

# From the Justice and Peace Law to the Revised Peace Agreement Between the Colombian Government and the FARC: Will Victims' Rights Be Satisfied at Last?

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## Abstract

The Colombian Government and its sworn enemy the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC) are striving to implement a historical peace accord, which will allow the country to start healing the wounds of a brutal conflict that raged for more than five decades. One of the most controversial and contested parts of the agreement deals with justice and reparations for victims. The present article analyses the effective promotion and fulfilment of victims' rights in Colombia first through the implementation of the existing laws and then in light of the peace agreement signed on 26.9.2016 and subsequently revised, following the results of the referendum held on 2.10.2016. It is argued that the measures adopted so far have failed to provide a comprehensive and adequate response to victims' needs, thus leaving the majority of the population affected by the war in some sort of limbo. Ultimately the article reflects on

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whether the revised peace agreement will finally be able to meet Colombia's international legal obligations to protect, respect and fulfil victims' rights.

## I. Introduction

Colombia's population has been pulled into a five decades-long civil war<sup>1</sup> among the Government's forces, paramilitary groups and their successors,<sup>2</sup> the *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo* (FARC-EP or more commonly FARC)<sup>3</sup> and the National Liberation Army (ELN).<sup>4</sup> In a nutshell, the main actors involved in this complex armed conflict are the State's armed forces, the paramilitary groups generally aligned with the protection of elite landowning interests and the guerrilla (or rebel) forces traditionally associated with the left.<sup>5</sup> Violence stemming from the country's internal armed conflict has forcibly displaced more than 5.7 million Colombians, and about 200,000 continue to flee their homes each year, generating the world's second largest population of internally displaced persons (IDPs).<sup>6</sup> Furthermore, according to a report launched by the National

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<sup>1</sup> Civil war or non-international armed conflict (NIAC) is used in accordance with the customary international legal definition provided by the Appeals Chamber of the ICTY in the *Tadić* case. The threshold set out in the *Tadić* case identifies an armed conflict not of an international character when there is protracted armed violence between a State and an organised non-State armed group on its territory, or protracted armed violence between organised non-State armed groups on the territory of a State. See *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, Case No. IT-94-1-A, para. 70.

<sup>2</sup> The term "paramilitary groups" refers mainly to the United Self-Defence Forces of Colombia (AUC) a right-wing umbrella group that was formed in 1997 by drug-traffickers and landowners to combat against the rebels in lieu of the State. The group was officially dismantled in 2006. See Profiles: Colombia's Armed Groups, BBC, 29.8.2013, at: <<http://www.bbc.com>>.

<sup>3</sup> The FARC is the oldest and largest group among Colombia's left-wing rebels, it was founded in 1964, when it declared its intention to overthrow the Government and install a Marxist regime. C. Lee, The FARC and the Colombian Left Time for a Political Solution?, *Latin American Perspectives* 39 (2012), 28 et seq.

<sup>4</sup> Y. Kemper/N. Roshani/M. Bonilla Portilla, No One to Trust: Children and Armed Conflict in Colombia, Watchlist on Children and Armed Conflict, 2012, at: <<http://watchlist.org>>.

<sup>5</sup> D. Guzmán/N. Sánchez/R. Yepes, Colombia, in: M. C. Galvis Patiño (ed.), *Las Víctimas Y La Justicia Transicional: Están Cumpliendo Los Estados Latino Americanos Con Los Estándares Internacionales?*, 2010, 95 et seq.

<sup>6</sup> The 2014 Global Report by the Internal Displacement Monitoring Centre (IDMC) placed Colombia as the country with the second highest number of IDPs in the world, at: <<http://www.internal-displacement.org>>.

Centre of Historical Memory, the internal conflict has claimed at least 220,000 lives, and four of every five victims were civilians.<sup>7</sup>

Although since 2002 the Colombian armed forces have expanded their military operations throughout the country, non-State armed groups remain active in most parts of the Colombian territory. In some of the remote areas of the country, such groups, first and foremost the FARC, even started to act as the ruling authority, enforcing the law and providing public services, thus filling the vacuum created by the absence of the State.<sup>8</sup> The reactionary policies of the Colombian State have allowed the FARC to remain closely connected to the peasants and to keep increasing its power, suggesting that the State's strategies, in particular the different approaches adopted to counter rebels as opposed to paramilitary groups, have contributed to create an atmosphere conducive to the consolidation of the FARC's position.<sup>9</sup>

In such a complex scenario a partial agreement on transitional justice was reached between the FARC and the Government, on 23.9.2015.<sup>10</sup> On 15.12.2015 the parties concluded an agreement on victims that fleshes out how the Comprehensive System of Truth, Reparations, Justice and Non-repetition is going to work and what forms of remedies are conceived for those affected by the violations occurred.<sup>11</sup> The agreement on victims, fully incorporated in the Final Peace Agreement (FPA) reached on 24.8.2016 and officially signed on 26.9.2016, represents one of the most controversial and criticised aspects of the accord, which was narrowly rejected in a plebiscite vote held on 2.10.2016.<sup>12</sup> Only 41 days after the rejection of the FPA the

<sup>7</sup> National Centre of Historical Memory, *Enough Already: Memories of War and Dignity*, July 2013.

<sup>8</sup> Y. Kemper/N. Roshani/M. Bonilla Portilla (note 4).

<sup>9</sup> See J. J. Brittain, *Revolutionary Social Change in Colombia: The Origin and Direction of the FARC-EP*, 2010, 25 et seq.

<sup>10</sup> Comunicado conjunto No. 60 sobre el Acuerdo de creación de una Jurisdicción Especial para la Paz, La Habana, Cuba, 23.9.2015; at: <<http://wp.presidencia.gov.co>>.

<sup>11</sup> See Acuerdo sobre las Víctimas del Conflicto: Sistema Integral de Verdad, Justicia, Reparación y No Repetición, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos, (Agreement on Victims), at: <<http://equipopazgobierno.presidencia.gov.co>>. The agreement on victims was wholly incorporated in the Final Peace Agreement. See Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Final Peace Agreement or FPA), 24.8.2016, at: <<https://www.mesadeconversaciones.com.co>>.

<sup>12</sup> The voters in Colombia rejected the Final Peace Agreement with 50.2 % voting against it. The question posed to the Colombian population was "Do you support the final agreement to end the conflict and build a stable and lasting peace?". See S. Brodzinsky, *Colombia Referendum: Voters React to Rejection of FARC Peace Deal*, 3.10.2016, at: <[www.theguardian.com](http://www.theguardian.com)>.

parties presented a new draft of the peace deal,<sup>13</sup> which takes in several suggestions from the original accord's critics. The aspect of the agreement most relevant to the current analysis, i.e. the one dealing with victims' rights and the transitional justice framework, has also been modified to address some of the concerns raised by those who campaigned against the deal.

It is worth mentioning from the outset that the revised deal does not change the fact that the broadest possible amnesty will be granted to the FARC members who have committed "political crimes and crimes connected to them".<sup>14</sup> The details of the amnesty are outlined in the Law on Amnesty, Pardon and Special Criminal Procedures attached to the new deal.<sup>15</sup> In line with the Inter-American Court of Human Rights (IACtHR) jurisprudence on national amnesty legislation,<sup>16</sup> the most serious crimes will not qualify for amnesty.<sup>17</sup> Such crimes will be addressed under the framework of the Special Jurisdiction for Peace (SJP), which allows for alternative sanctions, better defined in the current version of the deal,<sup>18</sup> for perpetrators of gross human rights violations who admit responsibility, disclose the truth about their actions and contribute to reparations. The decision to adopt a lenient approach towards the perpetrators who accept to play a proactive role in restoring peace and promoting victims' rights has been labelled by some as an attempt to foster impunity and it can be easily regarded as one of the main factors that led to the rejection of the FPA.<sup>19</sup> Thus, the FPA has been harshly criticised on the grounds that it favoured ending a long lasting conflict with the oldest operating guerrilla movement in the world over achieving justice for victims and strengthening accountability, a decision

<sup>13</sup> See Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Revised Peace Agreement), 12.11.2016, at: <<https://www.mesadeconversaciones.com.co>>.

<sup>14</sup> Art.14 of the Ley de Amnistía, Indulto y Tratamientos Penales Especiales clarifies which are the crimes recognised as "political"; Art. 15 enshrines a list of crimes defined as connected to "political" ones. See Ley de Amnistía, Indulto y Tratamientos Penales Especiales, Revised Peace Agreement, 288 et seq.

<sup>15</sup> Anexo I, Ley de Amnistía, Indulto y Tratamientos Penales Especiales, Final Peace Agreement (note 11), 258 (Annex I).

<sup>16</sup> On the "amnesty jurisprudence" of the IACtHR see *C. Binder*, The Prohibition of Amnesties by the Inter-American Court of Human Rights, GLJ 12 (2011), 1207 et seq. See also *L. Mallinder*, The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws, ICLQ 65 (2016), 665 et seq.

<sup>17</sup> Revised Peace Agreement (note 13), 148.

<sup>18</sup> Revised Peace Agreement (note 13), 164 et seq.

<sup>19</sup> Former President *Uribe* was the leader of the "NO" campaign, which ultimately led to the rejection of the FPA. See *M. Ford*, A Peace Deal for Colombia, FARC Reaches a Final Agreement with the Country's Government after a Half-Century of Violence, 26.8.2016, at: <<http://www.theatlantic.com>>.

which, according to its opponents, was in contrast with the existing international human rights law (IHRL) framework.<sup>20</sup> Instead, this article argues that alternative sanctions for serious offences are not incompatible with Colombia's obligations under the American Convention on Human Rights (ACHR) and, in an effort to end the conflict and implement a comprehensive transitional justice system, there may be flexibility in the forms of punishment envisaged, also in response to gross violations of human rights.<sup>21</sup>

The present article analyses the effective promotion and fulfilment of victims' rights in Colombia first through the implementation of the existing laws and then in light of the revised peace agreement. Prior to diving in the Colombian case, it is important to summarise what kind of rights victims are entitled to in the aftermath of IHRL and international humanitarian law (IHL) violations perpetrated in conjunction with an armed conflict.<sup>22</sup> After a brief and general overview of victims' rights, the next paragraphs will introduce the measures already implemented in Colombia, i.e. the Justice and Peace Law (hereinafter JPL or Law 975) and the Victims' and Land Restitution Law (Victims' Law). Following the analysis of the previous milestones in the Colombian transitional justice process, this contribution will discuss the latest layer represented by the agreement on victims' rights, as embedded in the latest version of the peace accord.<sup>23</sup> It is argued that the measures enforced so far have failed to provide a comprehensive and adequate response to victims' needs, thus leaving the majority of the population affected by the war in some sort of limbo, waiting for a stable peace to be finally reached. Ultimately the article questions whether the revised peace agreement will be able to overcome the previous laws' shortcomings and enhance the fulfilment of victims' rights in Colombia.

