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# Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes

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**Citation**

Bosdriesz, H. (2019, December 3). *Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/81377

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**Author**: Bosdriesz, H.
**Title**: Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes
**Issue Date**: 2019-12-03

# 6 Inter-American contributions to the design of transitional justice mechanisms in Colombia

## 1 Introduction

On 30 November 2016, the Colombian Congress ratified a contentious peace agreement between the Colombian government and the FARC-EP guerilla movement, thereby officially ending the longest running internal armed conflict in the world. The peace process leading to the agreement with the FARC-EP was the second round of successful negotiations conducted in Colombia in the last two decades. Before initiating talks with the FARC-EP in 2012, the Colombian state had negotiated the demobilization of a number of paramilitary groups, organized under the umbrella of the *Autodefensas Unidas de Colombia* (United Self-defense Forces of Colombia – "AUC") between 2002 and 2006.[1] This remarkable succession of peace negotiations has put Colombia at the center of the "peace v. justice" debate in the 21st century. Throughout the peace processes, the question how much justice is required in a balanced transitional justice framework, or how much of the victims' claim to truth, justice and reparation may be sacrificed in order to achieve peace for the nation as a whole, has divided Colombian politics and society. This chapter will analyze these contentious debates about what constitutes a balanced transitional justice framework and the contribution of the Inter-American system to those debates and to the transitional justice frameworks produced by them.

In analyzing the Inter-American contributions to these complex domestic processes, this chapter will take guidance from an interesting theory formulated by Colombian scholars Rodrigo Uprimny and María Paula Saffon. While international scholarship on the "peace v. justice" dichotomy tends to emphasize the tension between the need for peace and international standards on the victims' right to justice, these scholars suggest that this is not the full extent of their relationship.[2] Based on their analysis of Colombian

1 As will be discussed below, the negotiations between the paramilitaries and the Colombian government actually cannot properly be described as a 'peace process', because the negotiating parties had never actually been at war with each other. Thus, rater than a peace process, it was a demobilization process.

2 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 184.

experience, they propose that international standards can function as 'virtuous restrictions' on negotiations.[3] In their words:

> "[T]he relation between peace and justice may be understood not only in terms of a tension, but also as a virtuous relationship. This latter conception involves admitting that the legal norms on the issue of victims' rights may function not as obstacles to peace negotiations, but rather as virtuous restrictions capable of channeling those negotiations. The acknowledgment of this possibility is based on the assumption that the legal standards on the rights of victims constitute a minimum but inescapable legal imperative, that they have a *hard or non-negotiable core* and that, in that way, they constitute a *credible threat*."[4] [emphasis added]

One of the respondents interviewed in the context of this case study further explained this idea of human rights norms as virtuous restrictions, with a more particular emphasis on the norms developed by the Inter-American human rights system. When asked what he considered, all in all, to have been the Inter-American system's most important contribution to the Colombian peace processes, he said:

> "In Colombia I think the most important thing has been that it put, like, some virtuous limits to the parties. I mean, this is not my original idea, many people have said so. But I do believe that the big thing has been that it has managed to establish a framework for discussion which has, at least, placed the parties within one horizon, where each is situated in [different positions] but at least they have a common point of reference. And that it has set some limits which have made that they move within these limits and try to find creative ways on the domestic level to be able to respond to the international level [Spanish original: "para poder responder de manera complementaria en lo internacional"]. I think that this has been the fundamental impact of all of this. Justice and Peace was created because of this. They said: "ok, how can we incorporate these standards here so that we do not have to answer abroad later". […] It is an acceptance, not because they believe that the standard is legitimate, but simply to protect themselves. But even so, whatever may be the incentive for doing so, I believe that they do end up achieving […] that there are domestic arrangements which tackle this situation."[5]

In short, these Colombian experts believe that human rights norms, including those emanating from the Inter-American system, can 'channel' peace processes by setting limits to the parties' freedom to negotiate and serving as a common frame of reference when parties have very different ideas on the appropriate compromise between achieving peace and respecting

3 The phrase Uprimny and Saffon use (in Spanish) is "restricciones virtuosas". The Spanish words 'virtuoso' means virtuous, in the sense of morally good. However, is also means 'virtuoso' in the sense of masterful or skilled.

4 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 184.

5 Interview 7.

the right of victims to truth, justice and reparation. However, for human rights norms to be able to play such a guiding role in peace processes, they must be perceived by the parties as sufficiently clear and established at the international level that to be seen to disrespect these norms could pose a threat to the peace process or the sustainability of the compromise achieved through that process. In this context, Uprimny and Saffon speak of a *hard core* of international obligations, which must pose a *credible threat* to the parties and/or the peace negotiations.

Taking these perspectives to heart, the following pages will examine the different ways in which the Inter-American human rights system has impacted the two peace processes, by contributing to the perception that the international norms on the victims' right to truth, justice and reparation constituted an 'inescapable legal imperative' which, if ignored, could pose a credible threat to the sustainability of transitional justice frameworks put in place.

To be clear, this chapter does not suggest that the issue of victims' rights has been the only relevant issue at play between the negotiating parties. Other issues, including political participation of demobilized combatants and the possibility of their extradition to the U.S. to face drug-related criminal charges, were equally divisive and have likely had an important impact on the peace processes as well. However, given de topic of this research and in the interest of clarity and brevity, the chapter will focus on the question of transitional justice. Moreover, it should also be noted that this chapter focuses exclusively on the negotiations and the resulting legislative processes towards the adoption of a transitional justice framework, and not on implementation, in practice, of the laws discussed in this chapter. Those are entirely different processes, with different dynamics and involving different actors and the scope of this chapter does not allow for a full discussion of them. Finally, it should be noted that, at the time of writing this chapter, the legislative process regarding the transitional justice framework negotiated between the Colombian government and the FARC-EP had not been fully concluded. The discussion in this chapter covers the timeframe up to November 2016, when the peace agreement between the negotiating parties was formally ratified. It therefore does not cover the subsequent adoption of the legislation implementing that agreement and the various challenges of that legislation before the Constitutional Court.

The first part of this chapter – sections 2 to 5 – will focus on process towards the demobilization of the paramilitary groups and the adoption of the Justice and Peace Law, which established the transitional justice framework for it. Section 2 will introduce the domestic actors who have had a decisive role in this process, and the transitional justice framework originally proposed by the Colombian government for the demobilization of the paramilitaries. Section 3 will discuss the Justice and Peace Law as it was eventually adopted, after the government's original proposal had been withdrawn under considerable pressure from civil society. Section 4 will analyze how the Inter-American system has influenced the legislative

process towards the adoption of the Justice and Peace Law through its direct interactions with relevant domestic actors. Section 5 will analyze how the IACtHR's jurisprudence on the right to justice and the prohibition of amnesty laws has been used by domestic actors to redirect the domestic debate concerning the Justice and Peace Law, and how it has, thereby, influenced the normative content of that law.

The second part of this chapter – sections 6 to 9 – will focus on the peace process between the Colombian government and the FARC-EP. Section 6 will discuss how the domestic actors who had dominated the debate on the demobilization of the paramilitaries 'reconfigured' for the peace process with the FARC-EP and how they (re)positioned themselves on the question of transitional justice. In particular, it will provide an analysis of the Legal Framework for Peace, a constitutional amendment introduced by the government to serve as its guidelines on the issue of transitional justice in its negotiations with the FARC-EP. Section 7 will discuss the negotiations themselves and the transitional justice compromise reached between the Colombian government and the FARC-EP. Section 8 will analyze how the Inter-American system influenced the domestic debate surrounding the Legal Framework for Peace and, as a result, the peace negotiations with the FARC-EP through their direct interactions with relevant domestic actors. Finally, section 9 will examine how the IACtHR's jurisprudence has been used by the Colombian government and other domestic actors to manage the domestic (and international) debate on transitional justice and how it has, thereby, influenced the normative content of the transitional justice framework established through the negotiations with the FARC-EP.

## 2 The paramilitary demobilization process (2002 – 2006): actors and process

### 2.1 Negotiating parties: the government and the paramilitary groups

Paramilitary groups have been around in Colombia since the 1960s. They were legalized by the Colombian government in 1968 through Law 48, and grew rapidly during the 1970s and 1980s, becoming tied up with the drug trade.[6] The groups became particularly violent in the 1980s, attacking political opponents and even government officials. As a result of the latter – in combination with growing international pressure to take action against paramilitary groups – they were declared illegal in 1989.[7] However, they continued to operate and the paramilitary phenomenon was given new life (and legal mandate) in 1994 through Decree 356, creating the "convivir".

6 W. Tate, 'Paramilitaries in Colombia', (2001) 8(1) *Brown Journal of World Affairs* 163-175, pp. 164-165.

7 Idem, p. 166.

This led to the "second generation" of paramilitary organization.[8] In the 1990s, various paramilitary groups active in different parts of the Colombian territory organized themselves into a central organization, the AUC. By the time the AUC began negotiations with the government towards its demobilization in the early 21st century, it controlled considerable parts of the Colombian territory and was generating wealth through a variety of illegal trades, including the drug trade.[9]

Álvaro Uribe was elected President of Colombia in 2002, on the heels of a failed peace process between the government and the FARC-EP. The failure of the peace negotiations had left Colombia demoralized and the FARC-EP considerably strengthened. In response to this situation, Uribe ran a campaign based on the promise to provide security for the population and to confront the guerrillas through military means. This message proved so popular that he was elected in the first round with an absolute majority of the votes. Once elected, Uribe put these promises into practice through the adoption of his policy of 'democratic security',[10] which focused primarily on the build-up of Colombia's military capacity and military control over the territory.[11] Moreover, the Uribe government took the position that the security situation faced by Colombia should not be considered as one of armed conflict, but rather as that of a democratic state facing an internal terrorist threat.[12] Besides having considerable legal consequences, this rebranding of the conflict as a terrorist, and even 'narco-terrorist' threat, had the added effect of perfectly aligning the Colombian government's position with U.S. security concerns. In 2002, the U.S. government decided to further increase its already considerable military aid program to the country.[13]

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8 Idem, pp. 166-167, noting that: "Government officials maintained that the Convivirwere designed simply to provide improved intelligence and security in remote rural areas. However, this characterization was inaccurate, both in their legal definition and their conformation."

9 Idem, pp. 167-168.

10 For a more complete analysis of this policy, *see* A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) 34(4) *Security Dialogue* 391-409.

11 Mason explains that, while the policy officially recognizes that democratic security requires the build-up of all state institutions, including especially those focused on the rule of law and human rights, in practice the focus was firmly on the military. A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) 34(4) *Security Dialogue* 391-409, pp. 396-402. This results in the paradoxical situation that "in the name of *enhancing* democratic security, legal and human rights guarantees have actually been *restricted*". Idem, p. 401. (italics in the original text)

12 *See for example* H. Hanson and R. Romero Penna, 'The failure of Colombia's "Democratic Security"', NACLA reports, 25 September 2007, citing a 2004 BBC interview with Álvaro Uribe: ""There is no armed conflict here," says Uribe. "There was armed conflict in other countries when insurgents fought against dictatorships. Here there is no dictatorship; here there is a profound, complete democracy. What we have here is the challenge of a few terrorists.""

13 A. Mason, 'Colombia's democratic security agenda: public order in the security tripod', (2003) *Security Dialogue* 34(4), 391-409, p. 398.

While Uribe's strategy in relation to the guerrillas thus relied on confrontation through increased military capacity, he had a notably different approach to dealing with the other irregular armed forces active on Colombian territory: the paramilitary groups. Colombian paramilitary groups have long had a complex relationship to the state and its armed forces, marked more by shared interests than by confrontation. In the 1990s, Uribe – in his capacity of governor of Antioquia – had been one of the most vocal promotors of the convivir model. At the same time, however, the state vehemently denied any suggestion of the existence of direct links between its agents and the paramilitary groups and, consequently, of its responsibility for the human rights violations committed by those groups. Human rights NGOs, on the other hand, considered the ties between the state and paramilitary organizations to be one of Colombia's most important public secrets, and directed much of their efforts towards exposing this secret and having it become part of the national debate.[14] As a result, "[t]he issue of state connections to the paramilitary groups was the single most contentious issue" between NGOs and the state during the 1990s and the early 2000s.[15] It was also an issue that would play an important role in the debates about transitional justice mechanisms in the context of the demobilization of the paramilitary groups.

The preparations for the negotiations between the Uribe government and the AUC towards the latter's demobilization started in late 2002[16] and lasted until 15 July of 2003, when the government and the AUC signed the Agreement of Santa Fe de Ralito.[17] During this exploratory phase of the negotiations, the Uribe government enacted Decree 128 of 2003 granting certain benefits to members of illegal armed groups willing to demobilize.

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14 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), p. 293. The suspicions held by these NGOs of collusion between the paramilitary groups and State forces would later be confirmed through investigations by the Justice and Peace Tribunals which were established as a result of the demobilization of the paramilitary groups. Moreover, starting in 2006 a groundbreaking investigation by the Colombian Supreme Court, known as the *parapolítica* investigation, revealed extensive links between the paramilitaries and many high-level politicians, including several from the inner circle of Álvaro Uribe. For a full account of the parapolítica investigations, *see* M. McFarland Sánchez-Moreno, *There are no dead here – a story of murder and denial in Colombia* (Hachette UK, 2018).

15 W. Tate, *Counting the dead: the culture and politics of human rights activism in Colombia* (University of California Press, 2007), pp. 236 – 241.

16 In December 2002, the AUC declared a unilateral ceasefire and the government created an exploratory commission, under the guidance of the Commissioner for Peace, Luis Carlos Restrepo, to explore possibilities for reaching an agreement with the paramilitaries. *See* Final report of the High Commissioner for Peace on the AUC peace process, p. 4; *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 6 and Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 79.

17 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 7.

As part of these benefits, the Decree, together with legislation already in place, allowed the government to grant a generalized pardon to all those members of armed groups who were not suspected of having participated in 'atrocious' crimes including, amongst other things, terrorism, kidnapping, genocide or murder.[18] However, as broad as this arrangement was, it did not cover all the paramilitaries but applied mostly to the rank-and-file. The relatively small number of paramilitaries already being investigated for their participation in grave human rights violations, or already convicted for their crimes *in absentia*, included many of the most powerful paramilitary commanders who were representing their organizations at the negotiation table. As a result, these commanders had a strong interest in seeing the legal framework regarding the possibility of granting amnesties and pardons broadened even further. Their position on the issue of transitional justice can in fact be summarized in five words: *ni un día de cárcel* (not one day in jail).[19]

The exploratory stage of the peace negotiations had been conducted behind closed doors by the government and the paramilitary commanders,[20] leaving no space for outsiders' views to influence the direction the negotiations were taking. Particularly, the victims of the crimes

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18 *See* Article 50 of the Ley 418 de 1997 'por la cual se consagran unas instrumentas para la búsqueda de convivencia, la eficacia de la justicia y se dictan otras disposiciones', as regulated in Article 13 of Decree 128 of 2003. As a result of these arrangements, the great majority of the paramilitaries who would be demobilized through the peace process the Uribe government had initiated, would be granted amnesty and would never appear before a court at all. *See* Interview 2, saying:

> "[T]he criterion was: if there are is not already an open investigation, if there has been no sentence imposed, well, then those belonging to the [paramilitary groups] can be granted amnesty or pardon. So what happens? Well, that we had a justice system in which there existed not only 99% impunity for cases that were being processed, but that there was another great number of cases which were not even known by the authorities, not the facts let alone the perpetrators. So the great majority of [the demobilized], around 14.000 members of the paramilitaries, never came to the office of a judge, they never came to court, they have never known what it means to be confronted by a judge. And they went [home, HB]."

19 *See* 'Proceso con autodefensas está en un momento crítico', *El Tiempo*, 4 March 2004, 'Salvavidas precario', *El Tiempo*, 1 April 2004. *See also* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 171. In defending this position, the discourse employed by the paramilitary commanders was based on their assertion that they were "combatants by necessity", in the sense that their participation in the armed conflict was motivated strictly by their need to defend themselves from guerrilla aggression. Therefore, they maintained, they should be considered victims of the armed conflict, rather than offenders. As a result, what was needed was not 'vengeance', as they qualified the call for justice coming from human rights organizations and victims groups, but reconciliation and forgiveness. *See* Communication by Salvatore Mancuso, *as cited in*: Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Fundación Social, 2006), p. 75.

20 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 7

committed by the paramilitaries were not given a place at the table, as they were not considered to be a part of the process.[21] As a result, the Santa Fe de Ralito agreement, which marked the start of the official phase of the negotiations, was heavily oriented towards the disarmament and demobilization of the paramilitary groups and the reintegration of their members into civilian life, which were the primary concerns of the government and the paramilitary commanders respectively.[22] In this agreement, the AUC and the government decided that the demobilization of the paramilitaries would be initiated before the end of the year, while the government would start developing the (legislative) actions required to reintegrate the demobilized paramilitaries into civilian life.[23] Among the actions to be undertaken by the government following this agreement, was the presentation of a draft bill to introduce the transitional justice measures agreed upon between the negotiators. This draft bill, introduced to parliament in August of 2003, became known as the *Proyecto de Alternatividad Penal* (Alternative Punishment Bill – "AP Bill").[24]

### 2.2 Pro-accountability constituencies: human rights organizations opposing amnesty

The start of the negotiations between the state and the paramilitaries had rattled human rights groups suspicious of the ties between these two entities, who were now ostensibly the opposing parties in a negotiation process. In the eyes of victims' organizations and human rights groups, the interrelations between the parties made the negotiations essentially a sham. In the words of one respondent, who works at one of the Colombian human rights NGOs who have played a leading role in the opposition to the paramilitary demobilization process:

> "[T]he government was practically negotiating with itself, I mean, the alliances between the military and the paramilitaries were more than obvious and evident. I mean, the Inter-American Court had already recognized this and national case law as well. So this was a process where: 'I need you to tell truths

21 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 80.

22 Agreement of Santa Fe de Ralito, Annex 5 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1. The recommendations made by the exploratory commission, which formed the basis for the Agreement of Santa Fe de Ralito, were oriented towards the same goals. *See* Document of Recommendations of the Exploratory Commission, June 25 of 2003, Annex 4 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1.

23 Agreement of Santa Fe de Ralito, Annex 5 to the High Commissioner for Peace's final report on the AUC peace process, available at http://www.acnur.org/t3/uploads/pics/2258.pdf?view=1 .

24 Proyecto Ley 85 de 2003 (Senado), Gaceta del Congreso 436, 27-08-2003.

> ("verdades"), but then again not that many, because I believe that [in the end] I am the one responsible'. Remember that the paramilitary groups were created legally by the Colombian state. There are laws and decrees that created this. […] So the alliance was more than obvious."[25]

These groups pointed out that the narrow focus on the dismantling of the paramilitaries military power through their demobilization and disarmament would leave the bases for their political and economic power intact.[26] Thus, they feared, the process would result not in the dismantling of the paramilitary groups, but rather in their legalization. Moreover, they feared that the transitional justice mechanisms proposed by the government would give rise to a "project of impunity", serving only the government and the paramilitaries and not the victims of the war or society as a whole.[27]

These shared concerns brought together a diverse group of civil society organizations, both Colombian and international, who would become the driving force behind the resistance to the transitional justice mechanisms proposed by the government in the context of the paramilitary peace process. It is important to note that the various organizations involved in this campaign did not necessarily share the same attitudes to peace processes, and the proper role of criminal justice in them, in general.[28] However, they all agreed that the AP Bill, in any case, did not represent a good balance between the interest of peace and the interest of justice.[29] Moreover, in criticizing government's proposal they employed a common language: the language of human rights, more specifically the rights of the victims of the conflict to truth, justice and reparations. As explained by one respondent:

> "[S]o here is where an incipient movement of victims of human rights [violations] emerges, *Movice* ["Movimiento Nacional de Víctimas de Crímenes de Estado" – National Movement of Victims of Crimes of the state, HB], but supported by much more established organizations with a lot of international flair, [like] the Colombian Commission of Jurists ["CCJ", HB], Sisma, the Lawyers Collective ["CAJAR", HB]. These are more technical organizations of lawyers. I believe that in Colombia there never existed a great victims' movement and that a large part

25 Interview 2. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 143, describing the views of "some influential activists" who considered that the negotiations between the paramilitaries and the government were not "real political negotiation[s] to the extent that there [were no] conflicting interests and views between the parties".

26 *See* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 168.

27 Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University May 2011), p. 148.

28 *See* idem, pp. 144-146.

29 Idem, p. 146.

> of this discussion was channeled juridically. And it was channeled juridically through these organizations […] who had broad knowledge, many contacts, and who mastered the legal language of these standards."[30]

Colombian human rights organizations such as those mentioned here by the respondent were supported in their opposition to the demobilization of the paramilitaries. For example, Human Rights Watch ("HRW"), represented by the director of its America's division, José Miguel Vivanco, became one of the most vocal critics of the negotiations with the paramilitaries and of Uribe's human rights policies in general. Moreover, the International Crisis Group ("ICG") has monitored the demobilization of the AUC from the beginning and has shared many of the domestic NGOs concerns about it.[31] Likewise, the International Center for Transitional Justice (hereafter: "ICTJ") set up an office in Colombia in 2003 and immediately started collaborating with Colombian NGOs in their monitoring of the peace process and in making recommendations on how to improve it.[32] The involvement of such internationally recognized NGOs gave the campaign against the transitional justice mechanisms proposed in the context of the paramilitary demobilization considerable strength and international clout.

As a result of their criticism of the negotiations with the paramilitaries, and of the policy of Democratic Security more broadly, the relationship between the Uribe government and these human rights organizations quickly became strained. While human rights groups continued to question the links between state agents and paramilitary groups, Uribe in return

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30 Interview 7. The latter three organizations mentioned here by the respondent are: 1.) *Comisión Colombiana de Juristas* (The Colombian Commissions of Jurists, "CCJ"), an offshoot of the Andean Commssion of Jurists which developed into an independent NGO; 2.) *Sisma Mujer*, an organization focused on the protection of women's human rights; and 3.) *Colectivo de Abogados "José Alvear Restrepo"* (The "José Alvear Restrepo" Lawyers Collective – "CAJAR"], an activist law firm with a focus on the defense of human rights, especially those of marginalized groups and social leaders suffering persecution because of their activities. Both CCJ and CAJAR have successfully brought Colombian cases before the IACtHR.
While these three NGOs have certainly al played an important role in the processes described in this chapter, they were not the only ones. Other relevant organizations include the *Comisión Intereclesial de Justicia y Paz* (Interdenominational Commission for Justice and Peace), *The Centro de Estudios Derecho Justicia y Sociedad* (The Institute for Law, Justice and Society – "DeJusticia"), the *Fundación Social* and many more.

31 For example, in a report published in September 2003, weeks after the AP Bill was presented to parliament, ICG noted that: "it is essential that the government achieve a balance between guaranteeing the success of DR and upholding the basic principles of justice. […] While punishment for lesser crimes could include sentencing paramilitaries to social reconstruction work such as mine clearing or manual coca eradication, war crimes and crimes against humanity must be punished according to international norms." ICG, Colombia: negotiating with the paramilitaries, ICG Latin America Report No. 5, 16 September 2003, p. 29.

32 *See for example* Fundación Social and ICTJ, *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, (Fundación Social, 2004).

publically called out those human rights groups for, in his view, sympathizing with the guerrilla. For example, in a speech delivered in 2003, Uribe questioned the depth of these groups' dedications to the cause of human rights, suggesting that they only used human rights as a "political banner for certain occasions".[33] The true objectives of these "writers and schemers", he suggested, was to help the guerrilla.[34]

It is clear, then, that there would be little chance for these human rights groups to influence the development of the demobilization process – and the transitional justice mechanisms adopted its their context – by directing themselves directly to the negotiating parties. Instead, they focused their campaign on a different audience: the international community, which could put pressure on the Colombian state institutions, and, most importantly, the Colombian parliament. After all, any transitional justice mechanism the government wanted to enact to facilitate the demobilization of the paramilitary groups would first have to be adopted by parliament. Thus, outreach to parliamentarians became an important part of the campaign against the AP Bill. One important form of outreach consisted of inviting prominent parliamentarians to academic forums on transitional justice and victims' rights to help them to make "informed decisions".[35] Another way for civil society to communicate its concerns about the peace process to parliament was through the participation of several important representatives of civil society groups in the parliamentary hearings on the AP Bill.[36]

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33 *See* 'Uribe critica organizaciones de derechos humanos', *Semana*, 9 September 2003. The quotes reflected here are taken from the full transcript of Uribe's remarks published by Semana through their website, available at <https://www.semana.com/noticias/articulo/intervencion-del-presidente-alvaro-uribe-velez-durante-posesion-del-nuevo-comandante-fuerza-aerea-colombia/60507-3>, lact checked: 26-07-2018.

