Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz

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TRANSITIONAL JUSTICE IN TIMES OF CONFLICT: COLOMBIA'S LEY DE JUSTICIA Y PAZ

Lisa J. Laplante*
Kimberly Theidon**

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I. INTRODUCTION

Transitional justice has become a mainstay in post-conflict recovery and reconstruction. Since the 1970s, numerous countries have opted for alternative justice mechanisms to respond to periods of massive violence and human rights violations. The political openings that have made peace processes possible have varied—peace accords (El Salvador and Guatemala), moral weakening of militaries (Argentina), corruption charges (Peru), and international pressure (South Africa). Each of these experiences presents its own nuances, demonstrating that no fixed transitional justice model exists. However, to date these various transitions have shared a common trait: they occurred after episodes of internal armed conflict, political violence, and authoritarian regimes. In each of these settings, once political violence subsided, the governing power implemented transitional justice approaches to confront the past in the hope of establishing the foundations for a different sort of future. Indeed, as Ruti Teitel has argued, transitional justice is a leading rite of modern political passage and draws upon both legal innovations and ritual acts that enable the passage between two orders—the predecessor and successor regimes.

By definition, transitional justice involves alternative approaches to conventional justice, thus provoking lively and at times contentious debate. In each context, political leaders, intellectuals, perpetrators, victim-survivors, and other national and international actors struggle over the balance between truth and justice, accountability and impunity, retribution and forgiveness, and material and symbolic reparations.

4. The term “victim” and the elaboration of categories of victimization figure prominently in the work of truth commissions. In light of our work in Peru, we are more comfortable with the hyphenation “victim-survivor” for several reasons. First, not all people with whom we have spoken identify themselves as victims in their daily lives. Indeed, they may reject the term for the helplessness it implies, choosing to distance themselves from such an image. In Peru, for instance, those who suffered human rights violations use the term “afectados” (affected). Second, part of our ongoing research focuses on the ways in which people organize to demand reparations and how this political activism leads to new perceptions of citizenship and agency. Finally, we are influenced by the work of Mahmood Mamdani and his assertion that people must move beyond dichotomized identities as one way of searching for new forms of justice and coexistence following atrocity. See Mahmood Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda (2001).
among other issues. As a result, new transitional justice experiences do not evolve in a vacuum but rather are greatly shaped and influenced by the experiences that came before them. Through this growing "popular jurisprudence," new standards of acceptability and legal limits have evolved to shape future transitional justice models.\textsuperscript{5} Indeed, this evolving body of legal principles is increasingly normative, as various social actors—particularly victim-survivors and their advocates, as well as domestic and international human rights organizations—present absolute human rights standards to limit political expediency. Thus, the exceptional nature of transitional justice and the flexible equations that have been used to balance truth, justice, and reparations are becoming more formulaic as justice increasingly trumps the use of amnesties and pardons in the name of "stability and order" during periods of volatile political change.

Colombia is a case in point, and one that reflects this transitional justice genealogy. In July 2005 the country embarked on its own transitional justice project when the Colombian Congress promulgated Ley 975/05 (Law 975/05), the Ley de Justicia y Paz (Justice and Peace Law). Unlike its predecessors, Colombia chose transitional justice mechanisms pre-post-conflict: the country's internal armed conflict continues after years of failed peace negotiations and demobilization efforts with various illegal armed groups. However, these latest negotiations occur within a different international context and legal climate, which in turn shape the parameters of the legally and the socially possible. Indeed, prior to the Justice and Peace Law, Colombia began a comprehensive Disarmament, Demobilization and Reinsertion (DDR) program, reforming previous legal frameworks in an effort to collectively demobilize the paramilitaries. Previous attempts at demobilization in Colombia were informed by military and security objectives, and were generally evaluated in terms of technocratic concerns regarding the numbers of combatants enrolled and arms surrendered.\textsuperscript{6} Embarking on a transitional justice process in the midst of war changes the nature of DDR, as well as the objectives of transitional justice. Rather than operating in a sequential

\textsuperscript{5} Orit Kamir, \textit{Honor and Dignity in the Film Unforgiven: Implications for Sociolegal Theory}, 40 \textit{LAW & SOC'Y REV.} 193, 211 (2006). Although the concept of "popular jurisprudence" is associated with mass consumption and the entertainment industry, we adopt the term here in reference to the formation of popular notions of justice that develop in reaction to legal and political processes occurring with relation to disarmament, demobilization, and reintegration and its related laws and negotiations.

fashion, Law 975/05 shifted the DDR program onto the terrain of transitional justice and its concerns with issues of memory, truth, justice, redress, and reconciliation. Simultaneously, by explicitly merging DDR and transitional justice, Colombia draws upon the increasingly normative field of transitional justice while contributing an innovative case study: brokering peace through transitional justice mechanisms and staging a transition in the absence of peace accords—indeed, in the midst of war.

This proposed approach has provoked intense domestic and international debate on the grounds that it requires compromising the increasingly absolute human rights standards of truth, justice, and reparations with the desire to bring a warring faction to the negotiating table. How much is the Colombian state willing and able to cede to the paramilitaries while still remaining faithful to international jurisprudence and norms, as well as responding to the demands of a growing victim-survivors’ movement that is well-versed in the transitional justice thinking that has emerged over the last twenty-five years? The Colombian victim-survivors’ movement and the human rights organizations that serve as their advocates have begun a contentious battle to revoke the Justice and Peace Law through multiple judicial challenges, insisting on victim-survivors’ rights to truth, justice, and reparations—rights increasingly viewed as central to the broader goal of “national reconciliation.”

The authors examine these legal challenges in order to explore how absolute human rights standards have come to influence the transitional justice approach, which began as an alternative to these “rigid” principles. The authors propose that the legitimacy of transitional justice lies precisely in the space in which local actors seek to balance legality with politics, the demands of peace with the clamor for justice.

The authors of this Article were committed to researching the impact of the paramilitary demobilization process “on the ground”—that is, conducting qualitative research that would allow us to test the validity of different debates with the goal of generating recommendations on how future conflict and post-conflict countries might benefit from the merging of DDR and transitional justice. In this text we draw upon the preliminary results of our research on the individual and collective demobilization programs. The first stage of the project included 112 in-depth interviews with demobilized combatants from the Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo (FARC-EP) (Revolutionary Armed Forces of Colombia–People’s Army), the Ejército

7 For a fuller discussion of this research, see Kimberly Theidon & Paola Andrea Betancourt, Transiciones Conflictivas: Combatientes Desmovilizados en Colombia, 58 ANÁLISIS POLÍTICO 92 (2006), and Kimberly Theidon, Transitional Subjects: The Disarmament, Demobilization and Reintegration of Combatants in Colombia, INT’L J. TRANSITIONAL JUST. (forthcoming Spring 2007).
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de Liberación Nacional (ELN), and the Autodefensas Unidas de Colombia (AUC) (United Self-Defense Forces of Colombia).

We begin with a concise history of the current conflict in Colombia, as well as previous demobilization efforts with various illegal armed groups. We then turn to an analysis of the Justice and Peace Law, which established the legal framework in which the DDR program is being implemented. Following a discussion of the debates this process has generated, we present the findings from our qualitative research with demobilized combatants. We conclude by examining the benefits and challenges of moving DDR onto the terrain of transitional justice.

II. THE ORIGINS OF WAR

Colombia’s civil war is the lengthiest armed conflict in the Western hemisphere, beginning during the period known as La Violencia (1948–1953), when violent confrontation between two established political parties exploded. The Conservative Party launched a violent offensive against supporters of the Liberal and Communist parties, who were demanding socioeconomic and political change; these violent attacks prompted the rural population to begin organizing “self-defense groups.” By the time La Violencia ended, 200,000 people were dead, and more than a billion dollars in property damage had occurred. Ultimately, in 1958, “democracy” was restored in Colombia when the Liberals and Conservatives issued the Declaration of Sitges, in which they proposed a “National Front” of joint governance.

Soon thereafter, in the 1960s, a proliferation of guerrilla movements occurred in Colombia and throughout Latin America. In many cases, the guerrilla movements were the armed wings of existing communist parties, composed of those who felt traditional parties had failed to deliver on the promise of social change and political reform. The FARC, Colombia’s

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8. The ELN, formed in 1964, has its roots in the previous liberal peasant struggles, and is thus an outgrowth of university unrest, with an estimated 3,500–4,000 combatants. AMNESTY INT’L (AI), COLOMBIA, THE PARAMILITARIES IN MEDELLÍN: DEMOBILIZATION OR LEGALIZATION? 2 (2005). For more information on the various armed actors, see information provided by the Center for International Policy, Colombia Program, available at http://www.ciponline.org/colombia/infocombat.htm.


11. See Timothy P. Wickham-Crowley, Winners, Losers, and Also-Rans: Toward a Comparative Sociology of Latin American Guerrilla Movements, in POWER AND POPULAR
oldest and largest guerrilla group, established itself in 1966.12 Today the
FARC has an estimated 18,000 members, including many women and children.

The escalating insurgent violence prompted the formation of the al-
ternately legal and illegal armed groups known collectively as
paramilitaries.13 State sponsorship of these groups traces back to Emer-
gegency Decree 3398, issued in 1965 and subsequently transformed into
Law 48 and approved by the Colombian Congress in 1968.14 This law
allowed the government to “mobilize the population in activities and
tasks” to restore public order and contain the insurgent threat.15 Specifi-
cally, the military formed armed civilian groups to assist in joint
counterinsurgency operations. Although promoted as “self-defense
committees” organized to protect local communities against the guerril-
las, these groups came to assume greater responsibility in state-
organized “search and destroy” operations seeking to quash the guerril-
las.16 This initiative arose out of the logic of the Cold War and a
counterinsurgency strategy that lay the groundwork for the paramilitaries
to become the preferred means of protecting the interests of the powerful
elite, suppressing social protest viewed through the prism of anti-
communism, and ultimately assisting in the expansion of drug trafficking
throughout Colombia.17

Indeed, the growth of the paramilitaries occurred in the absence of a
state presence in war zones.18 Paramilitaries were often converted into
private security forces for rich landowners and economic elites who
wanted to remove peasants forcibly from land they later expropriated or

PROTEST: LATIN AMERICAN SOCIAL MOVEMENTS 132, 133 (Susan Eckstein ed., 2001); WICK-
HAM-CROWLEY, supra note 10, at 30–33.
12. Inter-Am. Comm’n on Human Rights (IACHR), Org. of Am. States (OAS), Third
Report on the Human Rights Situation in Colombia, ¶ 28, OEA/Ser.L/V/II.102, Doc. 9 rev. 1
%20of%20contents.htm; WICKHAM-CROWLEY, supra note 10, at 181.
13. Winifred Tate, Paramilitaries in Colombia, 8 BROWN J. WORLD AFF. 163, 164
(2001–2002); see Fernando Cubides, Narcotráfico y paramilitarismo: ¿Matrimonio indisolu-
26, 1968 (Colom.), available at http://www.dafp.gov.co/leyes/L0048_68.HTM [hereinafter
Law No. 48].
15. IACHR I, supra note 12, ¶¶ 36–37; Law No. 48, supra note 14.
16. AI, supra note 8, at 3.
17. Daniel Jaramillo García-Peña, La relación del Estado colombiano con el fenómeno
paramilitar: Por el esclarecimiento histórico, 52 ANÁLISIS POLÍTICO 58 (2005) (author’s
translation).
18. Alfredo Rangel, ¿A Dónde Van Los Paramilitares?, in EL PODER PARAMILITAR,
supra note 13, at 8, available at www.seguridadydemocracia.org/docs/pdf/ensayos/
prologoParamilitares.pdf.
developed. Multinational companies also played a role in contracting paramilitary groups to protect their interests. Increasingly, the paramilitaries became a means for resolving labor disputes, eliminating political opponents, and controlling social protests by targeting activists and peasant leaders—all actions that were brokered by the security forces and framed as part of the counterinsurgency strategy. The collaboration between illegal armed groups and drug traffickers only further complicated the war. Into this already volatile situation, the U.S.-backed Plan Colombia resulted in significant military support finding its way into the hands of the AUC.

Indeed, it was the fusion of paramilitary organizations and drug trafficking that ultimately gave rise to the phenomenon known as paramilitarismo. By the late 1980s, the paramilitaries formed part of a powerful parallel military structure “capable of coordinated action throughout the country.” Yet, in light of growing outrage over the ties between the military, paramilitaries, and drug traffickers—and the human rights violations attributed to these groups—then President Virgilio Barco outlawed the use of armed civilians in army operations in a decree, noting that “these provisions... may be taken as legal authorization to organized armed civilian groups that end up acting outside the Constitution and the laws... which stands in the way of pooling efforts to achieve reconciliation...” He also criminalized the promotion, financing, and membership in paramilitary groups and penalized...

20. Nazih Richani, Multinational Corporations, Rentier Capitalism, and the War System in Colombia, 47.3 LATIN AM. POL. & SOC’Y 113 (2005).
the act of training or equipping "persons in military tactics, techniques, or procedures for undertaking criminal activities," making it an aggravated offense if done by active or retired members of the military forces or National Police. However, in 1997, Carlos Castaño brought together eighteen paramilitary blocs to form the AUC as a national umbrella group of paramilitaries. The organization developed a highly regimented military command structure, seeking to translate its military power and economic might into political capital.

Thus, legal reforms aside, paramilitarismo continued. Domestic and international human rights organizations have documented the continued collusion between the military and paramilitary, resulting in massacres, assassinations, torture, forced displacement, forced disappearances, and kidnappings. Moreover, human rights organizations routinely attributed seventy to eighty percent of the human rights violations to the paramilitaries, making Colombia’s armed conflict “a war against civil society.”

