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Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process

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Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process

Katie Kerr*

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I. INTRODUCTION

Punishment has been the sticking point in the "peace talks" between the Government of Colombia (GOC) and the paramilitaries since negotiations started in 2003. Soon after the GOC announced plans for the demobilization of this group of some 15,000 to 20,000 right-wing fighters, Colombian civil society and media, the international community, and a significant number of national legislators joined in a demand that the paramilitaries, whose human rights record is the worst of all parties to Colombia's four-decade armed conflict,¹ be punished for their crimes.

1. It is estimated that the Autodefensas Unidas de Colombia (AUC) is responsible for 75% of the civilian deaths connected to the conflict, which have averaged 3500 per year. See Council on Foreign Relations, Terrorism: Questions and Answers, FARC, ELN, AUC: Colombia, Rebels, <http://cfrterrorism.org/groups/farc2.html> (last visited Nov. 17, 2005) [hereinafter Council on Foreign Relations]. Between January 1994 and December 2003, 1959 massacres (10,174 deaths) were reported in Colombia, the large majority of which are attributed to the paramilitaries. Starting in 2002, the share of serious violations attributed to the Revolutionary Armed Forces of Colombia (FARC) increased dramatically, while the paramilitaries' share began to fall. THE PEACE PROCESS IN COLOMBIA WITH THE AUTODEFENSAS UNIDAS DE COLOMBIA - AUC 2 (Cynthia J. Arnson ed., 2005) [hereinafter PEACE PROCESS IN COLOMBIA]. See also ANGEL RABASA & PETER CHALK, COLOMBIAN

When the paramilitaries responded with a non-negotiable refusal to spend a single day in jail,² a top paramilitary commander's assessment that the talks were "hanging by an unraveling thread"³ seemed sadly accurate.

The debate on punishment was taken to the Colombian Congress in August 2003 when President Alvaro Uribe proposed the "Penal Alternatives Bill," providing for non-prison sanctions for demobilizing paramilitaries.⁴ Surprisingly, while the GOC deliberated over the punishment question and in the face of uncertainty as to the legal implications of demobilization, more than 5000 paramilitaries proceeded to hand over their weapons and vow to live peaceably,⁵ presumably optimistic that the product of congressional debate would be favorable to them. Their gamble paid off in June 2005 when the Congress passed the Peace and Justice Law, which grants most of them an outright pardon and subjects those responsible for the worst crimes to a maximum sentence of eight years' confinement, most likely served in low-security facilities in the countryside.⁶

Passage of the new law has done little to quiet the debate on the desirability of affording paramilitaries lenient treatment in

LABYRINTH: THE SYNERGY OF DRUGS AND INSURGENCY AND ITS IMPLICATIONS FOR REGIONAL STABILITY 55-56 (2001).

2. See Dan Molinski, *Colombian Congress Gets Paramilitary Bill*, ASSOCIATED PRESS, Feb. 15, 2005, available at LexisNexis Academic (citing AUC's argument that they should not be punished since they fought against insurgents).

3. See Margarita Martinez, *Colombian Paramilitary Chief Warns Talks in Peril*, HOUSTON CHRON., Apr. 24, 2004, at A30 (quoting Salvatore Mancuso, lead negotiator for the paramilitaries until his own demobilization, who told the press that negotiations were in danger because the GOC was not offering amnesty).

4. Proyecto de Ley de Alternatividad Penal (Penal Alternatives Bill), modified by Pliego de Modificaciones al Proyecto de Ley Estatutaria 85 de 2003, Senado (Colom.), available at <http://www.mediosparalapaz.org/index.php?idcategoria=1758>.

5. According to the GOC, 5181 paramilitaries demobilized between November 2003 and the passage of the Peace and Justice Law in June 2005. See HIGH COMMISSIONER FOR PEACE IN COLOMBIA, REPORT ON DEMOBILIZATIONS, available at http://www.altocomisionadoparalapaz.gov.co/g_autodefensa/dialogos.htm (last visited August 6, 2005) [hereinafter GOC DEMOBILIZATION REPORT].