34 Idem. According to Semana, these remarks by Uribe came in reponse to the publication of a UNDP report critical of Uribe's handling of the armed conflict, which had publically been supported by a large number of domestic human rights NGOs.

35 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 156. An important example of such an occasion is the seminar on "experiences with alternative punishment in peace processes" organized at the Autonomous University of Barcelona in February 2004, which was attended by Rafael Pardo and Luis Carlos Restrepo and at which the James LeMoyne (UN Special Representative in Colombia), Michael Frühling (the Director of the Colombian Office of the UNHCHR), José Miguel Vivanco (Human Rights Watch) and Catalina Díaz (then CCJ) presented, amongst others. *See* 'ONU pide comisión de la verdad para Colombia', *El Tiempo*, 29 February 2003 and 'Paramilitarismo se ha consolidado' (interview with José Miguel Vivanco), *El Tiempo*, 28 February 2003.

36 The first round of hearings was organized in September 2003 and included contributions by representatives of the Colombian Commission of Jurists, the *Asociación de Familiares de Desaparecidos y Detenidos* (Association of Families of Disappeared and Detained Persons, hereafter "ASFADDES"), the ICG and Michael Frühling, representative of the of the UN Office of the High Commissioner for Human Rights. A second, more elaborate round of hearings was organized between January and April of 2004. At these hearings, 17 NGO representatives and 3 victim organizations were able to give their views on the AP Bill. *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 25-26 and 36.

In short, lobbying members of parliament to include human rights norms in their considerations became an important strategy for the accountability movement to correct the transitional justice mechanisms adopted to facilitate the demobilization of paramilitary groups.

### 2.3 The Constitutional Court

Another significant avenue through which human rights organizations have sought to influence the transitional justice mechanisms adopted in Colombia, has been by submitting them for review of their constitutionality by the Colombian Constitutional Court. While the Constitutional Court is a relatively young institution, which was created when the current constitution was adopted in 1991, is has quickly become a well-respected judicial institution with a big impact on Colombian law and politics.[37] As one respondent explained, the 1991 constitution gave the Court the position of 'Guardian of the Constitution'.[38] This position brought with it two main tasks: 1.) revising the decisions of lower courts on complaints about the violation of individual rights; and 2.) revising the constitutionality of laws and other legislative measures upon complaints by any citizen. It is particularly through this latter function that the Constitutional Court has had a profound impact on the peace processes and the transitional justice instruments implemented in that context.

According to the respondent, the Constitutional Court has long operated with the same progressive spirit that animated the 1991 Constitution generally.[39] Compared to older, more established institutions like the Supreme Court of Justice and the Council of State, the Constitutional Court had a less formalist and more activist approach to law.[40] One area in which the activism and progressivism of the Constitutional Court has found its expression, is in its openness to and "enthusiastic" use of international

37 Alexandra Huneeus has described the Colombian Constitutional Court as "one of Latin America's most influential judicial bodies and arguably the Inter-American Court's most dynamic judicial interlocutor". A. Huneeus, 'Human rights between jurisprudence and social science', (2015) 28 *Leiden Journal of International Law* 255-266, p. 264.

38 Interview 6.

39 Interview 6.

40 According to the respondent, this progressiveness is not only a consequence of the relative youth of the Constitutional Court as an institution, but also of the fact that the first generations of judges to sit on its bench, and their clerks, were "true liberals", belonging to the movement of the *séptima papeleta*, Interview 6 (field notes only), clerk at the Constitutional Court, Bogotá, 24 November 2015. The *séptima papeleta* was a movement of progressive law students which arose in 1989 and has had a profound impact on the drafting of the new constitution. For more information on the movement of the *séptima papeleta*, *see for example* J. Lemaitre, 'Los estudiantes de la séptima papeleta', *Semana*, 6 March 2010.

human rights law in its judgments.[41] This openness has a legal basis in Article 93 of the Constitution of Colombia, which codifies the doctrine of the 'Constitutional Block' (*Bloque de Constitucionalidad*). On the basis of this doctrine, the Constitutional Court has found that the provisions of international human rights treaties signed by Colombia, such as the ACHR, are of constitutional rank within the Colombian legal order.[42] Furthermore, the Constitutional Court has also held that the judgments by international courts authorized to interpret those conventions, amongst which the Inter-American Court figures prominently, are "relevant hermeneutical criteria" for interpreting these provisions and should be taken into account when applying them.[43]

However, as explained by one respondent, who is a lawyer working with CCJ and who has been involved in CCJ's litigation before the Constitutional Court, the receptiveness of that institution is not exclusively the result of its own institutional culture. While it is certainly true that the Constitutional Court has been open to international law, it has been nudged in this direction through strategic litigation efforts by human rights organizations, inviting the Court to go ever further in its application of the constitutional block. In his words:

> "Whenever we present this type of litigation, our first task is to demonstrate that [international] standards are not just soft hermeneutical criteria, but obligations which the state has taken on internationally and that the interpretations made by the authorized organs, like the Inter-American Court, the Inter-American Commission, The Committee on Civil and Political Rights, the Human Rights Commission… these are interpretations of the obligations taken on by the Colombian state, so they should binding in the appropriation [of these obligations, HB]. So, we have achieved that the Constitutional Court has taken this line, because the jurisprudential line, if you look from the year, I don't know, '95 or '96, when these discussions began, has progressed much more [in our direction, HB]. Before they said: "well, no, it is only international conventions signed by Colombia, their content only and exclusively, and on top of that, [it is] only those which cannot be suspended in a state of emergency. […] And this has been part of the work of human rights organizations: turn the Constitutional Court

41 Interview 6. In this sense, the Colombian Constitutional Court is a prime example of the embrace of a specific a vision of (constitutional) law, often described in the literature as 'neoconstitutionalism', by many judicial institutions in the Latin American region since the late 20th century. *See generally* J. Couso, A. Huneeus and R. Sieder (eds.), *Cultures of legality: judicialization and political activism in Latin America* (CUP, 2010) and A. Huneeus, 'Constitutional lawyers and the Inter-American Court's varied authority, (2016) 79(1) *Law and Contemporary Problems* 179-207. According to Huneeus, the embrace of neoconstitutionalism by important judicial actors is one of the most important factors explaining the degree of 'authority' of the Inter-American Court in any given legal system.

42 A. Huneeus, 'Constitutional lawyers and the Inter-American Court's varied authority, (2016) 79(1) *Law and Contemporary Problems* 179-207, pp. 188-189.

43 Constitutional Court of Colombia, Sentence C-010/200 of 19 January 2000, p. 44.

> over to an more international way of looking at human rights and appropriating the standards from the case law. This is our constant struggle when we present this type of claim, when we present this type of case: seek that this dualistic criterion between international law and internal law does not exist, but rather a more monist vision, where the standards are seen as one whole, as an integral part of the Constitution. I believe that on this point it has gone very well for us. The Court has taken steps backward but [overall] I think the Constitutional Court is one of the courts which has had the most extensive jurisprudence with regard to introducing international standards."[44]

In the context of the peace processes and transitional justice, this openness to international human rights standards has been especially important has made the Constitutional court an important avenue for human rights organizations seeking to have the right of victims to truth, justice and reparation be included in the legal framework.

### 2.4 Starting point of the legislative process: presentation of the Alternative Punishment Draft

The government's discourse in support of the AP Bill relied heavily on notions of forgiveness and reconciliation, which it considered necessary in order to be able to bring an end to the participation of the paramilitary forces in the armed conflict. According to its full official title, the AP Bill sought to further "the reintegration of members of armed groups who effectively contribute to national peace".[45] The Statement of Motives accompanying the AP Bill provides further illustrations of rationale underlying the transitional justice compromise proposed by the government. In it, the government, represented by the Minister of Justice, wrote the following:

> "The long confrontation which bleeds dry the country and cuts short the lives of thousands of fellow citizens each year, demands at this moment a genuine determination to design legal mechanisms which will help to close the door on the horrors inherent in war, underlying a horizon which allows for the laying down of weapons by those holding them. When a peace accord does not offer to those accused of committing grave crimes the possibility to contribute their efforts to the achievement of national peace, those who have committed them will not hand in their weapons and will persist in their military campaigns, sure to include new and brutal violations of International Humanitarian Law, leaving Colombians trapped in an apparently insolvable contradiction: in order to achieve full justice we must pursue war without bounds, to defeat all enemies of democracy and bring them to justice, or we must explore audacious formulas which do not set peace against justice, formulas which allow us to overcome a thin conception of justice centered in punishment for the guilty and to access

44 Interview 2.
45 Proyecto Ley 85 de 2003 (Senado), Gaceta del Congreso 436, 27-08-2003.

> a new concept of justice which allows us to effectively overcome bloodshed and cruelty with the purpose of reinstating in full the conditions for peaceful coexistence. Formulas which permit reaching peace by reorienting the meaning of justice and the function of its application towards the strengthening of democracy."[46]

Concretely, the AP Bill proposed a considerable extension of the already broad amnesty provided for by Decree 128 of 2003. Whereas the pre-existing framework did not allow for amnesties or pardons to be granted to for 'atrocious' crimes, the AP Bill provided for the suspension of prison sentences (Article 2 AP Bill) and imposition of alternative forms of punishment (Article 11 AP Bill) for those found guilty of such crimes. Moreover, the AP Bill seemed to confirm suspicions that the negotiating parties would try to suppress any information relating to the context of the paramilitaries crimes, by allowing paramilitaries accused of committing serious crimes to seek a '*sentencia anticipada*' (plea bargain). Critics noted that such a procedure would effectively cut short the investigations conducted by the Prosecutor's Office, allowing the paramilitaries, through their testimony, to determine the record of their own crimes.[47] In the words of one respondent:

> "This is something that nowadays people don't know about and, magically, they have it in their head that the Justice and Peace Law was the proposal that the Uribe government presented to Congress and that Uribe managed to achieve in order to legalize the paramilitaries. When in reality this isn't true! Uribe's proposal was: "they all go home, they all go to Congress" [i.e. amnesty and political participation, HB]. And they lost, they had to negotiate."[48]

The presentation of the AP Bill to Congress marked the shift from the discretion which had characterized the exploratory phase of the negotiations, where the government and the paramilitaries had full control over the situation, to a more open and diverse process.[49] Here, it became clear that human rights groups' opposition to the AP Bill had not been without effect. It had alerted parliamentarians to the risk of Colombia's international isola-

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46 Idem.

47 *See for example* Gustavo Gallón, 'justicia simulada: qué pena', El Espectador 31 August 2003. This point is further elaborated in a report on the AP Bill prepared by CCJ for a conference at the Universidad Autónoma in Barcelona in February 2004, which compiles the various criticisms made against the AP Bill by CCJ in the months leading up to it. CCJ, 'Justicia simulada: una propuesta indecente', February 2004, pp. 9-12.

48 Interview 7.

49 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 153.

tion if the bill would be adopted as it was.[50] As a result, a coalition against the AP Bill in its original form was starting materialize in parliament,[51] led by Senator Rafael Pardo.[52] As the legislative term progressed, this coalition increasingly put pressure on the government to strengthen the draft and include, amongst other things, minimum (prison) sentences for paramilitaries convicted for human rights violations.[53]

Needless to say, these developments in parliament rattled the paramilitaries, who in turn pressured the government to insist on the AP Bill in its original form and threatened to withdraw their support for the demobilization process.[54] As a result of this growing polarization about the AP Bill,

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50 This risk was underscored when the Colombian High Commissioner for Peace revealed that the UN had turned down the government's requests for its support for the peace process with the paramilitaries. This risk was underscored when the Colombian High Commissioner for Peace revealed that the UN had turned down the government's requests for its support for the peace process with the paramilitaries.
Moreover, 57 members of the US Congress sent an open letter to president Uribe stating that they were deeply troubled by "continuing credible reports of persistent links between members of the Colombian security forces and paramilitary terrorist organizations" and encouraged the Senate "to ensure that an eventual peace agreement with the AUC includes accountability for human rights violations". 'Letter to President Alvaro Uribe from 57 members of Congress', available at http://www.derechos.org/nizkor/colombia/doc/uscongress1.html. The letter was drafted by Tomas Lantos, member of the United States House Committee on Foreign Affairs. *See also* '56 congresistas contra alternatividad', *El Tiempo*, 25 September 2003. According to *El Tiempo* the letter was sent two days after the Colombian Commissioner for Peace, Luis Carlos Restrepo, had given a presentation on the peace process at the Wilson Center in Washington. 'Mensaje de alerta', *El Tiempo*, 26 September 2003. While *El Tiempo* asserts that there was no connection between these two occurrences, the open letter of the delegates did mention "recent public statements made by Colombia's High Commissioner for Peace Luis Carlos Restrepo".

51 '56 congresistas contra alternatividad', *El Tiempo*, 25 September 2003. *See also* 'Condiciones a la alternatividad', *El Tiempo*, 27 September 2003.

52 'No se puede perdonar todo' (interview with senator Rafael Pardo), *El Tiempo*, 5 October 2003. Pardo was a member of the governing party, and had originally been loyal to President Uribe.

53 'Piden endurecer alternatividad', *El Tiempo*, 7 October 2003. By late April 2004, the Senate Commission responsible for the AP Bill, under the leadership of Senator Pardo, even presented an updated version of the AP Bill, renamed the 'Justice and Reparation draft', which included some serious alteration to the original text. Amongst other things, this updated version included the creation of a specialized tribunal for truth, justice and reparation, and prison sentences of 5 to 10 years for those who were found guilty of serious crimes. Compared to the original AP Bill, the updated version thus reflected a radical shift in terms of its underlying rationale: its focus was no longer exclusively on the demobilization and reintegration of the paramilitaries, but gave consideration to the rights of the victims of the war as well. *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 49. *See also* 'AUC rechazan nuevo proyecto de alternatividad penal', *El Tiempo*, 15 April 2004.

54 'AUC rechazan nuevo proyecto de alternatividad penal', *El Tiempo*, 15 April 2004. According to a statement by the AUC, "the modifications to the [AP Bill] diverge from the collective sentiment in favor of peace and only reflect the interest of some sectors, which do not represent the majority opinion".

the government eventually saw itself forced to withdraw the bill altogether and restart the process during the next legislative term.[55] What should have been a mere formality, having the AP Bill approved in order to provide the paramilitaries with the amnesty they wanted, had turned into a major political battle for the government. And one that was increasingly being fought on other people's terms.

## 3 Transitional justice outcome: the Justice and Peace Law

In the months after the withdrawal of the AP Bill the government was pressured on all sides to make haste with presenting a new proposal for a legislative framework for the demobilization and reintegration of the paramilitaries,.[56] However, different sides had different ideas of what that legislative framework should entail. As a result, it would be 8 months before parliament would be able to start discussing new proposals for a legal framework for the demobilizations of the paramilitaries.[57] The variety of viewpoints on the proper balance between victims' rights and the exigencies of the peace process was reflected in the fact that, by February 2005, no less than 9 legislative drafts on the issue had been presented to Congress by different parliamentarians, each striking a different balance.[58] As observed by the *Fundación Social*, the international standard on the right to truth, justice and reparation:

> "became the symbol which distinguished between the more permissive drafts and those which were more restrictive. For the former, these standards were almost an international obstacle to achieving peace. For the latter, these standards were the tool for avoiding impunity and achieving a reconciliation which was not just fleeting but for the long term."[59]

The parliamentary commission responsible for studying the nine legislative projects soon accumulated them into two alternative drafts: one based on the proposal presented by the Minister of the Interior of behalf of the

55 Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 49. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), p. 155.

56 Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 73-74.

57 Idem, p. 63.

58 *See* idem, pp. 103-117, describing and comparing all 9 drafts.

59 Idem, p. 117 (translation by the autor).

government [60] and one based on the proposal one presented by parliamentarians Rafael Pardo and Gina Parody. These two drafts were the only ones which were seriously debated in parliament.[61] After some heated debates in parliament, it soon became clear that the government draft enjoyed the support of the majority of parliamentarians.[62] And so, on 22 June 2005, the last day of the legislative session, Parliament adopted the government draft, with some modifications. It was subsequently approved and signed by president Uribe as Law 975 of 2005, known as the Justice and Peace Law("JPL"), on 25 July 2005.

In terms of the protection of the victims' rights to truth and justice, the JPL presents a mixed bag. One the one hand, it is undeniable that the guarantees it provides in this area are much more robust than those originally contained in the AP Bill. For one, victims' rights are recognized throughout the law as an important aspect of the process established by the law. In this context, article 4 of the JPL provides that:

> "The process of national reconciliation to which this law will give rise should promote, in any case, the right of the victims to truth, justice and reparation and respect the right to a fair trial and judicial guarantees of the accused."

The victims' rights are further defined and explained in Articles 6 – 8 of the JPL. With regard to the right to justice, Article 6 recognizes that "the State has the obligation to carry out an effective investigation which leads to the identification, capture and sanctioning of the persons responsible for the crimes committed by the illegal armed groups […]".

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60 In fact, this proposal reflected a blend of the draft introduced by the Minister of the Interior with the draft introduced by Armando Benedetti, a parliamentarian allied with the government. In the interest of clarity, in cooperation with Luis Carlos Restrepo, the High Commissioner for Peace. *See* idem, p. 137. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), pp 160-162. As Gómez Sanchez explains, there had been a divide within the government concerning the Justice and Peace Law, resulting in the presentation of two (slightly) different drafts. The blending of these two drafts therefore represents the reconciliation between these different government positions.

61 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 137-141. *See also* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis May 2011), pp. 160-162.

62 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 155-156 and 173. The tensions in the debate about the JPL are illustrated, for example, by the fact that parliamentarian Gustavo Petro, a member of the opposition, accused Uribe's brother of being linked to paramilitary groups and suggested that this could explain the government's reluctance to seriously investigate these groups. During the same debate, Gina Parody saw herself forced to withdraw from the plenary session after receiving abuse from the High Commissioner for Peace and a large groups of parliamentarians loyal to president Uribe (who belonged to the same party as Gina Parody). 'Gina abandonó el recinto por rechifla de los Uribistas', *El Tiempo*, 22 June 2005.

Likewise, the alternative punishment of 5 to 8 years imprisonment is granted, according to Article 3 of the JPL, as a benefit "in return for [the accused's] contribution to achieving national peace, his collaboration with justice, reparation to the victims and his adequate resocialization", rather than as a result of simply laying down his weapons, as the AP Bill had done. On top of that, the alternative punishment, as conceptualized in the JPL, is truly alternative in the sense that it is imposed alongside the 'original' or ordinary punishment, which can be as high as 40 years imprisonment. This imposition of the original punishment has an important communicative function, but also a practical one, as the application of the alternative punishment is made conditional on the convict's conformity with certain standards, like the non-repetition of the crimes for which he was convicted (Article 29).

However, the JPL lacked the necessary concrete mechanisms for ensuring the protection of these rights.[63] Specifically, it did not ensure in any way that the accused, in return for the generous benefits offered in the form of alternative punishment, would in fact cooperate fully with the investigators through their full and accurate confessions. In this context, Article 17 of the JPL only stipulated that paramilitaries who wished to benefit from the law should provide a *versión libre* (testimony) to the Prosecutor's Office, without providing for any consequences in case that testimony turns out to be false. In fact, Article 25 provided that any crimes discovered after the accused had been convicted and which had not been revealed by his testimony would also be subject to alternative punishment, and would therefore not affect the benefits received by the accused.

In short, domestic commentators have noted that the JPL contained "important statements of principle" recognizing victims' rights to truth, justice and reparation.[64] However, the JPL has simultaneously been criticized for lacking the necessary concrete mechanisms for ensuring the protection of victims' rights, especially the right to truth.[65] As the Inter-American Commission observed:

> "The adopted bill concentrates upon the mechanisms to establish individual criminal responsibility in individual cases and involves demobilized members of illegal armed groups receiving procedural benefits. However, its provisions fail to establish incentives for a full confession of the truth as to their responsibility in exchange for the generous judicial benefits received. Consequently, the

63 R. Uprimny Yepes and M.P. Saffon Sanín, '¿Al fin, ley de justicia y paz? La Ley 975 de 2006 tras el fallo de la Corte Constitucional', in: R. Uprimny Yepes, M.P. Saffon Sanón, C. Botero Moreno and E. Restrepo Saldarriaga, *¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia* (DeJusticia, 2006), p. 202.

64 Idem.

65 Idem.

> established mechanism does not guarantee that the crimes perpetrated will be duly clarified, and therefore in many cases the facts may not be revealed and the perpetrators will remain unpunished."[66]

While the JPL thus represented a step forward from the AP Bill, and in that respect an important victory for the civil society groups who had campaigned against the latter, they were not yet satisfied with the result. In the eyes of those who had been critical of the process all along, the lack of incentives for the beneficiaries of the law to give a full account of their crimes and of the context in which they were committed formed the Achilles heel of the JPL and confirmed their long standing suspicions that the Uribe government was trying to keep the whole truth of the paramilitary phenomenon from coming out.[67] As a result of these concerns and on the basis of their close monitoring of the entire legislative process, some NGOs – including most notably the Colombian Commission of Jurists – decided to challenge the legality of the JPL before the Colombian Constitutional Court.[68]

The Constitutional Court, in a landmark judgment, decided that, while the JPL as a whole was not unconstitutional, some of its individual provisions did violate the constitutional rights of the victims of the armed conflict and should therefore be annulled. For certain other provisions it provided important interpretative guidelines, which were also aimed at the effective protection of the rights of victims. In short, this judgment, which will be discussed in more detail below in section 5.2.2. of this chapter, addressed civil society's most fundamental objections to the Justice and Peace Law.

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66 IACmHR, 'IACHR issues statement regarding the adoption of the 'Law of Justice and Peace' in Colombia, Press Release No. 26/05, 15 July 2005. Interestingly, the head of OAS' monitoring mission in Colombia, MAPP-OEA, chose to lend his support to the JPL, leading to the awkward situation of a disagreement between two MAPP-OEA and its human rights advisor, the IACmHR, on the JPL.

67 Human Rights Watch, for example, criticized the "glaring shortcomings" in the JPL in the form of its failure "to establish effective mechanisms to ensure the dismantling of these powerful, mafia-like groups" and to provide incentives for the confession or disclosure of their crimes. Other criticisms presented against the truth and justice elements established by the JPL concerned: 1.) the strict time-limits set for the investigation of the crimes committed by the paramilitaries and the formulation of charges against them; and 2.) the length of the alternative prison sentences, which many considered to be completely disproportionate in relation to the seriousness of the crimes committed by the paramilitaries. *See* HRW, 'Colombia: Sweden and the Netherlands should withdraw support for OAS mission', 22 June 2005, available at < https://www.hrw.org/news/2005/06/22/colombia-sweden-and-netherlands-should-withdraw-support-oas-mission-0>. With regard to the latter, it should be noted that the JPL allowed for the length of the alternative sentences to be shortened further by subtracting the time spent in the special 'demobilization zones' from the alternative sentence imposed (Article 31 JPL), while the circumstances in these zones were not at all comparable to the circumstances in a prison.

68 Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 165.

## 4 Inter-American contributions to the transitional justice framework: direct interactions

Throughout the paramilitary demobilization process, the organ of the Inter-American human rights system have sought – and found – ways to interact with the actors in that process and make known its position on the transitional justice issues at play. It first did so in the eight months hiatus between the withdrawal of the AP Bill and the introduction of the new, revised transitional justice proposals to parliament. During this critical time, while the government tried to arrive at a consensus with parliament regarding the proper balance between the interest of peace and the rights of victims to truth, justice and reparation, the Inter-American human rights system 'reached out' to the parties involved in two ways: 1.) through the IACmHR's official monitoring of the paramilitary demobilization process; and 2.) through a series of judgments delivered by the IACtHR concerning the paramilitary phenomenon in Colombia.

### 4.1 The Inter-American Commission's monitoring of the negotiations

In January 2004, the Organization of American States ("OAS"), of which the Inter-American human rights system forms part, had signed an agreement with the Uribe government to monitor the peace negotiations and the ongoing demobilization of the paramilitary groups.[69] As such, the OAS was expected to stay neutral in all political debates surrounding the demobilization process,[70] leaving human rights organizations worried that its presence would serve merely to legitimize the process, without any consideration for the human rights issues at play. However, after considerable pressure from human rights groups,[71] the General Assembly of the OAS, when ratifying the monitoring mission decided to include the Inter-American Commission on Human Rights in it.[72] Its role would be to advise the head of the monitoring mission on issues of human rights relating to the process. And while this is not, in itself, a strong mandate, it did provide the IACmHR the opportunity to undertake its own monitoring effort, aimed specifically at the issue of impunity and victims' rights.

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69 'OEA: verificación no da espera', *El Tiempo*, 27 January 2004. The agreement was concluded under the leadership of César Gaviria, then Secretary General of the OAS and former president of Colombia (1990-1994).