What began forty-two years ago as a war waged by Marxist revolutionaries against an exclusive political system has devolved into a bloody struggle over resources: the military, the paramilitaries, guerillas, domestic elites, and multinational actors vie for control of this resource-rich country. In the struggle, all groups have committed serious human rights violations, and according to Amnesty International, 70,000 people have been killed in the past twenty years alone. Thousands more have disappeared or been kidnapped, tortured, and forcefully recruited by illegal armed groups, among other grave violations of fundamental rights. The vast majority of the war casualties are unarmed civilians, and the escalating violence and fear have prompted massive internal and cross-border displacement. The UN High Commissioner for Refugees esti-

27. KIRK, supra note 22, at 173.
31. Al, supra note 8, at 2.
32. Id. at 3.
mates that almost three million people have been internally displaced.\footnote{U.N. High Comm’r for Refugees (UNHCR), \textit{Colombia Situation Map} (Jan. 2006), available at http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=44103c150.} Often, the most vulnerable sectors of society have been targeted, including disproportionate numbers of indigenous people and members of Afro-Colombian communities.\footnote{IACHR II, \textit{supra} note 25, ¶ 45; see also \textit{Human Rights Watch}, \textit{You’ll Learn Not to Cry: Child Combatants in Colombia} (2003) (discussing the vulnerability of children in Colombia’s conflict).} In sum, the war in Colombia has resulted in a humanitarian crisis provoking international concern, as various armed groups commit serious human rights violations and demonstrate total disregard for international humanitarian law.\footnote{IACHR II, \textit{supra} note 25, ¶ 2.}

**III. DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION: COLOMBIA’S SERIAL SEARCH FOR PEACE**

During Colombia’s forty-two-year internal armed conflict, each successive president has attempted some sort of military victory or, in the face of that impossibility, peace negotiations. While it is beyond the scope of this text to present an exhaustive review of these previous efforts, we note certain key features that serve to contextualize current peace negotiations and explain the tensions between traditional models of demobilization and a changing political and legal context.

Within the glossary of post-conflict reconstruction and peace building, three terms loom large: disarmament, demobilization, and reintegration. As the United Nations Department of Peacekeeping Operations (UNDPKO) defines it, in the context of peace processes, “disarmament” consists of the collection, control, and elimination of small arms, ammunition, explosives, and light and heavy weapons from the combatants and, depending upon the circumstances, the civilian population.\footnote{U.N. Dep’t of Peacekeeping Operations, \textit{Disarmament, Demobilization and Reintegration of Ex-Combatants in a Peacekeeping Environment: Principles and Guidelines} 15 (1999), available at http://www.un.org/Departments/dpko/lessons/DD&R.pdf.} “Demobilization” is the process in which armed organizations (which may consist of government or opposition forces, or simply armed factions) decrease in size or are dismantled as one component of a broad transformation from a state of war to a state of peace that may involve the concentration, quartering, disarming, management, and licensing of former combatants with the incentive of compensation or
other assistance to reenter civilian life. Finally, "reinsertion" or "reintegration" directs ex-combatants to strengthen their capacity, and that of their families, to achieve social and economic self-sufficiency. Reinsertion programs may include economic assistance, technical or professional training, or instruction in other productive activities. In sum, "DDR is concerned with dismantling the machinery of war."  

In its traditional formulation and implementation, DDR was squarely located within a military or security framework. This focus failed to give sufficient consideration to the host communities and the need to incorporate local, cultural, or gendered conceptions of what constitutes the rehabilitation and resocialization of ex-combatants. Yet, an evaluation of DDR programs in sub-Saharan Africa noted that "[l]ong-term integration is ultimately the yardstick by which the success of the DDR programme is measured." Reintegration therefore appears to be the weakest phase of the DDR process. The newly released United Nations Integrated DDR Standards underscores the deficiency of reintegration efforts and insists on "the need for measures to be conducted in consultation and collaboration with all members of the community and stakeholders engaged in the community, and [DDR programs] make use of locally-appropriate development incentives."  

Even if DDR has tended to be defined as a military strategy, its importance in human rights contexts has not gone unnoticed. For instance, the UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (the Joinet Principles) establish that "[g]uarantees of non-recurrence" include "measures to disband parastatal armed groups." In the report to which the principles are annexed, the Special Rapporteur states, "[d]isbandment of parastatal armed groups: this is one of the hardest measures to enforce . . . [because], if not accompanied by action to reintegrate group members into society, the cure may be worse than the disease." To that end, Joinet Principle 38 addresses the "Disbandment of unofficial armed groups directly or
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indirectly linked to the State and of private groups benefiting from its
passivity." This directive reflects the principle of prevention and non-
repetition, the underlying justification for the international human rights
protection system. In this vein, the Inter-American Commission on
Human Rights (IACHR) advised that "[t]he efforts at peacemaking and
demobilization of armed groups should be strengthened on the basis of
legitimacy and participation, so as to offer the beneficiaries a genuine
opportunity for reintegration into society and guarantees of protection in
the face of possible violent reprisals." Indeed, as will be explored,
Colombia's experience suggests that the traditionally slighted issue of
reintegration may serve as the bridge to the goals of transitional justice,
in particular reconciliation.

A. The Start of DDR in Colombia: Negotiating
Peace with Guerrillas

An overview of past DDR efforts in Colombia highlights the weak-
nesses in the traditional DDR framework in terms of the reintegration
phase, ultimately resulting in backslides to violence. Most approaches
adopted the logic of olvido y perdón en pro de la paz (forgetting and
pardon in favor of peace). For instance, in 1953, Army Chief of Staff
General Gustavo Rojas Pinilla staged a coup to end La Violencia, initiat-
ing Colombia's first demobilization effort through general amnesty and
government aid to belligerents who lay down their arms. Thousands
complied with the offer, and relative calm ensued for several months fol-
lowing the coup. The government failed to provide adequate security,
however, and many of the demobilized men were subsequently killed in
an escalating cycle of revenge.

Since then, numerous administrations have attempted to implement
DDR with various guerrilla groups. Early demobilization efforts
illustrate the extent to which absolute amnesty was considered a
legitimate means of securing "peace." The Betancour administration
(1982–1986) applied Law 35, Ley de Amnistía no condicionada y en pro
de la Paz (Law of Unconditional Amnesty in Favor of Peace) to
recognize the guerrilla organizations as political actors, thereby

45. Id. annex II, princ. 38.
46. See Lisa J. Laplante, Bringing Effective Remedies Home: The Inter-American Hu-
man Rights System, Reparations and the Duty of Prevention, 22 NETH. Q. HUM. RTS. 347,
47. IACHR II, supra note 25, ¶ 100.
48. See Gonzalo Sánchez, The Violence: An Interpretive Synthesis, in VIOLENCE IN
COLOMBIA: THE CONTEMPORARY CRISIS IN HISTORICAL PERSPECTIVE, supra note 9, at 102–
04.
49. For an interesting history of guerrilla politics in Colombia, see STEVEN DUDLEY,
establishing a framework for demobilization efforts not connected to a peace treaty. Nearly 700 guerrilla members from the FARC, ELN, and the Movimiento 19 de Abril (M-19) participated in this demobilization program. Law 35 also formed the basis for the Uribe Contract of 1984, in which the FARC agreed to a ceasefire and announced the establishment of a political party, the Unión Patriótica. Following their demobilization and reconstitution as a legitimate political party, some 3,000 members of the Unión Patriótica were assassinated by paramilitaries who had not been included in peace talks. The failure to guarantee security for the ex-combatants—and their subsequent slaughter—hovers over any negotiations with the guerrilla groups today.

The Barco government (1986–1990) also attempted to demobilize the guerrillas via the Iniciativa para la Paz (Initiative for Peace), requiring the guerrillas to dismantle their military apparatus, surrender their weapons, and reintegrate into society. This effort emphasized a national reconciliation process, yet still excluded the paramilitaries. The continued paramilitary violence, often carried out with the tacit support of the military, undermined the peace process. Moreover, the initiative did not contemplate concerted reintegration programs, although the first National Reintegration Office finally opened in April 1991. Among the problems plaguing the process were insufficient funding, scant monitoring of the demobilized combatants, and lack of consultation with or benefits to the host communities. In sum, the government’s main goal was ending the armed conflict, and little thought was directed toward how to move beyond winning the war to securing peace.

The succession of failed attempts continued, with Cesar Gaviria (1990–1994) attempting to control drug trafficking through plea-bargaining and reduced sentences for drug kingpins who turned themselves in to authorities. With attention focused on the key drug traffickers, other armed groups grew virtually unchecked. The paramilitaries expanded as allies in the struggle to provide “security” in those areas of the country where the state was historically absent, and as their...
power grew, so did the lethality of their methods. Thus, by the time President Ernesto Samper (1994–1998) was elected, the paramilitaries were increasingly viewed as a threat to the state; in consolidating their territorial and political power, they increasingly turned their violence on members of the elite who had been their allies and benefactors.55

Additionally, ongoing definitional debates revolved around which groups would be considered political and which would be labeled terrorist. Law 418 in 1997 opened the possibility that the government could bestow carácter político (political status) on guerrilla groups and popular militias, thus making negotiations possible.56 The law also established an exploratory commission charged with determining the possibility of entering into dialogue with the guerrillas and presenting “recommendations regarding the treatment that . . . would need to be given to the self-defense groups as parties to the armed conflict.”57 For the first time, the issue of paramilitary groups was included in the government’s efforts to develop peace policies.

These initial steps toward full inclusion did not last long. Andrés Pastrana (1998–2002) was elected president on a platform that promised renewed peace talks and a commitment to achieving a negotiated settlement to the war. In an effort to demonstrate to the guerrillas that he was a man of his word, he ceded to the FARC a large portion of southern Colombia to which military access would be denied, thereby ensuring the guerrillas a “safe zone” during the peace process.58 However, this controversial move did not succeed in securing meaningful negotiations, and once again, the paramilitaries remained strikingly absent from the negotiating table.

B. Negotiating Peace with Paramilitaries: Contemporary DDR Efforts

In the wake of so many failed peace processes, President Álvaro Uribe (2002–2006; 2006–present) was elected on the promise of restoring security and the rule of law. With the failure of Pastrana still fresh, Uribe refused to negotiate with the FARC, whom he considered a “terrorist
threat.\textsuperscript{59} Rather, he cautiously explored the possibility of negotiating with the paramilitaries, while simultaneously promising to rein in the guerrillas.

There is a certain irony to these negotiations: in part the paramilitary demobilization is an attempt to "de-paramilitarize" the Colombian state, distancing it from these "self-defense committees," that went beyond governmental control. In its report on Colombia's demobilization, Amnesty International notes that "[t]he notion of a peace or demobilization process between the government and paramilitaries is a seemingly contradictory concept given the long-standing and close links between the security forces and paramilitaries, and the fact that the raison d'être of paramilitarism is the defense of the Colombian state and the status quo against real or perceived threats."\textsuperscript{60} Yet certain sectors of the Colombian military also felt that the paramilitaries damaged the legitimacy of the institution itself and were thus eager to distance themselves from a group that had become a liability.\textsuperscript{61} Furthermore, increasing domestic and international pressure called for a more permanent solution.

The paramilitary leaders had their own motivations for engaging in dialogue. Alfredo Rangel has persuasively argued that paramilitary leaders entered into negotiations with Uribe for four key reasons.\textsuperscript{62} First, many paramilitary leaders were tired of combat. Many of these men are accustomed to urban life and its comforts, and life in the rural war zones is not only harsh but keeps them away from their families. Second, many paramilitary leaders expected the Uribe administration to weaken and beat back the guerrillas, which would deprive them of the discourse that justified their existence. Third, they assumed that the legal and political conditions for their demobilization and reinsertion would resemble those that previous administrations had extended to the guerrillas during the 1980s and 1990s. Finally, national and international sentiment was strongly behind Uribe's efforts to negotiate a demobilization process with the paramilitaries.

However, as we argue throughout this text, the paramilitary leaders were mistaken in several of their assumptions. Principally, they did not consider the substantial changes that have occurred in international human rights law and norms, and the increasing demand for truth, justice, and reparations following armed conflicts. Thus, rather than the well-worn path of pardon and forgetting, these paramilitary leaders entered

\begin{itemize}
\item[] 59. Kirk, supra note 22, at 279–80.
\item[] 60. Al, supra note 8, at 11.
\item[] 61. Id. at 6.
\item[] 62. Rangel, supra note 18, at 4.
\end{itemize}
Transitional Justice into negotiations that were strongly influenced by demands for *nunca más* (never again).

Within this shifting context, Uribe became the first Colombian president to enter into a peace process with the AUC. This innovation set Uribe’s peace policy apart from that of every other administration since 1989, when President Barco declared the paramilitary groups illegal. As García Peña observes, “[w]ith this, the analytical frame changes radically: it was always thought that the paramilitary demobilization would be the result of peace with the insurgency—either simultaneously or subsequently—because the paramilitaries themselves claim to be a consequence of the guerrilla.”

In August 2002, the government began negotiations with the paramilitaries, facilitating this process through Law 782 of December 2002, which regulated individual and collective demobilization efforts by both extending and amending Law 418 of 1997. The government named Luis Carlos Restrepo as the High Commissioner for Peace responsible for promoting the signing of the *Santa Fe de Ralito I* agreement on July 15, 2003. The agreement marked the beginning of formal talks between the AUC-linked paramilitary groups and the government, and it included terms for the demobilization of all paramilitary combatants by the end of 2005. The AUC was obliged to suspend its lethal activities and maintain the unilateral ceasefire, as well as aid the government in its anti-drug-trafficking efforts. As talks began, the AUC announced a unilateral ceasefire on December 1, 2002, while insisting that none of its members would face prison time or extradition to the United States. The *Santa Fe de Ralito II* agreement, signed on May 13, 2004, set up a 368-square-kilometer *zona de ubicación* (concentration zone) in Tierralta, Córdoba.

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63. García-Peña, supra note 17, at 66.
65. Id., supra note 8, at 11–12.
66. Id.
67. Colombia Law 975 prohibits extradition of members of illegal armed groups accused of “political” offenses such as rebellion and sedition. It does permit extradition for offenses such as drug-trafficking. See infra text accompanying note 227. Some have speculated that the paramilitaries have recently shown more interest in negotiations due to the threat of extradition to the United States on drug charges. HRW, COLOMBIA: LETTING PARAMILITARIES OFF THE HOOK 3 (2005), available at http://hrw.org/backgrounder/americas/colombia0105; Juan Forero, COLOMBIA Proposes 10-Year Terms for Paramilitary Atrocities, N.Y. TIMES, Nov. 16, 2004, available at http://www.nytimes.com/2004/11/16/international/americas/16colombia.html; see e.g., Press Release, U.S. Attorney, S. Dist. N.Y., US Indicts Leaders of Colombian Terrorist Organization on Narcotic Trafficking Charges (July 22, 2004) (making reference to the proceedings against Diego Fernando Murillo, alias Adolfo Paz or “Don Berna,” and Vicente Castaño Gil, alias “El Profe,” both members of the negotiating high command of the AUC).
to facilitate and consolidate the negotiation process between the government and the AUC, improve verification of the ceasefire, and establish a timetable for demobilization. However, while the military and national police are responsible for guarding the perimeter of the zone, they have no presence within it, leaving civilians inside the zone in a state of insecurity.