Before presenting the actions undertaken and the ones envisaged for the future it is worth stressing that at the time of writing there is uncertainty on how the new accord, signed in Bogotá on 24.11.2016 and approved by the Congress on 30.11.2016, will be put in effect and when the implementation will start.<sup>24</sup> Even though the cease-fire with the FARC has been in place

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<sup>20</sup> Human Rights Watch, Colombia: Dealing Away Justice, Government, FARC Agree to No Prison Time for Atrocities, 28.9.2015, at: <<https://www.hrw.org>>.

<sup>21</sup> See *L. Mallinder* (note 16), 668.

<sup>22</sup> See *J. Wemmers*, *Victims in the Criminal Justice System*, 1996, 124.

<sup>23</sup> Punto 5 "Acuerdo sobre las Víctimas del Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos", Revised Peace Agreement (note 13), 124 et seq.

<sup>24</sup> If the result of the plebiscite had been yes, the agreement would have gone through Congress very quickly with "fast track" status, where legislators would have had a simple yes or no vote and no power to further modify the accord. Instead it seems that the new agreement will have to go through Congress at the "normal speed" and be open to debate and per-

since 2015, violence in Colombia is still rampant, making the expedited enforcement of the deal all the more important.

## II. Victims' Rights under International Law

Alongside States' duty to "prevent violations, investigate violations and punish violators",<sup>25</sup> since the end of World War II the international community has started to recognise a set of rights pertaining directly to individual victims of international law breaches.<sup>26</sup> As spelled out in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines or UNBPG),<sup>27</sup> victims' remedies encompass: i) equal and effective access to justice; ii) adequate, effective and prompt reparation for harm suffered; iii) access to relevant information concerning violations and reparation mechanisms.<sup>28</sup> Broadly speaking, the word "remedy" contains two separate concepts, the first being procedural and the second substantive. The former sense refers to the processes through which arguable claims of violations are heard and decided, the latter instead covers the outcomes of the proceedings, i.e. the concrete relief afforded to the victims.<sup>29</sup> The elements of every remedial strategy encompass the recognition of the victims, and therefore the determination of who fall within this category, the responsibility of all the actors involved in the commission of the violations occurred and the identification of the mechanisms and measures that need to be designed and implemented.<sup>30</sup>

The term "victim" refers to

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haps amendment. See *J. McDermott*, Colombia Has a New Peace Deal, But Challenges Remain Written, 14.11.2016, at: <[www.insightcrime.org](http://www.insightcrime.org)>.

<sup>25</sup> *M. C. Bassiouni*, International Recognition of Victims' Rights, HRLR 6 (2006), 204.

<sup>26</sup> *M. Funk*, Victims' Rights and Advocacy at the International Criminal Court, 2<sup>nd</sup> ed. 2015, 35 et seq.

<sup>27</sup> UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/Res/60/147.

<sup>28</sup> UNBPG (note 27), para. 11.

<sup>29</sup> *D. Shelton*, Remedies in International Human Rights Law, 2<sup>nd</sup> ed. 2005. See also *F. Capone*, Remedies, in: R. Wolfrum (ed.), MPEPIL, 2012.

<sup>30</sup> *T. van Boven*, The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations Audiovisual Library of International Law, 2010, at: <<http://legal.un.org>>.

“persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”.<sup>31</sup>

Everyone who is a victim of a violation of IHRL or IHL shall have equal access to an effective judicial remedy as provided for under international law.<sup>32</sup> In addition to judicial mechanisms, the other remedies available to the victim include access to administrative and other bodies, as well as further tools and modalities conducted in accordance with domestic law, which shall reflect the obligations arising under international law to secure the right to access justice and fair and impartial proceedings.<sup>33</sup>

The word “reparation”, from the Latin term *reparare*, i.e. “to dispose again”, refers to the process, as well as the result, of remedying the harm caused by a wrongful act. The purpose of reparation is generally understood to re-establish the situation that existed before the harm occurred, but of course a specific goal may prevail depending on the context and on violations occurred.<sup>34</sup> Within the international criminal law (ICL) framework, for example,

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<sup>31</sup> UNBPG (note 27), para. 8. In addition to the so-called “direct victims”, the UNBPG recognise that the term “victim” can also include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

<sup>32</sup> Art. 2 para. 3 International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; Art. 14 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85; Art. 2 lit. c Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13. At the regional level see Art. 34 of the European Convention on Human Rights, 1950, ETS 5; Art. 63 American Convention on Human Rights, 21.11.1969, 1144 UNTS 143; Art. 27 African Charter on Human and Peoples’ Rights (Banjul Charter), 1982, 21 I.L.M. 58. Under IHL, see Art. 3 Hague Convention (IV) respecting the Laws and Customs of War on Land, 1907, UKTS 6; Art. 91 Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8.6.1977, 1125 UNTS 3.

<sup>33</sup> UNBPG (note 27), para. 12; see also A. *Cançado Trindade*, *The Access to Individuals to International Justice*, 2011, 179 et seq.

<sup>34</sup> See generally M. *Evans/K. Stratos*, *Remedies in International Law: The Institutional Dilemma*, 1998; see also C. *Gray*, *Judicial Remedies in International Law*, 1987; D. *Shelton* (note 29). See also S. *Altwickler-Hàmori/T. Altwickler/A. Peters*, *Measuring Violations of Human Rights An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*, ZaöRV 76 (2016), 8 et seq.

“reparations fulfil two main purposes [...] they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts”.<sup>35</sup>

Furthermore, awarding reparations can also pursue the twofold scope of ending ongoing breaches and deterring future ones. Reparations can help rehabilitating physical and psychological integrity and dignity; they can act as a vehicle for reconciliation as well as a measure to establish a new relationship between the violator and the victim. Although the ultimate goal of reparation is traditionally reckoned to be the restoration of the *status quo ante*, in the form of restitution, the current focus on individuals rather than States has led to the adoption of a different approach in the field of remedies, which endorses the efforts to design reparations as a tool to adequately, effectively and promptly redress the harm suffered by the victims.<sup>36</sup> As stated in Principle 15 of the UNBPG

“Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law [...]”.<sup>37</sup>

Such an approach is consistent with the one promoted by the IACtHR through its pivotal jurisprudence on reparations.<sup>38</sup> Notably, both in its revised version and in the previous one, the peace accord between the FARC and the Colombian Government made several references to the work of the IACtHR and in particular its efforts to award “integral” reparations in or-

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<sup>35</sup> *Lubanga*, ICC-01/04-01/06-3129-AnxA 03-03-2015, Judgment on the Appeals against the Decision Establishing the Principles and Procedures to Be Applied to Reparations of 7.8.2012 with amended order for reparations (Annex A) and public annexes 1 and 2), Appeals Chamber, 3.3.2015, para. 2. See also *O. Amezcua-Noriega*, Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections, ETJN, Reparations Unit, Briefing Paper No 1, 2011, 8.

<sup>36</sup> See UNBPG (note 27), para. 11.

<sup>37</sup> UNBPG (note 27), para. 11.

<sup>38</sup> On the jurisprudence of the IACtHR see generally *J. M. Pasqualucci*, The Practice and Procedure of the Inter-American Court of Human Rights, 2013, 188 et seq. See also *T. M. Antkowiak*, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, *Colum. J. Transnat'l L.* 46 (2008), 351.

der to grasp the full complexity of the individual victims as well as the collective damages produced by armed violence.<sup>39</sup>

According to the existing international and regional standards, “adequate” refers to reparations that are acceptable in quality and/or quantity, and thus both appropriate and proportional to the harm suffered. In other words, the forms and modalities of reparation should be suitable, taking into account the harm, the victims, the violations, and the broader society.<sup>40</sup> “Effectiveness” describes reparations’ ability to produce a desired or intended result, meaning that, for example, the scarce resources of countries in transition should be used in an optimised manner.<sup>41</sup> “Prompt”, finally, indicates the importance of providing timely redress to the victims, taking into due account those instances when, as stressed by the International Criminal Court (ICC), priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance.<sup>42</sup> In particular at the national level, the award of reparative measures that fulfil those criteria is often hampered by a combination of legal shortcomings, political obstacles and economic factors,<sup>43</sup> which, in the case of Colombia, have been further exacerbated by the ongoing armed conflict.

Concerning the third remedy, i.e. victims’ right to be informed, this has been firstly enshrined in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in 1985.<sup>44</sup> The Declaration generally alludes to the fact that victims should be informed of their rights in seeking redress through judicial and administrative mechanisms. Access to relevant information regarding violations and reparation mechanisms as spelled out in the UN-BPG, is formulated in broader and more detailed terms as it refers to victims’ right to know the truth on the causes leading to their victimisation and on the conditions pertaining to the violations suffered; as well as to States’ duty to develop means to inform the victims about all available legal, medi-

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<sup>39</sup> See Revised Peace Agreement (note 13), 129.

<sup>40</sup> See *H. Rombouts/P. Sardaro/S. Vandeginste*, The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights, in: K. De Feyter/S. Parmentier/M. Bosuyt/P. Lemmens (eds.), *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, 2005, 345 (346 et seq.).

<sup>41</sup> *H. Rombouts/P. Sardaro/S. Vandeginste* (note 40), 459.

<sup>42</sup> Case of *Lubanga* (note 35), Order for Reparations, Annex A, para. 19.

<sup>43</sup> *T. van Boven*, Victim-Oriented Perspectives: Rights and Realities, in: T. Bonacker/C. Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, 2013, 17 (27).

<sup>44</sup> GA Res 40/34, 25.11.1985, A/RES/40/34, para. 5.

cal, psychological, social and administrative services to which they are entitled.<sup>45</sup>

These three remedies represent the core victims' rights and the assessment of their fulfilment, or lack thereof, helps determining whether a State is acting or not in compliance with its international legal obligations in this sphere. In the case of Colombia, as the following section will show, the process of recognising victims' rights has been marked by the implementation of a number of laws and initiatives which have strived to reflect the progress achieved at the regional and at the international level.<sup>46</sup> Despite the considerable efforts made, the domestic legislation adopted so far has fallen short of duly addressing several crucial aspects, ranging from the narrow definition of "victim", which determined the exclusion of many individuals or groups deeply affected by the violations occurred, to the lenient attitude towards State's responsibility.