6. The Peace and Justice Law reserves to the executive branch the designation of a facility in which to confine ex-combatants. Ley 975 (Peace and Justice Law), 45.980 D.O., 25 de Julio de 2005 (Colom.), available at <http://www.coljuristas.org/justicia%5CLEY%20975%20DE%202005.pdf>. The administration has referred to "agricultural colonies," which are described in the Prison and Jail Code as low-security ranches or farms without fences. COLOMBIAN COMMISSION OF JURISTS, BULLETIN NUMBER 6, WITHOUT PEACE AND WITHOUT JUSTICE 2-3 (June 29, 2005), available at <http://www.usofficeoncolombia.org/documents/ccjdemobmemo6.pdf> [hereinafter CCJ JUNE BULLETIN].

exchange for their demobilization.⁷ The law's defenders are probably correct in their assertion that the paramilitaries would not have accepted stricter penalties and that the law saved the current round of negotiations. Its critics are likewise correct, however, in arguing that the law's leniency and failure to demand meaningful concessions from the demobilizing combatants in exchange for the generous benefits afforded to them render the law unjust and incapable of ridding the country of paramilitaries permanently.⁸ These opposing positions, often expressed in terms of the urgency of ending hostilities, on the one side, and the imperative of justice, on the other, appear irreconcilable: the law's defenders seem to prioritize demobilization over any other consideration, while its critics, once they concede the strength of the paramilitaries' bargaining power, must be saying that a continuation of the armed conflict would be better than the situation produced by the current law. The latter position is often coined as a criticism of the GOC for "purchasing peace at too high a price."⁹ Little effort has been made on either side, however, to determine what price Colombians should pay for the disarmament of the paramilitaries.

This paper attempts to re-frame the debate by evaluating the new law and punishment options available to the GOC with reference to the costs and benefits incurred to social welfare. Part I sketches the historical background of Colombia's armed conflict; the growth and organization of the paramilitaries; and the many efforts to negotiate an end to hostilities with irregular armed groups (IAGs). Part II outlines the legal framework governing the treatment of demobilized combatants in Colombia, including the new Peace and Justice Law. Part III sets out the basic approach

7. See, e.g., CCJ JUNE BULLETIN, *supra* note 6.

8. Critics note that the emergence of new paramilitary groups (in Valle del Cauca and Catatumbo) and the "recycling" or demobilized paramilitaries back into the conflict is already occurring. See *Colombia: Justice and Peace Law Will Guarantee Impunity for Human Rights Abusers*, AMNESTY INTERNATIONAL, Apr. 26, 2005, <http://web.amnesty.org/library/Index/ENGAMR230122005>; HUMAN RIGHTS WATCH, SMOKE AND MIRRORS: COLOMBIA'S DEMOBILIZATION OF PARAMILITARY GROUPS 44 (2005), available at <http://hrw.org/reports/2005/colombia0805/colombia0805.pdf> [hereinafter SMOKE AND MIRRORS]. See also Rafael Pardo, *Key Issues in the Negotiations Process, in PEACE PROCESS IN COLOMBIA*, *supra* note 1, at 17, 22 (explaining security risk in areas vacated by demobilizing AUC is not guerrilla reprisals but re-emergence of paramilitarism).

9. See, e.g., Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES, June 23, 2005, at A3 (quoting Michael Fruhling, the United Nations High Commissioner for Human Rights in Colombia saying that Uribe paid too high a price for disarmament).

of this paper and provides an overview of the literature from which the analysis borrows – including transitional justice literature and law and economics approaches to domestic criminal law. Part IV assesses the Colombian demobilization laws and punishment options in terms of their effectiveness in achieving the goals of the peace process. Finally, Part V discusses the perceived externalities of Colombia's punishment decisions and the steps taken by the international community to compel their internalization.