Decree 128, promulgated on January 22, 2003, regulates Law 782 and thus governs both the individual and collective demobilization processes. The Decree established the Comité Operativo para la Dejación de Armas (Committee for Laying Down Arms) to verify membership in illegal armed groups and to evaluate whether individuals and groups have a genuine desire to demobilize and provide identification papers to certify their status. Decree 128 provides economic and legal benefits—including “pardons, conditional suspension of the execution of a sentence, a cessation of procedure, a resolution of preclusion of the investigation or a resolution of dismissal”—to armed groups that committed “political and related crimes.” These groups also enjoy immunity from future prosecution for the same crimes underlying the benefits granted. Finally, Decree 128 regulates social benefits, such as the provision of food, shelter, safety, and even economic opportunities.

The complete process takes a maximum of forty-eight days, beginning with the paramilitary leaders giving the government a list of their members and the weapons they will surrender. Following this stage, the members are moved to a “concentration zone” where their identities are verified through fingerprints, photographs, and dental records for the Registraduría Nacional del Estado Civil (National Registrar of Civil Status). These individuals also hand over their weapons and are checked for outstanding arrest warrants for crimes not covered by Decree 128, based on

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68. AI, supra note 8, at 14. This agreement was implemented through Resolution 092 of 2004 (Colom.). IACHR II, supra note 25, exec. summary, ¶ 10.

69. Ceding the concentration zone to the AUC has caused some to question whether President Uribe is headed toward his own “Caguancito” (little Caguán), referring to the zone Pastrana ceded to the FARC during his failed negotiations of 1998–2002. Indeed, when Uribe authorized preliminary talks with the AUC leadership, he assured at least one of the Catholic priests accompanying the negotiations that he did not want a repeat of Caguán. Interview with representative of the Catholic Church, in Apartadó, Colom. (Sept. 6, 2005).

70. In this text we focus on the collective demobilization of the paramilitaries. However, under the presidency of Álvaro Uribe more than 6,000 members of the FARC, the ELN and the AUC have individually demobilized. For more information, see OFFICE OF THE HIGH COMM’R FOR PEACE OF COLOM., Cuadros Resumen, Areas Despejadas 2003–2006 31.671 DESMOVILIZADOS, available at www.altocomisionadoparalapaz.gov.co/desmovilizaciones/2004/index_resumen.htm (last visited Feb. 19, 2007).


72. HRW, supra note 67, at 7, n.20 (citing OFFICE OF THE HIGH COMM’R FOR PEACE OF COLOM., REPORT OF THE GENERAL RAPPORTEUR, section 3.6 D).
the Office of the Attorney General’s database, as well as those of the state intelligence services.

When an individual is transferred to the zone, the government determines whether he or she is responsible for a human rights violation. While this determination should be based on information provided by the Attorney General’s office along with information from the state intelligence branch, the Attorney General’s office apparently conducts only a cursory check of its files to see if the individual is already the subject of an ongoing prosecution or has been previously convicted. Thus, no new prosecutions arise during the demobilization process unless and until crimes are discovered at a later time. Finally, if an individual is suspected of being a human rights violator—irrespective of whether the acts in question were political—he is not eligible for Decree 128 and remains in the concentration zone after the remainder of the group is returned to the place of origin. Those who return begin to receive economic benefits and other support, and any criminal charge or investigation terminates. None of those subject to this process is required to identify illegally obtained assets or provide reparations to victims.

In practice, flaws in this system have resulted in pardons for paramilitary members under investigation for non-pardonable offenses such as human rights violations. In December 2004, the Office of the General Prosecutor, the government entity responsible for disciplinary investigations of public officials and security force members charged with misconduct and human rights violations, revealed that 160 members of the paramilitary group Bloque Cacique Nutibara (BCN) were pardoned under Decree 128 but were later found to be under investigation for human rights violations. While a handful of members and many paramilitary leaders have been sent to the concentration zone, many other demobilized paramilitaries who benefited from Decree 128 have therefore gone free, often returning to their communities of origin. The Colombian Procuraduría (Inspector General’s Office) found that 163 individuals charged with atrocities such as kidnapping and forced disappearances had received judicial benefits.

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73. Id. at 7.
74. Id. at 8.
75. Decree No. 128 of Jan. 22, 2003, art. 21, O.G. No. 45.073; see also HRW, supra note 67, at 8, n.22.
76. AI, supra note 8, at 13.
77. Technically, those who come under later investigation for human rights violations lose the Decree 128 benefits and would then be subject to the Law 975 benefits, including an extraordinary justice route. Id.
78. Procuraduría General de la Nación (Inspector General’s Office), Comisión especial de la Procuraduría vigila proceso de desmovilización de AUC en acción preventiva,
C. Problems with Colombia’s DDR: The Question of Accountability

Since 2003, Colombians have watched orchestrated ceremonies of paramilitaries laying down their arms before television audiences and dignitaries in efforts to demobilize. The process commenced on November 25, 2003, when 874 members of the BCN laid down their arms, setting off a series of large-scale demobilizations.\(^7\) To date, a total of 30,151 AUC combatants have demobilized, and 16,983 weapons have been turned in and registered.\(^8\) Despite the media-friendly performance of demobilization, the reality reveals the difficulties and superficialities of such efforts.

While the Ministry of Defense claimed significant reductions in the violence beginning in 2003,\(^9\) other sources showed that sociopolitical violence remained high, with almost 5,000 extrajudicial killings in 2003, the majority executed by paramilitaries.\(^10\) The Centro de Investigación y Educación Popular (Research and Public Education Center) has also identified increases in displacement due to the violence.\(^11\) The Colombian Defensoría del Pueblo (Ombudsman’s office) reported in September 2004 that it had received 342 complaints against paramilitaries, including massacres, assassinations, and kidnappings.\(^12\) That same


\(^12\) Defensoría del Pueblo de Colombia, Seguimiento al Cese de Hostilidades Prometido por las Autodefensas Unidas de Colombia como Signo de su Voluntad de Paz para el País,
year, the Colombian Commission of Jurists reported 1,899 disappear-
ances from the date of the ceasefire. Similarly, while the Ministry of
Defense has reported that twenty percent of the paramilitary combatants
have demobilized, others claim that the number of paramilitaries has
grown by ten percent annually. In 2004, the IACHR observed that the
process had neither resulted in a significant reduction of violence nor
altered the threatening and abusive behavior of local paramilitaries. In
other words, despite televised collective demobilizations, the general
population continued to live in a climate of fear and violence. Critics
blame the mechanisms used for the physical demobilization of paramili-
tary troops and the lack of oversight of the process.

In particular, Decree 128 affects individual demobilization but does
not adequately address collective demobilization. Thus, the structure of
paramilitarism is not dismantled, even though individual combatants dis-
arm and demobilize. Importantly, collective demobilization is “identified
with the development of peace negotiations with the leadership of illegal
organizations,” whereas “individual demobilizations seek to dismantle
these organizations from their base, offering their members the opportu-
nity to avail themselves of procedural, social, and economic benefits in
exchange for their surrender and cooperation with the authorities.”

Since the passage of Law 418 of 1997, the tenor of demobilization ef-
forts has been to encourage individuals to desert illegal armed groups. Yet,
Decree 128 does not require individuals to provide information about the
group to which they belong, leaving some information about crimes un-
covered. The demobilization procedures follow what Human Rights
Watch terms “an assembly line approach,” which adheres to mechanical
procedures in accordance with an expedited schedule mandated by the
High Commissioner for Peace. Investigators lose valuable information
about the group’s structures, crimes, financing, illegal assets, and other
critical information. The differences in the means may therefore reflect

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86. IACHR II, supra note 25, ¶ 78.
87. Id. ¶¶ 96–97.
88. AI, supra note 8, at 43.
89. IACHR II, supra note 25, ¶ 72.
90. See Decree No. 128 of Jan. 22, 2003, art. 13, O.G. No. 45.073, Jan. 24, 2003 (Co-
91. HRW, supra note 67, at 7. See Office of the High Comm’r for Peace of Colom.,
Schedule of Demobilization (Nov. 3, 2003), http://www.altocomisionadoparalapaz.gov.co/
noticias/2004/noviembre/nov_03_04b.htm.
differences in the desired ends. Andres Peñate, the Colombian Deputy Secretary of Defense, has affirmed that the “demobilization of individuals is regarded as a ‘war tactic’ by the government, as its emphasis is on the retrieval of information and the weakening of the insurgent groups, [while] ‘collective demobilization’ is conceived as a peace instrument.”

Moreover, with so many ex-paramilitaries free without consequences and paramilitarismo intact, new problems complicate the peace process. One arises when paramilitaries undergo a “legitimization” process, which entails the purchase of legal businesses and other productive projects, as well as integration into local, regional, and national politics. Paramilitaries often gain control of these assets or positions through co-optation or threats, and thus they have maintained a widespread societal presence, occupying “a significant number of local mayors’ offices, governorships, the judicial apparatus, the health and education system, public contracts, business cooperatives and other economic concerns, private security firms, and the criminal economy, including drug-trafficking, extortion, the illegal trade in gasoline, prostitution, and gambling rackets, thus part of a complex criminal organization.”

Meanwhile, those living in the community, labeled comunas, continue to live under “the reign of silence.” As Human Rights Watch cautions, “unless the law takes into account the complexity, power, and regenerative capacity of paramilitary mafias, there is a serious risk that the demobilization process will simply give paramilitary leaders the benefits they seek without resulting in any real advances in terms of accountability or peace.” Any reengagement of demobilized combatants in the conflict therefore contributes to the failure to “break the cycle of violence in Colombia.”

Without a breakdown of paramilitarismo, both demobilized paramilitaries and guerrillas are being “recycled” into the conflict, often as paid military informants, and thus “legalized” to become “more palatable to domestic and international public opinion.” Moreover, they gain economic and legal benefits while continuing with their illegal activities.

92. KOTH, supra note 51, at 26.
93. Al, supra note 8, at 10.
94. Id.
95. IACHR II, supra note 25, ¶ 82.
96. HRW, supra note 67, at 1.
97. IACHR II, supra note 25, exec. summary, ¶ 3.
98. Al, supra note 8, at 49. For instance, the Ministry of Defense adopted Decree 2767 on August 31, 2004, expanding the regime of economic benefits already established in Decree 128 to include persons who collaborate with military forces and the National Police by providing more information on the activities of illegal groups. This arrangement was considered a way “to offer them an opportunity to develop a life plan safely and with dignity.” Decree 2767 of Aug. 31, 2004, pmbl., O.G. No. 45657, Aug. 31, 2004 (Colom.), available at http://www.presidencia.gov.co/prensa_new/decretoslinea/2004/agosto/31/dec2767310804.pdf.
In this way, paramilitarismo becomes “reengineered” rather than dismantled. As the IACHR recognizes, fostering conditions for the successful reincorporation to society of those who have formalized their intent to put down their arms is valid and desirable. At the same time, the use of civilians in tasks to support the military forces and National Police must be evaluated with caution since it could reproduce the circumstances that originally led to the creation of the groups that are now the object of demobilization efforts.99

Programs that benefit the demobilized by giving them access to job training, income and employment generation, and psychosocial accompaniment are equally divisive and may cause resentment in the poor communities in which the demobilized reside.100 These former “criminals” are perceived as having easy access to privileges that are beyond the reach of many of the poor, who struggle on a daily basis. Above all else, the IACHR concludes that “[t]he demobilization mechanisms have not been accompanied by comprehensive measures to provide relief to the victims of the violence nor to clarify the many criminal acts that remain unpunished, and therefore the factors generating the conflict in large measure persist.”101

Thus, neither the number of demobilized combatants compiled in the aggregate statistics nor televised collective demobilization ceremonies are sufficient to satisfy a need for substantive compliance and justice. Even if sincere, these events do not reflect careful consideration of the social processes that must accompany them. The result is collective demobilizations that run the risk of remaining mere rituals of statecraft, lacking social resonance. They confirm what many of these community members and former combatants fear: that it is all a façade—the state in its theatrical register, orchestrating a transition that does not reach beyond the flat, shiny surface of the television screen.

D. Reintegration: Towards a Concept of Reconciliation?

Frequently, peace processes, democratic transitions, and “national reconciliation” efforts are little more than the restructuring of elite pacts of governability and domination. In these superficial forms of reconciliation, the dialogue involves the same interlocutors, the same silences, and the same exclusionary logics that existed previously. Maximizing the commitment of demobilized combatants to reintegrating themselves into

99. IACHR II, supra note 25, ¶ 79.
100. For example, the “Regreso a la Legalidad” [Return to Legality] program provided social benefits for the 868 who demobilized in Medellín as a means of promoting their reincorporation into civilian life. Id. ¶ 80.
101. Id. ¶ 60.
“legal life” requires public rituals that construct a new way of coexisting, as well as a redistribution of resources and power. For example, in South Africa, the discourse of national reconciliation was, to a great extent, dominated by political and religious leaders. Wilson criticizes the South African Truth and Reconciliation Commission (TRC) for having deployed the concept of reconciliation in a top-down manner, leaving little space to express the sentiments of retribution and revenge that operated in the local sphere. The failure to translate the grand vision of national reconciliation to the local level was striking, and religious and political elites appropriated the term “reconciliation” as a meta-narrative to reconstruct the nation-state and their hegemony, post-apartheid. Wilson argues that part of the gap between national and local processes resulted from the lack of “any dispute-resolution mechanisms within the TRC framework to negotiate the return of former ‘pariahs’ to the community.” His conclusions support the need to reincorporate demobilized combatants into the communities in which they live, and the need to work with the victims, the victimizers, and the beneficiaries in reconstructing social life.

This challenge underscores the fact that the least studied and least successful phase of DDR is reintegration, which should in fact be a central focus in Colombia. If ex-combatants are not provided with viable paths leading to their reincorporation into society, then they may choose to “return to the hills” and the fighting that has convulsed Colombia for more than four decades. Moving DDR onto the terrain of transitional justice may work to the benefit of both former combatants and broader society. The Colombian experiment may be the first to implement the recommendations in the newly released Stockholm Initiative on DDR, which advocates reformulating traditional DDR to include links to transitional justice and reconciliation measures.

