knowledge of, to the limits of their competence” (emphasis added).

In consequence, and staying with the Constitutional Court’s opinion on this matter, “the 36 hour period... cannot be interpreted as the period of time for the investigation, as the plaintiffs have interpreted it, but rather the established amount of time for the control guarantee Magistrate to denote and carry out a hearing in which the charge will be formulated, once the Attorney General involved in the case has requested it”. And that request can only be made “when the Attorney General considers that the methodological programme of the investigation has been carried out to perfection, because only then will the state have built a case to support the charges”. In consequence, the Court declares the reference of 36 hours in Article 17.4 to be constitutional “on the understanding that the person placed at the disposition of the control guarantee Magistrate’s orders, and the request for a hearing in which charges are made, will only take place once the methodological programme called for in the third section of the same article has been carried out to perfection and pursuant to Article 207 of the Penal Procedural Code”.²¹

Without any doubt, the investigation of matters related to paramilitary activities is going to be one of the central aspects of the whole process which we have been analysing. Only if serious, systematic and exhaustive investigations are carried out will it be possible to punish specific crimes and lay the foundations for the dismantling of paramilitary structures.

²⁰ The methodological programme, according to Article 207 of the Procedural Penal Code (Law 906, of 2004), is an investigative tool designed by the Attorney General assigned to the investigation with the support of members of the Judicial Police which makes up the investigation team.

²¹ Constitutional Court..., *op. cit.*, 6.2.3.1.2.; 6.2.3.1.6.2.; y 6.2.3.1.6.3.; y VII, thirteenth.

Duration of stay in temporary placement zones and calculation of sentences

Another aspect which was very controversial during the process of negotiation and passing of the Justice and Peace Law was the amount of time which demobilised paramilitaries have stayed in the temporary placement or concentration zones created by the Government to facilitate dialogue and negotiations with the illegal armed groups. With regard to the time interval, article 31 of the Law states that “up to a maximum of 18 months will count towards the carrying out of the alternative sentence”. The application of this norm could see some demobilised paramilitaries serving prison sentences as short as three and a half years, which was considered quite insufficient. Besides, the concentration zones cannot be compared under any circumstance to a penitentiary centre, if only because appearing there constitutes a voluntary act by members of the outlawed groups, and the regime which governs them is far from being that of a prison.²² The Constitutional Court has also pronounced on this provision, reaching the conclusion that the time spent in concentration zones:

“does not constitute a penalty to the extent that it does not carry with it the coercive imposition of the restriction of fundamental rights. Generally, the time spent in a concentration zone... is due to a voluntary decision... which contributes to excluding any possibility of comparing the serving of a prison sentence to a situation of this nature, dispensing with and displacing those state interventions which characterise the state monopoly on sanctioning power”.

For the reasons laid out, the Constitutional Court declared Article 31 unconstitutional²³, and therefore the time spent in the concentration zones cannot be discounted when calculating the sentence which a

²² In May 2007 the magazine *Semana* revealed how the headquarters of the peace negotiations in Santa Fe de Ralito ended up turned into “a paramilitary area of festivities, sex and business”.

²³ Constitutional Court..., *op. cit.*, 6.2.3.3.4.6.; y VII, twenty fourth.

demobilised paramilitary who takes advantage of the Justice and Peace Law has to serve.

Extradition and the nature of the crime

As previously emphasised, the non-extradition guarantee vis-à-vis possible trial in the USA was one of the main conditions laid down by the paramilitaries (and the drug trafficking paramilitaries) when the time came to sit down and negotiate the process of demobilisation. In spite of the Justice and Peace Law of 2005 not making explicit reference to the question of extradition, Article 71 of the Law is used to avoid that eventuality, as it grants a political character to the crime of belonging to an illegal armed group, classifying it as sedition. As Article 35 of the Colombian Constitution states “extradition will not apply to political crimes”, extraditing paramilitaries who have taken advantage of the Justice and Peace Law is prohibited. Fortunately the Colombian Constitutional Court has declared Article 71 of the Law to be unconstitutional.²⁴ In any case, the Uribe government has guaranteed the paramilitaries that if they carry out all of the requirements of the Justice and Peace Law, they will not face extradition. This measure has been criticised by some NGOs such as Human Rights Watch, who think that the Government has lost important leverage in the demobilisation process,²⁵ severely limiting the threat of the sword of Damocles which the genuine application of the principle of universal jurisdiction could imply.