70 As Sergio Caramagna, head of the OAS monitoring mission in Colombia, said in an interview with *El Tiempo*: "There has to be a balance between the political and social decision to achieve peace and the dose of justice that Colombians deserve. What this dose should be is for you to decide. If we were to come from the outside telling you what price must be paid, we would be committing a grave error. […] We will not express opinions about legal issues and political decisions." 'OEA tendrá silla en la mesa', *El Tiempo*, 15 March 2004.

71 'Dura carta de HRW a la OEA por asumir rol en proceso con paras', *El Tiempo*, 4 February 2004.

72 'Verificación incluirá a DD.HH.', *El Tiempo*, 7 February 2004.

From the beginning, the IACmHR made clear where it stood with regard to the issue of the amnesties proposed by the government in the AP Bill. During her first visit to Colombia, in August 2004, the IACmHR's observer for the peace process said in an interview with *El Tiempo* that:

> "No-one wants impunity. The [IACmHR] has come here insisting that all crimes against human rights will be duly investigated and punished. So the function of the Commission is to ensure that the process functions, but not against any price."[73]

With regard to the position of the victims in the negotiations, she added that:

> "The victims are a central element. We cannot have only the state actors and the AUC at the table. What happens with the victims of these massacres, of the displacements, of the kidnappings, of the executions which have occurred… The Commission's reports will put the emphasis on this theme."[74]

True to her word, the reports and communications which came out of the Inter-American Commission would consistently focus on the rights of the victims of the Colombian conflict and remind the government of its international obligation to provide justice for the crimes committed against them.[75]

### 4.2 IACtHR judgments concerning the paramilitary phenomenon

Pressure on the government to abstain from granting amnesties to the paramilitaries emanated not only from the Inter-American Commission. On 5 July 2004 the Inter-American Court delivered its judgment in the case of the *19 Tradesmen v. Colombia*, marking the beginning of a series of six judgments dealing with crimes committed by the paramilitaries and the responsibility of the Colombian state for such crimes. Of these six judgments, four were delivered between July 2004 and July 2006,[76] a timeframe which corresponds roughly to the period in which the legal framework for the demobilization of the paramilitary groups was being designed and debated domestically.

The timing of these judgments vis-à-vis the domestic developments seems to suggest a conscious effort by the organs of the Inter-American human rights system to influence domestic debates about the legal frame-

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73 'Sin las víctimas es imposible un proceso', *El Tiempo*, 3 August 2004.

74 'Idem.

75 These reports and communications are compiled in: IACHR, 'Inter-American Commission on Human Rights follow-up on the demobilization process of the AUC in Colombia – digest of published documents (2004 – 2007)', OEA/Ser.L/V/IICIDH/INF.2/07. Some of these reports and communications will be further discussed below.

76 Apart from the *19 Tradesmen* these were: *Mapiripán massacre v. Colombia* (15 September 2005), *Pueblo Bello massacre v. Colombia* (31 January 2006) and *Ituango massacres v. Colombia* (1 July 2006). The other two judgments, *La Rochela massacre v. Colombia* and *Valle Jaramillo and others v. Colombia*, were delivered shortly after the definitive adoption of the Justice and Peace Law, on 11 May 2007 and 27 November 2008 respectively.

work for the demobilization of the paramilitary groups and the possibility of granting amnesties. Of course, the IACtHR does not itself decide when to take on a case, but is dependent on the Inter-American Commission to submit cases for its consideration. In this context, it is important to point out that in four out of these six cases, the decision to send the case to the Court had been made by the Commission between September 2003, shortly after the government had introduced the AP Bill, and 10 March 2006, shortly before the Constitutional Court decided on the constitutionality of the Justice and Peace Law.[77] Moreover, it should be noted that the Inter-American Commission was certainly aware of the legislative process which was taking place in Colombia, given its role in the OAS' monitoring of the demobilization process. It therefore seems plausible that the IACmHR understood the urgency of submitting the paramilitary massacre cases to the IACtHR at the particular time,[78] and that the IACtHR understood the particular context in which its judgments would be received.

The *19 Tradesmen* judgment was remarkable for a number of reasons: firstly, it was the first judgment to discuss the ties between the paramilitary groups and state forces, as a result of which the state was held responsible for crimes committed by the former, and it ordered the state to pay large sums in reparations to the victims of those crimes. Secondly, it discussed in detail the lack of a proper judicial response to the crimes committed by the paramilitaries and the questionable role played by the military courts in ensuring that the senior military officers accused of being involved in the crimes escaped prosecution and punishment.[79] In this context, the Court found that Colombia had violated the right to justice and an effective remedy of the next of kin of the disappeared tradesmen, reaffirming its established case law that victims of human rights violations have the right to access to (criminal) justice[80] and, on the flip side, reaffirmed the state's obligation to prevent and combat impunity "with all available legal means, because impunity leads to the chronic repetition of human rights violations and the total defenselessness of victims and their next of kin".[81] It also specifically reminded the state of the prohibition on amnesty laws for grave human rights violations.[82]

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77 The two exceptions are: *19 Tradesmen v. Colombia* (sent to the Court in 2001) and *Valle Jaramillo and others v. Colombia* (sent to the Court on 13 February 2007). It should also be noted that some of these cases had been under consideration by the Inter-American Commission since the late 1980s.

78 One respondent explained that the Commission, as the political organ of the Inter-American human rights system, sometimes has its own agenda for sending cases to the Inter-American Court. According to this respondent, the Commission's own estimation of which issues are particularly pressing at a given moment, combined with the pressure exerted by the petitioners and the NGOs representing them, can be more important for the decision to send a case to the Court than the formal rules on this issue. Interview 3.

79 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, paras. 47 – 55.

80 Idem, para. 188.

81 Idem, para. 175.

82 Idem, para. 263.

Given the domestic context at the time this judgment came out, with the AP Bill suspended and the government looking for a political compromise on the issue of amnesty, it came as a considerable blow. The official government response to the judgment was short and neutral, saying only that "[o]urs is a country of laws, and we have to respect the judgments of the Courts".[83] Internally, however, the reaction was less composed. As one respondent, who worked in the state agency responsible for defending the state before the Inter-American Court at the time the *19 Tradesmen* judgment came out, put it:

> "When this judgment came out, everything started to move , there was a… well… it impacted greatly on society, because of the issue of the collusion between paramilitaries and state agents, but also because of the [monetary reparations, HB]! Because it was a sentence of eight million dollars in compensation alone. So [the response was, HB]: 'Who is this Court? What happened? Since when do they decide guilt or innocence and, on top of that, condemn us to pay this money?'"[84]

The impact of the IACtHR's insistence on its prohibition of amnesty legislation on the parliamentary debates regarding the Justice and Peace Law will be further discussed below in section 5.1.3 of this chapter. Here, it should also be underscored that the IACtHR's discussion of the ties between the paramilitaries and the state, at the exact moment that these two parties were engaging in negotiations, put the government in an uncomfortable position.

Each of the six judgments about the paramilitary phenomenon concerned particularly notorious crimes, mostly massacres, committed by various paramilitary groups involved in the negotiations with the government. For example, the judgment in the case of the *19 Tradesmen* was followed, in September 2005, by the IACtHR's judgment in the case of the *Mapiripán massacre v. Colombia*. The case concerned a massacre committed by the AUC in July 1997 in which some 49 people were brutally tortured and murdered. The massacre was carried out under the command of some of the highest paramilitary leaders in Colombia, many of whom were representing their groups in the negotiations at the time the judgment was rendered.[85] The *Ituango massacres* judgments, meanwhile, concerned a series of massacres committed by paramilitary forces in the department of Antioquia in the 1990s, when Uribe had been governor of that department.

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83 'Presidente dice que respetará fallo', *El Tiempo*, 23 July 2004.

84 Interview 1.

85 For example, both Carlos Castaño and Salvatore Mancuso were involved in the Mapiripán massacre. Castaño even spoke proudly to the press about the massacre, boasting that it "was the greatest combat activity in all the history of the self-defense groups. We had never killed 49 members of the FARC or recovered 47 rifles. [..] There will be many more Mapiripanes […]". IACtHR *Mapiripán massacre v. Colombia (merits, reparations and costs)*, 15 September 2005, para. 96.50. With regard to Salvatore Mancuso's involvement in the massacre, *see* 'Testigo de massacre señaló a Mancuso', *El Tiempo*, 23 November 2005.

Thus, the judgments about the paramilitary phenomenon rendered by the IACtHR provided considerable support for civil societies' claims of collusion between the state and the paramilitaries, casting the negotiations between these two parties in a different light. The resulting doubts about the legitimacy of these negotiations made it costly for the Uribe government to be seen to be 'soft' on the paramilitaries, for example by providing them with favorable transitional mechanisms.

## 5 Inter-American contributions to the transitional justice framework: the influence of the IACtHR's jurisprudence on the right to justice and the prohibition of amnesty.

Having sketched the negotiations with the AUC and the legislative process leading up to the adoption of the Justice and Peace Law, we can now turn to the analysis of how the Inter-American human rights system has contributed to these processes. The direct interventions of the organs of the Inter-American system have already been set out above in section 3. This section, on the other hand, will analyze how the doctrines of the IACtHR on the obligation to investigate, prosecute and punish and the prohibition of amnesty laws have been used by domestic actors in order to 1.) reframe the public debate around the adoption of transitional justice mechanisms; and 2.) correct the legal framework for transitional justice.

### 5.1 Framing the debate on transitional justice in the context of the paramilitary demobilization process

The Inter-American human rights system has made an important contribution to the victims' rights oriented discourse employed by civil society actors in the debates concerning the appropriate transitional justice measures to be applied to the demobilized members of the AUC. As discussed in the previous paragraph, this discourse was critical to the rejection of the AP Bill and the subsequent adoption of the JPL. This paragraph will show that civil society's discourse was based primarily on international human rights norms, especially those flowing from the Inter-American system and the case law of the Inter-American Court.

#### *5.1.1 Introducing the language of truth, justice and reparation*

The rationale provided by the Uribe government for the transitional justice framework proposed by the through the AP Bill had relied heavily on notions of peace and reconciliation. This official discourse has been roundly criticized by Colombian scholars, who have argued, for example, that while it used terminology taken from restorative justice theory, there was no "clear official understanding of the meaning, requirements and applicability

of that framework".[86] Some have even gone so far as to call it an "abuse" and a "manipulation" of transitional justice discourse.[87] However, at the time the AP Bill was first introduced this discourse would have been persuasive to many, as it was rooted in the Colombian experience of previous peace negotiations with various guerilla groups, which had included full amnesties for rebels willing to lay down their weapons almost as a matter of course.[88] Furthermore, peace is enshrined in Article 22 of the Colombian constitution as a right of every citizen and a legal duty on the part of the state. In referring to the need to achieve peace through forgiveness and reconciliation, the government was therefore invoking not only a moral imperative and a particular interpretation of transitional justice, but also a legal obligation of constitutional status.

In order to challenge the AP Bill successfully, civil society organizations critical of the negotiations with the paramilitaries thus had to formulate a discourse with comparably compelling moral and legal foundations. They found their answer in the language of victims' rights and the state's international legal obligation to guarantee those rights, which had been developed by international human rights bodies, and especially the Inter-American system, since the late 1980s. The negotiations with the paramilitaries would become the occasion on which civil society groups introduced their human rights-based objections to the idea of granting amnesties under pretext of 'forgive and forget' in Colombia. One respondent, a researcher at an influential Colombian human rights think tank, described the rise of this discourse, saying:

> "[I]t was in fact because of the impact which the cases before the Inter-American Court had had – around this time 19 Tradesmen and Caballero Delgado and Santana had already come out – and also all of the discussion about truth, justice and reparation, that [pressure started to build] to design a formula to take into account the rights of the victims. […] So this is where the discussion changes completely, it changes from an idea of simply […] forgive and forget to a much more robust idea in terms of victims' rights and of the guarantee of truth, justice and reparation."[89]

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86 C. Diaz, 'Challenging impunity from below: the contested ownership of transitional justice in Colombia', in: K. McEvoy and L. McGregor, *Transitional justice from below: grassroots activism and the struggle for change* (Hart Publishing Ltd., 2008), p. 201.

87 R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 177. It is worth noting that the scholars cited here and in footnote 145 all have a background in Colombian civil society and, in that capacity, had been critical of the AP Bill from the beginning.

88 *See* Gabriel Gómez Sanchez, *Between reconciliation and Justice: the struggles for reconciliation and justice in Colombia* (PhD thesis, Arizona State University, May 2011), p. 80.

89 Interview 7. In this quote, the respondent is referring to the process towards the adoption of the JPL more generally. As explained, at the time of the introduction of the AP Bill, the *19 Tradesmen* judgment had not yet been delivered. However, the *Caballero Delgado and Santana* judgment had been delivered, and so had other relevant case law against countries other than Colombia, like the *Barrios Altos* judgment against Peru.

A similar analysis was put forward by Catalina Diaz, a Colombian scholar and the current head of the Transitional Justice Office of the Colombian ministry of justice, when she wrote that "[t]he critique of the [AP Bill, HB] was framed in terms of the rights to truth, justice and reparations, and the violation of international law contained therein".[90] Likewise, the *Fundación Social* and the Colombian office of the ICTJ have summarized civil society's response to the AP Bill by saying that it had been "severely criticized by important sectors of the national and international community" because of fears that it would

> "give occasion to a great process of impunity, in which the principles of truth, justice and reparation derived of the international obligations of the Colombian State would be flagrantly violated".[91]

The language of truth, justice and reparation allowed the opposition to the AP Bill to argue that the peace process as it had been conducted thus far, with its one-sided focus on the interests of the paramilitaries, was excluding the legitimate interests of an important group not represented at the negotiation table: the victims of the armed conflict.[92] Moreover, the emphasis on the state's international obligations in the area of human rights also helped to counter some of the more aggressive rhetoric employed by the paramilitary commanders. The paramilitaries' first instinct in responding to this victims' rights based discourse was to intimidate those opposing the AP Bill and call into question their motives for doing so. For example, in an interview with El Tiempo in early December 2003, Carlos Castaño made (thinly) veiled threats against politicians and human rights activists campaigning against the AP Bill saying:

> "[the High Commissioner for Peace] should let us talk and he should permit that opposition delegates like Petro, Navarro and the little black woman ["la negrita"] Piedad come here, and those nay-sayers from the NGOs, like Gustavo

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90 C. Diaz, 'Challenging impunity from below: the contested ownership of transitional justice in Colombia', in: K. McEvoy and L. McGregor, *Transitional justice from below: grassroots activism and the struggle for change* (Hart Publishing Ltd., 2008), p. 202.

91 *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones*, Fundación Social and ICTJ (Fundación Social, 2004), p. 1. This document is one of the most elaborate civil society responses to the AP Bill. Its drafting history, described in short in the document itself, provides an interesting insight into the coalition of domestic and international civil society groups and academics who were leading the response to the AP Bill. Idem, p. ii.

92 For example, in January 2003 the then sub-director of CCJ opened an opinion article in national newspaper *El Tiempo* on the ongoing negotiations saying "let us center the debate in the rights of the victims and in the obligation states have to ensure human rights". Carlos Rodríguez Mejía, 'Sobre las amnistías e indultos', *El Tiempo*, 14 January 2003.

> Gallón [CCJ, HB] and Alirio Uribe [CAJAR, HB]. Let all those who have doubts come so we can explain it to them."[93]

Such threats against politicians and activists campaigning against the AP Bill happened throughout the process.[94] Even in the paramilitaries' more official communications, their disdain for those campaigning for victims' rights shone through. In a joint communication issued in October 2004, several paramilitary commanders wrote:

> "We are not asking for impunity. But Colombia equally should not fall into the trap of 'humanitarian fundamentalism'. When one demands truth, justice and reparation it is necessary to put these demands into context. In effect, there is not one truth and in many cases […] it will not be possible to know it. Likewise, Justice should not be confused with vengeance, which is the spirit which one can make out in many of the 'defenders' of human rights in Colombia."[95]

Through its consistent reference to international legal standards, however, the human rights groups opposing the AP Bill sought to redirect the debate, away from their personal motivations and towards the state's international obligations. This constant reference to international human rights norms and the NGO's superior expertise on these standards, combined with their international network, made it difficult for the government, which had to be mindful of its international image, to simply brush aside their arguments by discrediting the source.

### *5.1.2 Articulating a hard core of international legal obligations*

Human rights groups opposing the AP Bill focused their lobbying efforts primarily on parliament, which would ultimately decide the fate of the bill. In their outreach to parliamentarians, the international legal obligations at

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93 'Tribunales regionales de verdad' (interview with Carlos Castaño), *El Tiempo*, 4 December 2003. This quote is part of Castaño's argument that the peace negotiations should be reopened, now that the AP Bill had encountered problems in parliament, with participation of other sectors of Colombian society. This can be interpreted in a positive light, as allowing for a more open process with participation of victims and consideration of their rights. However, the intimidating and derogatory way in which he speaks of parliamentarians from the opposition and members of civil society shows what he envisaged this 'dialogue' to be like. As the article points out, several of those mentioned here by Castaño had previously been the object of threats by the AUC. Piedad Cordoba, a politician from the Liberal Party, had even been kidnapped by them.

94 For example, in the first stages of the parliamentary discussion of the AP Bill in September, Carlos Castaño had sent a letter to the Senate advising them to vote in favor of the bill. While the Luis Carlos Restrepo, the High Commissioner for Peace, "did not consider this message by Carlos Castaño to be a threat" he did admit that "it was a mistake of the [paramilitaries] to mention the names of some of the delegates on their webpage". 'No a chantaje de Castaño', *El Tiempo*, 17 September 2003.

95 *As cited in:* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), p. 74.

stake in the debate surrounding the AP Bill played a particularly important role, as human rights groups tried to convince parliamentarians of the existence of a 'minimum but inescapable legal imperative' which would be violated if they decided to adopt the AP Bill as it was. For example, in a position paper on the AP Bill presented at a conference in Barcelona, which was attended by senator Rafael Pardo, CCJ noted that:

> "from a legal point of view, a peace negotiation which claims itself to be legitimate has to respect both national and international law. Both are required when it comes to the need to guarantee the rights to truth, justice and reparation."[96]

However, while the language of victims' right to truth, justice and reparation and the state's obligation to ensure those rights is incredibly valuable in opening up the debate and ensuring that the interests of victims are considered, it does not, in itself, dictate any clear limits to the state's freedom to find creative legal solutions in order to end an armed conflict. While it forces parliament to take the rights of victims into account in its deliberations, it does not dictate a particular outcome. In other words, it does not constitute a 'hard or non-negotiable core' of international legal obligations. For this, civil society had to rely on the interpretation the Inter-American Court had famously given to the right to justice in the Barrios Altos case against Peru, as containing a prohibition on amnesty laws.

Therefore, CCJ's position paper cited above continued from the states general obligation to guarantee the rights to truth, justice and reparation to its more specific obligations, saying:

> "the Inter-American Court has declared the incompatibility of laws granting amnesty and *punto final* for international crimes with the American Convention of Human Rights, of which Colombia is part."[97]

For this aspect of the discourse challenging the AP Bill the case law of the Inter-American Court was key, as it provided the only clear legal precedent thus far for the illegality of amnesty laws. The importance of the Inter-American Court's case law in this respect is illustrated by the testimony José Miguel Vivanco, director of Human Rights Watch Americas, delivered in the parliamentary hearings on the AP Bill organized in the spring of 2004. Vivanco confronted parliaments with the limits international law has established for the state's freedom to adopt amnesty laws, saying:

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96 G. Gallón Giraldo and C. Díaz Gómez, 'Justicia simulada: una propuesta indecente', *CCJ*, February 2004, p. 7.

97 Idem. For other examples of civil society groups employing this line of argumentation and relying directly on Inter-American case law, *See for example* Carlos Rodríguez Mejía, 'Sobre las amnistías e indultos', *El Tiempo*, 14 January 2003 and Fudación Social and ICTJ, *Ley de Alternatividad Penal y justicia transicional – documento de recomendaciones* (Fundación Social, 2004), pp. 18-21

> "[t]he international consensus on this matter is not simply a matter of good intentions, to be forgotten once a real situation arises. Countries are using international conventions and other legal instruments to eliminate or roll back amnesties or other judicial measures that grant actual or effective impunity.
>
> My full statement contains an extended appendix that lists these documents. Here, I would like to focus on one of those agreements, one of the most important ones: the American Convention on Human Rights.
>
> […] the Inter-American Court of Human Rights has established an impressive body of case rulings that require member states to prevent human rights violations. But there is more. The Convention also obligates states, among them Colombia, to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

The decisions of the Inter-American Court are not mere suggestions or opinions, but are binding and obligatory, given that the Colombian state long ago ratified the Convention and is bound by other instruments that are now part of international law."[98]

He then turned to the Barrios Altos judgment specifically, saying:

> "Here, I would like to refer to one of the most important recent cases that has had international impact. In this example, a ruling by the Interamerican [sic] system set up to protect human rights not only prevented impunity for a series of atrocities committed by a Latin state, but also directly addressed internal legislation designed to uphold impunity for serious human rights violations.
>
> […]
>
> The Court firmly rejected as illegal Peru's amnesty laws. Let me read you the relevant part of the decision. The Court found that 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.
>
> The Court continues. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based

98 'Human Rights Watch testimony before the Peace Commission of the Colombian Senate' (English translation), 1 April 2004, available at <https://www.hrw.org/news/2004/04/01/human-rights-watch-testimony-peace-commission-colombian-senate>, p. 4.

> or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated."

The impact of the Inter-American Court's case law in articulating the hard core of the state's international obligations in regard to providing justice for the victims of the armed conflict was further amplified when the Court delivered its string of paramilitary massacre judgments, in the middle of the internal debate about the AP Bill and the JPL. Through this series of 6 judgments, delivered at the exact moment domestic debates about the legal framework for the demobilization of the paramilitaries were at a decisive stage, the Court was able to indirectly pressure the state to abandon the idea of granting amnesties. The judgments reminded parliamentarians of Colombia's obligations under the ACHR with regard to the investigation and prosecution of serious crimes committed by the paramilitaries. And its findings came accompanied by direct legal consequences: findings of state responsibility, orders to pay large sums of money in reparation to victims and orders to investigate and prosecute serious human rights violations.

While none of these cases directly concerned the legal framework being developed as a result of the negotiations between the Colombian government and the paramilitaries, the Court still found the opportunity to make its position on the issue known. For example, in the judgment in the case of the 19 Tradesmen, the first of this series of cases delivered in July 2004, the Court stated that:

> "[T]he State must abstain from using figures such as amnesty, provisions on prescription and the establishment of measures designed to eliminate responsibility, as well as measures intended to prevent criminal prosecution or suppress the effects of a conviction. [...]"[99]

The Court repeated and expanded on this position in its judgment in the case of the *Mapiripán massacre v. Colombia*, delivered in September 2005. When discussing the investigation and prosecution of the crimes committed by the paramilitaries as a form of non-pecuniary reparation, said the following:

> "Regarding this matter, the Court reiterates its *jurisprudence constante* that no domestic legal provision of law can impede compliance by a State with the obligation to investigate and punish those responsible for human rights violations. Specifically, the following are unacceptable: amnesty provisions, rules regarding extinguishment and establishment of exclusions of liability that seek to impede investigation and punishment of those responsible for grave human rights violations -such as those of the instant case, executions and forced disappearances."[100]

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99 IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004, para. 263.

100 IACtHR *Mapiripán massacre v. Colombia (merits, reparations and costs)*, 15 September 2005, para. 304.

Through these statements, the Inter-American Court emphasized the applicability of its existing case law to the Colombian situation. It reminded the state that the limits it had established on states' freedom to decide how to deal with past crimes were not simply abstract notions, but were to be respected by Colombia's legislative organs in the situation at hand. In other words, the paramilitary massacre cases made clear that the hard core of Colombia's international obligations in the area of justice was indeed non-negotiable, at least in the eyes of the Inter-American Court.

### *5.1.3 Presenting international law as a credible threat*

Finally, the Inter-American system has made an important contribution to civil society's discourse in opposition to the AP Bill by allowing it to present international law as a credible threat to the peace process with the paramilitaries. In this context, it would perhaps seem more logical to focus on the impact of the ICC and its preliminary investigation into the Colombian situation, which exposed Colombia to the possibility that, if it did not investigate and prosecute the paramilitaries itself, the ICC would intervene and do so in its place.[101] However, if one analyzes civil society's discourse closely, it is clear that the Inter-American system had a similar and parallel role in presenting international law as a credible threat to that of the ICC.