E. The Demobilized as Transitional Subjects?

The interviews conducted for this study enabled critical insights into the reintegration process. Of the 112 individuals interviewed, ninety percent were combatientes rasos (foot soldiers) or squadron leaders in charge of a maximum of ten to fifteen men. These individuals were chosen for interviews because they represent the “castaways” of the war—the cannon fodder that are often expendable and woefully replaceable.

103. Id. at 175.
104. See the various works by Dr. Sami Faltas, including Faltas, supra note 6.
We emphasize the need to differentiate according to rank and to recognize that while many of these ex-combatants do blur the line between victim and perpetrator, they are not among those who are the true beneficiaries of the war. Obviously, differences in rank translate into differences in earnings and responsibilities; they also influence combatants’ intellectual authorship, the severity of their crimes, and their sense of guilt and the guilt others attribute to them.

Our research demonstrates that key factors motivating the combatant’s desire to participate in the DDR program include missing one’s hometown, friends, and family, as well as the “war weariness” so many of these men and women expressed. One factor contributing to this fatigue is the lack of any meaningful ideology that these combatants might use to justify their actions. It was common to hear that “this war is just a business,” and that these men were tired of “killing innocent people—people I didn’t even know.”

Another phrase that echoes throughout our conversations with ex-combatants is volver al monte (return to the hills), a symbolically rich idea that invokes far more than a geographical location. The former combatants described life in “the hills” (the battle front) as marked by gnawing hunger, days and weeks without sleep, sickness without access to medical care or medications, lives of fear and clandestinity, and incessant killing or watching others being killed. The harsh reality of life in the hills has played a key role in motivating demobilization. Moreover, family proved essential, acting as a bridge between life in the hills and memories of civilian existence—a tie that enabled many of these former combatants to remember that they were still human beings, even out in the hills. Indeed, our findings indicate that the majority of these former combatants are looking for some way to leave the war behind, and yet they are living in the midst of an ongoing armed conflict. The irony is that these demobilized combatants are, in many cases, “transitional subjects.” Unfortunately, the social context is not.

Our research also indicates that paramilitary demobilization must extend beyond the former combatants to include their social environment, requiring that national processes and policies be combined with local and regional initiatives. While local processes should not be romanticized as intrinsically harmonious or democratic, neither should they be overlooked. Reconciliation needs to include certain performative aspects. For instance, collectives engage in “ritual purification” and the reestablishment of

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106. Research based on 112 in-depth interviews with demobilized combatants, followed by more focused analysis of three sites: Bogotá, Medellín, and Turbo-Apartado. Sixty-four interviewees were from the guerrilla (ELN or FARC) and forty-eight were from the AUC. Of the 112, fourteen were women, all of whom were ex-guerrillas. For a fuller discussion of this research, see Theidon & Betancourt, supra note 7, at 58.
group unity via the secular rituals embodied in transitional legal practices. From this perspective, law is not only a set of procedures, but also a series of secular rituals that break with the past and mark the beginning of a new moral community. Although the literature on transitional justice has focused almost exclusively on the international and national spheres, transitional justice is not the exclusive preserve of either international tribunals or states: communities also mobilize the ritual and symbolic elements of these transitional processes to deal with the deep cleavages left, or accentuated, by civil conflicts.107

To assume that a change in legal status—combatant to ex-combatant—will translate into the social sphere in the absence of any preliminary process of consultation with the host community is shortsighted. Interviews with people in the surrounding neighborhoods reveal the deep mutual fear that exists between the ex-combatants and the host community. The failure to involve this broader community leads to a vicious cycle of suspicion and fear, both on the part of the “re-integrated” ex-combatants and members of the communities who suddenly find themselves living with former killers. One person assured us that everyone looks at these demobilized combatants as though they were “people from a new race.” Ex-combatants also worry enormously about their own security. One of the administrators of the Bogotá DDR program expressed this mutual fear:

Really, I think it’s a fairly complex process. First of all, the beneficiaries of the program are running a huge risk if they leave the program early because nobody has any idea what they will do if they have to manage their own homes. In addition to this, there’s the question of what they will do whenever the state’s aid runs out—how will they make a living when it’s over? And then there’s the problem of what might happen if the community does not know how to receive them. There hasn’t been any work with the community so that they become used to all the demobilized. There has not been much concern for facing the question of how they could and would ultimately have to live together.108

108. Interview with a DDR program administrator, in Bogotá, Colom. (Nov. 17, 2005).
The question of how to live together resonated among the former combatants as well as their social circles and the host communities. DDR must extend beyond the mere collection of weapons to seriously address the reincorporation of ex-combatants into society, and that reincorporation will involve issues of justice, reparation, and reconciliation. Author Theidon, in her work with the Peruvian Truth and Reconciliation Commission in Ayacucho, studied how people attempt to reconstruct social relationships and sociability after years of living as "intimate enemies." It is clear that local initiatives and local processes play a key role in post-conflict reconciliation. Reconciliation is forged and lived locally, among families, neighbors, and communities. Without implementing mechanisms for the return and reintegration of former "pariahs"—mechanisms that would provide security for all concerned as well as ensure forms of justice and reparation—the DDR process will continue to be hampered by the high level of impunity that has characterized the program to date.

F. The Transformation of DDR: The Introduction of Transitional Justice Concepts

The concerns generated by the reintegration process ultimately give rise to issues intimately connected to transitional justice and ultimately international law: the victims and their rights. Colombia provides a salient example of how international pressure affects traditional DDR processes, in particular through the involvement of international monitoring bodies. In early 2004, the Member States of the Organization of American States (OAS) unanimously expressed their "unequivocal support for the efforts of the Government of President Uribe to find a firm and lasting peace," along with their interest in supporting the peace process. In what some perceive as a promotional strategy, the Colombian government signed an agreement with the General Secretariat of the OAS on January 23, 2004, to set up the Misión de Apoyo al Proceso de Paz en Colombia (MAPP/OEA) (Mission to Support the Peace Process in Colombia). MAPP/OEA's mandate includes overseeing and verifying initiatives undertaken to secure a ceasefire and an end to hostilities.

110. Id. (providing an illustration of different local mechanisms used by rural communities in Peru to reinsert members who had become subversives).
111. OAS Res. 1397/04, OEA/Ser.G/CP/RES.859 (Feb. 6, 2004) [hereinafter OAS Resolution].
through DDR strategies. It has assumed the responsibility for oversight of the demobilization effort, which includes monitoring the concentration zone; keeping an inventory of weapons, war material, and munitions; and assuring respect for the ceasefire at the national level. It has also assisted in the reinsertion of paramilitaries into civilian life.

Despite this front-line role, the mission may not publicly comment on the demobilization efforts unless requested to do so by the Colombian government. It also has no power to sanction paramilitaries who fail to meet the terms of their demobilization agreements. The process has therefore been criticized as lacking transparency and effective oversight. These shortcomings have led some countries to demand the establishment of a legal framework that would ensure respect for international norms of truth, justice, and reparation. Specifically, the OAS Permanent Council highlighted the need to “ensure that the role of the OAS is fully consistent with the obligations of its Member States with respect to the effective exercise of human rights and international humanitarian law,” and invited the IACHR to provide advisory services to the MAPP/OAS Mission.

In July 2004, the IACHR delegation visited Colombia to evaluate the demobilization process and the legal regime under which it operated. In its concluding report, the IACHR mission observed, “[t]he demobilization mechanisms have not been accompanied by comprehensive measures to provide relief to the victims of the violence nor to clarify the many criminal acts that remain unpunished, and therefore the factors generating the conflict in large measure persist.” As a result, the IACHR offered “background information in the form of case-law and doctrinal writings on peace processes and administration of justice to be taken into account in the demobilization process.” This decisive move prompted a vigorous political campaign that helped insert transitional justice guidelines into the DDR process.

Diverse monitoring bodies and human rights organizations began to demand that Colombia’s demobilization process be coupled “with guar-

113. IACHR II, supra note 25, ¶ 1.
114. AI, supra note 8, at 15–16.
115. Interview with member of the MAPP/OAS Mission, in Barrancabermeja, Colom. (Apr. 17, 2006).
116. AI, supra note 8, at 16.
117. Id. at 48.
118. Id. at 15.
119. OAS Resolution, supra note 111.
120. The delegation was led by the Vice President and Rapporteur for Colombia, Susana Villarán, and the Executive Secretary of the IACHR, Santiago A. Canton, from July 11 to 17, 2004. IACHR II, supra note 25, exec. summary, ¶ 1.
121. Id. exec. summary, ¶ 3.
122. Id. ¶ 7.
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... that the State's international obligations will be respected."

Other observers criticized the lack of an adequate legal framework for setting forth the benefits and conditions of demobilization and the process of dialogue between the "negotiating high command" of the AUC and government.124

In particular, concern arose over Decree 128, which excludes benefits for combatants who are "being processed or have been condemned for crimes which according to the Constitution, the law or international treaties signed and ratified by Colombia cannot receive such benefits."125 This decree applies only to ex-combatants who decide to participate in individual or collective demobilization but who are being investigated or serving sentences for "lesser" crimes, such as illegal possession of arms, membership in illegal armed groups, and petty crimes. But Law 782 defines the crimes referenced in Decree 128 as "atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, and murder committed outside combat," among others.126 The gap created by Law 782 attracted international scrutiny and required the government to create an alternative framework for the DDR process to deal with members alleged to have committed human rights abuses.

The international community took advantage of the opportunity to modify the DDR process by drawing attention to the missing link in the standard DDR process—concern for the victims and the host communities. Thus, the IACHR endorsed "genuine mechanisms of participation ... in secure conditions, for the victims of the conflict, so as to ensure access to truth, justice, and reparation."127 It found the negotiations and ceasefire to be at a crucial stage that "should be guided by the principles and standards set forth in international law for resolving armed conflicts" while also respecting the "state's obligation to ensure justice, truth, and reparations for all persons under their [sic] jurisdiction."128 Accordingly, the IACHR included a section in its 2004 report on Colombia, Principles and Standards for Overcoming Armed Conflicts and their Consequences for the Civilian Population, noting that:

The successful development of a process of demobilization ... calls for the clarification of the violence and reparation of its consequences. Realistic expectations of peaceful coexistence under the rule of law should be based on measures that address

124. IACHR II, supra note 25, exec. summary, ¶ 8.
128. Id. ¶ 94.
the challenges posed by the construction of a culture of tolerance and the rejection of impunity. The international community has identified a series of guidelines with respect to truth, justice, and reparations that draw on the experiences of different societies and the principles of law reflected in the obligation of states to administer justice in keeping with international law.\footnote{129}

Similarly, Amnesty International noted the need to balance individual rights within the demobilization process as a means of combating impunity:

The right of victims to truth, justice and reparation must form the backbone of efforts to resolve the conflict. Truth, justice and reparation play a key role in ensuring against repetition of human rights abuses. They are essential components of a just and lasting peace and of a future in which human rights are respected and protected.\footnote{130}

International critics thus invoked what have become classic debates in the transitional justice literature regarding impunity through amnesty, the difficulty of balancing the desire for peace with the demands for justice, and the need for domestic legal principles to respect changes in international jurisprudence.

\section*{G. Legislating Peace and Justice}

International pressure greatly shaped the legislative history of the legal framework eventually adopted to deal with the “gap” created by Law 782. The resulting Justice and Peace Law helped merge DDR and transitional justice into one legal framework. The merger signifies a momentous break from all previous conventional demobilization frameworks applied in Colombia.\footnote{131} Above all else, it also creates a novel legal model that mirrors the growing consensus that DDR can no longer operate independently of those considerations normally associated with transitional justice—the rights of victim-survivors to truth, justice, and reparations.

Yet, as will be discussed in this next section, the resulting law did not emerge without substantial debate. For those accustomed to an unbridled freedom to broker peace through the most expedient means available, this new direction presented formidable alterations in thinking and practice. Resistance to this new model slowly subsided in the face of consistent lobbying by national and international intermediaries commit-

\footnotesize{129. \textit{Id.} ¶ 10.}
\footnotesize{130. \textit{AI, supra} note 8, at 16.}
\footnotesize{131. \textit{See supra} Part III.A.}
ted to the task of establishing new limits to acceptable peacemaking practices.

Indeed, the “give and take” between these two positions was apparent from the very start of Colombia’s most recent attempt to create a legal framework for demobilization. To encourage demobilization and reincorporation into civilian life, the government’s first proposed initiative in 2003 contemplated the elimination of criminal sentences altogether for persons who had committed serious violations of human rights or international humanitarian law. In defense of the initiative, President Uribe commented that he understood “the concern raised by offering alternative sentences for grave crimes, . . . [b]ut in a context of 30,000 terrorists, it must be understood that a definitive peace is the best justice for a nation in which several generations have never lived a single day without the occurrence of a terrorist act.”

After a considerable national and international outcry ensued—magnified by a heated debate in the Colombian Congress—the bill was withdrawn for modification. The IACHR referred to its court’s “clear and firm jurisprudence” denouncing “enactment of laws that limit the scope of judicial proceedings intended to clarify and redress basic human rights violations committed during a domestic armed conflict . . . .” Yet, the lack of balance between the demands of peacemaking and the rights of victim-survivors reflected a tension that would come to color the state’s position not only for the remainder of negotiations over the law but also in the aftermath of its eventual promulgation.

In the wake of President Uribe’s failed initiative, a series of new proposals appeared, each attempting to respond to the new internationally imposed limits yet representing the range of possibilities along the DDR and transitional justice spectrum. Indeed, the legislative agenda of the Colombian House of Representatives indicates that nine such bills were presented between July 2004 and June 2005, and significantly, all

132. IACHR II, supra note 25, ¶ 63.
134. UNHCR—Colom., Observaciones sobre el Proyecto de Ley por la cual se dictan disposiciones en procura de la reincorporación de miembros de grupos armados que contribuyan de manera efectiva a la paz nacional (Sept. 23, 2003), available at http://www.hchr.org.co/publico/pronunciamientos/ponencias/po0329.pdf. See also Letter from U.N. High Comm’r for Human Rights Office—Colom. to Legislators of the First Comm’n of the Senate and House of Representatives, Observaciones sobre el Pliego de Modificaciones al Proyecto de Ley “por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley que contribuyan de manera efectiva a la consecución de la paz,” DRP/175/05 (Mar. 30, 2005) [hereinafter Letter to Legislators].
were categorized as relating to the "[r]einsertion of armed groups operating outside of the law."\(^{136}\)

The proposed legislation coincided with the Coordination and International Cooperation Roundtable for Colombia, held in London in July 2003 and Cartagena in February 2005 and involving the Colombian government and potential donors, such as the G24 countries, the Inter-American Development Bank, and the United Nations.\(^ {137}\) While the purpose of the international meetings was to discuss recommendations issued by the UN High Commissioner for Human Rights Office in Colombia, they inevitably involved discussion of the DDR process.\(^ {138}\) These meetings may have been a turning point in the negotiations in that they communicated clearly to the Colombian government that it would have to bring DDR into compliance with international standards on truth, justice, and reparation. Moreover, they ignited the lobbying efforts of local and international human rights groups.