### III. The Previous Legislative Efforts to Advance Victims' Rights in Colombia

Colombia's efforts to finally come to terms with its pervasive and violent internal armed conflict have officially begun in August 2012, after the signing of the "General Agreement for the End of the Conflict and the Construction of a Stable and Lasting Peace". Prior to undertaking the long and challenging process of ending the half-century war with leftist armed groups, the Colombian Government established a complex legal framework to deal with the crimes committed by the members of paramilitary groups. The legal framework, outlined in the JPL, has put significant emphasis on paramilitaries' demobilisation, thus moving the issue of victims' remedies to the background. On the contrary the adoption, a few years later, of the Victims' Law has brought victims, in particular those forced to abandon their lands, under the spotlight. Both laws present strengths as well as considerable shortcomings. Significantly each of them has been focussing on a specific aspect of the Colombian transitional justice process, thus reflecting the fact that the adoption of a more comprehensive approach was ultimately

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<sup>45</sup> See Art. 6 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, (2012), OJ L 315/57. See Art. 18 International Convention for the Protection of All Persons from Enforced Disappearance, 2006, 2716 UNTS 3.

<sup>46</sup> C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 2012, 220.

not foreseeable, nor desirable, until the end of the armed conflict.<sup>47</sup> The JPL and the Victims' Law are, in fact, framed within a transitional scheme of justice, however at the time when these laws have been designed, Colombia did not exhibit the characteristics of that scheme. Therefore, the lack of elements that are crucial to the success of a transitional justice process, such as agreement among all parties involved, guaranteed security for victims, definition of the universe of victims and the total cost of the reparations to be implemented,<sup>48</sup> have undermined the scope of the laws as well as their effectiveness.

## 1. The Justice and Peace Law

During President *Álvaro Uribe's* administration the legislative action related to the rights of victims of the armed conflict was primarily focussed on inducing paramilitary groups to leave the battlefield. Consistently with this approach, the JPL, signed by President *Uribe* on 22.7.2005, has been adopted to bring peace by facilitating the demobilisation and reincorporation into civil society of members of paramilitary groups. Through the implementation of the JPL the legislator has tried to pursue a manifold goal, namely i) to achieve demobilisation, disarmament and reintegration of illegal armed groups, ii) to recognise and enforce the rights of the victims to truth, justice and reparation and iii) to conduct criminal proceedings against the leaders of these groups that are responsible for the commission of serious crimes.<sup>49</sup>

Despite its ambitious scope, the JPL has eventually prioritised the neutralisation of State's "opponents", over the rights and the needs of victims.<sup>50</sup> In order to achieve its objectives, the JPL has established judicial benefits for those who participated in the demobilisation process, i.e. access to reintegration programme's incentives and reduced sentences of five to eight years if they admitted the crimes committed.<sup>51</sup> Law 975 has been strongly criticised by international human rights organisations on various grounds,

<sup>47</sup> *J. García-Godos/K. A. Lid*, Transitional Justice and Victims' Rights before the end of a Conflict: The Unusual Case of Colombia, *Journal of Latin American Studies* 42 (2010), 488.

<sup>48</sup> World Bank, Report No. 73140-CO, Peace Programmatic II: Reparation for Especially Vulnerable Victims of the Armed Conflict in Colombia, 25.5.2007, 16.

<sup>49</sup> Review Conference of the Rome Statute, Transitional Justice in Colombia, Justice and Peace Law: An Experience of Truth, Justice and Reparation, RC/ST/PJ/M.1, 1.6.2010.

<sup>50</sup> *P. Alston*, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Mission to Colombia, 31.3.2010, A/HRC/14/24/Add.2, para. 56.

<sup>51</sup> *P. Alston* (note 50), Appendix C, Justice and Peace Law, para. 3.

in particular because it unduly limits the legal definition of “victim” to individuals who had suffered at the hand of organised armed groups at the margins of law,<sup>52</sup> focussing on paramilitary groups and leaving *de facto* unpunished the acts perpetrated by the other parties involved in the armed conflict.<sup>53</sup> While officially more than 30,000 paramilitaries passed through the programme, the Government never verified whether all of them actually demobilised, and it was unable to dismantle the groups’ criminal networks and support system.<sup>54</sup> As a result, some groups or sections of groups either never demobilised, or re-armed right after the process, forming new groups, the so-called *bandas criminales emergentes* (BACRIM).<sup>55</sup> As of September 2014, 37 paramilitaries who officially participated in the demobilisation process had been convicted of crimes under the JPL.<sup>56</sup> Therefore, the convictions covered only an insignificant amount of the nearly 70,000 crimes confessed by defendants seeking access to Law 975 benefits.<sup>57</sup>

As stated in the JPL, in order to be eligible for benefits, individual demobilised paramilitary candidates must provide information about their paramilitary organisation, sign a statement of commitment to the Government and turn over all illegally obtained assets which are then collected in the *Fondo de Reparación* (Reparation Fund).<sup>58</sup> If the candidate fulfils these requirements, judicial proceedings are initiated which involve the following: investigations by a prosecutor; a confessions process, including the delivery of *versiones libres* (voluntary depositions) in which the person provides a list and details of confessed crimes; arraignment following the completion of the prosecutor’s investigation; acceptance of charges by the candidate; a public hearing before a Justice and Peace Tribunal to determine whether the acceptance of charges by the individual was free and voluntary; delivery of

<sup>52</sup> Art. 5 JPL. Ley de Justicia y Paz, 1/35, Diario Oficial 45.980, Ley 975 de 25.7.2005.

<sup>53</sup> J. García-Godos/ K. A. Lid (note 47), 501.

<sup>54</sup> M. Humphrey, The Individualising and Universalising Discourse of Law: Victims in Truth Commissions and Trials, in: T. Bonacker/C. Safferling (note 43), 77 (89).

<sup>55</sup> According to the OHCHR 53 % of the BACRIM’s members are former paramilitaries members. Annual Report of the United Nations High Commissioner for Human Rights: Addendum: Report on the Situation of Human Rights in Colombia (Annual Report OHCHR 2012), 31.1.2012, A/HRC/19/21/Add.3.

<sup>56</sup> Human Rights Watch, World report-2015: Colombia, 2015, at: <www.hrw.org>.

<sup>57</sup> Human Rights Watch (note 56). According to the International Center for Transitional Justice (ICTJ) since the entry into force of the JPL the paramilitaries have confessed more than 40,000 crimes affecting 51,000 people, including nearly 1,000 massacres, 25,000 murders, and more than 3,500 forced disappearances involving more than 1,400 State agents. M. C. Moreno, Uncovering Colombia’s System of Macro-criminality, ICTJ 8.12.2014, at: <https://www.ictj.org>.

<sup>58</sup> See Art. 11 JPL. The National Commission for Reparation and Reconciliation (CNRR) is established by Art. 50 of the JPL and monitors the Reparation Fund.

the verdict and sentencing.<sup>59</sup> The way the JPL was formulated has left little room for victims' rights and its legitimacy has been immediately tested before the Colombian Constitutional Court. The Constitutional Court in the end upheld the law, but declared some of its provisions partially or wholly unconstitutional.<sup>60</sup> Among the interpretation parameters established by the Constitutional Court are those intended to ensure victims' participation in the proceedings and their access to full redress. More in detail the Constitutional Court shed light on the following aspects of the JPL

“the alternative sentences from five to eight years were acceptable, but the ruling extended the time that prosecutors had to investigate crimes committed by ex-combatants seeking the law's benefits, which according to the law were just 60 days; the Court also defined greater incentives for truth by establishing that legal benefits would be withdrawn if it were later determined that a paramilitary had lied during their confessions, a situation unforeseen by the law; it contented that paramilitary would be responsible for paying victims' reparations not only from their illegally acquired assets, as it was originally established in the JPL, but from all their assets, regardless of whether they were actually legal; finally the sentence expanded victims' rights by demanding major access for victims' participation in the judicial proceedings.”<sup>61</sup>

Despite the subsequent decrees adopted by the Government in the attempt to address the issues raised by the ruling,<sup>62</sup> the final outcomes did not match the JPL original aspirations.<sup>63</sup> Concerning the legitimacy of reduced sanctions for serious offences and their compatibility with the American Convention on Human Rights, the petitioners in the case of the *Rochela Massacre v. Colombia* argued that the forms of leniency promoted by the JPL were *de facto* comparable to a “concealed amnesty”.<sup>64</sup> The IACtHR, which has been called to express its views at the initial stage of the JPL im-

<sup>59</sup> Art. 16-25 JPL; see also *P. Alston* (note 50), para. 50, Appendix C, Justice and Peace Law, paras. 4-6.

<sup>60</sup> Colombian Constitutional Court, Decision C-370/06.

<sup>61</sup> *R. Figari Layús*, *The Role of Transitional Justice in the Midst of Ongoing Armed Conflicts: The Case of Colombia*, 2010, 73.

<sup>62</sup> For example Decree 315 of 2007 has regulated the intervention of victims, and provided that they have the right of personal and direct access, or through their attorney, to the taking of statements, formulation of indictments and charges and other procedural steps in the context of Law 975, relating to the events that caused the damage. Ministry of Interior and Justice, Decree 315 of 7.2.2007, regulating intervention by victims in the investigation stage of justice and peace proceedings in accordance with Law 975 of 2005.

<sup>63</sup> Information about the rights of victims under the JPL is available (in Spanish) at: <<http://www.fiscalia.gov.co>>.