A clear example of a civil society actor using the Inter-American system in this way can be found in José Manuel Vivanco's testimony to parliament in the context of the hearings on the AP Bill. As discussed above, Vivanco used his testimony to confront parliamentarians with the hard core of Colombia's international obligations in the area of justice through his discussion of the Inter-American Court's *Barrios Altos* judgment. He then went on to describe the effects this judgment had had on the Peruvian amnesty law, and its possible implications for Colombia, in the following way:

> "Significantly, Peru accepted this ruling not only in the Barrios Altos case, but for all cases shelved because of the amnesty decrees. The Inter-American Court made it clear that this decision was generally applicable to other cases; judicial authorities have already responded by reopening cases, among them an indictment against former President Fujimori for his role in the Barrios Altos massacre.
>
> This example demonstrates that if Colombia implements a law guaranteeing impunity for individuals responsible for serious human rights violations, for example, for the individuals who planned and carried out the 1997 Mapiripán

101 Other authors have analyzed the influence of the ICC over the Colombian peace processes in depth. *See for example* A. Chehtman, 'The ICC and its normative impact on Colombia's legal system', DOMAC/16, October 2011, A. Chehtman, 'The impact of the ICC in Colombia: positive complementarity on trial', DOMAC/17, October 2011 M. Wierda, 'The local impact of a global court – assessing the impact of the International Criminal Court in situation countries' (PhD thesis, Leiden University, 2019) and R. Urueña, 'Prosecutorial politics: the ICC's influence in Colombian peace processes, 2003-2017', (2017) 111(1) *American Journal of International Law* 104-125

> massacre, the Inter-American Court will have to, to remain consistent with its previous rulings, declare this a violation of Colombia's obligations under the American Convention. Therefore, the Court will require Colombia to punish those responsible for this atrocity. And as this country s own Constitutional Court has ruled, these international decisions are of mandatory compliance."[102]

The reference to the Colombian Constitutional Court is relevant, because it demonstrates to the parliamentarians to which his testimony was addressed that domestic judicial institutions would be willing and able to implement an Inter-American judgment annulling a possible Colombian amnesty law.

Having thus discussed the Peruvian case, Vivanco then went on to discuss recent developments in Argentina, where Inter-American case law had served as a legal basis for annulling domestic amnesty legislation, even in the absence of a specific ruling by the Inter-American Court against the Argentinian state on the issue of amnesty.[103] He concluded his discussion of the Inter-American case law by pointing out that:

> "[w]hat is happening in Argentina and Peru should not be viewed here in Colombia as a possible, though unlikely future. It is the certain future if a law granting impunity or de facto impunity for crimes against humanity is passed and implemented.
>
> As you are well aware, your own Constitutional Court ruled last year that decisions by the Inter-American Commission, the Inter-American Court, and the U.N. Human Rights Committee that reveal a glaring failure on the part of the Colombian State to fulfill its obligations to investigate in a serious and impartial way human rights and international humanitarian law violations can be used to mount legal appeals within Colombia. This is possible even when a case has resulted in an acquittal."[104]

As Vivanco's testimony shows, Inter-American case law was one of the arguments that the opposition to the AP Bill used to convince parliament that the adoption of the bill would lead to repercussions on the international level and that this, in turn, would have effects on the domestic level as well. This argument was strengthened further by the Inter-American system's direct interventions in the debate through the paramilitary massacre cases and the reporting on the peace process. These interventions made it clear that the Inter-American system was paying attention to the process and that violations of its standards would not go unnoticed.

That the watchful eye of the Inter-American system and the 'threat' posed by it was felt on the domestic level, is illustrated by *El Tiempo*'s

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102 'Human Rights Watch testimony before the Peace Commission of the Colombian Senate' (English translation), 1 April 2004, available at < https://www.hrw.org/news/2004/04/01/human-rights-watch-testimony-peace-commission-colombian-senate>, p. 8.

103 Idem.

104 Idem.

commentary to the judgments delivered by the Inter-American Court in the paramilitary massacre cases. When discussing on the Court's elaborate analysis of the many failings of the Colombian justice system in response to the disappearances in the case of the *19 Tradesmen* and the Court's emphasis on the victims' right to justice and the state's obligation to combat impunity, the newspaper noted:

> "The judgment of the Inter-American Court of Human Rights against the State for the murder of 19 tradesmen [...] reveals the fragility and ineffectiveness of our judicial system and the risks to which we are exposed in the face of an international community intolerant of the impunity on which the Colombian conflict feeds."[105]

Similarly, *El Tiempo* commented on the *Mapiripán* judgment and its significance for the peace negotiations, saying that:

> "International justice just taught the Colombian State a hard lesson by condemning it for the grave actions and omissions of members of the Armed Forces who facilitated and covered up the massacre at Mapiripán […] The sentence could not have come at a worse time for the country, with the demobilization of the paramilitaries being watched closely by the international community, which follows with equal attention the fate of the Justice and Peace Law. […]
>
> Now, by orders of the hemispheric Tribunal, the national justice system will have to correct these omissions and compensate the families of the victims. Which, if done at the very beginning, would have spared Colombia the double shame of being called out in front of the world and ordered to do justice."[106]

In short, the doctrines developed by the IACtHR have been instrumental in the development of a human rights based discourse in opposition to the 'restorative justice' discourse employed by the Uribe government. These standards have helped human rights groups to bring the rights of victims to truth, justice and reparation into the conversation around the demobilization of the paramilitaries and to emphasize the state's obligation under international law to investigate and prosecute grave human rights violations. The consistent case law of the IACtHR on these issues helped anti-impunity actors to instill the message that the Colombian state was not entirely free in its choice of transitional justice mechanisms to facilitate the demobilization of the paramilitaries, as it had committed itself to international rules limiting its freedom in this respect. Moreover, the consistent case law of the IACtHR and the impact this case law had already had in other Latin American cases, in combination with the string of judgments concerning the paramilitary phenomenon in Colombia the IACtHR rendered

105 'Una condena histórica', *El Tiempo*, 25 July 2004.

106 'Mapiripán: doble verguënza', *El Tiempo*, 13 October 2005. The Justice and Peace Law was the successor of the AP Bill, which, at the time the Mapriripán judgment was rendered, had just been approved by Parliament.

between 2005 and 2007, helped anti-impunity actors to convince Colombian lawmakers that failing to respect these international standards could have negative consequences for Colombia. In doing so, these groups have been able to fundamentally reframe the national debate on transitional justice.

## 5.2 Contributions to the normative content of the Justice and Peace Law

It follows from the previous section that the first and perhaps most important contribution of the IACtHR's case law to the Justice and Peace Law, was that it helped bring about rejection of the AP Bill. The discourse which had inspired these parliamentarians' doubts about this Draft was built, in large part, around Inter-American case law and the standards developed therein. The hesitation on the part of an important faction of parliament forced the government to repeal the AP Bill and restart the legislative process on the basis of a new draft bill. This new draft would form the basis of the JPL as it was eventually adopted by Parliament.

However, the impact of Inter-American standards on the JPL does not end with the rejection of the AP Bill. To prevent it from meeting the same fate as the AP Bill, the government's new draft had to be seen as more respectful of the international standards invoked by civil society and the international community. Furthermore, the parliamentarians who had led the parliamentary opposition to the AP Bill presented their own draft bill, which would be discussed alongside the government's draft and which presented a slightly different view on the proper balance between peace and victims' rights. This paragraph will discuss how the drafting of the JPL was farmed in terms of Inter-American standards, how this frame translated into the substance of the law adopted by parliament and, finally, how Inter-American standards influenced the Constitutional Court's adjustments to the JPL.

### *5.2.1 Contributions through parliament*

The change in paradigm which had taken place in Colombia in the year-and-a-half between the presentation of the AP Bill and the JPL draft becomes clear when one compares the exposition of motives accompanying the former to the one accompanying the new government draft. Whereas the AP Bill had not considered the interests of the victims or their right to truth, justice and reparation in any way, the new draft, while still focused primarily on achieving peace, recognized that "in recent years the demands of criminal justice impose the denial of the privilege of pardon or amnesty to those who have committed grave crimes".[107] It then proceeds to state that:

107 Exposición de motivos Proyecto Ley no. 211 de 2005, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), available at <http://www.fiscalia.gov.co/jyp/direccion-de-fiscalia-nacional-especializada-de-justicia-transicional/relatoria/normatividad-proceso-especial-de-justicia-y-paz/>, p. 22.

> "This draft is structured around the concepts of Truth, Justice and Reparation, giving special importance to the rights of victims. In this way, only after the demands of justice are satisfied in regards to truth and integral reparation to victims, can we think of conceding privileges to members of illegal armed groups who have demobilized and contributed – through their direct action – to the dismantling of these criminal organizations."[108]

Even if one considers this change in tone to be merely rhetorical, as some commentators do,[109] the fact that the government saw itself forced to adopt such discourse is still telling of just how much the landscape of transitional justice had changed in Colombia.

The alternative draft went much further still in its recognition of the victims' right to justice. According to the exposition of motives, the draft aimed to "promote national reconciliation and the Rule of Law" and therefore "is not simply about solving the legal problems of the members of [the paramilitary groups, HB]".[110] Furthermore, the exposition of motives includes an elaborate list of the international norms which should be taken into account in designing an appropriate legal framework for the demobilization of the paramilitaries including, but not limited to, those from the Inter-American human rights system. With regard to the victims' right to justice in particular, it says the following:

> "In the area of justice, the State has the obligation to pursue, investigate, prosecute, punish and ensure the adequate execution of the punishment of persons accused of committing grave violations of human rights or International Humanitarian Law. In effect, even if national and international law allow broad amnesties or pardons for those who have committed political crimes or minor infractions of IHRL and IHL, the fact is that for those who have committed or ordered atrocious crimes there should exist judicial processes, full investigations and adequate sanctions. Such was decided by the Inter-American Court of Human Rights in its judgment in the case of the 19 tradesmen vs. Colombia. As the Inter-American Court of Human Rights has reiterated, the obligation to investigate supposes the existence of an adequate and integral investigation which, in a reasonable time […], achieves the reconstruction of the criminal phenomena under investigation and the satisfaction of the right of the victims and of society as a whole to know the truth of what happened."[111]

The substance of the two new drafts also shows the impact of the introduction of the discourse of victims' rights and the state's obligation to investigate, prosecute and punish. Both drafts provided for the investigation and prosecution of serious human rights violations committed by the

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108 Idem, pp. 22-23

109 *See for example* R. Uprimny and M.P. Saffon, 'Usos y abusos de la justicia transicional en Colombia', (2008) 4 *Anuario de Derechos Humanos* 165-195, p. 177.

110 Exposición de motivos Proyecto Ley no. 208 de 2005, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), p. 3.

111 Idem, pp. 4-5.

paramilitaries through specialized chambers within the existing judicial institutions.[112] And while both drafts provided for alternative punishment for paramilitaries convicted by these specialized chambers, the alternative punishments consisted of reduced prison sentences of 5 to 8 years, rather than community service.

The main difference between the two drafts was to be found in what they demand of the paramilitaries in return for the privilege of being granted this alternative punishment. The Pardo-Parody proposal required that those wishing to benefit from these mechanisms would make a full confession of their crimes and lend their full cooperation to the investigations. It also provided that the privilege of alternative punishment could be taken away in case it turned out that the person in question had provided false information to the investigators.[113] In short, this proposal included strong incentives for truth-telling. The government proposal, on the other hand, included no such incentives.[114]

Between February and June 2005 both drafts were debated in parliament. These discussions were partially framed in terms of the state's international obligations in the area of human rights and the obligation to investigate grave human right violations. A very explicit expression of the increasing recognition of these international standards in parliament was given by Gina Parody when defending her draft during one of the parliamentary debates on 22 April 2005. She argued:

> "During this debate I have heard above all two arguments. […] The second argument which I have repeatedly heard, is that peace processes previous to this one have succeeded, and that this was in large part because pardon and amnesty were granted and that this will be the first process where justice will be applied, as if applying justice were a sacrifice that society would have to make rather than an obligation of the State in the face of those who have committed crimes against humanity.
>
> Both arguments are partially false. […] the second [is false] because, even if this is the first process in which justice will be applied, this is not a sacrifice of society, it is an obligation of the Colombian State, which for a long time has been signing international treaties which oblige us to apply justice in those cases and against those persons who have committed crimes against humanity, which is the case with the members of these illegal armed groups.
>
> This indicates that we in Colombia have ceded sovereignty […] for example to the Inter-American Court of Human Rights as of 1985 and this Court can […] repeal laws, which has just happened in Peru in the case of Barrios Altos, and it can demand that the Colombian State reopens the investigations. We have also ceded sovereignty to the International Criminal Court, which is more recent and which we all know.

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112 *See* Fundación Social, *Trámite de la Ley de Justicia y Paz – elementos para el control ciudadano al ejercicio del poder político* (Bogotá, 2006), pp. 137-141.

113 *See* idem, pp. 137-141.

114 Idem.

> […]
> So what we are doing here is not trying to comply with whatever the NGOs say, that is not what we are doing. What we are doing here is complying with International standards to which the Colombian State is bound. Complying with these standards does not mean that we are doing what the NGOs are telling us to do, which is the argument I have heard, but it is complying with the obligations of the Colombian State."[115]

This quote illustrates how international human rights law was used in the parliamentary debates, by those parliamentarians favoring the investigation and prosecution of crimes committed by the paramilitaries, to legitimize their position, emphasizing that it rested not only on civil society discourse, but on the legal obligations undertaken by the state. At the same time, it shows how the presence of international institutions such as the Inter-American Court and the ICC is used as a 'threat' to pressure the state to move in the direction of investigation and prosecution.

When it comes to the acceptance of international human rights standards and their relevance to the demobilization of the paramilitaries, a more restrictive point of view was expressed by the sponsor of the government's draft law, Mario Uribe. On 8 March 2005, during the parliamentary debates of his draft law, he said:

> "Today a much more attentive attitude is required with regard to the treatment which the most serious crimes should receive in the context of peace processes. The global consciousness requires us to put into play the so-called international norms in three basic axes: the right to know what has occurred, the right to justice and the right to reparation. The international consciousness rejects the so-called […] laws of full stop ("*punto final*") and the use of the mechanism of amnesty.
> […]
> About the theme of these International standards, mister President, we could discuss later, if necessary, what their true legal nature is, what their origin is and how they can guide us in this discussion and, down the road, in the decisions we take, to the point that the [draft] that we approve here will be in accordance with the currents of human rights law and international humanitarian law and, in general, with the solutions which are given to these problems in the [wider] world, warning that, mister President, the study that I have conducted has led to the conclusion that in these matters Colombia will have to lead the way for the international community."[116]

While not as welcoming of international standards as the sponsors of the alternative JPL Draft, this quote nevertheless illustrates the at least rhetorical acceptance by the Uribe government of the human rights standards concerning victims' rights and the fight against impunity. The sponsors

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115 G. Parody during parliamentary debates over the JPL, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), pp. 183-184.

116 M. Uribe during parliamentary debates over the JPL, as included in: *Antecedentes Ley 975 del 25 Julio 2005* (document compiled by the Colombian Prosecutor's Office), pp. 98-99.

of the government's JPL Draft recognize that international human rights standards set certain limits to the state's leeway in concluding peace agreements, and that the adoption of anything resembling a full amnesty is no longer an option. In order to preserve the largest possible flexibility for itself within these standards, the sponsors of the government's JPL Draft highlighted perceived gaps, arguing that international standards offered no clear guidance on the particular issues Colombia was facing.

Eventually, the more restrictive position embodied in the government's JPL Draft prevailed in parliament, which led to the adoption of that draft with its lack of strong incentives towards truth-telling. However, this fact does not negate the contributions made by the standards developed by the IACtHR on the state's obligation to investigate, prosecute and punish have contributed to parliament's considerations in adopting the JPL , as shown by the quotes above. Even if the language of the victims' right to truth, justice and reparation and the prohibition of amnesty was accepted instrumentally, it still represents a major shift away from the government's original proposal and the complete lack of recognition of international standards on truth and justice embodied in it. The JPL as originally adopted by parliament, for all its limitations, did provided for the possibility of investigating and prosecution of paramilitary commanders for the serious human rights violations committed under their orders.

### *5.2.2 Contributions through the Constitutional Court*

Finally, it should be noted that the normative content of the JPL as it was eventually put into practice, was not determined exclusively by Parliament. The case law of the Colombian Constitutional Court has left a significant mark on the final shape of transitional justice mechanisms adopted in the context of the Colombian peace processes of the 21st century, starting with the JPL. And the case law of the Colombia Constitutional Court, in turn, is marked considerably by the case law of the Inter-American Court on the state's obligation to investigate and prosecute and the victims' rights to truth, justice and reparation. This section explores the first steps taken by the Constitutional Court in consolidating its now consistent case law on transitional justice issues, the relevance to that case law of standards developed by the Inter-American Court and the result of that case law in shaping the normative content of the JPL.

#### *5.2.2.1 The reception of the victim's constitutional right to truth and justice*

The Constitutional Court's case law on victims' rights to truth, justice and reparation and the reception of Inter-American standards on the issue, actually started some years before the JPL was presented to the Court. In January 2003, just as the Uribe government was starting its negotiations with the paramilitary groups, the Constitutional Court delivered its deci-

sion C-004/03,[117] which concerned the precise meaning of the principle of *ne bis in idem* under the Colombian criminal code.[118] In the context of transitional justice it is relevant to note that the complainant had argued that the principle of *ne bis in idem*, as formulated in the Colombian criminal code, violated the rights of the victims in criminal proceedings to truth and justice. These rights, however, were not explicitly recognized under the Colombian constitution or criminal code. In analyzing this complaint, the Constitutional Court thus had to analyze whether victims were indeed entitled to these rights. On this issue, the Court stated the following:

> "In the last two years, and in large part taking into account the evolution of the international standards on the issue, the Court modified its doctrine on the rights of victims in criminal proceedings. In this sense, the most authoritative international doctrine and case law on human rights has concluded that the rights of victims exceed the area of compensation and include the right to truth and justice being done in their concrete case. In this respect, the judgment of 14 March 2001 of the Inter-American Court of Human Rights in the case of Barrios Altos […] is of particular importance, in which this court decided that the Peruvian amnesty laws were contrary to the [ACHR] and that the State was responsible for violating the right of the victims to know the truth and obtain justice […]"[119]

This statement was followed by an exploration of the first steps the Constitutional Court had already taken in its case law of the previous two years towards the recognition of these rights of victims. This led the Court to the conclusion that there could be "no doubt" as to the recognition and importance of victims' rights in the Colombian legal order.[120] The Constitutional Court also connected these rights of victims to the obligation on the part of the state to investigate, prosecute and punish human rights violations. In the words of the Court:

> "As is obvious, these rights of victims correspond to certain obligations of the State, since, if the victims have the right not only to be compensated but also to know what happened and that justice is done, then the State has the corresponding obligation to seriously investigate the criminal acts. The more social harm the criminal act has done, the more intense this state obligation is. For this reason, the state obligation acquires particular force en cases of violations of human rights. Because of this, the Inter-American Court has noted – and this Constitutional Court shares its reasoning ["con criterios que esta Corte prohíja"] – that persons affected by acts which violate human rights have the right that the State

117 Constitutional Court of Colombia, Sentence C-004/03 of 20 January 2003.
118 For a discussion of the implications of this important decision for criminal procedure, *see infra* Chapter 7, Section 4.2.
119 Constitutional Court of Colombia, Sentence C-004/03 of 20 January 2003, p. 22.
120 Idem, p. 24.

> investigates these acts, punishes those responsible and reestablishes, as much as possible, their rights."[121]

In short, by January 2003 the Constitutional Court had accepted both the victims' right to truth and justice and the state's obligation to investigate, prosecute and punish human rights violations, as norms of constitutional rank. This determination rested completely on the case law of the Inter-American Court, which was considered as authoritative within the Colombian legal order through the doctrine of the Constitutional Block.

#### *5.2.2.2 Constitutionality of the Justice and Peace Law*

Thus, by the time the JPL was adopted and CCJ presented its complaint against it to the Constitutional Court,[122] CCJ was able to build its legal argumentation around their assertion that the transitional justice compromise achieved in the JPL represented a violation of a norm of constitutional status. One respondent, a lawyer working with CCJ, described the central arguments underlying his organization's complaint against the JPL and their basis in international human rights standards in the following way:

> "So, against this background of a law [the JPL, HB] which was adverse, let's say, to the interests of victims, we presented a legal action of unconstitutionality, a complaint. […] There were about 48 provisions in [the JPL], where, basically, the central argument was that the law, as a whole, was not directed at guaranteeing neither truth, nor justice, nor reparation. And for this, our main instruments were international human rights standards. I will address the instruments we used most: the Joinet principles to combat impunity of the United Nations and then the different judgments [of the Inter-American Court; HB] for different themes. For example, the judgment of the 19 Tradesmen helped us to argue the whole issue of the state's international obligation to investigate, prosecute and punish violations of human rights and to say basically… what it told us is that these investigations should be serious […] . And we used this standard to address […] the whole issue of amnesty which we had found. For us, [we regarded the JPL as] a veiled amnesty or pardon, and because of this for example the standard from Barrios Altos helped us very much to construct this argument. […]
>
> So we presented our complaint. Like I said, I believe that around 70 or 60% of the arguments contained in the complaint […] were taken from international standards, and most of all Inter-American standards, on truth, justice and reparation."[123]

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121 Idem, p. 24. The Constitutional Court refers to the Inter-American Court's judgment in the case of *Velásquez Rodríguez v. Honduras*, from which it proceeds to cite at length.

122 In fact, CCJ was only one of several NGOs which decided to challenge the legality of the JPL before the Colombian Constitutional Court. However, in the interest of clarity and brevity, this text will limit itself to CCJ's complaint, resulting in the Constitutional Court's sentence C-370/06, which is generally considered to be the most important judgment concerning the JPL.

123 Interview 2.

Indeed, in its decision on CCJ's complaint, issued on 18 May 2006, the Constitutional Court described the tensions underlying the JPL as a "conflict between different constitutional rights", being the right to peace and the victims' rights to truth and justice.[124] In establishing the constitutional status of the right to peace, the Constitutional Court could rely directly on the Constitution which, in Article 22, explicitly recognizes the right to peace as "a right and a binding obligation [of the State]". However, for establishing the constitutional status and the scope of the right to truth and justice, the Court again relied on international law and on its own previous case law.[125] Most prominently, the Constitutional Court's exploration of the rights to truth and justice includes a 22-page summary of the case law of the IACtHR on the matter.[126] With regard to the legal relevance of the Inter-American Court's case law, the Constitutional Court stated:

> "The Court particularly emphasizes that the above conclusions come from the Judgments of an International Tribunal whose competence has been accepted by Colombia. Article 93 [the *Bloque de Constitucionalidad*, HB] prescribes that the rights and obligations laid down this Constitution are interpreted in conformity with the international treaties on human rights ratified by Colombia. Now then, if an international treaty that is binding on Colombia and refers to rights and obligations enshrined in the Constitution provides for the existence of an organ authorized to interpret it, such as is the case for example with the Inter-American Court of Human Rights, created by the American Convention on Human Rights, its case law is relevant for the interpretation of those rights in de internal order."[127]

Having thus recognized the victim's right to truth and justice as a constitutional right, the Constitutional Court then goes on to determine whether the JPL represents an accurate balance between the different constitutional rights at play. Judgment C-370/06 addresses CCJ's central arguments against the JPL, namely: 1.) that it creates a "system of impunity" because its various provisions taken together constitute a "veiled pardon" or amnesty;[128] and 2.) more concretely, that the lack of effective mechanisms ensuring full cooperation and full confessions by the paramilitaries in return for the benefit of alternative punishment constituted a violation of the victims' rights to truth and justice.[129] While these were not the only arguments presented by CCJ and discussed by the Court, this text will, in the interest of clarity and brevity, limit itself to these two.

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124 Constitutional Court of Colombia, Sentence C-370/06 of 18 May 2006, para. VI.5.3 - VI.5.4.

125 Idem, para. VI.4.3 – VI.4.9. Apart from the Inter-American Court's case law, other sources of international law recognizing the victims' right to truth and justice discussed by the Constitutional Court are the reports issued on the issue by the Inter-American Commission and the Joinet Principles of the United Nations.

126 Idem, para. VI.4.4 – VI.4.6.

127 Idem, para. VI.4.6.

128 Idem, para. 1.2.1.1 - 1.2.1.9.

129 Idem, para. 1.2.1.4 and 1.2.5.

With regard to the complainant's argument that the law in its totality represented a veiled amnesty or pardon, the Constitutional Court is short and clear: it observes that the JPL neither provides for the termination of the legal proceedings as such, nor for the dismissal of the punishment for the crimes committed by the paramilitaries.[130] As a result, according to the Constitutional Court, the law does not provide its beneficiaries with an amnesty or pardon and it does not establish a system of impunity.