Competence of the International Criminal Court

Another important aspect which has loomed large throughout the process is the possible entrance on the

scene of the International Criminal Court in the demobilisation, trial and punishment of paramilitaries in Colombia. As is widely known, Colombia ratified the Rome Statute of the International Criminal Court on 5 August 2002, the treaty becoming legally binding on 1 November 2002. Whilst this might be so, the Colombian government, using the prerogative that Article 124 of the Statute of Rome allows for, made a declaration at the same time as it deposited the ratification instrument stating “during a period of seven years from the date that the Statute becomes legally binding in the country, Colombia will not accept the competence of the ICC on criminal matters referred to in Article 8”. This means that until 1 November 2009 the International Criminal Court will not be competent on matters of *war crimes* in its territory, a decision which has been criticised by human rights NGOs, opening the door as it does to even greater impunity in a country which is still locked in an internal conflict with a high degree of degradation. In any case, the Court will have jurisdiction in matters relating to genocide (Article 6 of the Statute) or crimes against humanity (Article 7) from the moment the Statute of Rome is legally binding in Colombia.

A relevant development regarding the possible jurisdiction of the International Criminal Court on crimes committed in Colombia took place on 2 March 2005, when the Prosecutor of the Court, Luis Moreno Ocampo, sent an official communiqué to the Colombian government in which he requested an explanation of the state’s response to information received about numerous and serious crimes against humanity from November 2002 onwards, the date from which the Statute of Rome became legally binding in Colombia. In the same way, the Prosecutor was very interested in the different draft bills which were being debated to structure the process of demobilisation of the paramilitary groups, instructing the government to “keep (him) informed of progress in this respect”. As we can see, the Prosecutor of the International Criminal Court aims to closely follow crimes committed during the armed conflict in Colombia and the state’s response, something which was reaffirmed by the Prosecutor’s recent visit to

²⁴ Constitutional Court, Sentence n° C-370/2006, of the 18 May 2006.

²⁵ Human Rights Watch (2005): *Las apariencias engañan. La desmovilización de grupos paramilitares en Colombia*, Vol. 17, n° 3, pp. 9 y 10.

Colombia in October 2007. On that trip, the Prosecutor made a declaration which went some way to shedding light on the matter: "I am aware of the judicial trials which are taking place in Colombia, linked to crimes which could fall under my jurisdiction. I am following the judicial trials and I can verify that they are carrying out their function".²⁶

In principle, a correct application of the Justice and Peace Law would deprive the International Criminal Court jurisdiction, given the principle of complementarity which governs international criminal justice. However, and as Hernando Valencia rightly points out, to the extent that the application of the Justice and Peace Law might lead to the "appearance or simulation of justice"²⁷, the International Criminal Court would be competent on matters relating to genocide and crimes against humanity. In that case, Article 17 of the Statute of Rome could be applied, which regulates the conditions of admissibility of cases by the Court. More specifically, the Court has to determine "whether there is a willingness or not to act upon a determined matter... taking into account the principles of a trial with the obligatory guarantees as recognised by international law". To be able to judge whether there is willingness or not to carry out justice, Article 17 lists a number of circumstances which must be taken into account. This is to say, if the state is unwilling or unable to carry out the investigation or trial of the alleged responsible parties, the competence of the International Criminal Court would come into play in a subsidiary fashion.

Basically, it amounts to an attempt to prevent impunity for crimes which have sickened the conscience of humanity and which have affected thousands of victims in Colombia. International criminal justice can become in this way a very timely instrument with which to complement the efforts of society to see justice done and guarantee the right to the truth and the right to reparation of the victims.

²⁶ *El Tiempo*, 21 October 2007.

²⁷ Valencia Villa, Hernando (2005): "Colombia ante la Corte Penal Internacional", *Hechos del Callejón*, UNDP, Year 1, n° 4, p. 8.

We can conclude this brief analysis of the right to justice in the Colombian process of demobilisation by confirming that Constitutional Court sentencing has shown up the most obvious holes in the Justice and Peace Law. In any case, whether justice ends up prevailing in a country characterised by a very wide margin of impunity is something that can't be judged in its totality for the moment. The law is beginning to be applied and only when we have greater perspective will we be in a position to judge in a more or less conclusive way.

The right to the truth in the Colombian demobilisation process

The right of the victims and of society to know the truth about the events which took place is an essential component in a process of transitional justice and reconciliation. Only when the victims know the whole truth, when justice has been carried out and the damage caused has been repaired to the extent that is possible, will a true process of national reconciliation begin. Another issue is the need for forgiveness as an essential element in the process.²⁸

In the case we're analysing, the right to truth is fundamental, both for the victims of grave abuses of human rights and for Colombian society at large. It is crucial to shed light on the individual abuses of human rights as well as to get the bottom of the factors which permitted the emergence, development, and consolidation of the paramilitary phenomenon.