<sup>64</sup> See *L. Mallinder* (note 16), 668. See *Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 11.5.2007, IACtHR, Ser. C No. 163, para. 192.

plementation, did not affirm that the more lenient punishments amount to an amnesty nor that this approach is incompatible with the values upheld by the American Convention on Human Rights. Nonetheless the IACtHR specified a number of criteria to ascertain whether a national legislation dealing with serious crimes complies with the ACHR, in particular

“the State must fulfill its duty to investigate, try, and, when appropriate, punish and provide redress for grave violations of human rights. To achieve this objective, the State should observe due process and guarantee the principles of expeditious justice, adversarial defense, effective recourse, implementation of the judgment, and the proportionality of punishment, among other principles.”<sup>65</sup>

Furthermore, the IACtHR clarified that

“in cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way [...] With regard to the participation of the victims, the State should guarantee that at every stage of the proceedings the victims have the opportunity to present their concerns and evidence, and that these be completely and seriously analyzed by the authorities before determining the facts, responsibility, penalties, and reparations.”<sup>66</sup>

Despite the guidance provided by the IACtHR, ultimately the application of the provisions enshrined in the JPL was not conform to the ACHR. With regard to victims’ access to justice, victims have limited access to the hearings, held in locations and cities, i.e. Bogotá, Medellín and Barranquilla,<sup>67</sup> far from where the crimes occurred.<sup>68</sup> Moreover, the institutions in charge of implementing the JPL are ill equipped to provide adequate legal representation and, on average, each public defender has been tasked with assisting over 300 victims.<sup>69</sup> Overall, victims’ participation has been seriously hampered also by the continuous threats and actual attacks carried out by members of paramilitary groups against community leaders and human rights activists. As a result and due to the lack of measures aimed at guaran-

<sup>65</sup> *Rochela Massacre v. Colombia* (note 64), para.193.

<sup>66</sup> *Rochela Massacre v. Colombia* (note 64), para. 195.

<sup>67</sup> International Crisis Group, *Correcting Course: Victims and the Justice and Peace Law in Colombia*, Latin America Report No. 29, 30.10.2008, 25, at: <<http://www.crisisgroup.org>>.

<sup>68</sup> *J. Easterday*, *Beyond the “Shadow” of the ICC: Struggles over Control of the Conflict Narrative in Colombia*, in: C. M. De Vos/S. Kendall/C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Intervention*, 2015, 432 (456).

<sup>69</sup> *R. Figari Layús* (note 61), 79.

teeing security, many victims gave up the idea of participating in the hearings and/or bringing forward their reparations' claims.<sup>70</sup>

Since the entry into force of Law 1592 (2012)<sup>71</sup> victims eligible to claim reparations under the JPL can no longer exercise this right and instead they must seek redress within the framework provided by the Victims' Law. Under the JPL, those affected by the crimes committed by the paramilitaries were in principle entitled to seek reparations through a judicial process overseen by the Justice and Peace Unit (JPU) and the Justice and Peace Tribunals of the Superior Judicial District Courts, which were tasked with setting individual, collective or symbolic reparations as appropriate.<sup>72</sup> These reparations claims were restricted to the context of a form of criminal proceeding against the alleged perpetrator, and only victims of the specific perpetrator could petition the Superior Judicial District Court for reparations.<sup>73</sup> The perpetrator was held personally responsible for paying compensation to the victim. If the perpetrator did not possess sufficient assets to autonomously provide for the reparations, the group to which the perpetrator belonged could be held collectively responsible. In case this was insufficient, the State had an obligation to step in and contribute to repair the victim.<sup>74</sup>

A relevant example of how the JPL framework has been concretely implemented with regard to the issue of victims' reparations stems from the case against *Fredy Rendón Herrera*, alias *El Alemán*. The Superior Judicial District Court found out that Mr *Herrera*, a former commander of the United Self-Defence Forces of Colombia (AUC), had a direct role in overseeing the illegal recruitment of 309 children in Chocó and Antioquia between 1997 and 2002, by visiting schools to promote enlistment and authorising the admission of minors into the group. In accordance with the JPL, in the *El Alemán* case the obligation to provide reparation has been attributed directly to the culprit, but, since he was not able to fulfil it, the obligation has been extended to the other AUC's members,<sup>75</sup> whereas the State has

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<sup>70</sup> S. Jaramillo/Y. Gih/P. Torres, *Transitional Justice and DDR: The Case of Colombia*, Research Unit International Center for Transitional Justice, 2009, 38 et seq., at: <<https://www.ictj.org>>.

<sup>71</sup> Art. 8 Ley 1592 de 3.12.2012, Diario Oficial 48.633.

<sup>72</sup> Art. 8 JPL.

<sup>73</sup> Art. 45 JPL.

<sup>74</sup> E. Pizarro Leongómez, *Victims and Reparation: The Colombian Experience*, ICC Stocktaking of International Criminal Justice, 2010, at: <<http://www.icc-cpi.int>>.

<sup>75</sup> The original text of the judgment reads "Condenar al postulado Fredy Rendon Herrera de manera solidaria con los demás integrantes del bloque Elmer Cárdenas de las Autodefensas Unidas de Colombia, al pago de los daños y perjuicios materiales y morales, en los montos y

been called upon by the Court to support victims' other needs to rehabilitation and prevention.

This approach, even innovative in light of the scant developments concerning non-State actors' secondary obligations,<sup>76</sup> is, at least in part, consistent with the UNBPG. In particular Principle 15 affirms that

“in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim”.<sup>77</sup>

Principles 16 further underlines State's subsidiary role in cases where the parties liable for the harm suffered are *unable or unwilling* to meet their obligations.<sup>78</sup> However, if on the one hand the willingness to play a subsidiary role is laudable, on the other hand the State should have also admitted responsibility and implemented measures to redress the victims who suffered harm as a result of its agents' conducts or due to breaches of due diligence. In spite of its wide-ranging formal aspirations the reparations framework established through the adoption of the JPL, and in place for seven years, in practice has fallen short of fulfilling victims' right to obtain redress. *In primis* because the narrow definition of victims and the lack of State's accountability made the JPL fundamentally flawed and secondly because the framework's implementation was also not successful as only some 1,400 of the 410,000 victims registered under JPL have benefited from court-ordered measures.<sup>79</sup>

Concerning victims' right to be informed about the proceedings and to know the truth on the causes that led to their victimisation, the Inter-American Commission of Human Rights (IACHR) in 2007 stressed that the system of notices in place to allow victims' participation was not effec-

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condiciones establecidos en la parte motiva de la providencia”. Proceso 2007, 82701, *Fredy Rendon Herrera*, Sentencia de 16.12.2011, Fiscalía 44 Unidad Nacional de Justicia y Paz, 413.

<sup>76</sup> See C. Ryngaert/J. d'Aspremont, Third Report of the ILA Non-State Actors Committee, 2014, 10, at: <<http://www.ila-hq.org>>. See also L. Moffett, Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda, in: N. Gal-Or/C. Ryngaert/M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, 2015, 323 (347); C. Rose, An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors, *Hastings Int'l & Comp. L. Rev.* 33 (2010), 307.

<sup>77</sup> UNBPG (note 27), para. 15 (emphasis added).

<sup>78</sup> UNBPG (note 27), para. 15 (emphasis added).

<sup>79</sup> International Crisis Group (note 67), 5.

tive.<sup>80</sup> The Prosecutor General's Office has published the notices in newspapers of broad circulation as well as in the offices of the Prosecutor General and in its website. However, the IACHR has highlighted that the only newspaper of national circulation, "El Tiempo", is not distributed in many small towns and villages afar from the big cities. Those who live in the rural areas, where the greatest numbers of victims are to be found, do not even have television or access to Internet service and they have been *de facto* cut out from the outreach initiatives even though they represent the segment of the population most in need of access to information on their rights and how to enforce them.<sup>81</sup> Furthermore, the very formal and technical language used by authorities to call on the victims to participate in the proceedings has not contributed to a clear dissemination of the content of the JPL and its respective institutions. Those who have suffered harm as a result of a violation of their rights needed first and foremost a friendly institutional framework able to reflect the technicalities of the JPL while making them accessible to all.<sup>82</sup> Instead, the victims had to deal with a highly bureaucratic system, which ultimately failed to strike a balance between the reduced sentencing incentives for demobilisation and the principles of truth, justice and redress that are part of the State's international obligations.

The broad participation in the demobilisation process, which was in any case the top priority of the legislator,<sup>83</sup> represents the main achievement of the JPL. In sum, the JPL has been developed retaining its core element, namely that of demobilisation and alternative sentences for perpetrators,<sup>84</sup> to the detriment of victims' rights, including their entitlement to participate in the proceedings and claim for reparations.

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<sup>80</sup> See OEA/Ser.L/V/II, CIDH/INF.2/07, IACHR, Inter-American Digest, Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and the First Judicial Proceedings, paras. 56-58.

<sup>81</sup> Inter-American Digest (note 80), para. 59.

<sup>82</sup> *S. Jaramillo/Y. Giba/P. Torres* (note 70), 38.

<sup>83</sup> See *C. Rojas*, Securing the State and Developing Social Insecurity: The Securitization of Citizenship in Contemporary Colombia, in: M. Berger/H. Weber (eds.), *War, Peace and Progress in the 21<sup>st</sup> century*, 2011, 227 (247).

<sup>84</sup> *C. Evans* (note 46), 212.

## 2. The Victims' and Land Restitution Law

To remedy, at least partially, the shortcomings of the JPL and develop a much needed land restitution policy,<sup>85</sup> on 10.6.2011 President *Juan Manuel Santos* signed the Victims' Law, which came into effect on January 2012. The Victims' Law was designed to be a comprehensive set of norms,<sup>86</sup> able to include in the reparations discourse also some of the victims that were neglected by the previous legislative efforts, in particular those who suffered from land dispossession or who were forced to abandon their properties.<sup>87</sup> As stated in Art. 1 and Art. 2 of the Victims' Law, its purpose is to establish judicial, administrative, social, economic, individual and collective measures for the victims.<sup>88</sup> The Victims' Law provides a broader definition of "victim" than the one enshrined in the JPL. According to it, a "victim is any person who has suffered grave violations of human rights or international humanitarian law as a result of the conflict since 1985".<sup>89</sup> The provision also includes as victims the relatives of those who have been killed or disappeared and the Constitutional Court has further expanded the definition of victim as to encompass "the third degree of kinship-relations such as nieces and nephews, grandparents and grandchildren, cousins and in some cases even friends".<sup>90</sup>

Ultimately, however, the Victims' Law has created what can be defined as a "hierarchy of victims" depending on the date the violations were carried out. As a result, victims of forced displacement and other human rights abuses occurring before 1985 only qualify for symbolic reparations, whereas victims of human rights abuses committed between 1985 and 1991 are eligible for financial compensation, but not land restitution. Finally, victims whose lands were misappropriated or illegally occupied through human rights violations after 1991 and before the end of the Victims' Law's applicability in 2021 are eligible for land restitution.<sup>91</sup> The following paragraphs of Art. 3 narrow down the definition by explaining that the term

<sup>85</sup> See *N. Summers*, Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?, *Harvard Human Rights Journal* 25 (2012), 225.