Transitional justice principles and rules, grounded in international law, became the "parameters to be taken into account at the moment of judging whether the demobilization process of armed illegal groups satisfies the requirements of truth, justice and reparation for the victims of the armed conflict in Colombia."\(^ {139}\) Yet, at the same time, the challenges of integrating transitional justice principles into a pre-post-conflict situation were not overlooked, as evidenced by a letter issued by the UN High Commissioner for Human Rights stating that "mechanisms of transitional justice should only be applied within processes of negotiation, dialogue and agreements with illegal armed groups that have previously agreed with the government to demobilize and dismantle."\(^ {140}\) These pronouncements, combined with the stream of legislation being presented, pressured the Minister of the Interior to present the international community with a revised bill during the Cartagena meeting. The revisions incorporated provisions on truth, justice, and reparations,\(^ {141}\) but when the

\(^{136}\) HRW, supra note 67, n.28 (citing Listo Nuevo Proyecto Que Busca Marco Jurídico Para Grupos Armados Irregulares, El Espectador, Dec. 17, 2004). For a specific list of proposals, see Secretary-General of Legislation, Camara de Representantes de Colombia, Agenda Legislativa: Julio 20 de 2004 a Junio 20 de 2005.

\(^{137}\) Cartagena Declaration, Cartagena de Indias, Feb. 3–4, 2005, available at http://epp-ed.europarl.eu.int/Press/peve05/docs/050922cartagenadeclaration_en.doc; Al, supra note 8, at 21 n.32. The Cartagena meeting was attended by high-level representatives of the governments of Argentina, Brazil, Canada, Chile, Japan, Mexico, Norway, Switzerland, the United States, the EU and its Member States, the European Commission, the UN system, the CAF, the IDB, the IMF, the World Bank, and the Colombian government. Id. at 22 n.33.

\(^{138}\) Al, supra note 8, at 16, 21 n.32.

\(^{139}\) IACHR II, supra note 25, exec. summary, ¶ 7.

\(^{140}\) Letter to Legislators, supra note 134, at 5.

\(^{141}\) HRW, supra note 67, n.30 (citing Gobierno Presentará Marco Legal Para Desmovilización de Paramilitares el Próximo Mes de Febrero, El Tiempo, Dec. 14, 2004).
The bill was presented to the Colombian Congress the next day, these provisions had already been weakened. 142 The Minister's comments reflected the continued resistance to altering traditional DDR approaches that were predicated upon leniency for armed actors. Indeed, a series of further modifications weakened the proposal that eventually constituted the final bill approved by the Colombian Congress. 143

IV. TENSIONS IN BALANCING THE POLITICAL WITH THE LEGAL: DDR AND TRANSITIONAL JUSTICE

The debate surrounding the creation of a legal framework for Colombia's peace process has revealed the tension between the state's political need to promote DDR and its legal obligations under human rights and international humanitarian law. Law 975/05, signed by President Uribe July 22, 2005, embodies the strain between these two competing principles and the difficulties inherent in balancing the need to broker peace between warring factions with the obligation to respect the rights of those who suffered harm during the armed conflict. 144 Attempting to integrate principles of international law into a DDR process can seem futile if done only superficially or for political expediency—victim-survivors may reject these cosmetic alterations and at times the entire transitional justice package.

As discussed above, the Justice and Peace Law was originally designed to fill the gap left by Law 782/02 and Decree 128/03, which pertain to Colombia’s “foot soldiers” who elected to participate in the demobilization, benefiting from a process that de facto amounts to a pardon or amnesty. Left over are those who do not qualify for this amnesty because they are under investigation for grave human rights violations. In this way, the Justice and Peace Law does not supersede, but rather complements, the demobilization law. The UN Permanent Mission to Colombia clearly explains that the Justice and Peace Law “is exceptional in nature, inasmuch as it is not a law intended for normal times but rather to encourage an end to violence by organized groups outside the law.” 145

142. AI, supra note 8, at 22.
143. Colombian High Commissioner for Peace Luis Carlos Restrepo and Vice President Francisco Santos had lent their support to an even weaker bill that had been presented by Senator Armando Benedetti. The final bill was presented to Congress on March 3, 2005.
Interestingly, the title of the law reads “for the . . . reincorporation of members of armed groups operating outside the law who contribute in an effective manner to the achievement of national peace.” While the law thus places emphasis on the “R” of DDR, it also integrates transitional justice concepts in its “Definition and Principles,” which includes as the law’s primary objective “to facilitate the peace process and the individual and collective reincorporation of members of extra-legal armed groups into civil life, guaranteeing the rights to truth, justice and reparation of victims.”

In fact, the Justice and Peace Law emphasizes criminal proceedings to accomplish this goal, with Article 2 clarifying that the law “regulates the judicial investigation, procedures, sanction and benefits of people linked to armed groups operating outside the law, as authors or participants in criminal acts committed during and as part of their membership to these groups, who have decided to demobilize and contribute decisively to national reconciliation.” In particular, it regulates the conditions for providing an “alternative sentence,” instead of a standard punishment in exchange for “contributions to the achievement of national peace, collaboration with justice, reparation to the victims and an adequate re-socialization.” The law contemplates both collective and individual demobilization, but first requires that individuals who choose to participate in the process must appear on the Attorney General’s list provided by the national government as part of its peace talks, while also adhering to the requirement that illegal activity cease.

While the thrust of the law and the mechanisms it puts in place emphasize the DDR process, the influence of international actors can be seen through the explicit protection of victims’ rights. Specifically, Article 4 establishes that the process of national reconciliation “should always promote the right of victims to truth, justice and reparation” as well as “respect the right to due process and judicial guarantees of the prosecuted.” The law also explicitly protects the right to effective investigations and sanctions, the right to truth, and the right to reparation. Finally, the law creates the Comisión Nacional de Reparaciones y Reconciliación (CNRR) (National Reparations and Reconciliation Com-

146. Law No. 975 of July 22, 2005, O.G. No. 45.980. Article 1 defines “grupo armado organizado al margen de la ley” as pertaining to both guerrilla and paramilitary groups, or a significant and integral section of either in blocks, fronts, or other modalities that come under Law 782 of 2002. Id. art. 1.
147. Id. art. 1 (author’s translation) (emphasis added).
148. Id. art. 2 (author’s translation).
149. Id. art. 3 (author’s translation).
150. Id. arts. 10-11 (author’s translation).
151. Id. art. 4 (author’s translation).
152. Id. arts. 6-8.
mission) to assist in guaranteeing these rights. Despite these textual provisions, internal contradictions in the law were quickly criticized for undermining the goals of victim protection.

A. Challenges to the Law

Contradictions in Law 975/05 prompted vociferous national and international criticism, including general objections and pronouncements from the United Nations, the IACHR, Human Rights Watch, Amnesty International, and the Colombian Commission of Jurists, among others. Sectors of Colombia’s civil society also organized to protest the law. For instance, the Movimiento de Victimas de Crímenes de Estado (Movement of Victims of State Crimes, or Victims’ Movement) was formed on June 25, 2005. The movement, composed of numerous grassroots organizations and growing rapidly from 300 to approximately 800 delegates from around the country, protested the approval of Law 975/05. It also brought one of the ten national lawsuits presented before the Colombia Constitutional Court.

Another lawsuit, brought by a consortium of 105 human rights and victim-survivors’ organizations, challenged the form or content of thirty-three of the seventy-two articles in Law 975/05. On May 18, 2006, the Constitutional Court ruled on the merits of this challenge, issuing its opinion in Gustavo Gallón Giraldo v. Colombia. The consortium’s claims were supported by amicus curiae from national and international actors such as the International Center for Transitional Justice (ICTJ). The decision prompted significant controversy in Colombia, especially from paramilitary leaders, but it set important parameters for the balance between peace and justice. Although the Colombian Constitutional
Court upheld the law in general terms, it declared other articles partially or wholly unconstitutional, tilting the balance in favor of victim-survivors. In the following sections, we offer an overview of the various criticisms of Law 975/05, including arguments made in Gustavo Gallón Giraldo, couched within an overview of the transitional justice paradigm presented in the academic literature. The amalgam of civil society responses to the law reflects current national and international expectations of transitional justice that limit the scope of the state’s prerogatives in peace negotiations and political transitions. Indeed, the legal challenges center around the absence of perfect protection of the three central components of transitional justice: truth, justice, and reparations. We examine how the Constitutional Court sought to resolve these tensions, in particular by elevating peace to a right in an effort to legitimize a proportionality test that often provokes disagreement among international law purists. While it is beyond the scope of this Article to present a comprehensive analysis of the law and the Constitutional Court ruling, we offer this preliminary examination in anticipation of further analysis once implementation of Colombia’s Law 975/05 begins.

1. The Right to Justice

In the course of its development, the field of transitional justice has helped establish justice as a key principle of international law. Historically, absolute amnesties have been used as bargaining tools to end repressive regimes or war, preserve peace, prevent further hostilities, or promote transitions to civilian governments. Yet, in many transitional justice settings, amnesties are not intended to facilitate the surrender of weapons or an end to hostilities, but rather, later in the peace process, to facilitate investigation of human rights. For instance, in South Africa,

163. See Hayner, supra note 2 (providing an overview of the features of truth commissions within a transitional justice context).
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amnesties were a tool for gathering a "fuller truth" about the past to satisfy a national need for reconciliation.168 Even then, amnesties met with great opposition.169 Advocates of justice—defined to include investigation, prosecution, and sanction of wrongdoers—challenge the use of amnesties170 and the claim that the right to an effective remedy before a competent national court “is one of the fundamental pillars” of the rule of law and the state’s duty to guarantee human rights protection.171 Consensus has propelled the rights of victim-survivors into the peace formula.172

a. Reduced Sentence as Veiled Amnesty

Issues related to the appropriate dose of criminal justice cut to the heart of the debates regarding Law 975/05. As Kerr observes, “[p]unishment has been the sticking point in the ‘peace talks’ between the Government of Colombia (GOC) and the paramilitaries.”173 The ability to determine “optimal levels” of punishment constitutes the bargaining chip in Colombia’s transitional justice process, with Law 975/05 embracing a middle path: the law does not offer a South Africa-style amnesty, but it also does not promise full criminal trials as in Peru.


The law offers a reduced and qualified punishment via an “alternative” sentence—suspension of existing sentences and proceedings, to be replaced with imprisonment of no less than five years and no more than eight years for beneficiaries who comply with the basic demobilizing requirements. The Colombian Superior Court determines punishment depending on the gravity of the crime and the defendant’s level of collaboration, while aggregating all other proceedings and punishments. Time spent in “concentration zones” counts towards reducing the alternative sentence by up to eighteen months. The government then decides where the prisoners will serve their sentences, potentially obviating incarceration in regular prisons. A probationary period equal to half of the sentence begins upon completing the alternative sentence, and if all illegal activities cease, the original sentence will extinguish. Failure to refrain from all illegal activity, however, results in reversion back to the original suspended sentence. Revelation of new crimes not previously included in the defendant’s confession will result in a twenty percent increase of the alternative sentence if omission is found to be intentional.

In the Gallón Giraldo case, the claimants argued that these provisions disproportionately favor the perpetrators, and that the alternative sentence and absence of direct investigation and prosecution act as an indulto velado (veiled pardon). The perpetrator gains leniency without absolute guarantees to the truth, reparations, or the cessation of hostilities. The claimants portrayed Law 975/05 as part of a larger scheme that creates both “an instrument and system” of impunity. The claimants also asserted that Law 975/05 is “a very sophisticated mechanism for impunity since it presents definitions and announcements apparently very generous with regard to the rights of victims, but designs a system that in an undercover way permits impunity.” Commenting on the effect of the law, the Victims’ Movement claimed the law was “wrongly called Justice and Peace,” and instead asserted that it completes the cir-

174. Law No. 975 of July 22, 2005, arts. 3, 29, O.G. No. 45.980, July 25, 2005 (author’s translation). Resocialization entails work and study during detention, as well as assisting in the demobilization of the illegally armed group to which the beneficiary belonged.
175. Id. arts. 20, 29.
176. Id. art. 31.
177. Id.
178. Id. art. 29.
179. Id. art. 25.
181. Id. at 75. See text accompanying footnotes for lack of absolute guarantees.
182. Id. at 21, 257.
183. Id. at 74.
cle of impunity initiated by Law 782/02 and Decree 128/03, 184 which do not require criminal investigations. Thus, the Justice and Peace Law only applies to demobilized persons already under investigation, meaning many perpetrators may go free. The plaintiffs in Gallón Giraldo claimed that the failure to investigate and sanction crimes promotes repetition and thus undermines prevention. 185 The amicus brief presented by the International Commission of Jurists argued that the alternative sentence clause contradicts the principle of proportionality, since existing criminal penalties in Colombia range from ten to forty years for human rights crimes, and if combined, could result in a life sentence. 186 Alternatively, the UN High Commissioner for Human Rights noted that the reduced sentence would be fair only if the law guaranteed effective collaboration that revealed identities, circumstances, motivations, and harms caused to victims. 187

b. Constraints on an Effective Investigation

The claimants in Gallón Giraldo argued that Law 975/05 lacks an effective promise of criminal investigation, and thus punishment, despite creating special prosecutors, judges, judiciary police, and support staff for each of these actors. 188 Claimants also questioned the drastic time constraints in the law, as charges must be brought thirty-six hours after a prosecutor presents the “spontaneous confession” to the sitting magistrate. 189 The special prosecutor then has sixty days to investigate and verify the confession, after which a criminal trial must be initiated within ten days. 189 The Gallón Giraldo claimants contended that these limits do not guarantee full, effective, and impartial investigation and prosecution of the individuals responsible for the thousands of serious human rights violations that occurred during the conflict. 189 The IACHR pointed out that “the seriousness and complexity of the crimes perpetrated,” along