²⁸ Hamber and Wilson alert us to certain well-intentioned but ultimately simplistic discourses on forgiving and reconciliation after grave attacks on the most basic human dignities. An enormous diversity of responses exist in the face of suffering and hoping that everybody will forgive is something that might not take place; on occasions, the desire for revenge may take root in society which makes for a very difficult reconciliation process. in Hamber, Brandon and Wilson, Richard (2002): "Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies", *Journal of Human Rights*, Vol. 1, n° 1, p. 53 (en <http://www.du.edu/humanrights/workingpapers/papers/05-hamber-04-00.pdf>).

In terms of the right to truth, it has to be recognised that the Justice and Peace Law is far from satisfactory, something which has been remedied to some extent by the Constitutional Court's decision in May 2006 based on increasingly developed international standards on the matter. Once again, under promising formulations of principle²⁹, the mechanisms to make the above mentioned right effective have proven to be completely insufficient and inappropriate. Article 7 of the Law offers a robust affirmation of the right to the truth when it affirms that "society, and the victims particularly, have the full, effective and inalienable right to know the truth about the crimes committed by outlawed armed groups and to know the whereabouts of the victims of kidnappings and abductions". However, this promising statement is not accompanied by adequate instruments to give it any real bite, as is explained below.

Memory as a duty

The right to the truth carries with it the state's duty to remember, because "the awareness, for a people, of its history of oppression belongs to its patrimony and as such, ought to be preserved".³⁰ This duty to remember has been incorporated into the Justice and Peace Law although, as we previously mentioned, the mechanisms to make that duty effective are quite deficient. It is Article 56 of Law 975 (2005) which establishes that "knowledge of the history, development and consequences of the actions of armed groups outside the law should be maintained through adequate procedures, in fulfillment of the *duty of the preservation of the historical memory* which corresponds to the state". (emphasis added)

That being said, the state's duty to remember does not mean that it is the only legitimate party with a role to play in the process of maintaining or, when relevant, recovering or reconstructing the above mentioned

historical memory. And the important point here is that remembering is uncomfortable, it's politically incorrect and it can even be seen as dangerous, because it makes us confront our shame, our demons from the past. The discomfort of remembering can become unbearable for a state like Colombia, with its well-established ties with the emergence, development and consolidation of the paramilitary phenomenon, as the scandal regarding *parapolitics* is demonstrating to great effect.

The necessary preservation of the archives

An important aspect of the state's duty to remember is the necessary preservation of the archives where information about human rights abuses can be found and the adoption of appropriate measures to facilitate their consultation. As the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, elaborated by the independent expert Diane Orentlicher in 2005, points out, in this regard "the right to know implies the need to preserve the archives".³¹ The Justice and Peace Law in Colombia has also tried to establish measures for the preservation of archives in this sense. As Article 57 states, "the right to the truth implies that the archives be preserved. The judicial bodies in charge of them, as well as the National Attorney General's Office, should adopt measures to prevent the removal, destruction or falsification of the archives aimed at imposing impunity." For its part, Article 58 includes measures meant to facilitate access to the archives "in the interest of the victims and their family members to uphold their rights". As we can see, the Justice and Peace Law establishes important measures aimed at the conservation and consultation of the archives, measures which will have to be implemented if there is any real interest in putting a stop to impunity.

²⁹ See in this respect Articles 1, 4, 7 y 15 of the Law.

³⁰ *La cuestión de la impunidad de los autores de violaciones de los derechos humanos civiles y políticos*. Informe elaborado por M. Joinet en aplicación de la decisión 1996/119 de la Subcomisión, E/CN.4/Sub.2/1997/20/Rev.1, of 2nd of October 1997, p. 4.

³¹ Report by Diane Orentlicher, independent expert commissioned to bring the Principles and Guidelines up to date..., *op. cit.*, principle 14. See also principles 15, 16, 17 and 18, all of which are related to the relevant question of the archives.

Plurality of ways of reconstructing the truth

An initial criticism of the Law is that it stakes everything on a judicial truth, without explicitly foreseeing other forms of reconstructing the truth and the historical memory, such as an extra-judicial commission for truth, something which was on the table during negotiation of the Justice and Peace Law. We have already seen how the state has a duty to the historical memory, but the instruments to make that pledge operative are conspicuous by their absence. The only state organ which takes on the task of “guaranteeing the rights of victims to the truth and preserving the collective memory from oblivion” is the Secretary of the Upper District Court in matters of Justice and Peace, which is a very limited instrument for carrying out such an all-encompassing task. That said, Law 975 itself opens the door to the idea that “in the future other non-judicial mechanisms may be applied in the reconstruction of the truth”.³²