<sup>86</sup> Annual Report OHCHR 2012 (note 55), para. 49.

<sup>87</sup> *L. M. Céspedes-Báez*, Colombia's Victims Law and the Liability of Corporations for Human Rights Violations, *Estudios Socio-Jurídicos* 14 (2012), 180.

<sup>88</sup> Art. 1-2 Victims' Law. Ley 1448 de 10.6.2011, Diario Oficial No. 48.096. Human Rights Watch, Colombia: Victims Law a Historic Opportunity, 10.6.2011, at: <<http://www.hrw.org>>.

<sup>89</sup> Art. 3 Victims' Law.

<sup>90</sup> *M. Humphrey* (note 54), 79.

<sup>91</sup> Amnesty International, Colombia: The Victims and Land Restitution Law: An Amnesty International Analysis, AMR 23/018/2012, 2012, 7, at: <<http://www.refworld.org>>.

“victim” does not cover members of armed groups, unless they are former child soldiers who were able to demobilise before turning 18 years old; or victims of ordinary crimes, e.g. offences perpetrated by the BACRIM.<sup>92</sup> Concerning the former category, i.e. child soldiers, the approach pursued by the Victims’ Law tends to draw a distinction, based solely on the age factor, between victims and perpetrators, without duly taking into account the complex status of children associated with armed forces or groups.<sup>93</sup> With regard to the latter category, i.e. victims of ordinary crimes, such exclusion can be in part motivated by the State’s unwillingness to acknowledge the failure of the demobilisation process, which in the end was unable to successfully reintegrate the members of the paramilitary groups.<sup>94</sup>

Significantly, the Victims’ Law is not based on the recognition of State’s responsibility for the violations committed;<sup>95</sup> instead, it purports the State’s subsidiary role as providing reparations and assistance, given the difficulties that most victims have faced under the JPL framework. Again, thus, there is no admission of State’s responsibility for unlawful conducts of its agents nor for tolerating or supporting paramilitary groups’ activities on its territory and for failing to prevent and punish the violations committed by the armed opposition groups. On the contrary, several provisions of the law make it clear that the recognition of victim status does not entail the acknowledgment of any responsibility on behalf of the State for the violations established.<sup>96</sup>

With regard to victims’ access to justice, this aspect was significantly streamlined by the entry into force of the Victims’ Law. In fact, unlike the JPL, under the Victims’ Law victims are simply required to submit a written declaration and supporting evidence of the event and related harm suffered in order to earn the legal status as victim. The Victims’ Unit reviews the declaration, verifies the facts provided and decides whether to grant the applicant the victim status, independent of any criminal proceedings against the perpetrator.<sup>97</sup> Concerning the burden of proof, the Constitutional Court has clarified that the victims’ statement should be presumed true, and

<sup>92</sup> Art. 3 para. 2 Victims’ Law.

<sup>93</sup> *M. Drumbl*, *Reimagining Child Soldiers in International Law and Policy*, 2012, 80 et seq.

<sup>94</sup> *C. Correa*, *From Principles to Practice Challenges of Implementing Reparations for Massive Violations in Colombia*, ICTJ, 2015, 3, at: <<https://www.ictj.org>>.

<sup>95</sup> *P. Dixon*, *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*, *International Journal of Transitional Justice* 9 (2015), 8 et seq.

<sup>96</sup> *P. Dixon* (note 95).

<sup>97</sup> Significantly, the process of acquiring victim status is explicitly divorced from the process of condemning the person responsible for victimisation. See *N. Summers* (note 85), 226.

therefore it is the State's obligation to prove otherwise.<sup>98</sup> Once the application is granted, the victim is registered with the Victims' Registry. In order to be awarded land restitution under the Victims' Law, the victim must engage in both an administrative process and a separate judicial process, which takes place in courts of the Superior Judicial District Courts specialised in land restitution.<sup>99</sup> To initiate a land restitution procedure, victims must register their claims with the Registry of Dispossessed or Forcibly Abandoned Lands. The entity in charge of overseeing the Registry is the Land Restitution Unit, which, upon receipt of the victim's application, will investigate the claim to determine whether it qualifies as rightful.<sup>100</sup> After the claim has been registered, either the victim or the Land Restitution Unit may submit the request for reparations to a specialised land restitution judge (or where there is no specialised judge available, any civil judge with jurisdiction), who will refer the claim to the competent authorities.<sup>101</sup>

The Victims' Law provides for individual, collective, material, moral and symbolic reparations. More in detail the law offers the payment of compensation to victims of the most serious human rights violations, i.e. killing, enforced disappearance, kidnapping, bodily harm resulting in different degrees of disability, torture, sexual violence, and forced recruitment of minors, as well as to displaced families; the creation of a programme on Comprehensive Psychosocial and Health Care; a programme on house restitution through subsidies; debt alleviation, access to educational training and access to employment; exemption from the mandatory military services for male youth.<sup>102</sup>

Despite the different kinds of redress measures envisaged, reparation in the form of restitution is central to the scope of the law and victims are first and foremost entitled to the return of their previously owned, used, or occupied land.<sup>103</sup> Nevertheless, the Victims' Law recognises that in some instances restitution of the same land is neither possible nor desirable. Restitution shall be deemed impossible under specific circumstances, i.e. when the original land is located in an area of high natural disaster risk; when the land has been the object of multiple dispossessions and has already been returned to another victim; when restitution would result in a risk to the life or personal integrity of the victim; or when the land has been fully or par-

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<sup>98</sup> Colombian Constitutional Court, Decision C-250/12 (Dossier D-8590; D-8613; D-8614), paras. 9.1-9.2.

<sup>99</sup> Art. 76-102 Victims' Law.

<sup>100</sup> Art. 105 Victims' Law.

<sup>101</sup> Art. 79 Victims' Law.

<sup>102</sup> C. Correa (note 94), 7.

<sup>103</sup> Art. 72 Victims' Law.

tially destroyed such that it is impossible to reconstruct conditions similar to the original ones.<sup>104</sup> In any of those cases, the victim is entitled to an equivalent plot of land with similar characteristics. In line with the everlasting primacy of restitution over monetary indemnification or other forms of reparation,<sup>105</sup> only if the exact, or equivalent, land restitution is impossible the victim may receive compensation.<sup>106</sup>

As the primary goal of the Victims' Law is to enforce property restitution for those who have been dispossessed of their land or who have been forced to abandon it, one of the key challenges is to reach the potential beneficiaries and make sure that they are adequately and promptly informed with respect to their rights under this framework. Concerning the barrier in accessing information about the possibility to submit a claim, the Victims' Law states that the authorities are obligated to provide victims with information including the procedures for filing a complaint and realising their rights as victims.<sup>107</sup> Despite such obligation less than one per cent of displaced Colombians have been returned to their land since the Victims' Law was enacted, and many are afraid to apply for titles in fear of reprisals.<sup>108</sup> As a result displacement continued, with yearly averages of 200,000 displaced persons since 2010, while the Land Restitution Unit and specialised tribunals produced only 723 restitution decisions between 2012 and October 2014.<sup>109</sup> Furthermore, notwithstanding the efforts made to create a mechanism able to simplify and accelerate victims' access to justice and reparations, the low numbers of claims in comparison to original estimates demonstrate the complexity of the existing framework and show that on the one hand the whole process is still too burdensome for the victims and on the other the resources dedicated not enough to comply with the policy in an expedient way.<sup>110</sup> In particular it is likely that the Victims' Law was drafted having in mind an unrealistic design that requires a judicial decision for each case even though there are not enough courts. The new institutions created to implement the Victims' Law have not been fully responsive to victims' needs and

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<sup>104</sup> See *N. Summers* (note 85), 228.

<sup>105</sup> *C. Gray* (note 34), 11 et seq.

<sup>106</sup> Art. 72 Victims' Law.

<sup>107</sup> Art. 35 Victims' Law.

<sup>108</sup> Amnesty International, *Colombia: A Land Title is not Enough: Ensuring Sustainable Land Restitution in Colombia*, AI AMR 23/031/2014, 27.11.2014, 33, at: <<https://www.amnesty.org>>.

<sup>109</sup> Annual report of the United Nations High Commissioner for Human Rights Addendum Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, 23.1.2015, A/HRC/28/3/Add.3.

<sup>110</sup> *C. Correa* (note 94), 23.

the many coordination problems within the central Government, and at the local level, have significantly limited progress.<sup>111</sup>

Ultimately, given the fact that displacement is mainly caused by the armed conflict and the consequent dearth of security and stability, starting to restore property rights while the transition to peace was not yet complete is one of the main challenges that the Victims' Law has been facing since its adoption. Even though it is undeniable that the Victims' Law contributed to overcome many of the problems associated with the JPL, from the broader definition of victim adopted to the reversed burden of proof to obtain the victim status, and thus deserves to be praised for its victim-centred approach; it is also true that the considerations of resource constraints, which are legitimate in any mass reparations programme, the very ambitious strategy pursued and the lack of peace and stability represent major hurdles for the fulfilment of victims' rights under the Victims' Law framework.

#### IV. Colombia's Final Attempt to Close the Circle on Accountability and Victims' Rights

Colombia's attempts to implement a successful transitional justice process have been significantly hampered by an unstable situation, in part mitigated by the beginning of the peace negotiations. Over more than four years the talks between the FARC and the Government have reached an agreement on all items on the negotiating agenda, i.e. land reform, the rebels' reintegration into civilian life and their political participation, the end of the conflict, the illegal drugs trade and victims' rights.<sup>112</sup> However, as explained above, the comprehensive accord was ultimately rejected by the Colombian population, called to vote in an up-or-down referendum on the FPA, and its incorporation into Colombian law.<sup>113</sup>

<sup>111</sup> International Crisis Group, *Transitional Justice and Colombia's Peace Talks*, Crisis Group Latin America Report No. 49, 29.8.2013, 39, at: <<http://www.crisisgroup.org>>.

<sup>112</sup> What is at Stake in the Colombian Peace Process?, BBC News, 24.9.2015, at: <<http://www.bbc.com>>. International Crisis Group, *Colombia: Peace at Last?*, International Crisis Group Latin America Report No. 45, 25.9.2012, 34, at: <<http://www.crisisgroup.org>>.