184. Declaración Final-III Encuentro Nacional de Víctimas de Crímenes de Estado, Ocho propuestas para la verdad, la justicia, la reparación integral, la memoria y la no repetición de los crímenes contra la humanidad (July 11, 2006) (on file with authors) [hereinafter Victims’ Final Declaration].
185. Id. at 28.
188. Law No. 975 of July 22, 2005, arts. 33, 16, O.G. No. 45.980, July 25, 2005 (Colom.). For discussion, see OAS Observations and Recommendations, supra note 145, at 26–27.
189. Law No. 975 of July 22, 2005, arts. 17, 18, O.G. No. 45.980.
190. Id. art. 18. If the subject accepts the charges, then the court verifies that it was free, voluntary, and spontaneous. Id. art. 19.
with institutional limits to investigation and prosecution, will make it
difficult to offer "a realistic alternative to establish individual responsi-
bility in full measure." ¹⁹²

c. Involvement of Victim-Survivors

The apparent exclusion of victim-survivors from the criminal proc-
cess also raised concern. The Gallón Giraldo claimants criticized the lack
of adequate and explicit guarantees to protect their participation, particu-
larly in terms of access to evidence and participation in all stages of the
process. ¹⁹³ They argued that Law 975/05 prevents them from contributing
to the litigation strategy and limits their ability to protect their interests
and rights. ¹⁹⁴ The IACHR affirmed that victims' involvement in the legal
process helps "re-establish the conditions of equality that make it possi-
ble for the victims of the conflict to recognize their status as citizens and
regain trust in the institutions," making such involvement of "fundamen-
tal importance for attaining peace." ¹⁹⁵

Colombia’s current "pre-post-conflict" context poses challenges to
the participation of victim-survivors, who still live in great fear and are
reluctant to divulge information or come forward on an individual basis.
The criminal proceedings and largely adversarial posture of Law 975/05
do not necessarily provide the "victim-friendly" forum usually associ-
ated with transitional justice measures such as truth commissions. ¹⁹⁶
Indeed, Colombia’s transitional justice project does not include a truth
commission per se, although the CNRR will assume many tasks associ-
ated with such a body, without a truth-seeking component that includes
victims’ testimonies.

¹⁹². Press Release, OAS, IACHR, Issues Statement Regarding the Adoption of the "Law
Of Justice And Peace" in Colombia, para. 6 (July 15, 2005), available at http://www.cidh.org/
Comunicados/English/2005/26.05eng.htm [hereinafter OAS Press Release].
¹⁹⁴. Id. at 21.
¹⁹⁵. IACHR II, supra note 25, ¶ 29. The Colombian government amended these limits,
making corrections through Decree 4760, promulgated in 2005, which allows victims to furn-
ish evidence, request information, cooperate with court officials, and be notified of and able
to challenge decisions at each stage of the proceedings. Decree 4760 regulates Law 975/05 in
an effort to assure victim participation, with Article 11(5) clarifying that victims participating
in all stages of the proceedings will receive private legal assistance, or be provided with legal
representation by the Public Ministry. Decree No. 4760 of Dec. 30, 2005, art. 11(5) (Colom.).
For discussion, see OAS Observations and Recommendations, supra note 145, at 28.
¹⁹⁶. See generally Minow, supra note 107 (discussing the advantages of a truth com-
mission for providing a forum for victims to tell their stories).
2. The Right to Truth

The "truth v. justice" debate is central to the field of transitional justice and has helped raise the profile of the right to truth. South Africa’s experience raised questions about whether compromising justice results in fuller truth, as protected by international law. In addition, the Joinet Principles establish that “[s]tates must take appropriate action to give effect to the right to know.” The Inter-American Court of Human Rights has held that victim-survivors or their next-of-kin have the right to have human rights violations identified and enumerated by competent organs of the state. Similarly, the United Nations Human Rights Committee has established a right to judicial determination of the circumstances of a human rights violation and those responsible for it. In its discussion of Colombia’s DDR process, the IACHR explains that individuals and societies have the right “to know the truth of what happened as well as the reasons why and circumstances in which the aberrant crimes were committed, so as to prevent such acts from recurring.” Here, truth relates to more than just knowing about the conduct of perpetrators; it also means understanding “the objective and subjective elements that helped create the conditions and circumstances in which atrocious conduct was perpetrated, and to identify the legal and factual factors that gave rise to the appearance and persistence of impunity.”

In this way, by understanding the full context, causes, and responsibilities of human rights violations, truth and historical memory form part of reparations. Substantive and procedural protections ensure this process: the former relates to revealing what happened, why the crime occurred, and who committed it; the latter relates to the mechanism most

198. See generally WILSON, supra note 102 (providing an in-depth analysis and criticisms of this process).
203. Id.
suiited to answering these questions. Raquel Aldana-Pindell notes that truth commissions often are substituted for criminal trials, circumscribing the full truth. Yet in Colombia, the absence of a truth commission and the undue restrictions placed on criminal proceedings account for limitations on the pursuit of truth.

a. No Incentive to Give a Full Confession

The truth-gathering capacity of Law 975/05 rests on “spontaneous confessions,” in which a demobilized individual offers a free and full version of the facts, which is subsequently verified in the presence of a defense lawyer, followed by interrogation by a prosecutor. The individual is expected to “manifest the circumstances of time, mode and place” of the crimes he or she committed as a member of an illegally armed group, as well as indicate all illegally gained property and goods to be delivered to the Reparation Fund. The Gallón Giraldo claimants have complained that an individual may receive full benefits of the law without ever having to give a full confession, thus failing to make “a genuine contribution to the clarification of the truth.” Indeed, the Justice and Peace Law lacks compelling and effective incentives for former combatants not only to come forward to tell the truth but to reveal it in full. For instance, if it is later discovered that a demobilized combatant benefited from the law but did not disclose all of the truth, he or she will be penalized only if the state proves this omission was intentional. Amnesty International contended that this burden would “prove practically impossible” to overcome. Moreover, even where proven to be an intentional omission, the subject’s sentence increases by only twenty percent of the alternative sentence that was imposed.

The weak investigatory apparatus established by the law could help participants conceal crimes. Without full confessions, many facts will remain obscured, resulting in uninvestigated crimes and unpunished perpetrators, and frustrating the reparatory goals of transitional justice

205. Aldana-Pindell, supra note 204, at 1439–43.
206. Id. at 1438.
207. Law No. 975 of July 22, 2005, art. 17, O.G. No. 45.980, July 25, 2005 (Colom.).
208. Id. art. 19.
209. Id. art. 17.
211. Law No. 975 of July 22, 2005, art. 17, O.G. No. 45.980; supra note 170 and accompanying text.
212. See AI, supra note 8, at 23.
213. See IACHR, supra note 135, ch. IV, ¶ 16.
The UN Working Group on Enforced or Involuntary Disappearances points out that neither the collective nor individualized demobilization efforts in Law 975/05 call for disclosure of the location of disappeared persons, contrary to treaty law. As the Gallón Giraldo claimants point out, the law requires only “an infinitesimal minority” of demobilized individuals to reveal the truth. Using statistics from the Attorney General’s office, they estimate that only .48% of all paramilitaries will be subject to Law 975/05, while the remaining 99.52% will benefit from Law 782/02. Of this small pool of duty-bound ex-combatants, only those who admit the full truth will be subject to prosecution.

The claimants further question how Law 975/05 can be effective given that most human rights violations have never come under investigation. Amnesty International observes that the “endemic nature of impunity in Colombia” means that most paramilitary members and guerrillas have never come under formal judicial investigation for violations of human rights or international humanitarian law. They “are even less likely to have been tried or convicted for such offences.” Human Rights Watch posits that

[b]ecause most paramilitary crimes do not yet have a known author, it is very likely that many individuals who have committed massacres, kidnappings, or other crimes will be able to avoid detection and prosecution. In effect, historically endemic failures to properly investigate and prosecute paramilitary abuses would become guarantees of impunity today.

If unaccompanied by rigorous parallel criminal investigations, Law 975/05 does not create an explicit state burden to investigate. Decree 4760, the preliminary regulation for Law 975/05, indicates that the
CNRR will request investigations with necessary supporting information. Likewise, the regulation calls for the design of "an appropriate, transparent and swift mechanism to receive the requests, petitions and complaints of victims." The Inter-American Court clarified that initiating criminal investigations is the state’s legal duty and not the responsibility of victims and their next-of-kin. Given the diminished probability of an investigation, paramilitaries will feel less compulsion to confess the truth and resort to the alternative presented by Law 975/05. Moreover, Law 975/05 made paramilitary activity a seditious crime, eliminating the threat of extradition or transfer to the International Criminal Court and further decreasing the incentive to participate.

b. Focus on Individual Culpability

The Justice and Peace law mandates a "duty of memory" and requires the preservation of archives yet constructs this memory by using judicial proceedings to establish the facts of individual cases and individual criminal responsibility. Individualizing the process weakens efforts to dismantle the paramilitary infrastructure and undermines the overall goal of DDR. The larger context of the war and the history of the various armed actors will remain under-explored and poorly understood. The need for historical truth means determining "the degree of involvement of different participants in the perpetration of crimes against the civilian population by action, omission, collaboration or acquiescence." Amnesty International calls for the exposure of all economic, political, and institutional links to the paramilitary, including state institutions and security forces, individuals, companies, politicians, and other sectors of civil society.

The individualized focus of the Justice and Peace Law also undermines any effort to determine state responsibility for acts and omissions in protecting citizens. As the Victims’ Movement points out, Law

224. Decree No. 4760 of Dec. 30, 2005, art. 23 (Colom.).
225. Id.
227. Law No. 975 of July 22, 2005, art. 71., O.G. No. 45.980, July 25, 2005 (Colom.).
228. Id. art. 56.
229. Id. arts. 57–58.
230. Id. art. 56; OAS Press Release, supra note 192.
231. AI, supra note 8, at 22.
232. OAS Press Release, supra note 192.
233. AI, supra note 8, at 15.
234. See generally Seagrave, supra note 220 (discussing how the Colombian state would be held responsible under international law not only for the acts of its own agents but also for failing to control third parties such as the guerrillas and paramilitary); Roman David &
975/05 does not “recognize the existence of victims of the State, and seeks to cover up state responsibility in the creation, encouragement, development, and consolidation of the paramilitary strategy.” The Gallón Giraldo claimants likewise argue that it will not be possible to identify the systematic and generalized nature of the violations. The Inter-American Court has also established that even if the state does not officially encourage the formation of paramilitary groups, it remains responsible for tolerating a legal framework that permitted such activity by not taking the measures “necessary to prohibit, prevent, and duly punish their criminal activities.”

This type of comprehensive investigation usually occurs through truth commissions. Truth commissions emphasize that exploring the broader context of a conflict permits better strategies for addressing its root causes, especially through institutional reform. Truth commissions also provide a “collective memory” that permits a country to confront the past, official denials, and imposed silences. This process provides victim-survivors with public validation of their suffering and advances an understanding of “state-sponsored terrorism” not just as a reckless or aberrant undertaking but rather as “a political project.” Finally, this approach makes the state’s obligation to provide integral reparations increasingly irrefutable.

Above all else, truth commissions place emphasis on the voices of victims, their families, and other social and political actors. Confessions, in contrast, focus on perpetrators, omitting the personal

235. Victims’ Final Declaration, supra note 184.
237. IACHR II, supra note 25, ¶ 41.
experiences of victims. As Borneman explains, “listening, witnessing, and retribution cannot be delinked in a project of reconciliation over time; they are conceptually part of the same complex.” Researching and reconstructing the truth of violent periods is not a private process but rather one implicating a whole society, a process more closely associated with truth commissions. In this way, historical memory projects serve as an opportunity for those who have been “excluded, persecuted, [and] stigmatized” to participate in public life.

Thus, while transitional justice projects often attract criticism for trading justice for truth, Colombia’s experience may not even include the truth—or at least not enough of it. In fact, to some extent Colombia seems to be doing it backwards, beginning with a commission that attempts to repair and seek peace, followed by a somewhat limited chance at justice.

c. “Sort of a Truth Commission”: The National Reparations and Reconciliation Commission

The state responded to the purported shortcomings of the Justice and Peace Law in its report to the Committee on Juridical and Political Affairs of the OAS Permanent Council in April 2006, wherein Colombia claimed that the CNRR vindicates the right to truth. Indeed, Article 51 of Law 975/05 assigns the CNRR a wide array of responsibilities, some pertaining to the clarification of truth. The CNRR must “guarantee that victims participate in judicial investigation procedures as well as recognition of their rights”; “present a public report on the reasons for the emergence and development of illegal armed groups”; and “monitor and verify the reinsertion process and the work of local officials so as to insure full demobilization of illegal armed groups’ members and the full

246. Victims’ Final Declaration, supra note 184.
247. OAS Observations and Recommendations, supra note 145.
248. OAS Press Release, supra note 192 (responding to the IACHR’s July 15, 2005 press release stating that the law does not permit clarification of the “historical truth”); OAS Observations and Recommendations, supra note 145 (referring to id. para. 15).
249. Law No. 975 of July 22, 2005, arts. 51, 52.1 [sic], O.G. No. 45.980, July 25, 2005 (Colom.).
250. Id. art. 52.2 [sic].
operation of institutions in those territories." Given this array of responsibilities, Dr. Eduardo Pizzaro, the president of the CNRR, stated:

The CNRR holds the dear conviction that without the truth, neither justice nor reparations nor reconciliation are possible. Consequently, reconstruction of the truth, both factual and historical, will be one of the main tasks of our Commission. To that end, and in line with the text of the law, it is essential to distinguish judicial from historical truth. The former is an essential task of the judiciary, even though the Commission will need to insure active participation by victims in the judicial investigations. The latter, on the other hand, will be fundamentally the task of the CNRR. One and the other, however, are not mutually exclusive and must accordingly nurture each other.

In this way, the CNRR assumes the function of a truth commission without technically being one. Dr. Pizzarro clarified the distinction: "[t]he CNRR is not itself a truth commission even though many of its functions . . . will be those that create conditions that promote the creation of a truth commission in the future." Article 7(3) of Law 975/05 provides that "judicial proceedings advanced after this law enters into force will not rule out the application in the future of other nonjudicial mechanisms to reconstruct the truth."