II. BACKGROUND

A. Colombia's Armed Conflict

Colombia, arguably Latin America's oldest democracy and most stable economy, has been involved in violent conflict for the better part of the last six decades.¹⁰ The current conflict is traceable to the emergence of guerrilla groups in 1964, after a brief respite from internal conflict was secured by a power-sharing pact between Liberals and Conservatives in 1958.¹¹ Since 1964, the conflict has resulted in over 200,000 deaths, mostly of unarmed civilians,¹² and led to the forced displacement of some 3 million Colombians.¹³

1. Leftist Insurgents

Despite demobilizations of guerrilla groups in the 1980s and 1990s, two numerically significant guerrilla groups remain. The Revolutionary Armed Forces of Colombia (FARC) is the older and more powerful of the two with an estimated 9000-12,000 members.¹⁴ The FARC's income is estimated between \$400–800 million annually, which is derived primarily from the drug trade, as well

10. See Marc Chernick, *Negotiating Peace Amid Multiple Forms of Violence*, in *COMPARATIVE PEACE PROCESSES IN LATIN AMERICA* 159, 162-68 (Cynthia J. Arnson ed., 1999) (providing brief history of armed conflict from 1960s forward). See also William D. Shingleton, *Understanding Colombia*, 25 *FLETCHER FORUM OF WORLD AFFAIRS* 255, 281 (2001) (calling Colombia the region's "oldest democracy" but noting deteriorating effects of corruption and violence).

11. Chernick, *supra* note 10, at 162.

12. Council on Foreign Relations, *supra* note 1.

13. Juan Forero, *Colombia's 3 Million Refugees Hidden in Plain Sight*, N.Y. TIMES, Sept. 12, 2004, available at <http://www.nytimes.com/2004/09/12/weekinreview/12fore.html?ex=1132376400&en=ed8b623845396469&ei=5070>.

14. The U.S. Department describes the FARC as "Latin America's oldest, largest, most capable and best-equipped insurgency of Marxist origin." U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 app. B, 133 (2004), available at www.state.gov/documents/organizations/31946.pdf.

as from kidnapping and extortion.¹⁵ The GOC estimates that the FARC takes in five or six times more revenue than it spends,¹⁶ suggesting that it is capable of increasing its military operations, or that its commanders are accumulating great wealth, or both. After failed negotiations with the last administration, the FARC has refused to enter into peace talks with Uribe's team. The National Liberation Army (ELN) is smaller with approximately 3000 members.¹⁷ The ELN has been essentially defeated and is exploring the option of voluntary demobilization.¹⁸

2. Right-Wing Paramilitaries

Paramilitary groups cropped up in Colombia during the early 1980s.¹⁹ In some places, they were financed by landowners and entrepreneurs to provide protection from the guerrillas, often with the support of the Colombian armed forces. In others, they were hired-guns for drug traffickers. In the mid-1990s, the paramilitaries organized themselves, regionally in 1994, and nationally in 1997 in an umbrella group called the United Self-Defense Forces of Colombia (AUC),²⁰ which today brings together most of the

15. Council on Foreign Relations, *Terrorism: Background Questions and Answers: FARC, ELN, AUC (Columbia, Rebels)*, http://www.cfr.org/publication/9272/farc_eln_auc_colombia_rebels.html (last visited Dec. 20, 2005) (estimating FARC's drug income at \$200 – 400 million per annum, representing more than half of its overall income); Shingleton, *supra* note 9, at 257 (estimating the combined budgets of the FARC and the ELN at \$100 million per month).

16. Sergio Jaramillo, *Atajando el Conflicto*, SEMANA (Colom.), available at <http://semana2.terra.com.co/opencms/opencms/Semana/articulo.html?id=83861> (last visited Nov. 17, 2005).