<sup>113</sup> The Colombian Constitutional Court established that the referendum was essential to validate the agreement especially in light of the status that the peace accord was expected to acquire, in fact as stated in its original version the agreement was supposed to be incorporated into Colombian law as part of the "constitutional block". Furthermore, the Constitutional Court, in line with the approach adopted by the IACtHR in the case *Gelman v. Uruguay*, has stressed that an amnesty law that shields the perpetrators of gross human rights violations would be inadmissible even if approved by national referendum. See Colombian Constitu-

The FPA was negotiated with the direct participation of the victims of the Colombian armed conflict as 60 of them travelled to Cuba to present their views to the negotiators.<sup>114</sup> The victims, divided in five delegations, were tasked with reporting to the negotiators the opinions and the proposals collected back home. To this end a series of regional fora for victims' participation, along with a large number of "peace roundtables", i.e. *Mesas Regionales de Paz*, organised by the Colombian parliament, have been held throughout the country. A total of 17,000 concrete proposals resulting from these consultations were presented to negotiators.<sup>115</sup> Different categories of victims participated in the process, including women, indigenous people and children unduly affected by the long lasting internal war. According to the statistics published after the referendum, a large number of victims of the armed conflict and in general those living in the most affected and poorest areas of the country supported the FPA,<sup>116</sup> while the opponents of the agreement were mainly located in the most stable part of the Colombian territory, i.e. some of the provinces near the capital.<sup>117</sup> The new peace agreement, which modifies many controversial aspects of the FPA, has been revised in a very short lapse of time and it incorporates 56 amendments suggested by all the sectors in favour of the rejection of the deal. Notably, even though the revised peace agreement conveys the views of a wider segment of the population, it does not necessarily reflect the mainstream opinion of the victims towards the original deal. In fact the new accord, which enshrines the amendments collected by the Government, submitted to the FARC and swiftly accepted by the armed group, has been adjusted on the purpose to quickly address some of the concerns of the opposition, rather than to further improve the situation of victims, even though in some instances the latter goal has been also achieved.

The negotiations, the FPA and the current accord first and foremost focus on ending the armed conflict between the FARC and the Government; therefore the security threat posed by the existence of former paramilitary groups, i.e. the BACRIM, or the role of the ELN, which continues to fight

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tional Court, Decision C-379/16, 56. See also *Gelman v. Uruguay*, Merits and Reparations, 24.2.2001, IACtHR, Ser. C No. 221, paras. 238-239.

<sup>114</sup> Agreement on Victims (note 11), 3.

<sup>115</sup> Victims' Voice heard in Colombia Peace Talks, Global Justice News and Civil Society Views from the Coalition for the ICC, 16.3.2015, at: <<https://cicglobaljustice.wordpress.com>>.

<sup>116</sup> An overview of the referendum's results is available on the website of the National Civil Registry, at: <[www.registraduria.gov.co](http://www.registraduria.gov.co)>.

<sup>117</sup> Colombia Referendum: Voters Reject FARC Peace Deal, BBC News, 3.10.2016, at: <[www.bbc.com](http://www.bbc.com)>.

the central Government, have not been addressed. Albeit it does not cover the whole scenario, the new accord strives to fulfil the need for a far-reaching strategy. The agreement describes the multi-layered composition of the Comprehensive System of Truth, Reparations, Justice and Non-repetition, which will encompass a Truth Commission, a Special Unit for the Search of People deemed as Missing within the Context and due to the Conflict, the SJP and a set of reparative measures and guarantees of non-repetition. The latter category, which under the UNBPG is regarded as a form of reparation, has been kept separate from the other redress measures and it is described as the combination of all the other mechanisms listed above as well as the ones belonging to the third point on the negotiating agenda, i.e. the end of the conflict.<sup>118</sup>

It is too soon to determine whether the revised accord between the Government and the FARC will be successfully implemented, thus overcoming the shortcomings of the previous laws, however an overview of the new framework can shed light on the extent to which it departs from the JPL and the Victims' Law.

## 1. The Architecture of the Special Jurisdiction for Peace

The SJP implements the justice component of the Comprehensive System of Truth, Reparations, Justice and Non-repetition, which is a crucial part of the revised peace agreement. It is designed to guarantee the rights to truth, reparations, justice and non-repetition for victims of war crimes, crimes against humanity, serious human rights crimes, and similar crimes under Colombian law, committed during the civil war. The SJP will be exercised through a number of new bodies, i.e. a Chamber of Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts, a Peace Tribunal, a Chamber for Amnesty and Pardon, a Chamber for the Definition of the Legal Situations (for those cases different from the previous ones and for all those other cases that had not been foreseen) and a Special Unit for Investigation and Indictment.<sup>119</sup> According to the revised peace agreement, the SJP will not remain in place indefinitely, but it will operate only for ten years, with a possible extension of five years to allow the conclusion of all the pending activities.<sup>120</sup>

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<sup>118</sup> Revised Peace Agreement (note 13), 186.

<sup>119</sup> Revised Peace Agreement (note 13), 152.

<sup>120</sup> Revised Peace Agreement (note 13), 145.

The bodies of the SJP will be tasked with defeating impunity, obtaining truth, contributing to reparations and punishing those responsible for the grave violations committed during the armed conflict.<sup>121</sup> One of the additions to the original agreement further strengthens the victim-centred approach adopted by the SJP highlighting that the justice process must be implemented privileging its restorative component over the retributive one and taking into due account the urge to tackle all the factors that contributed to the social exclusion of the victims.<sup>122</sup> The justice component foresees that upon the termination of hostilities, in line with the relevant provision regulating NIAC,<sup>123</sup> the Colombian State will grant the broadest possible amnesty for political and related/connected crimes. State's agents, a category defined in detail in the revised accord,<sup>124</sup> will not receive amnesties or pardons because the Colombian Constitution authorises the application of this measure only to those responsible for political crimes and crimes related/connected to them.<sup>125</sup> However, State's agents can benefit from the equitable, balanced, simultaneous and symmetrical treatment outlined in the Law on Amnesty, Pardon and Special Criminal Procedures.<sup>126</sup>

With regard to the FARC members, under the previous version of the Law on Amnesty, Pardon and Special Criminal Procedures attached to the FPA,<sup>127</sup> it was determined that "political" crimes, for which the amnesty applies, would also include those committed to finance the armed conflict, if not committed for personal benefit.<sup>128</sup> The revised accord diverges from this approach as it specifies that drug-related crimes will be assessed in court on a case-by-case basis to determine whether all the proceeds of illicit activities have been actually used to support the FARC's operations.

Furthermore, no amnesty or pardon will ever be awarded for conducts typified in the national legislation as corresponding to crimes against humanity, genocide, and grave war crimes, among other serious crimes such as

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<sup>121</sup> Revised Peace Agreement (note 13), 143.

<sup>122</sup> Revised Peace Agreement (note 13), 144.

<sup>123</sup> Art. 6 para. 5 Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 UNTS 609 states that "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." See *D. Fleck*, *The Law of Non-International Armed Conflict*, in: *D. Fleck* (ed.), *The Handbook of International Humanitarian Law*, 3<sup>rd</sup> ed. 2013, 609 (610).

<sup>124</sup> Revised Peace Agreement (note 13), 149.

<sup>125</sup> Agreement on Victims (note 11), 25 et seq.

<sup>126</sup> Título III, Ley de Amnistía, Indulto y Tratamientos Penales Especiale (note 14).

<sup>127</sup> Annex I (note 15), 258.

<sup>128</sup> Annex I (note 15), Art. 7.

the taking of hostages or other serious deprivation of liberty, torture, forced displacement, forced disappearance, extra-judicial executions and sexual violence.<sup>129</sup> This is in line with the jurisprudence of the IACtHR,<sup>130</sup> according to which impunity for violations of non-derogable human rights norms is always inadmissible, and therefore amnesty laws that shield perpetrators of grave human rights violations from prosecution are incompatible with the American Convention on Human Rights.<sup>131</sup> The revised accord, thus, also establishes that the crimes for which no amnesty will be granted will remain subject to investigation and prosecution by the SJP; however it takes a further step towards accountability by tightening up the concept of “command responsibility” and establishing that the “effective control” requirement is the same as the one set forth in Art. 28 of the Rome Statute, meaning that the Special Jurisdiction for Peace will not have to prove that the commander had effective control over the criminal conduct itself, but rather that he had the ability to prevent or repress the commission of that criminal conduct or to submit the matter to competent authorities afterwards.<sup>132</sup>

The SJP will be implementing two different procedures, one for those who recognise the truth and accept their responsibilities, and another one for those who fail to do so. The first category encompasses both those who acknowledge truth and responsibility before the Chamber of Acknowledgment and those who acknowledge truth and responsibility before the Section of first instance of the Peace Tribunal,<sup>133</sup> who will be sanctioned with an alternative punishment.

The former will be subject to effective restrictions on their liberty, provided that they have previously laid down their arms. In the FPA the alternative penalties, which will last between five and eight years, were not duly outlined thus prompting concerns over the extent to which FARC mem-

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<sup>129</sup> Annex I (note 15), Art. 22.

<sup>130</sup> According to the IACtHR “[...] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited *because they violate non-derogable rights recognized by international human rights law*”. *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, IACtHR, Ser. C, No. 75, para. 41 (emphasis added).

<sup>131</sup> *C. Binder* (note 16), 1209.

<sup>132</sup> Revised Peace Agreement (note 13), 150.

<sup>133</sup> The Peace Tribunal will have two different sections of first instance, one for cases where the perpetrators have accepted to contribute to establishing the peace and admitting responsibility, and one for the remaining cases, which will be dealt with through an adversarial procedure.

bers' rights would be effectively restricted. According to para. 60 of the agreement on victims embedded in the new version of the peace accord, "overall the sanctions' main goal will be to fulfil the rights of victims and to consolidate peace", thus stressing that the ultimate scope of the deal and of the SJP is not to punish the perpetrators. However, the revised peace agreement has shed light on how the alternative sanctions will be implemented and has established the criteria that the judges will be called to apply.<sup>134</sup> The latter, i.e. those who recognise the truth and admit responsibility belatedly, will also undergo an alternative sanction, but in this case the penalty, i.e. the deprivation of liberty from five to eight years, will have a retributive character and will be served under the ordinary prison regime.