Despite this distinction, Dr. Pizzaro recognized that the CNRR was assigned certain responsibilities normally given to truth commissions. He explicitly acknowledged that while other truth commissions were created after the conclusion of a dictatorship, civil war, or apartheid, the CNRR "was created in a time when conditions are only now ripening to overcome the country’s armed conflict." He added that "promoting policies on truth, justice and reparation in the middle of conflict will be undoubtedly one of the greatest challenges to confront the CNRR."

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251. *Id.* arts. 51, 52.3 [sic].
252. The CNRR was sworn in by the President of Colombia on October 4, 2005, choosing Dr. Eduardo Pizarro León Gómez as its chair. The CNRR is made up of delegates from the executive, the Ministry of Justice, the Minister of Finance and Public Credit, the National Prosecutor’s Office, the Public Defender, five personalities, including women appointed by the president, and two representatives of associations of victims of the conflict, including the director of the Social Solidarity Network, who serves as Technical Secretary. OAS Observations and Recommendations, supra note 145, at 23.
254. *Id.* at 1 (author’s translation).
255. Law No. 975 of July 22, 2005, art. 7, O.G. No. 45,980, July 25, 2005 (Colom.).
256. CNRR *Hoja de Ruta*, supra note 253, at 1 (author’s translation).
257. *Id.*
Dr. Pizarro’s clarification takes on greater significance in light of the government’s consistent rejection of proposals for the creation of a truth commission, in the apparent belief that to do so would be inappropriate before the end of the armed conflict. Even then, some still maintain that it is “not advisable to publicly disclose what has really happened during decades of violence because it would worsen the wounds.” Despite this reluctance to form a national truth commission, the CNRR appears to be a mutation of such an entity.

Still, a large sector of the Victims’ Movement has publicly condemned the CNRR, which they view as sacrificing their rights. In response, the Victims’ Movement has proposed “an authentic Commission of Historical Clarification when in Colombia there exist real guarantees for such a body.” The lack of victim support for the work of the CNRR is worrisome, given that the success of such bodies hinges entirely on victims’ participation. On this last point, Stover explains that, based on his studies in Iraq, Rwanda, and the former Yugoslavia, “all sectors of a war-ravaged society—the individual, community, society, and state—should become engaged participants in—and not merely auxiliaries to—the processes of transitional justice and social reconstruction.” In Colombia, a significant number of victim-survivors strongly object to the CNRR, making the CNRR’s greatest challenge finding ways to win the support of these dissenting voices.

3. The Right to Reparations

The last decade has seen increasing recognition that the violation of a human right triggers the subsequent duty to repair the damage caused by the offense. Indeed, recent truth commissions have put greater emphasis on reparations. The ascendance of the right to reparation became clear through the UN General Assembly’s approval of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Se-

259. Victims’ Final Declaration, supra note 184 (author’s translation).
261. Victims’ Final Declaration, supra note 184.
262. For a general discussion of the development of human rights law and the victim’s right to a remedy, see SHELTON, supra note 242, at 1–37 (1999); for a fuller discussion on the right to reparations, see Laplante, supra note 46, at 347, 351–361.
rious Violations of International Humanitarian Law, developed by UN Special Rapporteur Theo Van Boven (the Van Boven Principles). In view of the importance of reparations, critics have drawn attention to further inadequacies in the Justice and Peace Law.

a. Illicit Goods to Fund Individual Reparations

Law 975/05 presents a comprehensive definition of reparations that includes restitution, indemnification, rehabilitation, satisfaction, and guarantees against repetition. Furthermore, it refers to both individual and collective reparations. Yet it includes conditions that circumscribe guarantees that reparations will be fully implemented for all of the conflict’s victims. For instance, Law 975/05 stipulates that the Victims Reparation Fund will consist of all illegal goods and properties from the demobilized individuals subjected to the law, augmented by international and public funds “within the limits authorized by the national budget.”

The exclusion of some paramilitary property has generated a range of criticism. Amnesty International points out the risk that perpetrators will launder or otherwise conceal illicit funds, making their identification more difficult, or that paramilitaries will have no such assets. The Van Boven Principles reiterate that when the person responsible for the illicit conduct cannot pay reparations, the state should endeavor to do so. Claimants in the Gallón Giraldo case questioned the validity of the law’s limits on the state’s financial contribution based on budget constraints, arguing that “the state cannot excuse itself from paying compensation” by arguing it has no available funds. The claimants also complained that those responsible for crimes should be required to use all of their property, illegally obtained or not, to meet their obligations to pay reparations to victims of the conflict. In its amicus brief, the ICTJ labeled the reparations deceitful because of the significant risk that victims will not be adequately compensated.

Transfer of all illicitly gained property to the Victims Reparation Fund

265. Law No. 975 of July 22, 2005, art. 8, O.G. No. 45.980, July 25, 2005 (Colom.).
266. Id.
267. Id. arts. 10, 11, 45, 55.1, 56.
268. AI, supra note 8, at 24.
269. IACHR II, supra note 25, ¶ 31 n.52 (referring to princ. IX(16–19)).
271. Id. at 57.
272. Id. at 127.
could also undermine restitution to specific victims, since stolen land would not necessarily be returned to the rightful owner.  

b. Judicial Determination at the Request of Victim-Survivors

In contrast to other transitional justice settings that rely on truth commissions to present reparation plans, Colombia’s plan relies on judicial determinations. Specifically, Article 8 of Law 975/05 holds that “competent judicial authorities will determine individual, collective, or symbolic reparations, whichever may be the case, in accordance with the terms of this law.” At this hearing, the victim-survivor or his or her legal advisers must express in a “concrete manner” the reparations they are soliciting and must present evidence necessary to prove damages. The court will encourage a friendly settlement or otherwise will make a ruling for inclusion in the final sentencing conviction. Even if the victim-survivor does not exercise his or her right to reparation, the law can be read to establish that the demobilized person will still be eligible for the alternative sentence. Victims who do not invoke their right during the special criminal proceedings do not enjoy explicit provisions for individual reparations under Law 975/05. Instead, Article 8 states that “collective reparation should be oriented towards the psychosocial reconstruction of populations affected by the violence.” Yet the law implies that only victims and their parents are eligible, excluding siblings and other related family members.  

The right to reparation should not hinge in this way on victim-survivors’ involvement in judicial proceedings. Instead, as the Gallón Giraldo claimants contend, “the right to reparation should be guaranteed in all circumstances ... taking into consideration that his or her participation may be limited by causes outside of his or her control.” Amnesty International also questioned placing the burden of seeking reparations on victims rather than the state, noting that if the “victim fails to present a claim, for example, because they [sic] are unaware of the case, then there will be no reparation.” Furthermore, if the victim-survivor is unable to establish the responsibility for and circumstances

273.  Id. at 58–59.
274.  Law No. 975 of July 22, 2005, art. 8, O.G. No. 45.980, July 25, 2005 (Colom.). Article 23 sets procedures for this determination. Id. art. 23.
275.  Id. art. 23.
276.  Id.
277.  Id.
278.  Id. art. 8.
279.  Id. art. 49.3.
281.  AI, supra note 8, at 24.
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surrounding a human rights abuse, perhaps in the absence of a full confession, he or she will not be able to direct the claim toward a specific individual.\(^\text{282}\) Colombia's framework minimizes the state's responsibility, and thus its obligation to pay reparations. The IACHR notes that, for collective reparations, the Justice and Peace Law "places greater emphasis on restitution of unlawfully acquired property than on the kind of mechanisms that will make full reparations for victims possible" and omits mention of damage to "the social worlds and relationships of indigenous peoples, Afro-descendant communities, or displaced women, who are frequently heads of household under conditions of poverty and extreme duress. Each of these groups rank [sic] among those most vulnerable to the violence perpetrated by participants in the armed conflict."\(^\text{283}\)

In theory, the CNRR has responsibility for overseeing the reparation process, monitoring and periodically evaluating remedies, and making recommendations regarding their proper implementation.\(^\text{284}\) Within two years following the law's entry into force, the CNRR will present the government and the Peace Commissions of the Senate and the House of Representatives with a report on progress made in paying reparations and guidelines for future reparations.\(^\text{285}\) Nonetheless, it remains unclear to what extent the CNRR will be able to fill the gaps in the reparation scheme.

B. Putting the Law to the Test

A new addendum in the genealogy of transitional justice sees courts testing the limits and setting stricter parameters for measures permitted in political peace processes. In the case of Colombia both national and international courts have set important precedents.

1. Judgment of the Inter-American Court of Human Rights on Law 975/05

This trend toward judicial review has greater salience in Latin America due to the availability of contentious jurisdiction in the Inter-American Court, which has helped build a human rights framework with noticeable influence on transitional justice projects.\(^\text{286}\) In fact, the first


\(^{283}\) OAS Observations and Recommendations, supra note 145, at 18.

\(^{284}\) Law No. 975 of July 22, 2005, art. 52.4, O.G. No. 45.980, July 25, 2005 (Colom.), translated in id. at 24.

\(^{285}\) Id. art. 52.5.

\(^{286}\) See generally Lisa J. Laplante, Entwined Paths to Justice: The Inter-American Human Rights System and the Peruvian Truth Commission, in PATHS TO INTERNATIONAL
test of the limits of Law 975/05 arose through an unprecedented decision by the Inter-American Court. Usually, a challenge to a national law cannot be brought directly to the Inter-American Court, but rather must arise after testing its application in a domestic case, such as in the challenges against Peru’s anti-terrorist laws. But the Inter-American Court granted a motion of “supervening event” to issue its opinion on Law 975/05 in *Mapiripán v. Colombia*.

The case, filed with the court in September 2003, involved the kidnap, torture, and murder of at least forty-nine civilians in July 1997 by state and paramilitary agents who then threw their victims’ bodies in the Guaviare River in Mapiripán. In August 2005, soon after President Uribe signed the Justice and Peace Law, victims’ representatives in *Mapiripán v. Colombia* asked the Inter-American Court to consider whether Law 975/05 interferes with the victim’s right to a remedy. In accordance with Article 44.3 of the court’s procedures, petitioners requested that the court “examine the normative framework of the internal legislation and the demobilization program using international standards related to rights of victims.” The court found that Law 975/05 did not provide sufficient incentive for exhaustive confessions, and that the multiple perpetrators who were part of demobilized paramilitary blocks could deny the full truth. It declared that the state must remove all actual and juridical obstacles to an exhaustive judicial examination of the violations, prosecution of those responsible, and reparations for the victims.

The state responded by arguing that Law 975/05 had not been applied in this particular case and therefore was not a “supervening event,” making the law immaterial to the court’s decision. In an unprecedented move, the court referred to its own jurisprudence in holding that no internal law or provision—particularly amnesties, statutes of limitations, and mitigating factors—can impede a state from complying with the obligation to investigate and sanction those responsible for human rights

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289. *Id.*

290. *Id.* ¶ 279–280.

291. *Id.* ¶ 303–04.

292. *Id.* ¶ 303.
violation. The court’s decision to make a pronouncement on Law 975/05 demonstrates the Inter-American Court’s growing influence over domestic matters that interfere with the most fundamental human rights embodied in the Convention, an influence felt by Colombia’s highest court.

2. Challenging the Law: Balance Between Peace and Justice in Gallón Giraldo

Notably, the Colombian Constitutional Court acknowledged in Gallón Giraldo “the difficult circumstances in which Colombia, its population and its institutions are struggling to achieve peace,” while not releasing Colombia from its obligations as a party to the American Convention on Human Rights. Specifically, the Court noted the tension between “finding peace by establishing juridical mechanisms to disarticulate armed groups” and “the interests of justice” under human rights and international humanitarian law. The Court, however, did not view this as “an insoluble dilemma,” but rather framed its analysis in terms of the “complementarity between the right to justice and the right to peace.”

In adopting a balancing approach, the Constitutional Court chose a flexible standard in what is fast becoming a seemingly absolute terrain. While outright amnesties are no longer accepted, some important academic and legal authorities still concede there is merit in balancing these interests. Diane Orentlicher warns against adopting “stark dichotomies” such as “punish or pardon” or “amnesty or accountability.” Similarly, Gwen Young confirms that the balancing test requires looking not only at “international law obligations, but also at political realities, and individual and societal needs for justice and reconciliation . . . . Resolution will require balancing the legal, political, and social objectives and realities surrounding the grant of amnesty.” This task, however, requires a careful examination of all relevant factors to be balanced, their relative importance, and their absoluteness as a right.

a. The Right to Peace

The Colombian Constitutional Court approached the balancing test by first examining peace, with Law 975/05 serving as “one of the most

293. id. ¶ 304.
295. id. at 26.
296. id.
297. Orentlicher, supra note 167, at 714.
298. Young, supra note 167, at 209.
important pieces in the juridical framework in Colombia’s peace process.\textsuperscript{299} Significantly, in Gallón Giraldo, the Court adopted the position that “peace” is not just a political aspiration but also a right, taking the discussion far beyond the arguments presented by the claimants.\textsuperscript{300} The Court recognized that the definition of peace may range from the absence of conflict and confrontation (“basic nucleus”) to full compliance with human rights (“maximum development”).\textsuperscript{301} Furthermore, it discussed the “multifaceted character” of peace as a “collective right within the third generation of rights”\textsuperscript{302} and viewed the right as a “juridical duty” of all individuals.\textsuperscript{303} This perspective reflects what Carl Wellman describes as the “notion of solidarity” inherent to collective rights, as they are realized only with the “concerted efforts of all the actors on the social scene: the individual, the State, the public and private groups, and the entire international community.”\textsuperscript{304} With this broadly shared objective, all become “joint and severally responsible.”\textsuperscript{305} The court mentioned that even though the UN Charter does not explicitly include the right to peace, the UN Educational, Scientific and Cultural Organization (UNESCO) lent support to the existence of the right in 1997.\textsuperscript{306}

This treatment of the right to peace presents an interesting new angle to transitional justice paradigms. The detailed presentation of the legal doctrine underlying the right to peace suggests an intention to elevate it beyond a mere political prerogative. If given equal standing with other fundamental rights such as justice, the right to peace could trigger the application of a proportionality test. If left as only a political aspiration, the right to peace would lose out to more commonly recognized human rights.

b. Relieving the Tension Between Peace and Justice

Colombia’s Constitutional Court established that “justice does not necessarily oppose peace,” but rather the “administration of justice con-

\textsuperscript{300} Gustavo Gallón Giraldo, Director y Representante Legal, Comisión Colombiana de Juristas, Demanda de inconstitucionalidad contra la ley 975 de 2005, at 17 (on file with authors).
\textsuperscript{302} Id. at 200.
\textsuperscript{303} Id. at 199.
\textsuperscript{304} Carl Wellman, Solidarity, the Individual and Human Rights, 22 Hum. RTS. Q. 639, 642-43 (2000).
\textsuperscript{305} Id. at 643.
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tributes to peace because it resolves controversy and conflict through institutional routes.”