Submitting the spontaneous declaration

Another aspect of the Justice and Peace Law which seems at the very least controversial from the viewpoint of the right to the truth, is the fact that the whole judicial process revolves around what is described as *spontaneous declaration* by the demobilised paramilitary. As Article 17 of the Law establishes, “the members of the armed group... will make a spontaneous declaration in front of the delegated Attorney General assigned to the process of demobilisation, who will interrogate (the person in question) on all of the matters of which he has knowledge”. This means that the criminal procedure established by Law 975 is articulated around the version provided by the accused himself. This obviously has very relevant consequences for the development of investigations of perpetrated crimes because:

“the disclosure of the crime is not understood in its whole context but rather based on somebody’s personal participation in the deed. In consequence, crucial elements in the investigation such as the responsibility of other individuals who are not involved in the process of demobilisation (such as forces of law and order or members of local government), the context of the abuse, and its place in a systematic model of human rights violations are excluded”.³³

At the same time, the Law does not demand a full confession from the paramilitaries of all their crimes as a prerequisite to taking advantage of the generous custodial terms offered under its auspices. No measures were established to aid the confession of crimes by the paramilitaries beyond those which were already known to the Attorney General; and it ought to be recognised that the information at the disposal of the Attorney General is very scarce, both because of the nature of the crimes themselves and because on many occasions the perpetration of serious crimes had been met with impunity. The truth is that to grant such generous sentencing conditions to the paramilitaries who have been demobilised without demanding in return that they provide the state and the victims involved with all the information they have at their disposal could be seen as undermining the victims’ right to the truth and the collective right of society to know its own history and preserve its memory. In this respect, the Constitutional Court has stated flatly that “covering up, silence or lying about the crimes committed cannot form part of a negotiation process which is in line with the Constitution.”

In consequence, the Court reaches the conclusion that the mechanisms designed by the Justice and Peace Law “do not effectively promote the full revelation of the truth” nor are “the judicial mechanisms necessary and sufficient to shed light on the macro criminal

³² Articles 32.2 y 1.3 of the Justice and Peace Law, respectively.

³³ Gallon, Gustavo., Reed, Michael., and Lleras, Catalina., (eds.) (2007): *Anotaciones sobre la Ley de Justicia y Paz. Una mirada desde los derechos de las víctimas*, Comisión Colombiana de Juristas, Bogotá, p. 19.

³⁴ Constitutional Court..., op. cit., 6.2.2.1.7.11.; y 6.2.2.1.7.15.; y 6.2.2.1.7.14.

phenomenon with which we are faced".³⁴ The Justice and Peace Law does not put sufficiently incisive mechanisms in place to incentivise the complete and faithful revelation of the truth. And it ought to be acknowledged that without a commitment on the part of the demobilised paramilitaries to tell the whole truth, many crimes are going to be swept under the carpet and their perpetrators let off the hook. The paramilitary phenomenon is highly complex, which means that carrying out any investigation into the matter is very difficult, making the cooperation of the authors of the crimes absolutely essential. As the Constitutional Court notes "the manipulation of evidence, the use of threats and murder to intimidate witnesses, investigators and judges, the use of terror against the population at large, are the practices which the illegal armed groups...have adopted to cover up the scale of their crimes and the proof of the same... Multiple crimes may be silenced, lost to oblivion if their perpetrators...choose not to fully confess".

In light of this, it should be acknowledged that the Justice and Peace Law falls some way short of the minimum requirements that can be expected to ensure the individual's right to truth, not to mention that of society at large. The consequences which the demobilised paramilitaries might face for not revealing the whole truth are insignificant. For these reasons, the Constitutional Court ruled on the conditional constitutionality of Article 17, "in the understanding that the spontaneous declaration must be *complete and truthful*" (emphasis added). In consequence, if it can be proved that the demobilised paramilitary has not confessed all of his crimes, he risks losing the advantages of alternative sentencing at any stage in the legal process, even after having served the alternative sentence and being let out of prison on probation. This is the meaning of the declaration of conditional constitutionality of article 29.5 of Law 975, "on the understanding that any benefit will be also be revoked if in the spontaneous declaration his participation as member of a group which perpetrated a crime related directly to the membership of that group is covered up".

The truth of the matter is that after the Court's ruling in May 2006, the right to the truth has been strengthened. There is now a much greater demand on the demobilised paramilitaries to cooperate thoroughly with the Justice Department, revealing information which is essential to guarantee the victims' and society's right to the truth. On this point, once more, the information which the accused can provide plays a crucial role in the possible dismantling of paramilitary structures. What the Court has called "the reconstruction of the macro criminal phenomenon"³⁵ is essential if we really want to put serious guarantees in place to ensure non-repetition.