17. See U.S. DEPARTMENT OF STATE, *supra* note 14, at 129.

18. Although the ELN and the GOC discussed the possibility of negotiation in 2004, even going so far as to agree that the Government of Mexico would facilitate the process, these talks were cancelled when the ELN refused to stop kidnapping and otherwise cease hostilities and the GOC refused to suspend these pre-conditions to negotiations. See INTERNATIONAL CRISIS GROUP, COLOMBIA: PRESIDENTIAL POLITICS AND PEACE PROSPECTS 27 (2005), available at http://www.crisisgroup.org/library/documents/latin_america/14_colombia_presidential_politics_and_political_prospects.pdf [hereinafter ICG 2005 REPORT].

19. Several writers trace the beginnings of paramilitarism to the 1960s, when self-defense groups were formed and supported by the state to support counter-insurgency efforts in isolated areas of the country. The GOC officially withdrew its sanction of self-defense groups in 1989. See PEACE PROCESS IN COLOMBIA, *supra* note 1, at 2. For a history of the development of the paramilitaries in Colombia, see generally MAURICIO ROMERO, PARAMILITARES Y AUTODEFENSAS 1982 – 2003 (2003); LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES (Alberto Ramirez Santo ed., 2002).

20. INTERNATIONAL CRISIS GROUP, COLOMBIA: NEGOTIATING WITH PARAMILITARIES 8 (2005), available at http://www.crisisgroup.org/library/documents/latin_america/_negotiating_with_the_paramilitaries.pdf.

country's estimated 15,000-20,000 paramilitaries,²¹ present in more than a third of the country's municipalities.²² Like the FARC, the paramilitaries have a steady income, primarily from the drug trade, which far exceeds their military expenditures. The GOC estimates that paramilitary commanders take home 90% of the revenue from drug-related activities.²³

The prevailing view is that the AUC is an extremely violent criminal organization, motivated by profit and devoid of political or ideological aspirations.²⁴ The U.S. Ambassador to Colombia labeled the paramilitaries "criminals, narco-traffickers, assassins and thieves,"²⁵ and a spokesperson for Human Rights Watch

21. It is very difficult to estimate the number of paramilitaries and self-defense groups outside of the AUC. Michael Taussig explains there are different kinds of informal paramilitaries: "[T]he local merchant . . . who decides to go on a killing spree at night along with his drunk buddies . . ." as well as "the goon squads assembled by large land-owners, and all manner of local self-defense organizations . . ." MICHAEL TAUSSIG, *LAW IN A LAWLESS LAND: DIARY OF A Limpieza in Colombia* 10 (New York Press 2003). Further complicating the count, AUC commanders have admitted losing their troops to non-AUC criminal gangs. See *Revelaciones Explosivas*, SEMANA (Colom.), Sept. 25, 2004, available at <http://semana2.terra.com.co/opencms/opencms/Semana/articulo.html?id=82024> (containing a partial transcript of unauthorized tape recordings of GOC-AUC negotiations).

22. The AUC operates through forty-nine "blocks" in 382 of the country's 1098 municipalities. ICG 2005 REPORT, *supra* note 18, at 17.

23. The GOC estimates that 80% of the AUC's income is derived from the drug trade. Ten percent of these funds go to financing military operations. Scott Wilson, *Colombian Fighters Drug Trade is Detailed*, WASH. POST, June 26, 2003, at A01. An AUC commander estimates that it costs \$5550 to train and equip each combatant and a further \$512 per month per combatant for operational expenses not counting other regular expenses like payments to widows. Javier Montanez et al., *La Verdad Sea Dicha*, in LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES, *supra* note 18, at 352, 355 (statement of three AUC commanders in response to suggestion by other AUC leaders that the paramilitaries pull out drug trade).