Rather than a veiled amnesty or pardon, the Constitutional Court considers the judicial mechanisms created by the JPL to represent a "conflict between different constitutional rights", as described in the previous paragraph.[131] The Constitutional Court, therefore, goes on to consider whether the legislator, in designing the judicial mechanisms in the JPL, adequately balanced these rights against the right to peace recognized in Article 22 of the Constitution.[132] The Court notes that the freedom the legislator enjoys in performing this balancing exercise, while considerable, is not absolute. Rather, it is subject to the limits set by constitutional and international law.[133] Concretely, the legislator should take care that none of the rights in question are disproportionally affected and that their "essential core" is respected at all times.[134] In the words of the Court:

> "[I]n a constitutional state like Colombia, the minimum protection of this structure of rights cannot be disregarded under any circumstance. In other words, the public powers are not authorized to disregard these rights in name of another legal good or constitutional value, since these form the limit to the creative powers of Congress, to the administration by the government and to judicial interpretation."[135]

This is no different in a situation, like the one at hand, where the law in question is the result of a process of negotiation to end an armed conflict. Although the Constitutional Court recognizes that such a transitional context carries with it an inherent tension between the right to peace and the victims' rights to truth and justice,[136] it notes that even negotiation processes should "respect certain minimum norms" and that "these minimum norms, recognized […] in international provisions which have freely and sovereignly been incorporated into domestic law, bind the state to comply with a series of inalienable obligations related to the satisfaction of the rights of victims of human rights violations".[137]

On the basis of this analysis, the Constitutional Court eventually came

130 Idem, para. VI.3.3.3.
131 Idem, para. VI.5.3 - VI.5.4.
132 Idem, para. VI.5.4 – VI.5.5.
133 Idem, para. VI.4.2.5 and VI.5.2.
134 Idem, para. VI.5.14 – VI.5.15.
135 Idem, para. VI.6.2.2.1.7.11.
136 Idem, para. VI.4.2.5.
137 Idem, para. VI.6.2.2.1.7.3.

to the conclusion that the lack of mechanisms ensuring the paramilitaries' full confessions and their full cooperation in establishing the truth of their crimes in exchange for the application of alternative punishment, violates the essential core of the victims' rights to truth and justice.[138] In particular, the fact that covering up and even providing false information about their crimes and the circumstances under which they were committed did not affect the benefits enjoyed by the paramilitaries under the JPL disproportionally affects victims' rights.[139] In the words of the Constitutional Court:

> "[I]n accordance with the provisions of the *Bloque de Constitucionalidad*, secrecy, silence or lies about the crimes committed cannot be the basis for a process of negotiation which meets the Constitution. However, a genuine and reliable account of the facts, accompanied by serious and exhaustive investigations and the recognition of the dignity of the victims can be the basis of a process of negotiation in which it is even accepted constitutionally to waive the imposition or full application of the punishment established by ordinary criminal law, including for crimes considered to be of the highest gravity by all humankind."[140]

As a result, the Constitutional Court has made some important adjustments to the JPL by: 1.) interpreting Article 17 of the JPL to mean that the free testimony given by those seeking the benefits provided by the JPL should be a "full and truthful" account of the facts; 2.) declaring the unconstitutionality of the paragraph of Article 25 JPL which provided that crimes not confessed by the paramilitaries but brought to light through subsequent investigations would also benefit from the application of alternative punishments; and 3.) interpreting Article 29 JPL to mean that the application of the alternative punishment would be revoked in case subsequent investigations would reveal that a person enjoying benefits under the JPL had, in his free testimony, remained silent about his participation in crimes committed by his organization.[141]

In short, international human rights norms, especially those developed through the case law of the Inter-American Court, have had an important normative impact on the transitional justice compromise laid down in the Justice and Peace Law. Firstly, these norms were an important consideration underlying the rejection of the government's original proposal, the AP Bill, by parliament. Secondly, these norms shaped the government's new draft for the JPL and the discussions about this draft in parliament, which resulted in the adoption of a law which recognizes victims' rights and the state's obligation to investigate, prosecute and punish human rights violations in principle. Thirdly, these norms formed the legal basis for the

138 Idem, para. VI.6.2.2.1.7.14 – VI.6.2.2.1.7.24.
139 Idem, para. VI.6.2.2.1.7.15.
140 Idem, para. VI.6.2.2.1.7.11.
141 Idem, para. VI.6.2.2.1.7.25 – VI.6.2.2.1.7.27.

Constitutional Court's recognition of the victim's right to truth and justice as a constitutional right and, consequently, for the adjustments made to the JPL by the Constitutional Court in order to include effective mechanisms for the protection of these rights.

## 6 The peace process with the FARC (2011 – 2016): actors and process

Some years after the process towards the demobilization of the paramilitaries had been concluded, the Colombian government entered into a second round of negotiations, which was meant to end the internal armed conflict once and for all. In 2012, the government started negotiations with the FARC-EP, Colombia's largest and oldest guerilla movement. These negotiations would eventually lead to the conclusion of a final peace accord between the two parties on 23 June 2016, thereby ending the world's longest-running armed conflict.[142]

The negotiations with the FARC-EP were made possible, amongst other things, by the fact that, after completing his second term, Uribe had to step down as President of Colombia. He was succeeded in office by his former Minister of Defense, Juan Manuel Santos. While Santos had been viewed by many as the candidate who would continue Uribe's policies, it did not take long after his installation as President for the policy-differences between Santos and his former political leader to become apparent. And these differences were particularly stark when it came to their approach to dealing with the guerrilla groups. Whereas Uribe considered the guerrilla groups simply as terrorist groups which should be eliminated by military force, Santos was open to a negotiated end to what he considered an internal armed conflict. As a result of these opposing views, Uribe quickly became Santos' main political adversary throughout the latter's two-term presidency, and the most vocal critic of the peace negotiations with the FARC-EP.[143]

The remainder of this chapter will analyze how IACtHR's standards on the obligation to investigate, prosecute and punish and the prohibition of amnesty laws have shaped the peace process between the Colombian government and the FARC-EP. To this end, the following sections 7 and 8 will first give an overview of the peace process and the actors involved, with a special focus on the direct interaction between the Inter-American system

142 While the peace accord with the FARC-EP has been treated by much of the press as bringing an end to the armed conflict, this is in fact not entirely true as the FARC-EP was not the only guerrilla movement still active in the country. However, since the FARC-EP was by far the largest guerilla group it is expected that the smaller organizations would quickly join the peace after a final peace agreement had been reached between the government and the FARC-EP. Indeed, formal peace negotiations between the government and the ELN, one of the smaller guerrilla groups still active in Colombia, started in 2016.

143 For some background on (early stages of) the rivalry between Uribe and Santos, *see* 'Santos v. Uribe', *The Economist*, 7 April 2012.

and the peace process as well as the outcome – in terms of transitional justice mechanisms – of the peace process. Then, section 9 will consider the contributions of the Inter-American system and the standards developed by it to both the peace process and its outcome.

### 6.1 The negotiating parties: the Santos government and the FARC-EP

The peace negotiations which are the focus of the remainder of this chapter were conducted between the Santos government and the high-command of the FARC-EP guerrilla movement. It was thus clear from the start that these negotiations were conducted between adversaries, looking to overcome real differences of perspective and conflicting interests in order to end the armed hostilities between them. The FARC-EP was one of the first guerrilla movements to be established in the context of the internal armed conflict and had been at war against the state since the 1960s. Santos, in his previous capacity of Minister of Defense under Uribe, had been responsible for the military attacks carried out against the FARC-EP. At the very start of his own presidency, Santos had also approved a military operation in which some of the highest commanders of the FARC-EP had been killed.[144] Moreover, Santos, a representative of an established family of the (urban) Colombian elite, personally embodied much of what the FARC-EP had been created to fight. Yet, despite these major political and personal differences, the preparations for possible future peace negotiations with the FARC-EP started almost immediately and formed the defining topic of the first years of Santos' presidency.[145]

One of the major issues requiring preparation, was that of transitional justice. The experience of the negotiations with the paramilitaries had showed the existing constitutional framework for peace negotiations and the demobilization of armed groups to be insufficient in the face of domestic and international demands for recognition of the rights of victims, including their right to justice. Meanwhile, the compromise carved out by the JPL and the Constitutional Court's case law, while more respectful of international standards, represented an *ad hoc* solution designed in response

144 'Top FARC leader 'Mono Jojoy' dead', *InSight Crime*, 1 November 2010, available at <https://www.insightcrime.org/news/analysis/top-farc-leader-mono-jojoy-dead/> , last checked: 31-07-2018.

145 While still unknown to the larger public, the Government had almost immediately started reaching out to the FARC-EP with the intent to initiate peace negotiations and end the civil war. *See* N.C. Sánchez and R. Uprimny Yepes, 'El marco jurídico para la paz: ¿Cheque en blanco o camisa de fuerza para las negociaciones de paz?', in: R. Uprimny Yepes, L.M. Sánchez Duque and N.C. Sánchez León, *Justicia para la paz – crímenes atroces, derecho a la justicia y paz negociada* (DeJusticia, 2014), p. 168, saying that "[t]ime has proven that the discussion [of the Legal Framework for Peace] was not hypothetical or based simply on the hope of a negotiated end to the conflict. It was motivated by the initial rapprochement between the national government and the FARC guerrilla group which public opinion was not aware of." (translation by the author)

to a very specific set of circumstances and it remained unclear what "the relation between the different legal instruments [is] and also […] what their contribution is to the end goal of transitional justice in Colombia […]".[146]

This lack of an integral strategy, and the resulting lack of clarity about the status of the justice mechanisms to come out of possible future negotiations, were feared to have a chilling effect on the guerrillas' willingness to enter into such negotiations in the first place. As one domestic observer paraphrased the government's concerns in this respect:

> "Well, if one day a negotiation starts with the guerrillas there are two circumstances which would prevent us from starting. Because we don't have a starting point. The first is the question of: How can we guarantee a level of certainty that what is negotiated will also be complied with, if we see all that has happened […] with the paramilitaries? – the guerrilla will say: 'Ps! They let down the "paras", who were their friends, so why would they keep their word to us?!'"[147]

In this sense, the Santos government had thus learned the lesson from the peace process with the paramilitaries, who, in the government's eyes, could "claim, with reason, that the conditions on the basis of which they demobilized were not complied with and who threaten to leave the peace process as a result of the absolute lack of legal certainty".[148] The Exposition of Motives of the Legal Framework for Peace explains that:

> "[t]he only way to open the door to a future peace process which will lead to the demobilization of the guerrillas is that there exists a legal framework for transitional justice which is sufficiently solid to truly live up to the principle of legitimate expectations".[149]

Thus, before starting negotiations with the FARC-EP, the government considered it necessary to update the legislation relevant to the demobilization of armed groups and the investigation and prosecution of their members, in order to create the "true strategy of transitional justice" the country had so far lacked.[150] Of course, such a transitional justice strategy, when drawn too tight, can also exert a chilling effect on future peace negotiations. Especially since it was widely expected that the FARC-EP would demand a full amnesty in return for laying down their weapons. Therefore, the government faced the difficult task of designing a legal framework which would allow for the flexibility necessary to negotiate peace with the *guerrillas* while, at the same time, remaining respectful of international standards on

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146 Exposition of motives to the LFP Bill, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 2.

147 Interview 7.

148 Exposition of motives for the LFP Bill, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 4-5.

149 Idem, p. 4-5.

150 Idem, p. 3.

victims' rights and the obligation to investigate and prosecute human rights violations committed in the context of the armed conflict.

### 6.2 Starting point of the negotiation process: the Legal Framework for Peace

The government's first step towards squaring the circle described above was taken with the presentation of the official draft for the '*Marco Jurídico para la Paz*' (The Legal Framework for Peace – "LFP") on 13 September 2013.[151] This draft proposed an amendment to the Constitution in order to create a constitutional basis for any transitional justice mechanisms to come out of possible future peace negotiations with guerrilla groups. More specifically, the draft proposed to add a new transitory article (Article 66) to the Constitution which, in accordance with the bill's official title, "establishes legal instruments of transitional justice" and thereby gives content to the right to peace, as enshrined in Article 22 of the Constitution.[152]

The bill for the Legal Framework for Peace received considerable support from Congress and, as a result, was passed within one legislative term. In June of 2012, the Legal Framework for Peace Bill was adopted as Legislative Act 01 of 2012. The transitory article added to the Constitution through this Legislative Act reads as follows:

> "The instruments of transitional Justice shall be of an exceptional nature and shall have as their main goal to facilitate the end of the armed conflict and the establishment of a stable and lasting peace, with guarantees of non-repetition and safety for all Colombians; and they shall *establish, as much as possible, the rights of the victims to truth, justice and reparation*. A statutory law shall be able to authorize that, in the framework of a peace agreement, a differentiated treatment is given to the various illegal armed groups which have been part of the internal armed conflict and also to State agents in relation to their participation in the latter.
>
> Through a statutory law, *instruments of transitional justice of a judicial or an extrajudicial character* shall be established which will *allow guaranteeing the State's obligations to investigate and punish*. In any case, mechanisms of an extrajudicial

151 *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011. While the bill was not officially drafted by the government, the senator who initiated it, Roy Barreras, was a member of the governing party and the text of the draft had been pre-accorded by the government. It had been presented to the President in August 2011, several weeks before it was presented to Congress. 'Ley que crea marco jurídico para proceso de paz, cerca del Congreso', *El Tiempo*, 10 August 2011. When reporting on the presentation of the bill to parliament, *El Tiempo* wrote: "One of the most remarkable aspects of this bill is that, while it is not an initiative of the Government, the text was agreed on by the Government. In fact, some recommendations formulated by members of the Executive were included in the text." 'Radicado en la Cámara el Nuevo marco jurídico para la paz', *El Tiempo*, 13 September 2011.

152 *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011.

character will be applied towards the clarification of the truth and reparation for the victims.

A law should create a Truth Commission and define its object, composition, powers and functions. The mandate of the commission can include formulating recommendations for the application of the instruments of transitional justice, including the criteria of [case] selection.

Both the *standards of prioritization and of case selection* are inherent to the instruments of transitional justice. The Attorney General shall determine the criteria of prioritization for the execution of penal action. *Without prejudice to the State's general obligation to investigate and punish grave violations of Human Rights and of International Humanitarian Law* in the framework of transitional justice, the Congress of the Republic, on the initiative of the National Government, shall, by statutory law, be able to determine the criteria of selection which will allow to *center efforts in the criminal investigation of those most responsible for all crimes which have the character of crimes against humanity, genocide and war crimes committed systematically*; establish the cases, requirements and conditions from which would follow the suspension of the execution of a sentence, *alternative sentences and special modalities of execution of and compliance with sentences;* and authorize the conditional renouncement of criminal prosecution of all cases not selected. The statutory law shall take into account the gravity and representativeness of cases when determining the criteria of selection." [emphasis added]

Besides simply creating a legal basis for future transitional justice mechanisms, the content of this new transitory article established an outline for the government's preferred approach to transitional justice. On the one hand, it makes repeated reference to the victims' rights to truth justice and reparation and the state's international obligation to investigate, prosecute and punish human rights violations. At the same time, however, it includes two mechanisms which can be seen as limitations to the state's compliance with that obligation: 1.) the mechanism of case selection, which allows the state to focus its investigations and prosecutions on the individuals it considers 'most responsible' for the commission of international crimes; and 2.)

the possibility of imposing 'alternative sanctions' for crimes committed in the context of the armed conflict.[153]

The Legal Framework for Peace was thus seen as an important indication of its position going into future negotiations with the FARC-EP, which indeed started shortly after its adoption in august of 2012. In fact, it was seen by some as the government's 'opening bid' towards the FARC-EP in those negotiations. At the same time, as will be discussed in detail in Section 9.1.1 of this chapter, the government was careful to always ground its approach to transitional justice in international standards concerning the state's obligation to investigate, prosecute and punish human rights violations. As one respondent explained:

> "The Legal Framework for Peace was, partly, the government's opening bid, not negotiated with the guerrillas. […] And the bid is: "I will face the fight on the international level, because this is our interpretation of the standards. And this is already difficult. This way I will already have [CCJ] messing with me and [HRW] bothering me […] But you guys have to understand that further than this we cannot go, that we have gone as far as we can. That there has to be investigation, prosecution and punishment of those most responsible. That's the minimum. We cannot go further than this because you can see how problematic this already is.""[154]

### 6.3 Pro-accountability constituencies and the peace negotiations with the FARC-EP

As the previous quote indicates, the swift adoption of the Legal Framework for Peace should not be taken as an indication that there was no opposi-

153 The parliamentary documents related to the adoption of the Legal Framework for Peace show that the possibility of imposing alternative sanctions was not art of the original draft bill, but was introduced during the debates in parliament. It first appears in the list of changes proposed for the first Senate debate in the second round of debates concerning the LFP. *See* 'Informe de ponencia para primer debate en segunda vuelta al proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', Gaceta del Congreso (Senado y Cámara) no. 287, 30 May 2012, para. 10(e). By that time, the draft had already been the topic of several debates in both the House of Representatives and the Senate, and had already been approved in the first round of voting. However, earlier drafts did establish that "the Congress of the Republic […] can by law determine criteria for section and prioritization […], establish in which cases to proceed with the suspension of the execution of the sentence; and authorize the renunciation of criminal prosecution in cases not selected". *See* 'Informe de conciliación al Proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 de Cámara', Gaceta del Congreso no. 965, 13 December 2011. It is not entirely clear that the 'suspension of the execution of the sentence' mentioned here is equal to the possibility of imposing alternative sanctions. It could also be interpreted as a solution for cases in which a sentence is already imposed, but which would fall outside of the category of cases selected for investigation and prosecution.
The parliamentary documents do not show that the introduction of the possibility of imposing alternative punishment was the result of an extensive debate in parliament or that it was met with much opposition.

154 Interview 7.

tion against it. While the majority of parliament supported the transitional justice approach proposed by the Santos government, a vocal minority of parliamentarians loyal to Uribe did not. And neither did part of the national and international NGO community. However, in contrast to its unified rejection of Uribe's AP Bill several years earlier, the response of civil society to the Legal Framework for Peace and to Santos' transitional justice approach was marked by internal ideological division.

The divisions among civil society organizations about the Legal Framework for Peace became clear already during the drafting of the bill, as the drafters had made an effort to gain civil society's input on the draft bill and thereby to ensure their support for it.[155] One respondent, who works at a human rights organizations, described his own participation in the drafting of the Legal Framework for Peace in the following words:

> "There were discussions. There were discussions. Maybe not that extended, because [the development of the LFP, HB] was very fast, with little room for maneuver, so we did not have […] the massive consultations that we had with the Victims' Law. But I was in several meetings where they tried to open discussions and where there were receptive people, […], who tried to be pluralistic and look for an opening. Then there was [another senator involved in the drafting of the LFP Bill, HB], who mostly led the discussion and was a bit more closed. But I do believe that there was discussion and, from the beginning, opposition."[156]

As this quote indicates, the hearings had not been able to get everyone on board. Some civil society organizations did not share the drafters' interpretation of transitional justice and the requirements posed by international law. Therefore, they opposed the Legal Framework for Peace. As the respondent expressed it, when asked if the Legal Framework for Peace enjoyed the support of human right organizations:

> "Well, it had ours, it's safe to say. […] But there was a lot of backlash. The Colombian Commission of Jurists was against it, it challenged the Legal Framework for Peace in the courts. But there were also supporters within civil society. Colombian civil society is very broad. Extremely diverse. With regard to this theme, I think there are NGOs which are oriented more towards peace, the construction of peace and culture of peace and this type of thing, and other are oriented more towards justice, which are the more legalistic NGOs. There are some which lean

155 In a public hearing organized shortly after the introduction of the LFP Bill in parliament, the author of the bill, Roy Barreras, emphasized that during the drafting process several roundtables had been organized to gain the input of civil society organizations. *See* 'Informe de ponencia para primer debate al Proyecto de acto legislativo 94 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 716, 26 September 2011. Moreover, several public hearing were organized during the parliamentary debates about the bill, during which representatives of civil society organizations were invited to provide their input on the bill to the members of parliament. *See* ponencia primer debate and ponencia tercer debate, gaceta no. 901, 28/11/2011.

156 Interview 7.

> more in this direction, and others which lean more in that direction. For example, the NGOs who supported the Legal Framework for Peace are more in this direction [peace, HB], and those who opposed it are more in that direction [justice, HB]. Because of this, the petitioners [who challenged the LFP before the Constitutional Court, HB] were the Colombian Commission of Jurists, the Lawyers' Collective, the Interdenominational Commission for Justice and Peace etcetera. And others were in favor [of the LFP, HB], like the *Movimiento para la Paz*, *Paz y Reconciliación*, the *Corporación Nuevo Arco Iris*, the ICTJ. And there are others who are more in the middle. I would say we have been more in the middle."[157]

Given the political (and emotional) sensitivity of the issues involved in the debates surrounding the Legal Framework for Peace, the opposing viewpoints among civil society groups sometimes resulted in hostility and mutual accusations. The respondent described the criticisms he has received from his peers within civil society as a result of the position he has taken on the issue as follows:

> "I have learned that, here, when one tries to find a balance, you are disliked by all. There are some who call me a "humanitarian punitivist", the ones who are on this side [peace]. Because they say that, in the end, we are vindictive, we like penalty and punishment, but that we put on a humanitarian front, so that we don't feel bad about ourselves. And others call me an "architect of impunity", because in the end [they believe that, HB] what we are doing is forging impunity, creating a structure of impunity."[158]

The schism between the more justice oriented and the more peace oriented groups was not limited to Colombian civil society. The big international NGOs active in Colombia were equally divided on the LFP draft. Whereas HRW has been one of the most vocal and consistent critics of the project,[159] even going so far as publicly calling it the 'illegal framework for peace',[160] both the International Crisis Group and the ICTJ spoke out in its defense.[161]

The disagreement among such leading NGOs over the Legal Framework for Peace shows that, while not representing an international consensus, the government's approach to transitional justice is grounded in an interpretation of international legal standards which appeals to at least part of the inter-

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157 Interview 7.

158 Interview 7.

159 *See for example* 'Guerrilleros en cárceles no son presos políticos: Human Rights Watch', *El Tiempo*, 9 April 2012; 'Marco para la Paz favorece impunidad de crímenes atroces: HRW', *El Tiempo*, 2 May 2012; 'Dura respuesta de HRW al gobierno sobre Marco Jurídico para la Paz', *El Tiempo*, 8 May 2012; 'Este es un marco antijurídico para la paz' (opinion article written by José Miguel Vivanco), *El Tiempo*, 15 May 2012; 'Críticas de HRW a cambios en marco para la paz', *El Tiempo*, 1 June 2012 and 'Nuevo cambio en marco para la paz expande a la impunidad, dice HRW', *El Tiempo*, 13 June 2012.

160 'Este es un marco antijurídico para la paz' (opinion article written by José Miguel Vivanco), *El Tiempo*, 15 May 2012

161 'Marco para la Paz no viola derecho internacional', *El Tiempo*, 13 May 2012 and 'Espaldarazo internacional a marco jurídico para paz', *El Tiempo*, 12 May 2012.

national community. In other words, it laid bare pre-existing disagreements within that community over the correct balance between peace and justice. This schism would persist after the adoption of the Legal Framework for Peace and mark the opposition to the government's transitional justice approach throughout the peace process, with organizations such as CCJ and HRW leading that opposition from the human rights community. Paradoxically, these NGOs were joined in their opposition by their long-time antagonist Álvaro Uribe, who opposed the peace process with the FARC-EP on principle.[162]

## 7 The negotiations and their transitional justice outcome: the Special Jurisdiction for Peace

On 26 August 2012, shortly after parliament had adopted the Legal Framework for peace, the government and the FARC-EP signed a general agreement marking the start of a process of negotiation in order to reach a conclusion to the armed conflict between the two parties.[163] This process has been long and complicated and concerned a broad agenda of issues, including politically sensitive ones such as land reform, political participation of the FARC-EP and illegal drugs. However, out of all the issues on the agenda of the negotiators, the issue of the rights of victims, including the application of transitional measures, was generally considered to be one of the most sensitive. So much so that when President Santos announced in September 2015 that an agreement had been reached on this point, this was taken to mean that the signing of the final Peace Accords would soon follow. And indeed, on 23 June 2016, the Santos government and the high command of the FARC-EP signed the final peace accord in Havana. Given

162 One respondent jokingly described this 'coalition' as a group of 'unlikely friends'. Interview 7. In reality, HRW's and CCJ's opposition to the government's transitional justice approach was based on entirely different considerations than that of Álvaro Uribe and his political allies, as will be described in detail below in Section 9.1.2 of this chapter. In fact, a close analysis of the arguments presented by HRW and CCJ shows that important differences existed even between these two organizations in their reasons for opposing the Legal Framework for Peace and the government's transitional justice approach. This is underlined by the fact that CCJ abandoned its opposition after the publication of the Transitional Justice Agreement between the government and the FARC-EP, while HRW remained critical throughout the process.