Even in viewing justice and peace as complementary principles, the court acknowledged that “in some occasions they are in apparent tension in contexts of democratic transition and overcoming armed conflict. In such contexts, it is necessary to provide penal benefits to those who have committed grave human rights violations and humanitarian law infractions to overcome the conflict.”

The court recognized that the express objective of Law 975/05 is to facilitate peace and the reincorporation of combatants into civil life while also guaranteeing the rights of victim-survivors, thus searching “for equilibrium between peace and justice.” Thus the rights to peace and justice are not contradictory but rather interdependent. Likewise, the Court also referred to the preamble of the Joint Principles, which recognizes that “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied.”

The Court even made reference to the UN Secretary-General’s 2004 report that characterized transitional justice as an extraordinary mechanism for administering justice when “normal” conditions do not exist due to violent conflict.

Still, the Court noted that “the social objectives of peace” do not mean the state’s international obligations to ensure minimum standards of justice, truth, and reparations should be relaxed.

Here, the Court reinforced the adaptation of transitional justice concepts to a situation of ongoing conflict, in effect making it a part of the peace negotiations.

The Court also made explicit reference to human rights norms. It outlined all the international human rights treaties to which Colombia is a party and then dedicated an entire section to reviewing landmark cases decided by the Inter-American Court. It explained that international norms and jurisprudence are “relevant to the interpretation of rights and duties in the internal order” and serve as “hermeneutic criteria” for making sense of local constitutional norms. The Court sought a balance between the instruments used to promote reconciliation and the

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307. Id. at 253.
308. Id.
309. Id. at 27.
310. Id. at 26–27.
311. Id. at 28–29 (citing Joinet Principles, supra note 43, pmbl.).
313. Id. at 202.
314. Id. at 203–208.
315. Id. at 208 (citing Godínez Cruz vs. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 224 (Jan. 20, 1989)).
guarantee of the victims’ rights in order to make “peace compatible with human rights.”316 In this way, the merging of DDR with transitional justice comes into focus.

c. Finding Balance: The Proportionality Test

In effect, the Constitutional Court’s opinion established that neither peace nor justice is an absolute right. The Court considered whether Law 975/05 is the most appropriate means for achieving the constitutionally valid right to peace, or alternatively whether it institutionalizes a system of impunity. Specifically, the Court applied a “method of deliberation” to the tension between the claimants’ rights and the legislative instruments chosen by the state to transition towards peace and democracy.317 The goal was to harmonize the two values or determine which should have prevalence.318 The Court emphasized that the legislative branch must operate within constitutional limits. In fact, Colombia’s 1991 Constitution itself was conceived as a “peace treaty,” thus demonstrating that peace carries great constitutional weight in Colombia.319 The Court explained that the “novel problem presented by Law 975 of 2005 is how to deliberate on peace,”320 but it clarified that “peace does not justify everything.”321 Indeed, “peace could be used to justify any type of measure, including nugatory constitutional rights.”322 The Court therefore applied a proportionality test, ruling that the means chosen to effect peace must not create a manifestly disproportionate effect on other constitutional rights.323

d. Principal Holdings in Gallón Giraldo

In Gallón Giraldo the Constitutional Court refrained on procedural grounds from considering some of the claims brought against Law 975/05.324 For instance, the Court declared itself unable to address the petitioner’s global criticism of a “system of veiled pardon and covered-up impunity,” since this claim related to the general demobilization process, including Law 782/02 and Decree 128/03, on which the court did

316. Id. at 241.
317. Id. at 249.
318. Id. at 250.
321. Id. at 250.
322. Id. at 253.
323. Id. at 254.
324. Id. at 255.
not have jurisdiction to rule on the merits.\textsuperscript{325} The Court also refused to hear the petitioner’s claim that if a victim does not invoke his right to reparation during the proceedings, the right ceases to exist. The Court felt that any opinion on the matter would amount to an interpretative guideline, although it did offer such interpretation in other parts of the opinion. The rulings relevant to our examination include the following holdings:

\textit{The Alternative Sentence.} While the Court acknowledged that limits on acceptable punishment can lead to impunity, it explained that tools for restoring peaceful coexistence may require flexibility when the goal is disarmament.\textsuperscript{326} The Court rejected the notion that the alternative sentence is a “hidden pardon,” since the original sentence does not expire until all conditions are met: demobilization, reparations, time served, and restraint from other criminal acts.\textsuperscript{327} The Court also rejected the allowance for accumulation of previous punishments in calculating the alternative sentence, which amounted to a “disguised pardon.”\textsuperscript{328} The Court modified the prohibition on recidivism for the same crime that led to conviction, making it apply to all illegal activity in the future and requiring complete resocialization and reininsertion.\textsuperscript{329} Failure to comply leads to revocation of the benefits and reinstatement of the original conviction or criminal proceedings. In addition, the Court ruled that the voluntary nature of participation in the concentration zones means that time spent there cannot count toward a sentence, nor can the state effectively pardon participants by relaxing prison conditions.\textsuperscript{330} The Court conceded, however, that the law would not apply retroactively to the thousands of combatants demobilized under Law 782/02 and Decree 128/03.

\textit{Effective Investigation.} While the Court did not find the time frame for investigation unconstitutional, it eliminated the qualification that a free confession immediately initiates the thirty-six-hour requirement for holding an indictment hearing. Instead, it embraced a “reasonable timeframe” standard, during which the prosecutor can build a case.\textsuperscript{331} The sixty-day limit for investigation comes into effect upon the indictment hearing, rather than at the time of the confession itself.

\textit{Victim-Survivor Participation.} The Court recognized the importance of victim-survivor participation and set forth expectations for

\begin{itemize}
\item \textsuperscript{325} Id. at 257–58.
\item \textsuperscript{326} Id. at 201.
\item \textsuperscript{327} Id. at 266.
\item \textsuperscript{328} Id. at 269.
\item \textsuperscript{329} Id. at 270.
\item \textsuperscript{330} Id. at 306 (finding Article 31 to be unconstitutional).
\item \textsuperscript{331} Id. at 299.
\end{itemize}
participation at the following stages: free confession, indictment, and acceptance of the charges. The Court explained that victims have an implicit power to intervene in all phases of the proceedings. On the question of standing, the Court adopted an inclusive view of "victims" but noted that the "state is not obligated to assume all the damage of all the family of direct victims." It also held that although not all family members have the same rights, the law cannot impede their right to an effective remedy.

*The Right to Truth.* The Court held that the law does not "design an effective incentive system that promotes the full and accurate revelation of truth." While accepting the alternative sentence, the court found the requirements for "collaborating with justice" too general to vindicate the victim’s right to truth. In addition, the Court required simply that information provided by the demobilized combatants be complete and reliable, rejecting the requirement that a beneficiary’s intent be determined whether or not a beneficiary denied, covered up, or was silent about information. The Court found that because the law provided no true incentive to tell the full truth, a more serious sanction for withholding information should apply. The more serious sanction would assist in dismantling illegal armed groups by facilitating fuller inquiry into the "macrocriminal phenomena" in Colombia. Failure to provide the full truth—or omitting truth—must trigger the state's legal responsibility to investigate and sanction, resulting in subjection to the normal criminal justice system and making the "free confession" alternative a "one-shot deal."

The Court conceived of the right to truth as expansive, including knowledge of the causes and circumstances of rights violations. The Court also required that the location of the disappeared be part of the information proffered. Additionally, any limitation on access to archives would only be permissible to protect witnesses and victims-survivors. The Court also annulled the sedition article based on proce-

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332. *Id.* at 306.
333. *Id.* at 309.
334. *Id.* at 328.
335. *Id.* at 267.
336. *Id.*
337. *Id.* at 280.
338. *Id.*
339. *Id.* at 278.
340. *Id.* at 287.
341. *Id.* at 290.
dural deficiencies in its enactment, essentially lifting any shield from extradition.  

Reparations. The Court maintained the individual liability standard for paying reparations, rejecting the notion that civil responsibility should be passed on to the state, and thus to taxpayers "who have not caused any damage but instead are victims of the macrocriminal process." The Court, however, required that all goods—not just those considered illicit—be eligible for consideration in reparations payments, although nonillicit goods would require a court order. Moreover, the Court removed the phrase "if he or she has it" in reference to payment into the Victims' Fund, eliminating financial hardship as a valid reason for nonpayment.

The Court also concluded that although penal responsibility remains individualized, a form of vicarious liability, or "solidarity," extended to the whole demobilized group. Still, the Court established a clear hierarchy of responsibility, beginning with the demobilized. The state enters "in this sequence only in a residual role to cover the rights of victims, especially those who do not have a final judicial decision to fix the amount of indemnification." The Court rejected limits in the budget as a reason for failure to pay reparations, which "cannot be absolutely submitted to the political will of those who define the budget, since the rights of victims must be satisfied, especially in the pursuit of peace and reconciliation." This ruling is significant in that states often claim that limited resources circumscribe their obligation to pay reparations. Even if the CNRR must temporarily allocate scarce resources, budget constraints do not altogether extinguish the state's obligation to provide some reparations.

With regard to collective reparations, the Court warned that the rights of individuals cannot be ignored, and again noted that the entire group was liable under the notion of solidarity. The Court eliminated any ambiguity about the need to identify the perpetrator to receive

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342. See Seagrave, supra note at 220 (citing IACHR, supra note 12, ¶ 74, which establishes that the conflict in Colombia is subject to international humanitarian law).
344. Id. at 320 (allowing all assets to be frozen pending proceedings, not just illegal assets as provided for in Article 13(4)).
345. Id. at 316.
346. Id. at 335.
347. Id. at 336; Law No. 975 of July 22, 2005, art. 42.2, O.G. No. 45.980, July 25, 2005 (Colom.).
reparations, since such a literal reading would amount to a disproportionate burden on the victim. The Court left open the issues of how payment will be made in individual cases, as well as the criteria for limiting these distributions. It also declined to interpret Article 55, which makes the Social Solidarity Network responsible for distributing reparations without further elaboration. The Court left the subject for future decisions, clarifying only that Article 54 places the burden for reparations on combatants.

**Definition of Victims.** The Court adopted an inclusive view of victims, with the qualification that the “state is not obligated to assume all the damage of all the family of direct victims.” The Court also held that not all the family members have “exactly the same rights,” but that the law cannot impede their right to an effective remedy.

**V. Conclusion**

The Constitutional Court’s decision in *Gallón Giraldo* clearly indicates that DDR and transitional justice can no longer be separated conceptually or practically. DDR programs must transcend the military and security frameworks in which they have traditionally been conceived and must be located squarely within transitional justice debates on truth, justice, reparations, and reconciliation. Rigorous respect for human rights norms can change the legal and political climate in which peace negotiations occur, meaning truth, justice, and redress should not be ignored or indefinitely postponed. DDR programs therefore must emphasize the “R” of DDR—reintegration, precisely the component that has traditionally been the weakest link in the chain. This approach would move beyond measures focused on how to give warring parties an incentive to disarm and include the rights and demands of victim-survivors and host communities.

A reading of the Constitutional Court’s opinion provides important benchmarks for negotiating this “balancing act” between the desire for peace—too frequently reduced to public order and issues of governability—and the observance of human rights. Proportionality means a minimum baseline of respect for the fundamental rights of truth, just-

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351. *Id.* at 336.
352. *Id.* at 333.
353. *Id.* at 328.
354. See generally Theidon & Betancourt, *supra* note 7 (discussing the military aspects of DDR in Colombia and the need for attention to local reconciliation processes).
356. *Id.*
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...the three basic pillars of transitional justice—while upholding the "right to peace." Indeed, the Court clarified that all these rights are interdependent, working synergistically; modifying one right directly affects the others. Colombia is left searching for a "fit" between two paradigms that are no longer legally or practically separable.

Undoubtedly, the challenges of this task contributed to the Court’s delay in publishing the ruling, which generated significant confusion and tension. In the interim, the Court felt compelled to release a press statement clarifying its key rulings in order to address the concerns of both victim-survivors and paramilitaries. It reassured the paramilitaries that previous convictions would accumulate under the maximum alternative sentence, and in turn assured the victim-survivors that an original conviction would expire only once the beneficiary fulfilled all conditions. In a sense, the judiciary entered into the peace negotiations, brokering a compromise while maintaining its legal duty to champion the rights and interests of the aggrieved.

Victim-survivors are now a third party to the peace negotiations.

While public debate continued on Law 975/05, President Uribe ordered the arrest of seventeen leaders of illegal armed groups. He also ordered more than 30,000 of the individuals who were demobilized in the last three years not to delay in invoking the special benefits of Law 975/05. Perhaps the potent combination of intense national and international protest forced the state to bring retributive justice into the DDR mix.

Colombia’s experience demonstrates that transitional justice is not merely a legal phenomenon; rather, the mechanisms of transitional justice are also social phenomena, and an evaluation of their success will depend in part upon the perceptions of members of the society undergoing transition from periods of violent conflict. As Teitel asserts, a "genealogy of transitional justice demonstrates, over time, a close relationship between the type of justice pursued and the relevant limiting political conditions. Currently, the discourse centers on preserving a minimalist rule of law identified chiefly with maintaining peace." She opines that this trend presages an "increased pragmatism in the politicization of the law." Yet the case of Colombia presents almost the

359. TEITEL, supra note 3, at 69.
360. Id.
opposite: the legalization of the political. These social and political forces will play a direct role in the subsequent phases of both the transitional justice and DDR processes in Colombia. The constantly evolving field of transitional justice requires more than a study of legal debates and norms: it requires an analysis of the cultural and political contexts that shape what is legally and socially possible. With Colombia's transitional justice process scheduled to proceed over the next eight years, this examination has only just begun.