Individuals belonging to the second category, instead, after being found guilty, will be sentenced to prison terms under ordinary conditions, for a maximum of 20 years.<sup>135</sup> As mentioned above, the possibility to benefit from alternative punishments in lieu of a more traditional approach, has drawn severe criticism against the FPA,<sup>136</sup> in particular its detractors claimed that the agreement "would deny justice to thousands of victims of grave violations of human rights and humanitarian law by allowing their abusers to escape meaningful punishment".<sup>137</sup> Ultimately human rights organisations feared that the regime of more lenient sanctions was not drafted keeping in mind the accepted standards of appropriate punishment for grave violations, hence resulting in Colombia's failure to ensure accountability for crimes against humanity and war crimes. The question of whether reduced sanctions abide or not by Colombia's duty to duly and adequately enforce the responsibility of those involved in the commission of the crimes perpetrated during the armed conflict has been already discussed in relation to the JPL, which in theory was not inadmissible, but *in concreto* failed to comply with the criteria outlined by the IACtHR.<sup>138</sup>

With regard to the SJP framework, which in principle does not appear to be in contrast with IHRL,<sup>139</sup> it is not possible to ascertain yet if its imple-

<sup>134</sup> Revised Peace Agreement (note 13), 166. Those opposing the FPA wanted the alternative sentences to potentially include prison time or, at least, confinement in penal farms. The revised version of the agreement states that the convicted rebels will be restricted to a very limited geographic area but will live in a residence during the entirety of their sentence as long as they are engaged in consolidating peace.

<sup>135</sup> Revised Peace Agreement (note 13), 165.

<sup>136</sup> See *N. Carrillo-Santarelli*, An Assessment of the Colombian-FARC Peace Jurisdiction Agreement, EJIL Talk, 29.9.2015, at: <<http://www.ejiltalk.org>>.

<sup>137</sup> Human Rights Watch (note 20).

<sup>138</sup> See *Rochela Massacre v. Colombia* (note 64), paras. 192-195.

<sup>139</sup> As noted by *Ambos* and other commentators in the end there are no objections to the agreement from the point of view of international law, see *K. Ambos*, Colombia—How Much

mentation will satisfy the conditions identified in the case of the *Rochela Massacre v. Colombia*, however the revised peace agreement has already addressed a number of concerns raised in relation to the alternative sanctions and in particular the way they will be determined by the judicial authority, carried out and monitored.<sup>140</sup> In the next paragraph some preliminary considerations will be made concerning the incorporation of victims' rights in the new transitional justice architecture.

## 2. Victims' Rights under the New Framework

The agreement on victims enshrined in the revised peace agreement between the Government and the FARC begins with a list of principles that must inform the whole implementation process, including the participation of victims, which should be guaranteed through different means and at different times.<sup>141</sup> In addition to the SJP, the peace agreement foresees also the establishment of a truth commission, called *Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición* (Commission for the Elucidation of the Truth, Coexistence and Non-repetition).

Notably, the parts of the peace accord dealing with the Commission did not undergo any revisions in the aftermath of the referendum, with the exception of the inclusion of a reference to the need to ensure the equal participation of both men and women in all stages of the Commission's work.<sup>142</sup> The Commission will be set up after the entry into force of the peace agreement and it will be a non-judicial body, completely disentangled from

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Justice Can the Peace Take?, Opinion Juris, 8.10.2015, at: <<http://opiniojuris.org>>. See also the Statement of the ICC Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, 24.9.2015, at: <<https://www.icc-cpi.int>>. (In which the ICC Prosecutor affirms "I note with optimism that the agreement excludes the granting of any amnesty for war crimes and crimes against humanity, and is designed, amongst others, to end impunity for the most serious crimes"; thus confirming, in principle, the new framework's compliance with international law standard.) Furthermore, as stressed by Judge *García-Sayán* in the *El Mozote v. El Salvador* case "Reduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered to fulfil States' international legal obligations". *Massacres of El Mozote and nearby places v. El Salvador*, Concurring Opinion of Judge *García-Sayán*, Merits, Reparations and Costs. Judgment of 25.10.2012, IACtHR, Ser. C No. 252, para. 17, cited in *L. Mallinder* (note 16), 667 (emphasis added).

<sup>140</sup> Revised Peace Agreement (note 13), 165. Regarding monitoring, the revised accord establishes that the UN mission on Colombia and the UN Office of the High Commissioner for Human Rights will verify the fulfilment of the alternative sanctions.

<sup>141</sup> Revised Peace Agreement (note 13), 124.

<sup>142</sup> Revised Peace Agreement (note 13), 137.

the judicial process and tasked with a threefold goal, i.e. contribute to shed light on the truth about the armed conflict, promote the recognition of victims as full-fledged citizens entitled to exercise rights and foster the peaceful coexistence of victims and perpetrators on the Colombian territory.<sup>143</sup> The Commission's mandate will last three years, during which this body will be tasked with investigating the violations committed from the inception of the armed conflict until its end. The eleven members of the Commission, that will encompass also three international experts, will be appointed through an inclusive process that will engage also victims' organisations. The work of the Commission will be embedded in a final report, enshrining also a set of recommendations. Despite affirming victims' centrality in the Commission's work, the peace agreement does not go any further and topics like the collection of victims' statements, procedural measures to ensure the participation of vulnerable victims etc. ... have not been spelled out yet. Nonetheless, the inclusion of a truth commission in the Comprehensive System of Truth, Reparations, Justice and Non-repetition is an important milestone, which allows the parties to overcome one of the most criticised aspects of the previous legislative efforts, i.e. the lack of a mechanism able to promote the discovery of a collective truth, rather than focussing solely on the individual truth that can be established through the criminal justice system.<sup>144</sup>

The other sections of the agreement describe how the Special Unit for the Search of People deemed as Missing within the Context and due to the Conflict will work, the key features of the SJP, the envisaged modalities to enforce victims' right to reparation and in which ways non-repetition will be guaranteed. With regard to the Special Unit for the Search of People deemed as Missing within the Context and due to the Conflict it is worth noting that it will be a temporary and highly specialised body, expected to act in close cooperation with victims' organisations and in full compliance with victims' rights, in particular their right to be informed about the progress of the Special Unit and their right to privacy.<sup>145</sup> In the revised version of the peace agreement, the collaboration between the various actors, in-

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<sup>143</sup> Revised Peace Agreement (note 13), 137.

<sup>144</sup> See *K. Ambos*, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court, An Inductive, Situation-based Approach*, 2010, 30. The CNRR, see (note 58), which was established by the JPL, has been described as a "kind of truth commission", however it did not hear victims' testimonies nor did it work with the aim of publicly presenting a final report inclusive of a set of recommendations. See *C. Evans* (note 46), 216.

<sup>145</sup> Revised Peace Agreement (note 13), 142.

cluding the Government and the FARC, involved in the search of missing persons is better unfolded through the addition of a specific paragraph.<sup>146</sup>

As mentioned above, the revised peace agreement maintained the distinction between cases where the individual perpetrators, or group, recognise the truth and accept responsibility from those cases where the alleged culprits fail to do so. The Chamber of Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts will act as a filter aimed at collecting all the information about a given crime and ultimately determining whether it was committed in conjunction with the armed conflict and if the alleged perpetrator is willing to accept the truth and admit his/her responsibility. The report on the wrongful conducts and the role played by the suspected author(s) will be submitted by the *Fiscalía General de la Nación*, established under the JPL, alongside with the other existing judicial bodies and the victims' organisations.<sup>147</sup> Significantly, the revised peace agreement has addressed an important issue overlooked in the previous version of the deal, i.e. the insurgence of possible conflicts between the JPL framework and the SPJ, which will be heard by a specialised Chamber, called *Sala Incidental*.<sup>148</sup> Moreover, the revised peace agreement overturns the original vision of the SPJ as a fully independent judicial framework by establishing that the decisions issued by the Peace Tribunal can be appealed before the Colombian Constitutional Court.<sup>149</sup>

Ultimately, the Peace Tribunal, which will not have an international component as previously envisaged by the FPA,<sup>150</sup> will rule on the cases and enforce the sanctions, which will be distinguished in three different categories: i) sanctions applicable to persons that comprehensively acknowledge the truth in the Chamber of Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts; ii) sanctions applicable to those who acknowledge truth and responsibilities for the first time in the adversarial process before the Section of first instance of the Peace Tribunal, prior to the pronouncing of a sentence; iii) sanctions applicable to persons who do not acknowledge truth and responsibility in the adversarial process before the Section of first instance of the Peace Tribunal, but are found guilty by the tribunal.

<sup>146</sup> Revised Peace Agreement (note 13), 142.

<sup>147</sup> Revised Peace Agreement (note 13), 154.

<sup>148</sup> Revised Peace Agreement (note 13), 144.

<sup>149</sup> Revised Peace Agreement (note 13), 161.

<sup>150</sup> Revised Peace Agreement (note 13), 167. The FPA foresaw the participation of four international judges, whereas the revised version of the peace accord envisages a wholly national bench which will be assisted by four international experts who can play the role of legal advisors, but cannot exercise judicial functions.

Under the SJP the reparative measures for the victims and the guarantees of non-repetition will be implemented reflecting this scheme of sanctions. Unlike the previous legislative efforts it shall be observed that the revised peace agreement does not specify which are the criteria to determine who is a victim, and, thus, it adopts a broad definition that includes everyone who has suffered harm, directly or indirectly, as a result of violations committed in conjunction with the armed conflict. Within the Comprehensive System of Truth, Reparations, Justice and Non-repetition, reparations and guarantees of non-repetition are framed as the indispensable corollary of justice. As spelled out in the peace agreement, everyone who has caused damage must abide by the obligation to provide redress to the victims. In particular those who fall within the group of persons that comprehensively acknowledged the truth in the Chamber of Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts may present detailed individual or collective projects for the execution of work, tasks or reparative and restorative activities.<sup>151</sup> The implementation of these kinds of sanctions may be carried out within a period previously established that takes into account the expected results, such as for example the construction of an infrastructure. Overall the projects will focus on rural areas, urban areas or on the clearance and eradication of explosive remnants of war, munitions, unexploded ordnances and antipersonnel landmines within the national territory.