163 'Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera', available at <https://www.mesadeconversaciones.com.co/sites/default/files/AcuerdoGeneralTerminacionConflicto.pdf> The FARC-EP is not the only armed group still active in Colombia. The other main group, the ELN was initially not part of the peace negotiations in Havana, but started its own negotiation process with the government in March of 2016, when a final agreement between the FARC-EP and the government seemed close. 'Con el ELN "serán conversaciones arduas"', *El Tiempo*, 30 March 2016. However, in the interest of clarity and brevity, this paragraph will focus on the negotiation between the government and the FARC-EP. Consequently, whenever the paragraph speaks of 'the peace negotiations' or 'the guerrillas' it should be understood to refer to the FARC-EP and the negotiations with that organization.

the focus of this study, this paragraph will limit its analysis of the negotiations between the FARC-EP and the government to the issue of victims' rights and transitional justice.

However, if the LFP was indeed an opening bid on the part of the government, it was initially firmly rejected by the guerrillas. In the first press conference in which the government and the FARC together explained their decision to enter into peace negotiations, organized in Oslo in October 2012, FARC commander Iván Márquez addressed the transitional justice framework created by the government in the following way:

> "[T]he so-called legal instruments of transitional justice, which aim to turn the victims into the victimizers, cannot be more than an insult. […] We are not the cause of but the answer to the violence of the state, which is the one who should submit itself to a legal framework so that it may answer for its atrocities and its crimes against humanity […] Those who should confess the truth and make reparations to the victims are the victimizers entrenched in the illegitimate institutions of the state. We are a belligerent force […] and we are motivated by the conviction that Peace is the way, but not the peace of the defeated, but peace with social justice."[164]

Thus, the government saw itself confronted with the difficult task of negotiating with a counterpart which was unwilling to compromise on the issue of justice, while at the same time satisfying its domestic and international critics that they were serious about preventing impunity and satisfying the victims' rights to truth, justice and reparation. An interesting measure taken by the negotiating parties to overcome the impasse caused by their competing interests in the area of transitional justice, was to appoint, in July 2015, a special commission of advisors to hammer out an agreement on the issue. This special commission consisted of 6 people, mostly lawyers, 3 of them selected by the government and 3 selected by the FARC. Crucially, however, none of them were directly related to either the government or

164 A video of Iván Márquez' intervention at the press conference is available on youtube (NTN24 channel), https://www.youtube.com/watch?v=oPXQXKhQZ7g, last checked 15/06/2016, at 26:20-28:12. It is possible that this rejection of the LFP can partly be explained not by its substance, but by the fact that it was designed unilaterally by the government. Thus, accepting this unilateral standard could have been interpreted as a sign that the FARC was 'submitting itself' to the conditions laid down by the government, an impression it was intent on avoiding. *See* interview 1, explaining the FARC's position on this topic in the following words: "[T]he FARC itself is against the Legal Framework for Peace. […] it has been against everything which has been proposed by the government, because it is unilateral. […] [T]hey want an agreement signed by them, so that it does not seem that the State is imposing it on them. […] The FARC absolutely rejects any notion that might suggest that they are being submitted to justice. And if they themselves are agreeing to certain things, well, then they are not being submitted."
In this interpretation, the initial rejection of the LFP did not so much reflect the FARC's unwillingness to accept any type of transitional measures as its (political) interest in having the transitional justice framework designed through bilateral agreement, to avoid the impression that it was accepting defeat.

the FARC and all of them had a particular expertise in international (human rights) law. It seems fair to assume that this move was intended, in part, to satisfy the international community and domestic critics that the transitional justice agreement was meant not only to serve the narrow interests of the negotiating parties, but would seriously take into account international human rights standards. As one respondent explained:

> "For this specific issue of justice, the President delegated to three lawyers, namely Juan Carlos Henao, Douglas Cassel and Manuel José Cepeda. […] These are three very good lawyers, famous in the country. And, while they are close to the government, they also have a general recognition in the academic community. And this ensures that there would be a sense of calm about who were working on this issue. […] Juan Carlos Henao is the rector of the *Universidad Externado de Colombia*. Manuel José Cepeda was a judge on the Constitutional Court for a long time […] And Douglas Cassel, on the other hand, is an academic. He did stir up some controversy, because he even sued the state [before the Inter-American Court, HB] in the case of [the Santo Domingo Massacre, HB]."[165]

The appointment by the government of such independent experts communicates the government's efforts to make sure the relevant legal norms on transitional justice are respected in the negotiation process. Likewise, the FARC appointed three legal experts who were not part of their organization. Their appointees were Álvaro Leyva, a Colombian politician from the Conservative Party with a broad experience in mediating between the Colombian government and various guerrilla groups; Enrique Santiago, a Spanish lawyer and activist who had been part of the team of lawyers who tried to bring former Chilean dictator Augusto Pinochet to trial;[166] and Diego Martínez, the director of the Colombian NGO *Comité Permanente de los Derechos Humanos*. That the FARC would leave the negotiations over an issue as sensitive as the justice scheme to which they themselves would be submitted to a group of civilians, as close as they may have been to their organization, is a significant step, as underscored by the profound wonder one respondent expressed over this fact. In his words:

> "I will never be able to explain, although others may correct me on this, but I will never be able to explain for myself how civilians who had never participated in the FARC ended up deciding the justice agreement. The requirement for the group of lawyers, the "3 and 3" […] was that they had an affinity with human rights. […] But the point is that all three are civilians! They were never under arms! Justice for the FARC ended up being decided by civilians, who were not

165 Interview 1. The controversy stirred up by Douglas Cassel is illustrated by an opinion article published in *El Tiempo*, in which a commentator likened his appointment by the State to negotiate the issue of transitional justice with the FARC to "calling on the forward player of the other team to serve as goalkeeper in ours". 'Y los del otro' (opinion article by María Isabel Rueda), *El Tiempo*, 2 August 2015.

166 *See* 'Este es el abogado español que asesora a las FARC', *El Tiempo*, 28 July 2015.

> part of [the FARC]. I will never be able to understand this. For me this is super paradoxical! And on top of that… I have been in the military, doing my military service, and I understand the natural hatred that members of the military have towards civilians. This idea that "they do not understand us!" And in the end some civilians decide on their fate? For me this is unfathomable."[167]

Even if this decision to let independent legal experts negotiate the justice agreement had been entirely strategic and aimed only to sooth the concerns of domestic and international critics, it was bound to affect the terms under which the negotiations would be carried out.

The Victims' Agreement between the Colombian government and the FARC was announced on 23 September 2015 and its content was published in full through the governments' website on 15 December of the same year. The 63-page document sets out a complicated system, called the Integral System of Truth, Justice, Reparation and Non-Repetition. The system will consist of five parts, namely 1.) a Truth Commission; 2.) a Special Unit for the Search for Disappeared Persons; 3.) the Special Jurisdiction for Peace; 4.) integral reparation measures; and 5.) guarantees of non-repetition.[168] Since a full analysis of this Integral System is beyond the scope of this study, this paragraph will focus on the Special Jurisdiction for Peace and aims to provide a general overview thereof.

Like the Legal Framework for Peace, the part of the Victims' Agreement dedicated to the Special Jurisdiction for Peace recognizes plainly and fully the right of the victims to justice and the obligation of the state to investigate, prosecute and punish. At the same time, however, it emphasizes the need to achieve peace and the state's obligations in this respect.[169] Tellingly, the discussion of the element of justice starts with a quote from the separate opinion to the *El Mozote* case of the Inter-American Court, in which the judges state that "international human rights law should consider peace to be a right and the State as obligated to achieve it".[170] The Agreement then describes the objectives of the Special Jurisdiction for Peace as:

> "satisfying the victims' right to justice, providing truth to Colombian society, protecting the rights of the victims, contributing to the achievement of a stable and lasting peace and adopting decisions which provide full legal certainty to those who have participated directly or indirectly in the internal armed conflict with respect to acts committed in that context and which constitute grave infractions of international humanitarian law and grave violations of human rights."[171]

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167 Interview 7.

168 'Acuerdo sobre las Víctimas', Joint Draft 15.12.2015, avalaibe at https://www.mesadeconversaciones.com.co/sites/default/files/borrador-conjunto-acuerdo-sobre-las-victimas-del-conflicto-1450190262.pdf, last checked 17 June 2016, pp. 6-7.

169 *See for example* Idem, pp. 24-25, paras. 17-22.

170 Idem, p. 21.

171 Idem, p. 21.

To solve the puzzle posed by the need to balance peace and justice, the Victims' Agreement proposes a system based on four basic pillars, which are 1.) an amnesty law for crimes of lesser gravity; 2.) prosecution of those responsible of crimes deemed unsuitable for amnesties; 3.) incentives for truth-telling by the accused; and 4.) the possibility of alternative sanctions. And while the Special Jurisdiction for Peace, as proposed in the agreement, shares several characteristic of both the Legal Framework for Peace and the Justice and Peace Law, it also differs from both those systems in several respects.

In short, the Victims' Agreement proposes that, once a final peace agreement is signed and the armed groups have demobilized, the state shall grant the members of these armed groups "the broadest possible" amnesty.[172] However, it also stipulates a number of crimes for which amnesties cannot be granted, namely crimes against humanity, genocide, war crimes, taking of hostages and other severe deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, abduction of minors, forced displacement and recruitment of child soldiers.[173]

All demobilized members of armed groups shall contribute to truth-finding and accept responsibility for their crimes, either collectively or individually, before a special Chamber for Recognition of Truth and Responsibility.[174] If, on the basis of this testimony or any the evidence already present in various state agencies or contributed by victims and human rights organizations, there is any indication that a particular demobilized person has participated in any of the crimes listed above, they will be tried by the Tribunal for Peace. The Tribunal for Peace will apply one of two different procedures:[175] 1.) a procedure for the cases in which the accused

172 Idem, p. 25, para. 23.
173 Idem, p. 25, para. 25 and p. 28, para. 40.
174 Idem, p. 30, para. 47.
175 Idem, p. 29, para. 45.

has already made a full confession and recognized his responsibility before the Chamber of Recognition of Truth and Responsibility; or 2.) a procedure for case in which the accused has not made a full confession to accepted his responsibility. The former may lead to the imposition of an alternative punishment of between 5 and 8 years, which will be restorative in nature and include effective restriction of liberty but not imprisonment.[176] In cases in which the accused has not made a full confession before the Chamber, but does so to the Tribunal for Peace before a judgment has been delivered, the Tribunal may impose an alternative prison sentence of between 5 and 8 years. In cases in which the accused does not make a full confession and/or denies responsibility throughout the proceedings, the Tribunal may, if the accused is found guilty, impose a prison sentence of between 15 and 20 years.[177]

Having painted the Special Jurisdiction for Peace in these very broad strokes, it is important to note that it is stricter than the Legal Framework for Peace in two ways. Firstly, the category of crimes which cannot be subjected to amnesties is broader than in the LFP. Apart from crimes against humanity and war crimes, a number of other types of crimes are exempted from amnesties as well. These types of crimes are among those most often perpetrated in the context of the Colombian armed conflict. Secondly, the Victims' Agreement does not share the LFP's focus on 'those most responsible' for serious crimes, but establishes that all those who are deemed responsible for those crimes must be investigated and prosecuted before the Tribunal for Peace, no matter their rank. Finally, it should be noted that, in contrast to the Justice and Peace Tribunals under the JPL, the Tribunal for Peace will have jurisdiction over participants on all sides of the armed conflict. Whereas much of the focus in the domestic and international press has been on the investigation and prosecution of *guerrilleros* through the Special Jurisdiction for Peace, this mechanism will also be competent to investigate and prosecute state agents accused of committing serious crimes and even civilians who have contributed in some form to the commission of such crimes.

## 8 Inter-American contributions to the FARC peace process: direct interactions

As it had done during the drafting of the JPL, the Inter-American Court made known its thoughts on the government's approach to transitional justice going into the negotiations with the FARC-EP. Since there were no

176 Idem, pp. 39-40, para. 60.
177 Idem, p. 40, para. 60.

cases in its docket that allowed it to address the issue directly,[178] it did so in a case against El Salvador and without ever mentioning Colombia explicitly. The IACtHR's judgment in the case of *The massacre of El Mozote and nearby places v. El Salvador* (hereafter: "*El Mozote*") was delivered in October 2012, some months after the adoption of the Legal Framework for Peace and the start of the official negotiations. And while the timing of this judgment may very well have been a coincidence,[179] it did profoundly impact subsequent discussions on transitional justice in Colombia.

In the case of *El Mozote*, the Court discussed an amnesty law passed by El Salvador in the early 1990s. What made this case so relevant to the discussion of the LFP in Colombia is the fact that, in the IACtHR's owns words "contrary to the cases examined previously by this Court, the instant case deal[ed] with a general amnesty law that relates to acts committed in the context of an internal armed conflict"[180] and that was adopted in the context of a negotiated transition from war to peace. In other words, the factual circumstances surrounding the adoption of the Salvadoran amnesty law were similar to those faced by Colombia.

The content of the IACtHR's judgment in the case of *El Mozote* and of the accompanying separate opinion has been discussed in depth in Chapter 3 of this study, in Sections 2.2 and 4.3 respectively. Taken together, the judgment and the separate opinion seemed to indicate a willingness on the part of the IACtHR to allow (slightly) more flexibility with regard to the investigation, prosecution and punishment of grave human rights violations in the particular context of a negotiated end to an armed conflict. In relation to the question of amnesty, the judgment held that states are prohibited from granting amnesties for any international crimes – rather than any grave human rights violations[181] – committed in the context of the armed conflict. The separate opinion, meanwhile, indicated the acceptance by the IACtHR of some of the more controversial aspects of the Legal Framework for Peace, including the possibility of alternative punishment.

Whereas the Inter-American Court thus suggested its willingness to accept a conceptual change in light of the special and complex set of circumstances facing Colombia, the Inter-American Commission has not been so

178 The Court delivered two judgments against Colombia in the roughly 2 years during which the Legal Framework for Peace was being debated and adopted in Colombia: IACtHR *Vélez Restrepo and family v. Colombia (preliminary objection, merits, reparations and costs)*, 3 September 2012 and IACtHR, *Santo Domingo massacre (preliminary objections, merits and reparations)*, 30 November 2012. However, the facts of these two cases offered the Court no starting points for addressing the LFP.

179 The case was submitted to the Court by the Commission in March 2011, months before the LFP draft was presented to parliament. *See* IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, para. 1.

180 IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, para. 284.

181 The distinction between these two concepts has been discussed above in Chapter 2, Section 4

flexible. In a country report on Colombia, published in December 2013 and titled 'Truth, Justice and Reparation', the Commission took issue with the LFP and the mechanism of case selection in particular.[182] With regard to the LFP as a whole, the Commission noted that its "approach, design, and provisions of the Legal Framework for Peace mark a conceptual change" which "provoke[s] a series of human rights concerns".[183] It objected especially to the mechanisms of case selection and the renouncement of the criminal investigation of cases not selected, which it considered to constitute and amnesty of sorts. In the Commission's words:

> "the Commission notes with concern that the Legal Framework For Peace contemplates the possibility of renouncing the investigation of the serious human rights and IHL violations not selected, which would lead to impunity. Taking into consideration that the duty to investigate and prosecute cases of serious human rights violations cannot be waived, the mechanisms for selecting and the absence of investigation of those cases would be incompatible with the obligations of the State."[184] (footnotes omitted)

The Commission drew this conclusion in spite of the objection of the state that such a finding would have "very serious implications for the peace process" and that it would go against the Inter-American Court's own findings in the case of *El Mozote*.[185] In response to this latter objection, the Commission denied the applicability of the precedent to the Colombian situation[186] and reiterated its own "*jurisprudence constante* to the effect that the state is still obligated to investigate […] the serious human rights violations committed during the armed conflict".[187] What's more, it noted that the Inter-American Court, in its interpretation of the relevant provisions of International Humanitarian Law, had relied on a report by the ICRC, of which the Commission concluded that it did not address states' obligations under human rights law.[188] In drawing these conclusions, the Commission suggested that it disagreed with the more lenient position taken by the Court in the case of *El Mozote* and the accompanying separate opinion. However, the next section

182 IACmHR, Country report Colombia – truth, Justice and reparation, OEA/Ser.L/V/II.Doc.49/13, 31 December 2013, paras. 333-356. The entire report is almost 500 pages long and discusses a wide variety of topics. The issue of the LFP is discussed in the chapter on Colombia's 'Constitutional and legal framework', in which it discusses a number of recent legal reforms, including the reforms to the JPL and the reform of military jurisdiction. However, for the purpose of this text, I will limit myself to discussing the Commission's remarks on the LFP.

183 Idem, para. 353.

184 Idem, para. 354.

185 Idem, para. 355.

186 Idem, paras. 259-273.

187 Idem, para. 273.

188 Idem, paras. 265-269.

will demonstrate that it was the Inter-American Court's position, not that of the Commission, which would end up having a profound impact on the peace process with the FARC and the domestic debates surrounding it.

## 9 Inter-American contributions to the peace process: influence of the IACtHR's case law on the right to justice and the prohibition of amnesty

### 9.1 Framing the debate on transitional justice

The dynamics of the debate surrounding the peace negotiations with the FARC and the associated transitional justice mechanisms played out rather differently than those in the debate surrounding the adoption of the JPL. The difficult and hard-fought road to the JPL had taught the new government a number of lessons, both practical and political, which it sought to apply upon entering into a new process of negotiation.

One very important lesson the government had learned from the adoption of the JPL, was that it must in any case take into account, or be seen to take into account, the rights of victims to truth, justice and reparation. Furthermore, the government had learned that a full amnesty for serious human rights violations would no longer be accepted, neither by domestic civil society nor by the international community. It should be noted that, at no time during the legislative process surrounding the LFP or the negotiations with the FARC, did the government openly question these basic limitations to its negotiation space. They had become the common ground between the government and human rights groups, or a shared vocabulary in which the debate on transitional justice was to be conducted.

The extent to which victims' rights had become part of a shared vocabulary is illustrated by the Statement of Motives accompanying the LFP draft when it was first introduced to parliament. In it, the drafters noted that Colombia was hoping to achieve a transition from war to peace and that such a type of transition

> "demands to weigh together with the satisfaction of the victims' rights to truth, justice and reparation, which are fundamental in any type of transition, other considerations particular to this type of transition, like the effective reintegration of ex-combatants into society, the [security situation, HB] within the territory and, in general, guarantees of non-repetition."[189]

What is striking about this wording is that it represents a complete reversal, at least rhetorically, of the government's discourse as it had been at the start of the negotiations with the paramilitaries: that process had taken

189 Exposition of motives belonging to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 3.

reintegration as its starting point, to which the notion of victims' rights had, through a vigorous campaign by civil society groups and the intervention of the Constitutional Court, served as a 'correction'. Here, however, the drafters present respect for victims' rights as the general rule in transitional situations and reintegration as a secondary consideration, flowing from the particularities of the Colombian context.

At the same time, the drafters of the LFP were careful to point out that the proposed law was not an amnesty law and that it did not entail pardons.[190] On the contrary, they maintained that the LFP aimed to prevent impunity and that the state would "uphold its inalienable obligation to investigate and punish the most serious crimes committed during the conflict."[191] The disagreement between the government and those opposing the transitional justice measures proposed by it on the issue of amnesty remained limited to the question whether those measures amounted to a *de facto* amnesty or not.[192] However, both sides agreed that amnesty laws for serious human rights violations were not an option.[193]

Given this starting point, this paragraph will discuss how both sides in the debate surrounding the transitional justice measures adopted in the context of the peace process between Colombia and the FARC employed a discourse based on respect for international human rights norms, especially those established by the Inter-American system, and how both sides presented their own, competing interpretations of the case law of the Inter-American system and its applicability in the Colombian context. Finally, this section shall discuss the Inter-American Court's 'intervention' in this debate through its judgment in the case of the *Massacre of El Mozote and nearby places v. El Salvador*.

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190 'Ley que crea marco jurídico para procesos de paz, cerca del Congreso', *El Tiempo*, 10 August 2011.

191 ''Marco Jurídico para la Paz rompe la impunidad', asegura Roy Barreras' (interview with Roy Barreras), *El Tiempo*, 13 December 2011.

192 *See for example* 'Gobierno responde a HRW tras críticas al Marco Legal para la Paz', *El Tiempo*, 4 May 2012 and "El marco para la paz no es amnistía ni indulto" (interview with Federico Renjifo), *El Tiempo*, 20 May 2012.

193 In an opinion article written for a media outlet aimed at legal professionals and published in September 2016, shortly before the referendum on the peace agreement between the FARC and the government, two researchers from human rights think-tank DeJusticia, which has generally been supportive of the Santos governments transitional justice proposals, summarized the state of the transitional justice debate in Colombia thusly: "In Colombia, we have advanced [towards] some fundamental consensus: no one now defends a peace with complete 'forgive and forget', as was done in Spain, but also no one defends that we should apply the normal punishments from the criminal code, as is there were no peace process. On the one hand, the agreement does not provide full impunity, because international crimes are excluded from amnesty and pardon. […]" Diana Isabel Güiza Gómez and Rodrigo Uprimny Yepes, '¿Un acuerdo de impunidad?', *Ámbito Jurídico*, 19 September 2016, available at http://www.dejusticia.org/#!/actividad/3258, last checked: 18 November 2016.

### *9.1.1 The discourse of the Santos government: reinterpreting the hard core of human rights obligations*

The discourse of the Santos government on transitional justice was designed to signal respect for international and, especially, Inter-American standards on the obligation to investigate, prosecute and punish. Simultaneously, however, the government was seeking within these standards the flexibility required in order to conduct peace negotiations with any hope of success. As one respondent explained:

> "The fundamental idea behind the Legal Framework for Peace […] was to find ways, within the interpretation of the accepted standards, to move the peace process forward. If you look, for example, at the exposition of motives [accompanying the LFP draft], it refers to the case law of the [Inter-American Court, HB]. And it is not confrontational. The government does not say: 'we cannot comply with it', or: 'it is wrong'. It says: 'this case law is very good, but what happens is… there are gaps, there is uncertainty. And because of that, we think that the best way to interpret it is *this* way'."[194]

In short, the government's discourse in support of the transitional justice measures was based on a distinction between two possible interpretations of international standards regarding the duty to investigate and prosecute human rights violations: the 'maximalist tradition' on the one hand, and the 'transitional justice tradition' on the other.[195] According to the government's conceptualization, the maximalist tradition was characterized by an insistence that *all* human rights violations should be fully investigated and prosecuted under *all* circumstances.[196] The transitional justice tradition, on the other hand, the victims' right to truth and justice should be balanced against other important values and principles, especially the need to achieve peace. According to this tradition, the government argued, the state's obligation to investigate and prosecute human rights violations should be assessed differently in the context of a transition from war to peace, than in a situation of 'normalcy' or in a transition from dictatorship to democracy.[197]

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194 Interview 7.

195 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4. This argument is repeated almost integrally and further developed in later documents, especially 'Informe de ponencia para primer debate al proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011 and 'Informe de ponencia para primer debate al proyecto de Acto Legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 948, 7 December 2011.

196 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.1.

197 Idem, section 4.2.

The government recognized up front that most of the Inter-American case law on the duty to prosecute and the prohibition of amnesty can be categorized as belonging to the maximalist tradition.[198] However, it argued that this case law was developed to respond to factual situations which were very different from the Colombian transitional context. In this context, the Exposition of Motives to the LFP draft says:

> "In the case of Colombia we should ask ourselves: what type of transition are we talking about? We are clearly not dealing with a transition from an authoritarian regime to a liberal democracy, the type which has constituted the paradigm for and the basis of the international doctrine of transitional justice. […]"[199] (emphasis added)

The reference to 'international doctrine' in this quote should be understood as responding primarily to the Latin-American experience with transitions and transitional justice and the Inter-American doctrine developed on the basis of this experience. As explained in Chapter 2 of this thesis, the regional experience was marked especially by the dictatorships of the 1970s and 1980s. In later documents, the government further develops this argumentation with a particular focus on the Inter-American Court's case law, saying:

> "in all relevant cases these obligations [to investigate and prosecute human rights violations] have been interpreted and assessed in situations of normalcy, as will be further explained below.
>
> […]
>
> In fact, so far, the Inter-American Court has not known any case in which a State has presented it a serious and coherent strategy of transitional justice which includes judicial and non-judicial mechanisms which are directed towards the achievement of a stable and durable peace and which at the same time allow the victims' rights to truth, justice and reparation to be satisfied."[200]

One respondent, who works with a Colombian human rights think-tank which has generally taken a favorable position on the Legal Framework for Peace, summarized this aspect of the government's discourse in the following way:

> "[T]hey are saying that [we] are in a factual situation which does not correspond to the standard […] I believe that they are partly right. The idea is to say: "sure, the [Inter-American] Court has ruled on all these cases of impunity [which took place, HB] under conditions which were completely different from those in

198 Idem, section 4.1.

199 Exposition of motives to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, pp. 2-3.

200 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.2.