Public nature of the information

One of the most effective ways to guarantee the right to the truth, as much in its individual as its collective form, is to "make public the spontaneous declaration hearings so that both the direct victims and their families, and society at large, can hear the declaration of the accused and find out the truth".³⁶ It should be acknowledged that both the enormous publicity given to the first spontaneous declaration proceedings and the scandal of *parapolitics* has amounted to a real catharsis in Colombian society (with side effects in the societies of some of Colombia's traditional allies³⁷), given that the complicity of high ranking political figures and the administration with the terrible atrocities which are coming to light can no longer be denied.

³⁵ Constitutional Court..., *op. cit.*, 6.2.2.1.7.20.; VII, twelfth.; VII, twenty second.; y 6.2.2.1.7.12.

³⁶ Gallon, Gustavo., Reed, Michael., y Lleras, Catalina., (Eds.) (2007): *Anotaciones sobre la Ley de Justicia y Paz...*, *op. cit.*, p. 58.

³⁷ In spite of the huge economic, logistical and political support from the USA in the framework of Plan Colombia, lately some criticisms have been voiced in relation to the grave violations of human rights by illegal armed groups, the ties between the armed forces and the paramilitaries and the penetration of paramilitaries within the state apparatus.

The right to reparation in the Colombian demobilisation process

This section analyses the third fundamental element in overcoming a past conflict: reparation for the victims of human rights' violations. Currently the issue is being discussed and, as a consequence, the Basic Principles and Guidelines on the right to reparations already mentioned have been passed, establishing the appropriate framework within which to guarantee the rights of victims and society at large to reparations.

In relation to the right to reparation, some aspects of the Justice and Peace Law are very deficient, although the Constitutional Court has tried to correct these with its May 2006 ruling. The general statement which is found in Article 1³⁸ and 42³⁹ of the Law is not accompanied by mechanisms which totally guarantee the victims' right to reparation, however.

Assets of the demobilised paramilitaries and reparation

The question of the assets with which the demobilised paramilitaries have to satisfy the right to reparation of the victims is one of the crucial elements of the entire demobilisation process and the implementation of the Justice and Peace Law. The enormous economic power which the paramilitary groups have accumulated due to their criminal activities and their close ties with drugs trafficking is no secret. Indeed it has turned them into real local and regional power players, substituting and challenging the supremacy of the state itself. Nor

³⁸As it appears in Article 1: "the present law has as its object to facilitate the peace process..., guaranteeing the rights of the victims to the truth, justice and reparation" (emphasis added).

³⁹ As established in this Article which heads Chapter IX of the Law, enshrining the *Victims' right to reparation*, "the members of the armed groups who benefit from the provisions allowed for under this law have the duty to make reparations to the victims for the punishable conduct for which they were condemned by judicial sentence".

should we lose sight of the dimensions of the *territorial control* which paramilitarism has enjoyed, with the appropriation of some four million hectares of land, something which amounts to nothing less than a counter-agrarian reform and which has seen its most dramatic consequences in the forced eviction and dispossession of thousands of people, of indigenous communities and those of African descent, a veritable process of land grabbing. In essence, the process of effectively dismantling paramilitary structures and guarantees of non-repetition necessarily require decisive action to put an end to the huge economic power bases in the hands of the main paramilitary leaders.

Faced with this situation and the evident unwillingness of the paramilitary leadership to hand over the fortunes they have amassed, the truth is that the Justice and Peace Law did not clearly wager on bringing that economic power under control. On the contrary, too many provisions leave the door open to it being maintained and perpetuated.

Firstly, it's necessary to make very clear the subtle distinction between two reparation measures which tend to be confused, not so much conceptually as in the mechanisms which have been established to put them into practice, in the complex and intricate text which is Law 975. This refers to *restoration* and to *compensation* or *indemnity*. As the Law itself establishes in Article 46, "restoration implies carrying out acts which lead to the return of the victim's situation prior to the violation of human rights", including "... *the return of assets...*" (emphasis added). Compensation or indemnity, for its part, aims to remedy "all of the calculable economic damage which came about as a consequence of (the) violations..."⁴⁰. These two forms of reparation are independent and not mutually exclusive, which is to say, they can be applied simultaneously. This means that in the case of the process of paramilitary demobilisation, there is an obligation to return all illegally acquired assets and, in the event, compensate the victims if the court decides to do so.

⁴⁰ See principle 20 of the Principles and Guidelines on the Right to Reparation passed in 2005.

The Constitutional Court has made its position crystal clear regarding illicitly obtained assets, stating that “all of them must, without exception, be handed in as a *prior condition* for acceding to the benefits which Law 975/05 offers... for both individual and collective demobilisation processes” (emphasis added).