As for the second category, alternative sanctions for very serious offences that are imposed on those who, prior to the pronouncing of a sentence, acknowledge truth and responsibility before the Section of first instance of the Peace Tribunal, will have an essentially retributive function, i.e. they will spend from five to eight years in prison. To be entitled to an alternative sanction, the perpetrator will have to commit to contribute to his or her re-socialisation through work, training or education during his or her period of liberty deprivation, and if possible promote activities aimed at non-repetition. When there is no acknowledgment of truth and responsibility, ordinary sanctions will be imposed. The effective deprivation of liberty will not exceed 20 years in case of serious violations; however, the additional benefits or additional reductions of sanctions envisaged under Colombian criminal law may be applied, provided that the beneficiary commits to contribute to his or her re-socialisation through work, training or education during the time spent in prison and engages in activities aimed at the non-repetition of damage caused following his or her release.<sup>152</sup>

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<sup>151</sup> Revised Peace Agreement (note 13), 180.

<sup>152</sup> Revised Peace Agreement (note 13), 175.

The general framework for reparations envisaged under the FPA has not been significantly changed in the aftermath of the referendum. However the revised peace agreement has introduced an important development by establishing that the members of the FARC must prepare an inventory of all their assets, which will be used to provide the victims with material reparations.<sup>153</sup> This addition is crucial as the opponents of the FPA strongly criticised the original deal for failing to fully address FARC members' duty to compensate those affected by their actions.<sup>154</sup>

Ultimately, under the SJP, the contribution to the implementation of reparations and guarantees of non-repetition will be proportionate to the degree of commitment towards the recognition of truth and responsibility. In other words those who will benefit the most from the special justice treatment within the framework of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, are also those who will participate to a greater extent in the initiatives aimed at the satisfaction of victims' rights to truth, reparations and non-repetition. In addition to reparations and guarantees of non-repetition that stem from the SJP system, the peace agreement foresees also the implementation of broader reparations strategies in pursuance of the construction of a stable and lasting peace. The comprehensive reparative measures envisaged (*medidas de reparación integral*) include public and solemn initiatives to acknowledge the collective responsibility for the violations occurred; concrete actions promoted by the Government to ensure that State's agents also contribute to redress the victims; collective reparations that will be implemented through plans and strategies, e.g. the Rural Reform, which retain a reparative component; psycho-social reparative measures that will be awarded in coordination with the work of the Commission for the Elucidation of the Truth, Coexistence and Non-repetition; the collective process to ensure the return of refugees and displaced victims and the restitution of land, building on the framework already established by the Victims' Law.<sup>155</sup>

The last point addressed in the agreement on victims embedded in the revised peace agreement concerns the guarantees of non-repetition, which, as

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<sup>153</sup> Revised Peace Agreement (note 13), 186.

<sup>154</sup> This approach is consistent with the one adopted by the Appeals Chamber of the ICC in the *Lubanga* case, the Chamber recognised a principle of liability to remedy harm that stems directly from the individual criminal responsibility of the perpetrator. According to the Court the accountability of the offender must always be expressed through an order against the convicted person. C. Stahn, Reparative Justice after the Lubanga Appeals Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?, *Journal of International Criminal Justice* 13 (2015), 801 et seq.

<sup>155</sup> Revised Peace Agreement (note 13), 178 et seq.

mentioned above, have been kept separate from the other forms of reparation. Within the IHRL framework, in fact, guarantees of non-repetition are recognised as an essential component of reparation, in particular for continuing and systematic abuses.<sup>156</sup> The UNBPG identify eight, non-exhaustive, types of guarantees of non-repetition, which combine both redress and prevention. These include, i.e., providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting mechanisms for preventing and monitoring social conflicts and their resolution and reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.<sup>157</sup> As noted by the ICC Trust Fund for Victims in its observations on the appeals against Trial Chamber I decision establishing the principles and procedures to be applied to reparations in the *Lubanga* case

“[p]rinciples of non-discrimination, doing no/less harm and aiming at reconciliation, measures that include education on the root and underlying causes of the conflict, background of crimes and conflict, as well as measures that aim at guaranteeing non-repetition of the crimes, necessarily and genuinely need to include broader communities”.<sup>158</sup>

Thus emphasising that guarantees of non-repetition, due to their nature and scope, do not target only the victims, but the community at large. In line with this approach, the peace agreement between the Colombian Government and the FARC considers guarantees of non-repetition as measures, including for example the establishment of new mechanisms to promote human rights and to protect human rights activists, that will benefit the whole population. Therefore, in this specific case guarantees of non-repetition are not merely one of the agreement’s component, but they represent the crowning achievement of all the processes and strategies listed in it.

Overall the accord on victims enshrined in the revised peace agreement can be regarded as a major step towards reaching the end of the world’s longest-running civil war. In the new version of the deal many of the loopholes and undefined issues that made the FPA vulnerable to criticism have

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<sup>156</sup> See C. Ferstman, *Reparation as Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-Repetition in Torture Cases*, March 2012, 21, at: <<http://projects.essex.ac.uk>>.

<sup>157</sup> UNBPG (note 27), 23.

<sup>158</sup> Observations of the Trust Fund for Victims on the appeals against Trial Chamber I, ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 8.4.2013, para. 168.

been clarified, in particular the relationship between the SJP and the existing judicial bodies as well as the use of FARC's assets in the reparations process. Even though the centrality of victims is better stressed throughout the revised peace agreement, the main focus remains on the SJP and the need to promote restorative justice measures and reintegration to make sure that both sides will be willing to cooperate and contribute to the finalisation and the implementation of the peace deal. In line with this overarching goal the alternative sanctions provided under the SJP and FARC's political participation have not been renegotiated,<sup>159</sup> despite the dissatisfaction of those still opposing the peace agreement. With regard to the latter issue it is worth stressing that even though FARC's political participation is still guaranteed, according to the new peace agreement former FARC's members may not run for the 16 special congressional districts, which will exist between 2018 and 2026, created for the zones that have been hit hardest by the armed conflict. Those seats, in fact, are reserved for the representatives of civil society organisations, including victims' organisations and social movements.<sup>160</sup>

## V. Conclusion

According to the United Nations High Commissioner for Human Rights “more so than any other development, the current peace process has the potential to transform Colombia in relation to its level of respect for and enjoyment of human rights”.<sup>161</sup> Given the devastating impact that the civil war has had on the entire population and in particular on those affected, directly or indirectly by the violations perpetrated by the parties involved, the fact that the agreement on victims has taken very long, since May 2014, does not come as a surprise. Finding an accord on transitional justice and remedies for victims has, in fact, required the same amount of time as land reform, political participation and illegal drugs trade, put together, because it was the most difficult and challenging of all the items on the negotiating agenda. Following the unexpected results of the referendum the FARC and the Government have swiftly reached a consensus on a new version of the

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<sup>159</sup> The revised version of the agreement still provides that the imposition of any sanctions under the SJP will not prevent anyone from running for a political office nor will it limit any right, active or passive, of political participation. Revised Peace Agreement (note 13), 150.

<sup>160</sup> Revised Peace Agreement (note 13), 54.

<sup>161</sup> Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, 7.1.2013, A/HRC/22/17/Add.3, 3.

peace agreement, which incorporates to the maximum extent possible many of the critics raised by its opponents.

Colombia has come a long way since the first serious attempt to start a transition towards peace and stability was made in 2005 through the adoption of the JPL. Over the years, the shortcomings of the previous laws have been acknowledged and to some extent addressed in order to better comply with the international standards on victims' rights. The Victims' Law represents a very ambitious effort to place victims under the spotlight, but, like the JPL, its effectiveness has been significantly hampered by the ongoing armed conflict; which, for example, made it very difficult for victims' organisations and human rights defenders to carry out their work and assist victims in a climate of fear. The revised peace agreement, instead, foresees an extensive role for victims' organisations and it will promote the implementation of measures aimed at protecting human rights activists and undo decades of stigmatisation against them as part of war propaganda.

Moreover, for the first time State's responsibility has been publicly and fully recognised. This entails that the State will not simply play a subsidiary role in the reparations discourse or act in lieu of those responsible, but it will

“take the necessary measures to promote participation in different measures or reparation that will be designed to that effect, of State agents and others who have been involved directly in the conflict causing harm as a consequence of serious IHRL violations or breaches of IHL, also of those who have indirectly participated in the conflict and may have had some responsibility in it. Furthermore, the National Government will adopt measures to promote and, if necessary, ensure collective actions of reparation by different State entities that may have been responsible for causing harm during the conflict.”<sup>162</sup>

Also FARC's engagement to satisfy victims' rights and award reparations, both material and symbolic, as a non-State entity represents a significant achievement. It is not the first time that the conclusion of a peace agreement encompasses also the recognition of a non-State armed group's direct liability and its commitment to contribute to the implementation of redress measures;<sup>163</sup> but the symmetrical admission of responsibility and both sides'

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<sup>162</sup> Revised Peace Agreement (note 13), 179.

<sup>163</sup> For example the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines states that “the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international humanitarian law” and it provides for indemnification of the victims of violations of international humanitarian law. See Art. 2 para. 3 and Part IV, Art. 1 and Art. 6 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part III. In Ugan-

involvement in the design and enforcement of new mechanisms is certainly unprecedented. It is worth stressing that establishing effective mechanisms to promote truth finding, victims' engagement and the award of adequate, prompt and effective reparations is essential to ensure that "criminal justice does not become illusory"<sup>164</sup> and a more lenient approach to punishment is still compatible with Colombia's obligations under IHRL. For the time being it is not possible to ascertain whether the implementation of the revised peace agreement will fully comply with the international standards on victims' rights, however the amendments made to the FPA have improved several relevant aspects of the peace accord, from the interpretation of the "command responsibility" principle, which is now in line with the Rome Statute's provision, to the announcement that FARC's assets will be used in the reparations process. Despite the fact that its detractors still perceive the current peace accord as flawed, especially since it allows FARC's members to run for and hold public office while serving their sentences, what emerged very clearly so far is that Colombia is closer than ever to a much awaited, and needed, peace, which will always represent the most important component of every process aimed at addressing victims' needs and rights.

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da, for instance, the Lord's Resistance Army pledged itself to provide reparations, as part of the Juba Peace Process, and the State agreed on facilitating and providing a subsidiary role in cases where members of the LRA were indigent. The leader of the LRA, *Joseph Kony*, failed to sign the final agreement and the peace talks were ultimately aborted. Clauses 6.4, 8.1, and 9, Juba Peace Agreement on Accountability and Reconciliation, 29.6.2007; and Clauses 16-18, Annexure to the Agreement on Accountability and Reconciliation, 19.2.2008. See *L. Moffett* (note 76), 307 et seq.

<sup>164</sup> *Rochela Massacre v. Colombia* (note 64), para. 196.