> Colombia, so the standard cannot apply in the same way". And I believe this is a reasonable discussion, generally speaking […] Nowadays, many *transicionalistas* criticize the fact that these standards were created, in large part, for a context of vertical violence and not horizontal violence, where the [perpetrators] were from the state, like in the case of the dictatorships. For cases of dictatorship and not of conflict. And there are differences between the violence in a conflict and that in a dictatorship, so why is the standard the same? Moreover, the fact is that many of the cases were decided on [by the Inter-American Court] when peace had already been achieved. *Almonacid Arellano* was decided 30 years after Pinochet had left power. The transition had already taken place! In contrast, [Colombia] would be the first case in which the Court would be deciding *during* the [transitional] process. And because of this the need for peace […] would be much more urgent in this case, so there would be more interests to weigh than in the other cases."[201]

The consequence of this line of argumentation by the drafters is that, insofar as the Inter-American case law does oblige states to undertake criminal investigations into *all* serious human rights violations, this case law was developed in response to cases which are relevantly different from the Colombian situation, and should thus not be applied to Colombia. In the word of the respondent quoted above:

> "So, technically the [Inter-American] Court […] has never confronted a case like the Colombian case. There are some standards which can help us in trying to construct a legal rule, but the point is that there is no legal rule for a situation like this yet." [202]

Furthermore, the government made sure to point out that the Inter-American Court's case law offered some support for believing that it would be more flexible with regard to transitional justice mechanisms adopted in a context of serious peace negotiations. In the words of the drafters of the Legal Framework for Peace:

> "[T]he case law of the Inter-American Court has supported judicial and non-judicial transitional justice mechanisms, and, therefore, has accepted that the standards pertaining to the right to justice are interpreted differently in such contexts [of transition from war to peace]. In this way, the IACtHR has recognized the importance of transitional justice processes for the protection of the rights to truth, justice and reparation. […] [W]ith regard to the Colombian situation, it has recognized that the country should have the opportunity to implement transitional justice mechanisms in such a way that it adequately recognizes the right of victims (*La Rochela v. Colombia*). In the same way, the Court does not prohibit penal benefits (for example, alternative punishment) especially in the context of transitional justice. Equally, its jurisprudence does not prohibit that

201 Interview 7.
202 Interview 7.

> non-judicial mechanisms are used to comply with international standards of investigation and punishment. […] [I]n the few cases in which the Court has assessed transitional justice mechanisms which do not imply a violation of the prohibition of self-amnesty (especially the Colombian Justice and Peace Law) it has concluded that these mechanisms are not per se contrary to the obligations derived from the American Convention on Human Rights."[203]

The government thus proposed a more flexible, transitional justice oriented interpretation of the international obligation to investigate and prosecute human rights violations as the most suitable approach for the Colombian situation and argued that this approach was in line with the case law of the Inter-American Court. It warned that:

> "the risk of committing ourselves to the maximalist tradition is that, in the interest of progressively protecting the rights of victims in an absolute way, we may end up perpetuating the armed conflict, thereby eliminating any possibility of peace and condemning Colombian society to the repetition of violent acts."[204]

Concretely, the 'transitional justice approach' proposed by the government through the LFP Bill rested on its estimation that international law does not stipulate that, in a situation of transition from war to peace, the obligation to investigate human rights violations can only be satisfied through judicial mechanisms. As the Exposition of Motives to the LFP Bill notes:

> "[I]t is important to emphasize that there does not exist any international obligation which prohibits that the obligations to investigate and sanction are guaranteed through non-judicial instruments. The American Convention [on Human Rights] does not explicitly include the obligations to investigate and sanction. In its development of articles 1(1), 2, 8 and 25, the Inter-American Court of Human Rights has reiterated that States have the obligation to investigate, prosecute and punish, the obligation to adopt internal provisions in order to respect and ensure the rights protected by the Convention and the obligation to combat impunity with all possible means. However, it is clear that the satisfaction of these obligations does not imply that the means to do so are strictly judicial."[205]

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203 'Informe de ponencia para segundo debate texto propuesto al Proyecto de acto legislativo 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 783, 18 October 2011, section 4.2.

204 'Informe de ponencia segundo debate al Proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011, section 3(c). This argument is reminiscent of the language employed by the Uribe government in the Statement of Motives to the AP Bill, cited above in Section 2.4 of this chapter. However, whereas that Statement of Motives relied exclusively on vague notions of forgiveness and reconciliation, the drafters of the LFP draft were careful to ground their rejection of the 'maximalist tradition' in an exploration of international (case) law and practice.

205 Exposition of motives belonging to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 6.

In this interpretation, the state therefore has the discretion to select only a (small) number of cases for criminal investigation and prosecution, as long as all other cases are investigated and sanctioned through non-judicial mechanisms. The drafters found support for their views in international law. Specifically, the Exposition of Motives refers to article 17 of the Rome Statute and points out that it:

> "establishes that the Court […] will find the inadmissibility of a case when: a.) the matter is the object of an investigation or prosecution by a State which has jurisdiction over it […]. In this sense, a complete non-judicial investigation would generate the inadmissibility of a case before the International Criminal Court."[206] (emphasis in the original)

Using admissibility before the ICC as a stand-in for determining legality of alternative processes under international law, the drafters thus argued that a serious investigation of a non-judicial character would be sufficient to satisfy international standards. Moreover, the drafters also took into account the case law of the IACtHR and, again, presented its own interpretation of it. As explained by one respondent, who has acted as agent of the state in several cases before the Inter-American Court and who has had an advisory role in the drafting of the LFP:

> "With regard to grave violations, as you know, the [Inter-American] Court has not defined specifically what 'grave violations' means. We have had several discussion at the Inter-American Court about this topic. […] In all its judgments on transitional justice in transitions from dictatorship to democracy, from *Barrios Altos* onwards, the Court has effectively said to investigate, prosecute and punish grave human rights violations. More or less. Because, if you look carefully, for example in *Almonacid Arellano*, the Court uses at least twelve different formulations of the obligation to investigate, prosecute and punish. So at one point is says to investigate, prosecute and punish crimes against humanity, at another point is says to investigate, prosecute and punish serious violation of human rights, then it says grave violations, then is says just violations. So the case law on the issue is not absolutely coherent, not even within one and the same case.[…] Based on this analysis of the case law, the Legal Framework for Peace was redacted to respect this interpretation that the Court says means international crimes."[207]

206 Idem.

207 Interview 1. In this context, the respondent also referred to a discussion between the State and the Inter-American Court on the term 'grave violations' in the case of *Vélez Restrepo v. Colombia*, in which "we discussed what 'grave violations of human rights' are, to show that what had happened in this case was not a grave violation, and the Court agreed with us". *See* IACtHR, *Vélez Restrepo and family v. Colombia (preliminary objection, merits, reparations and costs)*, 3 September 2012, paras. 279-285.

The drafters further argued that the transitional justice solution presented in the LFP draft, particularly the instrument of case selection, would in fact help to better serve the international community's stated goal of preventing impunity. In the words of the drafters, the instruments contained in the LFP project were "more than anything, strategies in the fight against impunity."[208] In making this argument, the drafters presented the issue of case selection as a lesson learned from previous experience, which "responds directly to the crisis of the model of transitional justice implemented in the country",[209] i.e. the Justice and Peace Law. As the drafters point out the JPL had, by late 2011, only produced four judgments, of which only one was final.[210] As an explanation for this lack of results, the Exposition of Motives points to the investigative strategy promoted by the JPL. In its words:

> "it is important to point out that the current investigative focus does not allow the [Prosecutor's Office] to concentrate its efforts and resources on the cases of the "most responsible", as is the international practice, nor in clarifying patterns and regional contexts of the operations of the different actors in the conflict, but rather promotes the investigation of individual and isolated acts."[211]

This lack of strategy, then, leads to "greater impunity" by spending finite resources on the investigation of cases "without taking into account [their] importance for the clarification of the truth and reparation for victims".[212] In contrast, the LFP draft would allow for "positive selection" of the most representative cases and for focusing the efforts and resources of the criminal justice system on "those most responsible" for the crimes committed in the context of the civil war.[213] In the words of the drafters:

> "To change this [current] focus it is necessary to concentrate efforts and resources in the cases of the "most responsible" and to clarify the system of macro-criminality in which these cases occurred, as is the international practice. The Inter-American Court of Human Rights itself has affirmed, in cases like *Manuel Cepeda v. Colombia*, that systematic violations should be investigated taking into account their context and with a strategy which allows exposing the criminal structures behind the crimes."[214]

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208 'Informe de ponencia para primer debate al Proyecto de acto legislativo 94 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 716, 26 September 2011.

209 Exposition of motives to the LFP draft, *Gaceta del Congreso (Senado y Cámara)* no. 681, 13 September 2011, p. 3.

210 Idem.

211 Idem.

212 Idem, p. 6.

213 'Informe de ponencia segundo debate al Proyecto de acto legislativo 14 de 2011 Senado, 094 de 2011 Cámara', *Gaceta de Congreso(Senado y Cámara)*, no. 901, 28 November 2011, section 4(c).

214 Idem.

Finally, the government used the perceived ambiguity in the international standards including the case law of the Inter-American Court, to argue that international law is silent on the issue of alternative punishment for serious human rights violations. While this aspect of the Legal Framework for Peace had (originally) not been as hotly debated as the mechanism of case selection, it was addressed in one of the final parliamentary debates on the bill. When confronted with critical questions on the issue of alternative punishment by Senator Juan Carlos Vélez, a senator from the government party with close ties to Álvaro Uribe, the sponsor of the bill responded in the following words:

> "The truth is that the international norms oblige states to […] investigate, prosecute and punish grave violations of human rights; investigate, prosecute and punish, which is what this framework allows [us to do]. But there exists no precise obligation that the sanction or punishment should be one way or the other. About the form of execution of the punishment there is no international obligation, among other things, because of it would exist there would be no way, not in Colombia or in any other country, to construct norms tailored to our reality and this would, of course, hinder peace in the entire world." [215]

In sum, the transitional justice solution presented in the LFP draft does not discount international legal standards, including especially Inter-American doctrine, but is based on the drafters' own, more flexible interpretation of those norms. In their view, the more controversial elements of the LFP, like the instrument of case selection, do not violate these norms, because 1.) international standards do not require that all human rights violations are investigated and prosecuted through the criminal justice system; 2.) in so far as they do, these norms do not apply to the Colombian situation, because they are developed in response to situations which are relevantly different from the Colombian situation; 3.) case selection will help the State to better satisfy the main goals underlying the international norms in question, namely the fight against impunity and the victims' right to truth, justice and reparations; and 4.) international law is silent on the issue of alternative punishment. As one respondent observes in relation to this line of argumentation:

> "As you see, this is a completely different legal argumentation than if the state would have been confrontational and had said: "no, this cannot be, the Court has no reason to [become involved]" or "it has a punitivist vision" […] No. It is a vision that is respectful of the [IACtHR's case law, HB] but simply says: "here we have no applicable standard". So, because of this, the dialogue between the Court and the state is different."[216]

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215 'Acta de plenaria 56 de 14 Junio de 2012 Senado', Gaceta del Congreso no. 575, 31 August 2012, p. 14.

216 Interview 7.

### 9.1.2 *Opposition to the transitional justice approach*

The Santos government's proposed transitional justice measures have encountered serious opposition, both from civil society and from political opponents. The civil society campaign against the LFP and, later, the transitional justice agreement with the FARC never reached the level of intensity as the one against the AP Bill, due to the profound disagreement between various civil society groups about the legitimacy of the measures proposed by the government. However, a number of prominent domestic and international NGOs did voice their objections to these measures throughout the process towards the adoption of the LFP and the following negotiations between the government and the FARC leadership. And while the international and domestic NGOs seemed to have slightly different priorities in their opposition to the government's transitional justice plans, they all presented their objections in terms of international human rights norms, and especially those developed by the Inter-American system.

The most prominent international NGO opposing transitional justice plans of the Santos government has been Human Rights Watch, which has consistently and vocally opposed to these plans from the early stages of the LFP process up to the referendum on the transitional justice agreement with the FARC. Its objections to the LFP draft were summarized in a letter HRW sent to Congress and to the President, which was published in its entirety in national newspaper *El Tiempo*. Firstly, it argued that the mechanism of case selection is "clearly contrary to the legal obligation undertaken by Colombia under international law to investigate, prosecute and punish all those who bear responsibility for crimes against humanity and other grave violations of human rights" which "the Inter-American Court of Human Rights has established […] in numerous judgments, which are binding on Colombia".[217] Secondly, HRW notes that the extrajudicial mechanisms proposed in the LFP draft for the investigation of 'not-selected cases' cannot replace criminal investigation and prosecution as means towards satisfying the state's international obligations. Referring again to the Inter-American Court, it says:

> "In several of its decisions the Inter-American Court has noted the necessity of realizing criminal investigations […] 'Extrajudicial' investigations do not fulfill this requirement, since, due to their nature, they are not oriented towards ensuring the "capture, prosecution and conviction" of all those responsible. The Inter-American Court has noted that truth commissions cannot substitute the criminal

217 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012. In this context, the letter also refers to the ICCPR and the decisions of the Human Rights Committee. It further speculates that the inclusion of the case selection element "could be a misguided attempt to emulate the operative policies of the ICC's Office of the Prosecutor […] which focuses on the prosecution of those who bears the greatest responsibility for crimes falling within its jurisdiction. This policy is not based on the scope of the international obligation […] but reflects the nature of the Court as an international tribunal, which complements national criminal justice systems but does not substitute them."

> investigation of grave human rights violations. As it recently stated in a decision against Brazil, "the information such a commission may eventually collect cannot substitute the obligation of the State to establish the truth and ensure the judicial determination of individual responsibility through criminal trials.""[218]

Thirdly, HRW has argued that the possibility of granting alternative sanctions in cases of serious human rights violations, which was included in the LFP, would violate international standards.[219] Here, HRW argued that the state has the obligation to impose sanctions on those found responsible for grave human rights violations, and these sanctions should be proportional to the violations in question. In its words:

> "In accordance with International law, Colombia has the legal obligation to impose punishment for violations of human rights and this should be proportional to the gravity of the abuse committed. In this context, the Inter-American Court has held that "there exists an international normative framework which establishes that crimes which can be categorized as grave violations of human rights should entail adequate punishment in relation to the gravity of those violations"."[220]

Of the domestic NGOs critical of the transitional justice measures proposed by the Santos government, the most prominent has been the CCJ. As it had previously done with the Justice and Peace Law, CCJ even took the initiative to challenge the constitutionality of the LFP before the Constitutional Court. Its objections to the LFP were based mainly on the mechanism of case selection. As one respondent, who works with CCJ and was involved in its litigation against the LFP, explained its central objection:

> "What we have said […] is: the criteria of prioritization and selection should be severely limited, because it cannot be that this will be our standard, that the maximum we will be able to do is investigate those most responsible for the most serious crimes. Rather, it should be reverse: the minimum of what we will do is investigate those most responsible and the most serious crimes and beyond that, we will see. […] This was our main criticism, in that we consider that the obligation to investigate, prosecute and punish human rights violations which are not the most serious crimes committed by those most responsible, was being violated. Because the concept of 'the most serious crimes' leaves out a very big category of crimes which may not be the most serious, but which may be representative [for the Colombian situation], like for example […] forced displacement, which is one of the crimes which has occurred most structurally in the Colombian armed conflict."[221]

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218 Idem.

219 *See for example* idem and HRW, 'Human Rights Watch analysis of Colombia-FARC agreement', 21 December 2015, available at https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement, last checked 15 November 2016.

220 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012.

221 Interview 2.

While HRW and CCJ were thus both very critical of the LFP and its mechanism of case selection, this quote reveals an interesting difference in the basis of their criticism and their use of international norms to articulate their criticism. Whereas HRW seems most concerned with the integrity of the international standards on investigation and prosecution of human rights violations and Colombia's failure to fully live up to these standards, CCJ seems more concerned about the particular consequences of the government's approach to these standards might have in the Colombian context. This can perhaps be explained from the fact that HRW has a horizon which is much broader than Colombia and is concerned about the precedent Colombia might set for future peace negotiations. CCJ, on the other hand, is focused first and foremost on its own domestic context is less interested in the effects the peace process might have on other situations or on the integrity of the international norms as such. Thus, while CCJ instrumentalizes international norms to argue for transitional justice measures which will do justice to the domestic context, HRW has a more absolute approach to international norms and argues that the Colombian case should fully comply with, and thereby reaffirm, the international standard.

This difference in orientation between HRW and CCJ is also evident in the fact that, whereas HRW has remained consistently critical of the transitional justice mechanisms adopted throughout the peace process,[222] CCJ changed its position when the transitional justice agreement between the government and the FARC was published.[223] As the quote above makes clear, CCJ's main objection to the LFP had been the inclusion of the mechanism of case selection, which CCJ considered to be too restrictive. Since this mechanism was no longer present in the transitional justice agreement, CCJ was able to embrace this agreement. In an article in Colombian newspaper El Espectador, Gustavo Gallón, co-founder and director of CCJ, praised the transitional justice agreement, saying that:

> "Far from being a distraction to evade justice (as had been feared), the agreement between the government and the FARC about the creation of a special jurisdiction for peace is an instrument to overcome impunity [for violations of] human rights and humanitarian law in the country, which is 99.99%."[224]

Apparently, CCJ did not share HRW's objections to alternative punishment, which it seemed to consider justified as a necessary tool towards achieving a peace agreement with the FARC. Moreover, one of the main grounds for CCJ's support for the transitional justice agreement was the fact explicitly

222 *See for example* HRW, 'Agreeing to impunity', 22 December 2015, available at <https://www.hrw.org/news/2015/12/22/colombia-agreeing-impunity>, last checked: 19/06/2016.

223 *See for example* Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015 and Gustavo Gallón, 'Un acuerdo ponderado', *El Espectador*, 23 December 2015.

224 Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015.

extended the application of the special jurisdiction for peace not only to the FARC and its leadership, but to all actors in the armed conflict, including members of the armed forces and even civilians funding or supporting either the guerrillas or paramilitary groups.[225] HRW, on the other hand, considered this broad reach to be one of the main weaknesses of the transitional justice agreement.[226] In HRW's argumentation, full investigation and prosecution of all those involved in the armed conflict constituted the norm. And while some divergence from this norm could perhaps be legitimate in light of the need to convince the FARC to agree to a peace accord, this divergence should not include actors other than the FARC. CCJ, on the other hand, seemed to take as a starting point the factual domestic situation of almost complete impunity of high military officials and powerful civilians for their role in the abuses committed during the armed conflict. Against this background, any investigation and prosecution of their crimes would be preferable to no investigation and prosecution.

Finally, the transitional justice measures proposed by the Santos government also met with political opposition on the domestic level, led former president Uribe. Unhappy with the new president's seeming leniency on the guerrillas, Uribe and his followers started a fierce campaign against the LFP, calling it an "law of amnesty for terrorism" [227] and a "road to impunity".[228] In their words, offering benefits to an enemy in exchange for its demobilization is "what a country defeated by terrorist aggression would do".[229] Uribe and his followers have consistently argued that, while the Colombia needs peace, it would have to be a peace without impunity for FARC members.

While the discourse of the political opposition to the LFP and, later, the SJP was thus framed the language of the fight against impunity, it does not seem to be based on Colombia's general obligation to prevent impunity for human rights violations under international law. Rather, Uribe's discourse relied on the more political argument that Colombia could not allow impunity for one particular group, namely the 'terrorists' of the FARC. The political nature of this argument is further illustrated by Uribe's professed disgust that the transitional justice agreement proposed to include members of the armed forces in the special jurisdiction for peace. In his view, this

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225 Gustavo Gallón, 'Un valioso acuerdo contra la impunidad', *El Espectador*, 1 October 2015..

226 'Carta de Human Rights Watch al Presidente y Congreso', *El Tiempo*, 2 May 2012; HRW, 'Human Rights Watch analysis of Colombia-FARC agreement', 21 December 2015, available at https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement, last checked 15 November 2016 and HRW, 'Colombia peace deal's promise, and flaws', 27 September 2016, available at https://www.hrw.org/news/2016/09/27/colombia-peace-deals-promise-and-flaws, last checked 15 November 2016.

227 'Campaña contra Marco Jurídico para la Paz', *El Tiempo*, 15 March 2012.

228 ''Marco para la paz es un camino de impunidad': Álvaro Uribe', *El Tiempo*, 10 April 2012.

229 'Militares retirados reviven polémica con Santos por la paz', *El Tiempo*, 17 June 2012. In fact, this quote comes from an open letter signed by a Group of retired officers about the MJP, which was shared (and supported) by Uribe through his Twitter account.

would equate the 'heroes' in the armed forces, who had risked their lives to defend their country, with the 'terrorists' of the FARC. Moreover, human rights groups have pointed out the inconsistency of Uribe's demand of 'peace without impunity' for the FARC, as compared to the AP Bill presented by his own government in the context of the demobilization of the paramilitaries and the discourse employed in support of it.[230] However, due to the polarization of the political debate surrounding the peace process this argument failed to resonate with many opponents of the transitional justice approach presented by Santos.

### *9.1.3 The contribution of the El Mozote judgment*

It is clear, then, that the Inter-American Court's case law influenced both the Santos government's transitional justice discourse and the response of (part of) civil society to that discourse. Whereas the Santos government claimed that the IACtHR left some flexibility to state's to compromise on the issue of justice in a context of a negotiated transition from war to peace, its opponents maintained the opposite, basing themselves on the strict standards the Court had developed in its case law against other states. The 'intervention' of the Court in this debate through its judgment in the case of *El Mozote v. El Salvador*, which it published in October 2012, was perceived as validating the government's claims on the issue, thereby giving a considerable boost to its discourse and further shaping the Colombian debate on transitional justice.

As discussed above in section 8 of this chapter, the Court found the Salvadoran amnesty law to be in violation of the ACHR. However, the judgment does seem to support the argument, consistently made by the Santos government in its transitional justice discourse, that the specific context of a transition from war to peace merit a more flexible approach to the strict rules developed by the Inter-American system regarding the obligation to investigate and prosecute and the prohibition of amnesty legislation. Moreover, even more than the judgment itself, the supporters of the government's transitional justice approach saw their positions validated by a separate (concurring) opinion drafted by the President of the Court, Diego García-Sayán and cosigned by four other judges. In other words: by a majority of the bench. In this separate opinion, judge García-Sayán acknowledges that

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230 *See for example* Rodrigo Uprimny Yepes, 'El Uribismo, la paz y la impunidad', *El Espectador*, 27 July 2004, available at http://www.dejusticia.org/#!/actividad/2255, last checked: 18 November 2016. Even HRW, despite its own vigorous opposition to the transitional justice proposals of the Santos government, expressed its profound discomfort in sharing this position with Uribe. *See* José Miguel Vivanco and Juan Pappier, 'Álvaro Uribe: Colombia peace deal's unwelcome critic', *The Miami Herald*, 15 August 2016, available at <https://www.hrw.org/news/2016/08/16/colombia-peace-deals-unwelcome-critic>, last checked: 18 November 2016.

> "in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances […] it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of others disproportionally."[231]

Taking this as a starting point, the separate opinion then seeks to give some guidelines to states wishing to undertake such a balancing exercise. In doing so, it addresses issues which have no direct relevance to the case of *El Mozote*, which concerns an amnesty law which had been adopted decades earlier. Therefore, the phrase "certain transitional situations" referred to in the separate opinion was widely understood to mean Colombia.

The guidelines provided by the separate opinion on how to balance the various obligations in time of transitions include the following elements: 1.) the need for an integral approach to transitional justice which includes both judicial and non-judicial mechanisms;[232] 2.) the prioritization of the investigation and prosecution of the most serious cases, especially war crimes and crimes against humanity;[233] 3.) the possibility that cases not concerning war crimes and crimes against humanity are dealt with through "other mechanisms";[234] and 4.) the possibility of applying "alternative or suspended sentences", depending on the suspect's willingness to acknowledge responsibility and contribute to truth-finding. With regard to this latter element, the dissenting opinion said that:

> "It can be understood that this State obligation is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed.
>
> […]
>
> Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened."[235]

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231 IACtHR *Massacre of El Mozote and nearby places v. El Salvador (merits, reparations and costs)*, 25 October 2012, Separate and concurring opinion of Judge García-Sayán, para. 38.

232 Idem, para. 22.

233 Idem, para. 24 and 29.

234 Idem, para. 29.

235 Idem, para. 28 and 30. In

The guidelines described here coincide, to a large extent, with the transitional justice approach proposed by the Santos government through the Legal Framework for Peace and throughout the peace process with the FARC. And while a separate opinion is not binding and cannot be said to express the position of the IACtHR as such, it does seem to suggest a level of support within the Court for the state's endeavors to ensure peace through negotiations.