As for the compensation which the demobilised paramilitaries have to satisfy after the judicial hearings called for under the Law, the Constitutional Court has also tried to tighten things up so that all of the paramilitary’s patrimony which can be disposed of to mitigate the damage caused. In this way, the Court underlines that “it is in line with the Constitution that the perpetrators of these kind of crimes respond with their own patrimony for the damage they have caused... what does not seem to have any constitutional basis whatsoever is that the state completely exempt the people who have caused such damage from their civil responsibility... passing the totality of the costs of reparation to the budget”. So, the primary responsibility for remedying the damage falls on those who actually brought it about. That would amount to setting an example and a very important social recognition of the damage done and of the victims’ rights to reparation, laying the groundwork for the dismantling of the criminal structures.

Moreover, and in the same vein of preserving the victims’ rights and trying to put an end to the enormous paramilitary power in order to eventually move towards its effective dismantling, the Court has established *jointly shared responsibility* of all of the members of a paramilitary group for any harm caused. As the Court shows when analysing the constitutional nature of Article 54 of the Justice and Peace Law, paragraph 2 is constitutional “on the understanding that”, besides responding with their own patrimony to compensate each one of the victims, “... they will also respond in solidarity for the damage caused to victims by other members of the armed group to which they belonged”.⁴¹ This question is very important in

⁴¹ Constitutional Court..., *op. cit.*, 6.2.4.1.18.; 6.2.4.1.13.; y VII, thirty first.

significantly advancing the exercise of the victims’ rights to reparation, because it means that all of the members of the group have to answer in solidarity for damages caused when it is not possible to point the finger at one individual as the author of a crime in which harm to victims has been established.

That being said, the Court itself is conscious of the enormous difficulties which lie behind the question of determining with total accuracy the assets which belong to paramilitary leaders. In its opinion, “it is truly difficult to distinguish between assets which are fruit of legal activities and those which are fruit of illegal ones. Usually, the assets obtained illicitly have been hidden or passed on to frontmen or even trustworthy third parties through whom they are ‘laundered’.” This is going to be one of the main obstacles in the herculean task of seeing justice, the truth and reparations to victims prevail in this whole process. That is why the Court is conscious of the necessity that “public resources contribute to reparation, but only in a *subsidiary way*” (emphasis added). In the Court’s words, the state should play an exclusively “residual role, providing a cover to the victims, especially those who have not benefited from a judicial decision which stipulates a total amount of compensation to which they have a right...and in the eventuality that the resources of the perpetrators prove to be insufficient”.

The participation of the victims

Another area where the Justice and Peace Law has been lacking is in the voice of the victims, which has been practically absent in the reparation process. This is something that, as previously mentioned, is important from the viewpoint of the victims themselves. The Constitutional Court again has tried to leave no room for doubt as to the right of the victims to participate throughout the entire judicial process, “from before the spontaneous declaration is received or at a posterior stage, all of this with a view to cooperating with the Attorney General’s Office in carrying out the duty to investigate exhaustively”. In light of the opinion reached in its ruling on the Justice

and Peace Law, the right of the victims to participate in the trial should be guaranteed as much “to obtain pecuniary compensation” as “in order to make effective their right to the truth and justice”.⁴²

The role of the National Commission for Reparation and Reconciliation

As is widely known, the Justice and Peace Law preceded the creation of a National Commission for Reparation and Reconciliation (Comisión Nacional de Reparación y Reconciliación⁴³ or CNRR), a body which is going to have to carry out a crucial role in the long and complicated process of guaranteeing the rights of the victims to reparation. In order to properly carry out this highly important task, it is obvious that the Commission ought to have the necessary resources for its proper functioning, something in which it still has a long way to go.

The truth of the matter is that some important deficiencies can be seen in the design of the CNRR. Whilst its functions are wide ranging, its composition leaves a lot to be desired, having as it does a very marked governmental component. Of its 13 members,⁴⁴ only two act as representatives of the victims’ organisations. This has brought criticism from victims’ associations and from other quarters, accusing the Commission of being an organ with little if any legitimacy. In order to counteract these criticisms and set out a way forward for the Commission, its President has underlined that from the very beginnings of its functioning “the victims and their associations will be our privileged interlocutors”.⁴⁵

⁴² Constitutional Court..., *op. cit.*, 6.2.4.1.14.; 6.2.4.1.13.; 6.2.4.4.11.; 6.2.3.2.1.10.; y 6.2.3.2.1.8.

⁴³ Article 50 of Law 975 of 2005.

⁴⁴ In virtue of Article 50, the CNRR is made up by the Vice President of the Republic or whoever he/she designates, who will preside; the National Attorney General or his/her delegate; the Minister of Justice and the Interior or his/her delegate; the Ministry of Finance and Public Credit or his/her delegate; the Ombudsman; five persons designated by the President of the Republic, two of whom, at least, must be women; the Director of the Social Solidarity Network and two representatives of the Victims’ Organisations. The President of the CNRR is Eduardo Pizarro.

⁴⁵ Pizarro, Eduardo (2006): “Elementos para la construcción de una Hoja de Ruta”, in *Tierra y Desplazamiento en Colombia. Crisis Humanitaria por el control del territorio*, Taula Catalana per la pau i els drets humans a Colombia, Barcelona, p. 118.

The working practice of the CNRR in matters pertaining to victims’ right to reparation is certainly of great importance. Firstly, the Commission should “guarantee the victims their place in the judicial processes of clarification and the fulfillment of their rights”. As previously explained, the participation of the victims is an essential ingredient in the reparation process; in this event, the CNRR should become the guarantor of that participation, trying to overcome the possible obstacles which might prevent it from taking place. In second place, the Commission’s mandate also includes “following up and evaluating periodically the reparation which concerns the present law and to make recommendations for its proper execution”.⁴⁶ Which is to say, the CNRR has to become the body which monitors the overall process of delivering on the victims’ rights to reparation and recommends measures to make an effective guarantee of that right to the relevant state organs. In the same way, it should “recommend the criteria for the reparations which the present law deals with, to be paid by the Victims’ Reparation Fund (Fondo de Reparación a las Víctimas)”⁴⁷. Finally, the CNRR should “coordinate the activities of the Regional Commission for the Restoration of Assets (Comisiones Regionales para la Restitución de Bienes)” (paragraph 52.7 of article 51). The restoration of assets is one of the most crucial aspects of the reparation process for victims of Colombia’s armed conflict.

And so we can see that the National Commission for Reparation and Reconciliation has begun, after a stuttering start marked by indecision and uncertainty, with some chronic underfunding thrown in for good measure, to define its strategies. Those charged with managing the Commission are all too aware of the enormous difficulties which are going to crop up along the way if there is a real interest in moving towards an effective process of reparation and reconciliation, especially given that conflict in Colombia is still making its tragic effects felt.

⁴⁶ Paragraph 52.1 y 52.4 of Article 51 of the Justice and Peace Law.

⁴⁷ Paragraph 52.6 of Article 51 of the Law. See in this respect National Commission for Reparation And Reconciliation (2007): *Recomendaciones de criterios de reparación y de proporcionalidad restaurativa*, Bogotá, en www.cnrr.org.co

Towards establishing non-repetition guarantees

The fundamental objective of any process of transition and pacification such as Colombia's is to ensure the non-repetition of the events which have caused so much suffering. We have seen throughout this analysis that the effective dismantling of the paramilitary phenomenon is absolutely essential in order to establish guarantees of non-repetition. For that to take place, besides the handing over of weapons and the commitment never to take up arms again, it is crucial to lay the groundwork which will put an end to the enormous economic, social and political power which these outlawed groups have built up. It should be acknowledged that this is one of the main challenges which the current paramilitary demobilisation process faces, presenting a number of obstacles which are very difficult to overcome. The *parapolitics* scandal has made abundantly clear the connivance between certain circles of local power with the emergence, development and workings of the paramilitary groups, influencing politics at the national level as well. The truth is that if this scandal is solved in a positive way and justice can get to the very bottom of the matter, it might turn out to be a window of opportunity for the consolidation of the democratic state and democracy in Colombia. If that is ultimately not the case, the future of the demobilisation process may be put in jeopardy.

It should be said that the section of the Justice and Peace Law concerned with "measures of satisfaction and non-repetition guarantees"⁴⁸ is one of the weakest. If mixing measures of satisfaction with guarantees of non-repetition for no apparent reason is already worthy of criticism, then it has to be noted that the latter are conspicuous by their absence. Of the eight paragraphs which the provision contains, only two

enshrine the concept of non-repetition. One of them refers generically to "the prevention of the violations of human rights", whilst the other establishes as a guarantee of non-repetition "the attendance by those responsible for violations of education courses on human rights",⁴⁹ something completely innocuous if it is not accompanied by more decisive measures.

Another factor which could derail the current demobilisation process is the absence of measures and incentives for the re-integration of ex-combatants in civil society. A telling sign of this absence is that only when the demobilisation process was well underway, in September 2006, was a specific body created, *The High Council for Re-insertion (Alta Consejería para la Reinserción)*, to substitute the Programme for Re-incorporation to Civil Life (Programa para la Reinserción a la Vida Civil or PRVC) of the Interior Ministry. It ought to be recognised that "ex-combatants pose a risk for security in the period following demobilisation and disarmament, given that they might re-arm, set up new groups or join up with other ones which have not demobilised".⁵⁰ In this sense, voices from different quarters have been insisting on the serious dangers of a situation marked by "the persistence of illegal organisations of coercive and local political control",⁵¹ something which constitutes one of the main risks for the consolidation of the peace process.