Overall, the *El Mozote* judgment and the accompanying separate opinion were interpreted as an important validation of the Santos government's transitional justice approach. As one respondent, who had been involved in the drafting of the LFP, described her interpretation of the judgment:

> "And the Court in its judgment – because here we often discuss the separate opinion of judge García-Sayán, but more than the separate opinion we have to see if the judgment differentiates the case law or not. It is my position – and in fact the one which the Constitutional Court ended up taking in its decision concerning [the LFP] – firstly that it indeed differentiated, because it used international humanitarian law […] and said: "look, in the context of these transitions from armed conflict to peace the obligation is to investigate, prosecute and punish international crimes. […] Furthermore, it appeared that it opened the door a bit more for states to have a larger margin of discretion when it comes to deciding amnesties, pardon and penal benefits in cases of transitions from conflict to peace. It is based on this analysis of the jurisprudence that [the LFP] has been drafted, exactly to respect this interpretation saying that the Court says [to investigate and prosecute, HB] international crimes."[236]

As noted in this quote, the *El Mozote* judgment would, in the months directly following its publication, have an important impact on the case before the Colombian Constitutional Court concerning the constitutionality of the LFP, as will be further discussed below in section 9.2.2. Furthermore, throughout the negotiations with the FARC the Santos government has used the judgment and separate opinion to defend its transitional justice compromises from critics saying that these compromises did not live up to international standards in the investigation and prosecution of human rights violations.[237] In this context, the leader of the government's negotiation team in Havana, Humberto de la Calle, called the *El Mozote* judgment "an important beacon of hope" that international human rights law did not have to form an obstacle to peace and that international institutions would respect the transitional justice outcomes of the negotiations with the FARC.[238] Similarly, in an opinion article in *El Tiempo* a Colombian scholar supportive of the government's transitional justice approach used the judg-

236 Interview 1.

237 Interview 16, saying that the government used the *El Mozote* judgment and, especially, the separate opinion "to further its case".

238 'De la Calle ve fórmula para blindar justicia transicional', *El Tiempo*, 25 February 2015.

ment and the separate opinion to push back against "some analysts" who believed that international law set "absolute limits" on the state's freedom to negotiate peace. In this context he pointed to the separate opinion's clarifications with regard to both the state's freedom to adopt amnesty provisions for come crimes and the possibility to impose alternative sanctions.[239] In other words, the *El Mozote* judgment was used to ward off criticism of the government's transitional justice approach, especially where this criticism was based on arguments concerning the supposed illegality of this approach under international law.

## 9.2 Contributions to the normative content of the transitional justice mechanisms adopted in the context of the peace process

As in the case of the JPL, Inter-American standards on the obligation to investigate, prosecute and punish human rights violations have also had an important normative impact on the transitional justice compromise achieved in the Legal Framework for Peace. The government's discourse accompanying the introduction of its original draft for the LFP had been aimed at promoting a particular approach towards transitional justice, based on its own analysis of Inter-American standards on the issue. While the LFP draft certainly explored the outer edges of the Inter-American doctrine on the state's obligation to investigate, prosecute and punish, it was careful to remain within the boundaries set by it, or to at least be able to make a credible argument to this effect. The draft was based on a thorough and detailed knowledge of those Inter-American standards, making it difficult for its opponents to argue that the government's approach to transitional justice would put it at risk of violating the core of international standards on transitional justice.

### *9.2.1 Contributions to negotiations leading to the Special Jurisdiction for Peace*

Compared to the Justice and Peace Law and the Legal Framework for Peace, the Transitional Justice Agreement is more difficult to analyze because of the relative scarcity of sources. Contrary to the JPL and the LFP, the Transitional Justice Agreement has not been developed through a formal process and has therefore left no paper trail. Moreover, negotiation processes are inherently non-transparent, which makes it difficult for the press to report on them beyond the tightly controlled information provided by the parties themselves. As a result, this paragraph relies mostly on interviews with certain respondents who have closely followed the negotiations from the beginning, and have, in one case, even been present in Havana for some

239 Francisco Barbosa, 'El proceso de paz y sus límites in el derecho internacional' (opinion article), *El Tiempo*, 16 March 2015. *See also* Francisco Barbosa, 'Una idea para destrabar la discusión de justicia en el proceso de paz' (opinion article), *El Tiempo*, 8 May 2015.

parts of them. The scarcity of sources necessarily makes the conclusions on this point more tentative than those regarding the other transitional justice instruments.

The limited sources available seem to indicate that the standards developed by the Inter-American system have, to an extent, functioned as a framework for the discussions on transitional justice between the government and the FARC at the negotiation table in Havana. That Inter-American standards would shape the government's positions in Havana is logical in light of the legislative process described in the previous paragraph. Having just developed its transitional justice approach, formalized in the LFP and designed to explore the outer limits of Inter-American doctrine while respecting its core, it seems obvious that this is the approach the government was planning to follow during the negotiations. Through its development of the LFP the government had 'tested the waters' and could now credibly maintain to have found an approach that would enjoy the support of the international community and (most of) civil society. It also had an impression of the aspects of its approach that could be considered controversial. The challenge, now, was to convince the FARC to convince the FARC of this transitional justice perspective.

The FARC, meanwhile, entered the negotiations unwilling to accept responsibility for the violence committed during the civil war and unwilling to accept criminal investigation and prosecution of FARC members. In convincing the FARC that some level of justice for grave crimes committed by both sides of the conflict was necessary, one respondent suggested that international law, including the Inter-American human rights system, played an important part. When asked whether she thought the case law of the Inter-American Court had had an impact on the negotiations between the government and the FARC, this respondent, who had been present in Havana during part of the negotiations and had advised the government on the issue of transitional justice, said:

> "Yes, without a doubt. That is to say, both the issue of the International Criminal Court and also the issue of the case law of the Inter-American system allow the government to explain to the FARC that today we are no longer in the same situation in which we were in the 1980s, when several countries in the Southern Cone could dole out amnesties, pardons, without any restriction. That in this day and age, international law […] does not allow for agreements which will generate impunity for international crimes. And this is important because it allows precisely for an agreement like the justice agreement. Because in a way it is also a [lesson] for the FARC, to tell them: 'it is not that, because in other peace processes such agreements were reached, that we can do the same.' [….]Yes, the case law of the Inter-American Court helps in this respect."[240]

240 Interview 1.

In accordance with this quote, the Inter-American Court's case law, among other international standards, helped the government to explain to the FARC that there is a hard core of international obligations which the state cannot discard, even if it wants to. This analysis is shared by another respondent, who sees an "enormous impact of the international community, both the ICC and the Inter-American system" on the negotiations between the government and the FARC through "the fact that it has been declared that some conducts cannot be subjected to amnesty".[241] Finally, a third respondent, who has worked Transitional Justice department of the Ministry of Justice during the negotiations, similarly allowed that the detailed and established case law of the Inter-American Court has guided the negotiations to some extent.[242] The government's reliance on international legal standards may have also helped to convince the FARC that the state's unwillingness to grant amnesty was not motivated purely by political considerations or a lust for revenge.

Furthermore, the respondent who had been present at some of the negotiations in Havana explained that the government used international institutions, including the Inter-American Court, to convince the FARC that these international norms presented a credible threat to them. That even if the state would give them the amnesty they want, international institutions could take it away again. Paraphrasing this argument, she said:

> "'[W]e will not have amnesties and there is no way that we can, because international law will annul them immediately. Even If we agree on them politically, even if the people ratify them through a referendum […], well, the International Criminal Court or the Inter-American Court will come and annul this agreement, and then all of the legal certainty you thought you had will be gone completely.' So this helps to achieve progress in the justice agreement and to get the FARC to agree on some level of submission to justice."[243]

In other words, the guidance offered to the negotiations by the Inter-American Court's case law is not necessarily the result of a true internalization of Inter-American norms by the parties. According to the respondent quoted here, the considerations for the FARC to accept these norms were strategic in nature and aimed at defending itself from outside intervention. And this strategic reasoning in relation to international law is not unique to the FARC. Another respondent described hearing similar considerations with certain members of the military, who would also be subjected to the transitional justice instruments established in the justice agreement. These

241 Interview 7.

242 Interview 16. This respondent attributed the 'guidance' provided by the Inter-American Court's case law mainly to the fact that the government's lawyers and negotiators were constantly trying to stay within the boundaries set by this case law, while at the same time being aware of its 'loopholes'.

243 Interview 1.

members of the military had learned from the experience of their colleagues in the region that a national amnesty could not offer them protection if it did not stand up to scrutiny by the international courts. In the words of the respondent:

> "I believe the idea of definitive closure is essential. I believe that they have the feeling that in this day and age […] if they do not come to a more substantive agreement at the [negotiation] table, in 15 years, or in 5, or whenever it may be, but they will come after them. Because I heard this a lot among soldiers, that there is a great fear and that is to turn into another Argentina. That in 10 years, 15 years, they will have to answer [for their crimes], when they are already old… I believe that the idea to reach a final agreement, which protects them in some way, has been essential."[244]

In short, according to the respondents cited here, the Inter-American Court's case law has had guided the negotiations between the Colombian government and the FARC and impacted their transitional justice outcomes, because 1.) they helped the government to articulate a hard core of international obligations to the FARC, which had to be respected regardless of the government's own position; and 2.) they helped the government to argue that these international norms posed a threat to legal certainty of those who had participated in the armed conflict in case the parties would bilaterally decide to grant amnesty for their crimes.

This very tentative conclusion is further supported by two practical arguments drawn from the context of the negotiations. Firstly, the fact that the special committee of experts, which had been responsible for negotiating the Transitional Justice Agreement, consisted of legal experts and included experts in Inter-American human rights law. These individuals are trained to think in terms of legal obligations and, especially, the obligations flowing from the Inter-American system and were selected for the job precisely because of that training. As a result, the committee of '3 and 3', as it had become known, formed a fertile breeding ground for reception of Inter-American doctrine and, simultaneously, would know on which points this doctrine could be applied with more flexibility. Secondly, the fact that the transitional justice compromise eventually achieved between the government and the FARC seems to respect the boundaries defined in the Inter-American Court's *El Mozote* judgment and the accompanying separate opinion. Specifically, the Special Jurisdiction for Peace 1.) recognizes the victims' rights to truth and justice; 2.) does not allow amnesty for international crimes; 3.) provides for the full investigation and prosecution of all crimes which cannot be subject to amnesty; 4.) makes the imposition of alternative punishment conditional on the suspect's full participation in the investigation; and 5.) therefore compensates the compromise on justice, in the form

244 Interview 7.

of alternative punishment, with a truth-finding 'bonus'. All of these points were discussed, in the *El Mozote* judgment and its accompanying separate opinion, as parameters for an acceptable justice strategy in the specific context of negotiated transitions from war to peace.

### *9.2.2 The Constitutional Court's review of the government's transitional justice approach*

Both the Legal Framework for Peace and the Special jurisdiction for Peace have been challenged before the Constitutional Court. As before, it was the civil society group CCJ which brought this legal action against the LFP, especially the mechanism of case selection enshrined in it, arguing that it violated the victims' right to justice and the state's obligation to investigate, prosecute and punish all human rights violations. And, as before, the Constitutional Court relied extensively on Inter-American case law in its interpretation of the Constitution and in its analysis of the LFP's constitutionality.

#### *9.2.2.1 Reception of the right to truth and justice as a fundamental pillar of the Constitution*

In its decision on the constitutionality of the Justice and Peace Law, discussed above in Section 5.2.2 of this chapter, the Constitutional Court had already firmly established the victims' right to truth and justice and the state's obligation to investigate, prosecute and punish human rights violations as norms of constitutional rank. In the context of the peace process with the FARC, the Constitutional Court took this case law even further, when it decided on the constitutionality of the LFP. In challenging its constitutionality, CCJ faced an additional and considerable hurdle in that the legislative act implementing the LFP constituted an amendment to the Constitution. As a result, it was not sufficient to simply argue the LFP's incompatibility with the Constitution. As one of the lawyers involved in drafting CCJ's complaint against the LFP explained:

> "[O]ne cannot say that [the LFP] contradicted the Constitution, because it was amending the Constitution. In this sense, a constitutional amendment [necessarily] contradicts the Constitution. So, one has to start by arguing, in the Colombian case, that this was not a modification of the Constitution, but a substitution of the Constitution."[245]

In accordance with the doctrine of constitutional replacement developed by the Constitutional Court, the legislator has the power to amend the Constitution, but not to substitute it by altering its basic features, or the "elements

245 Interview 2.

which define the identity of the Constitution".[246] Thus, in order for the Constitutional Court to find the LFP unconstitutional, CCJ had to argue that it touched on one of the basic features of the Colombian Constitution. In the words of the respondent cited above:

> "[…] So how is the Constitution being substituted? So, as the substituted element we identified precisely the obligation to investigate, prosecute and punish all grave violations of human rights, not only some."[247]

In short, CCJ argued that the obligation to investigate, prosecute and punish human rights violations forms one of the basic pillars of the Constitution and that the mechanism of case selection, by altering the scope of this obligation, substituted the Constitution itself.[248] In making this argument, CCJ relied extensively on international human rights law and, especially, the case law of the Inter-American Court.[249] As one respondent, who has been involved in the drafting of the LFP and was therefore on the other side in the case before the Constitutional Court, summarized CCJ's argument:

> "The central element [of the Constitution] which they said was being substituted was exactly the obligation to investigate, prosecute and punish. And their entire argument was centered around the case law of the Inter-American system. Because of you look closely, the domestic case law has not developed this obligation at all, and of the international courts, the one that has really focused on developing it, has been the Inter-American Court."[250]

The Constitutional Court eventually rejected CCJ's claim of unconstitutionality. However, it did so in a way that left much of CCJ's argument regarding the content and status of the obligation to investigate and prosecute intact.[251] Most importantly, the Constitutional Court, on the basis on a

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246 C. Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement doctrine', (2013) 11(2) *I•CON* 339-357, p. 343.

247 Interview 2.

248 CCJ, 'Demanda de inconstitucionalidad contra el Acto Legislativo 01 de 2012 (parcial)', available at <http://www.coljuristas.org/documentos/documento.php?grupo=3&id_doc=350>, p. 3-4.

249 *See* idem, p. 7- 25. *See also* Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, pp. 51-56.

250 Interview 1.

251 In this context, the respondent who had been involved in CCJ's legal action against the LFP remarked: "In the [Constitutional Court's] judgment [concerning the constitutionality of the LFP] I would distinguish between the decision itself, whether they say what is unconstitutional and what is not unconstitutional, and the motivation, where it presents its argument. In the motivation accepts 70 or 80% of our arguments. It says very important things, for example, about the binding nature of international human rights instruments." Interview 2.

lengthy analysis of the IACtHR's case law,[252] agreed with CCJ that the obligation to investigate and prosecute all human right violations forms a fundamental pillar of the Colombian Constitution.[253] In doing so, it therefore took its own precedent from its judgment on the constitutionality of the JPL one step further: not only does the obligation to investigate and prosecute, as developed by the Inter-American Court, form part of the Constitution, it is also one of the fundamental pillars of the Colombian Constitutional order. As a result, the Colombian state is legally obliged to take these principles into account when seeking a negotiated end to an armed conflict and afford them the same consideration as the constitutionally enshrined right to peace. As pointed out by one respondent, this approach to transitional justice has now become part of the Constitutional Court's settled case law, which will make it extremely difficult to overturn.[254]

#### *9.2.2.2 The constitutionality of the Legal Framework for Peace*

The Constitutional Court's judgment thus recognized that both the obligation to investigate, prosecute and punish human rights violations and the right to peace form fundamental pillars of the Colombian constitution. Faced with two constitutional norms of the same status, the Constitutional Court could not, in the words of one respondent "eliminate one norm against the other, but [had] to balance" them against each other.[255] Thus, the Constitutional Court concluded that the obligation to investigate, prosecute and punish can "be subject to limitations through a balancing exercise, if these result in greater winnings in terms of other constitutional principles, like the achievement of peace and the construction of the truth in a context of conflict."[256]

After careful consideration, the Constitutional Court came to the conclusion that the mechanism of case selection, as enshrined in the Legal framework for Peace, constituted a proper balance between the two fundamental pillars of the Constitution at play. This finding was based on the twofold argumentation that 1.) the mechanism was meant to help the state to design a more intelligent prosecutorial strategy, focusing on the most serious crimes and those most responsible for them, and thereby to help to ensure that justice is done more effectively;[257] and 2.) it respects the minimum rule that international crimes will be investigated, prosecuted and punished.

The influence of the IACtHR's *El Mozote* judgment is clearly present in the Constitutional Court's reasoning regarding the constitutionality of the LFP, as it had been throughout the proceedings. It should be noted that CCJ

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252 Constitutional Court of Colombia, Sentence C-579/13, 28 August 2013, pp. 265-285. This analysis included the judgment in the case of *El Mozote v. El Salvador*, which the Inter-American Court had delivered not long before.

253 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 335.

254 Interview 6.

255 Interview 2.

256 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 339.

257 Idem, pp. 340-342 and 347.

presented its complaint against the LFP on 18 December 2012, shortly after the Inter-American Court had delivered its judgment. As a result, the hearings organized in the context of CCJ's complaint against the LFP were dominated by this judgment and its possible implications for Colombia. A report from the national newspaper *El Tiempo* presented the *El Mozote* judgment as the "north star" guiding the hearings and pointed out that "almost all interventions were based on this text".[258] For example, the government's High Commissioner for Peace, speaking in defense of the LFP, did not deny either the applicability of the obligation to investigate, prosecute and punish nor its status as a central pillar of the Constitution. Rather, he relied, again, on the special circumstances faced by Colombia and the need to balance the obligation to investigate and prosecute against the obligation to seek peace, saying:

> "Behind this complaint there is a whole perspective which I think is very respectable coming from a human rights organization, but which is a perspective for a state which is at peace. And we, honorable magistrates, are not at peace. We are seeking precisely the end of conflict and the transition to peace. As the judges of the Inter-American Court recently so rightly said, in an exceptional situation like an armed conflict, one has to find mechanisms equally as exceptional to respond to the victims."[259]

The Constitutional Court also expressly relied on the *El Mozote* judgment in making the argument that the state is required to, as a minimum, investigate and prosecute international crimes. In this context, the Court considered that the rule providing that international crimes should be investigated, prosecuted and punished constitutes a:

> "further development of the obligation to guarantee [human rights, HB] in the context of an internal armed conflict, in which, as the Inter-American Court of Human Rights noted in the case of the *El Mozote massacre v. El Salvador*, exist particular and more flexible rules which imply that the obligation to guarantee [human rights] can be complied with if it is ensured that, as a minimum, [international crimes, HB] are tried.".[260]

In other words, the Inter-American Court's judgment in the case of *El Mozote* led the Constitutional Court to recognize a new 'hard core' of international obligations, specific to situations of (negotiated) transition from war to peace. Under such circumstances, the minimum rule is that international crimes should be investigated, prosecuted and punished.

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258 Camilo González Posso, 'Mozotes: la clave de Justicia y Paz', *El Tiempo*, 1 August 2013.

259 Intervention of the High Commissioner for Peace, Sergio Jaramillo, in the public hearing about the Legal Framework for Peace before the Constitutional Court of Colombia, Bogotá, 25 July 2013, available at http://www.altocomisionadoparalapaz.gov.co/desarrollos-legistlativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/discurso_gobierno_y_jefe_delegacion.pdf.

260 Constitutional Court of Colombia, Sentence C-579-13, 28 August 2013, p. 344.

## 10 Conclusion

This chapter demonstrated that the successive peace negotiations which have been conducted in Colombia since the start of the 21st century have been profoundly affected by the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish human rights violations, and by the prohibition of amnesty provisions which is an element of that overarching obligation. Through the interventions of a host of actors – including domestic and international NGOs, domestic courts and the organs of the Inter-American human rights system itself – these standards have helped to shape the domestic debate on transitional justice and the "peace v. justice" dilemma and, thereby, to redirect legislative processes concerning the adoption of transitional justice mechanisms. In relation to the peace process between the Colombian government and the FARC-EP, it is arguable that these norms also demarcated, to some extent, the discussions between the negotiating parties themselves. As a result, the standards established in the IACtHR's jurisprudence have shaped, albeit indirectly, the outcome of these domestic processes, i.e. the transitional justice mechanisms adopted in Colombia. Perhaps even more fundamentally, through these processes the obligation to investigate, prosecute and punish human rights violations, as developed by the IACtHR, has become accepted as a part of the Colombian constitutional order – and even as a fundamental pillar of that order.

During the first round of the peace processes, when the government was negotiating with the paramilitary organizations to achieve their demobilization, the IACtHR's jurisprudence contributed to the domestic debate on transitional justice in several ways. Firstly, it helped to introduce the language of the victim's right to truth, justice and reparation into a debate which, up to that point, had been determined almost exclusively by the interests of the negotiating parties. Secondly, it helped to establish that there are certain minimum standards for the type of transitional justice mechanisms that can be adopted in the context of peace negotiations – most importantly, that there shall be no amnesties for grave human rights violations. Thirdly, reference to international legal standards such as those developed by the IACtHR helped to amplify the thus far marginalized voice of domestic human rights organizations and made them less vulnerable to the accusation that they pursued justice against the paramilitaries because they sympathized with the guerrilla. Finally, the example of how the IACtHR's jurisprudence had affected transitional justice in other countries, the monitoring – direct and indirect – of the paramilitary demobilization process by the organs of the Inter-American system and, later, the interventions of the Colombian Constitutional Court, helped to establish it as a credible threat to the negotiating parties which, if ignored, could seriously derail the agreement they had reached between themselves. Supported in this way by the IACtHR's jurisprudence, domestic accountability actors were eventually able to connect with certain segments of parliament in order to redirect the legislative process towards greater accountability for grave human rights

violations. Concretely, they succeeded in having the AP Bill be retracted and in introducing truth, justice and reparation as relevant parameters in the discussion of new legislative proposals. Finally, the IACtHR's case law also formed an important basis for the Constitutional Court's intervention in the legislative process, which resulted in stronger guarantees of truth and justice in the Justice and Peace Law.

During the second round of peace processes, when the government negotiated a peace agreement with the FARC-EP, the IACtHR's jurisprudence likewise played an important role in shaping the domestic debates, but the dynamics of those debates were rather different. Having learned from previous experience, the government now took control of the transitional justice debate from the beginning by developing its own position based on a careful analysis of Inter-American standards. In doing so, the government reinterpreted the 'hard core' of Inter-American standards to better suit its agenda, by focusing on what it perceived to be the gaps and loopholes in those standards. Specifically, the government's interpretation of Inter-American standards on transitional justice led it to the conclusion that 1.) the prohibition of amnesty provisions relates only to international crimes; 2.) the IACtHR allows – or should allow – more flexibility with respect to the obligation to investigate, prosecute and punish in the particular context of peace negotiations; 3.) in such situations, the obligation to investigate, prosecute and punish allows for the imposition of alternative punishment. This interpretation of the relevant standards resonated with important segments of domestic and international civil society and – it would appear from the *El Mozote* case – of the IACtHR. On the basis of this carefully constructed position, the government was able to secure the swift adoption of the Legal Framework for Peace – its 'opening bid' in the negotiations with the FARC-EP – by parliament and its approval by the Constitutional Court. In relation to the negotiations themselves, several respondents expressed a belief that jurisprudence of the IACtHR on the prohibition of amnesty did help the government persuade the FARC-EP that it was impossible to obtain the full amnesty sought by it. As a result, the transitional justice agreement eventually achieved between the government and the FARC-EP stays within the limits set by the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations – as understood by the Colombian government.

The important contributions of the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish to the processes described in this chapter have been mostly indirect, in the sense that they rely on the mobilization of domestic actors and their willingness to receive and apply it. NGOs, both domestic and international, with expertise in human rights and extensive knowledge of the Inter-American system and its case law have played an important role in redirecting the domestic transitional justice debate and introducing international legal standards on the obligation to investigate, prosecute and punish human rights violations. Likewise, the presence of a well-respected Constitutional Court with an openness

to international law and knowledge of Inter-American standards, made it possible for these standards to be received into the domestic legal system and accepted as part of the constitutional order. However, the organs of the Inter-American system have not relied solely on the work of domestic actors for its standards to be able to contribute to the Colombian transitional justice debate and the concrete mechanisms adopted as a result of that debate. At times, it has taken a more proactive role and sought to exert its influence directly. The Inter-American Commission has done so through its official role in monitoring the paramilitary demobilization process and through the country reports it compiles on Colombia. The Inter-American Court, meanwhile, has at times 'intervened' in the domestic legislative processes towards the adoption of transitional justice mechanisms by delivering relevant and/or sensitive judgments at key moments for domestic decision making. In this way, its judgments in cases like the *19 Tradesmen* and *El Mozote* have been able to have an impact far beyond the facts to which they relate.