The success or failure of the current process of demobilisation is going to depend on the establishment of adequate non-repetition guarantees. For this to happen, besides necessary political will and boldness, it is fundamental to profoundly change the economic, social and political dynamics which, in Colombia's regions, were the perfect breeding ground for the ever-widening circle of paramilitary activity.

⁴⁹ Paragraphs 49.7 and 49.8 of Article 48.

⁵⁰ Area DDR (2007): *Los conflictos armados contemporáneos y el desarme, la desmovilización y la reincorporación de excombatientes. Una propuesta para el Area DDR de la CNRR*, Bogotá, in www.cnrr.org.co

⁵¹ National Commission for Reparation and Reconciliation (2007): *Disidentes, rearmados y emergentes: ¿bandas criminales o tercera generación paramilitar?*, Informe n° 1, Area de Desmovilización, Desarme y Reintegración, CNRR, August, p. 3.

⁴⁸ Article 48 of Law 975.

Conclusions

The first conclusion of this working paper is that the current paramilitary demobilisation process is partial and fragmentary, not including actors as important as the guerrilla groups. While the negotiations with the ELN in Cuba seem to be on track, by way of contrast, all channels of communication with the FARC seem to have shut down after the failed experience of Caguán. The partial, fragmentary nature of Colombia's *sui generis* peace process is what raises doubts about whether the country really is in a transitional process and whether the mechanisms of transitional justice are the right ones for a context still deeply marred by violence.

The development and consolidation of international standards in terms of justice, truth, reparation and non-repetition guarantees which we have witnessed over the last few years amount to a straightjacket which states tackling a peace process or transitional justice can scarcely free themselves from. The Colombian Constitutional Court, basing itself on that international legal framework, has made clear the enormous limitations contained in the Justice and Peace Law. In any event, the big challenge of the current process of demobilisation is the adequate application of the Law according to the logic of victims' rights. The process has barely taken its first steps, but already some hopeful signs of light and some worrying shadows can be discerned which might end up tarnishing the whole process. It has to be acknowledged that the spontaneous declaration hearings amount to a torrent of information which is very important in guaranteeing the rights of justice and the truth. Alongside this we can observe the use of spontaneous declaration hearings to try and justify the most atrocious crimes on the part of paramilitary bosses, as well as the use of threats and extortion of the victims to discourage them from testifying. It's still too soon to make predictions, but it seems essential to be

aware of the enormous difficulties which lie in store for the implementation process of the Justice and Peace Law.

At the same time, during the negotiation process with the paramilitaries and the adoption of the normative framework for demobilisation, pressure from Colombian civil society and the international community has played an important part in making the government more inclined towards victims' rights. This critical scrutiny, both from within Colombia and from outside the country, is going to continue to be necessary throughout the whole process of the implementation of the Justice and Peace Law, constituting a guarantee of credibility for the process.

Another point worth underlining is the undeniable progress, thanks in large part to the incalculable contribution of the media, which is being made in guaranteeing the victims' and Colombian society's right to the truth. The first spontaneous declaration hearing and the explosion of the parapolitics scandal have put the spotlight on the horrendous crimes committed by paramilitaries, with their ties to high echelons of political and economic power. Colombian society can no longer close its eyes before this dramatic reality. Let's hope that this new awareness will end up opening the way to drastic change in the relationship between the elites, power brokers and the paramilitary leadership.

Finally, the most important obstacle that stands in the way of the current demobilisation process is the effective dismantling of the paramilitary structures, with their huge economic, political and social power in vast regions of the country. The restoration of lands that thousands have been violently dispossessed of is one of the most critical elements of the entire process, alongside the undeniable links to drug trafficking mafias. As long as drug trafficking continues to be a lucrative trade in Colombia, the paramilitaries and the guerrillas will be able to rely on an important economic base to carry on with their criminal enterprise.

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Since President Álvaro Uribe took office in August 2002 a dialogue process and subsequent demobilisation of paramilitary groups has taken place in Colombia, with 31,671 members of illegal armed groups pledging to lay down their arms. Throughout this process, Colombia has been faced with the onerous task of tackling the dilemmas which any transitional justice process creates: to pull off the precarious and unstable balancing act between the need for peace and the need for justice.

Amidst intense pressure from paramilitary groups that they should not have to go to prison, and also that they be allowed to keep a significant part of what they have acquired through their illegal activities, there is a danger that the process is utilised to guarantee impunity does not ultimately lead to the dismantling of paramilitary structures. The absence of the victims in the process has also been criticised as one of its main failures.

This working paper explores the international legal framework with regards to justice, truth and reparation and asks to what extent Colombia's very own tailor-made framework is in line with these parameters, especially in the light of the Constitutional Court's ruling on the Justice and Peace Law.

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