24. See, e.g., Rodrigo Rojas et al., *El Futuro Incierto del las AUC*, in LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES, *supra* note 17, at 289, 292. Some analysts argue that the AUC should not be equated to a drug cartel because the characterization does not account for their vehement opposition to government negotiations with the FARC or the existence of some paramilitary leaders who abstain from drug-trafficking (instead suggesting a limited political purpose). See generally ROMERO, *supra* note 18. One problem with this argument is that the AUC has not expressed an ideology – except its opposition to the FARC – nor is it insisting on any political space or change in the current negotiations. Paul Collier's work on the economic motives underlying civil conflicts worldwide is helpful in understanding how illegal armed groups disguise profit motivations behind political or historical rhetoric. See, e.g., PAUL COLLIER, *THE ECONOMIC CAUSES OF CONFLICT AND IMPLICATIONS FOR POLICY* 2-4 (World Bank 2000) (explaining difficulty in separating "greed" from "grievance" motives for conflict because rebels develop grievance narratives to justify profit-motivated conduct).

25. *Colombia's Paramilitaries and Drug Lords*, THE ECONOMIST, Oct. 21, 2004, available at http://www.economist.com/displayStory.cfm?story_id=3317964&tranMode=none (quoting U.S. Ambassador William Wood).

called them "bandits, gangsters and drug-traffickers."²⁶ Few commentators would disagree with their portrayal. The GOC reported that paramilitaries are indistinguishable from drug-traffickers,²⁷ and even the AUC leadership has admitted that they are increasingly dependent on the drug trade.²⁸ Moreover, the paramilitaries have the worst human rights record of any party to the conflict. They are responsible for the vast majority of crimes against humanity and deaths,²⁹ accomplished with unparalleled brutality, which has not precluded the use of claw-hammers and chainsaws.³⁰

One caveat to the characterization of the AUC as no more than a blood-letting drug cartel is that the group has received a significant measure of support in the countryside.³¹ A poll from December 2004 gave Salvatore Mancuso, the most well-known AUC commander, a one percentage point lead in approval ratings over the Minister of Defense.³² Their popularity distinguishes the AUC from the FARC, whose approval ratings average 5% according to opinion polls.³³ Comparing perceptions of the two groups, a 1999 poll asked respondents to name the most serious threat to Colombian welfare: 39% chose the guerrillas, while only 8% chose paramilitaries (9% chose common criminals).³⁴

a. Links to the Colombian Government

Paramilitaries are the "enemies of the enemies" of the Colombian armed forces,³⁵ and in the late 1980s and early 1990s, the two

26. Kevin Sullivan, *Disarmament Holds Out Hope for Elusive Peace in Colombia*, WASH. POST, Dec. 26, 2004, at A36 (quoting Jose Miguel Vivanco, Executive Director of the Americas Division of Human Rights Watch).

27. See Wilson, *supra* note 23, at A01.

28. See Montanez et al., *supra* note 23, at 355; *Revelaciones Explosivas*, *supra* note 21.

29. See *supra* note 1 and accompanying text.

30. Juan Forero, *Colombia's Gamble: Give a Death Squad Some Big Concessions*, N.Y. TIMES, Nov. 28, 2004, at S.4, p.3.

31. See Rodrigo Rojas & Otty Patino, *Las Perspectivas de un Proceso de Paz con las Autodefensas*, in LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES, *supra* note 18, at 304, 306-07; Scott Wilson, *Colombian Militiamen Turn in Weapons*, WASH. POST, Nov. 26, 2003, at A16 (noting that AUC receives political support from "war-weary population").

32. *Popularidad de Jefe Paramilitar Supera Ministro de Defensa en Colombia*, SEMANA (Colom.), Dec. 21, 2004, available at <http://www.terra.com/actualidad/articulo/html/act188408.htm>.

33. RABASA & CHALK, *supra* note 1, at 29.

34. *Id.* at 56 (citing COLOMBIAN MINISTRY OF DEFENSE, LA FUERZA PUBLICA Y LOS DERECHOS HUMANOS EN COLOMBIA 29 (2000)).

35. Wilson, *supra* note 31, at A16.

groups cooperated extensively.³⁶ Under pressure from NGOs and from the international community, including the U.S. – which ostensibly conditions its military aid on human rights compliance – the GOC has taken steps to distance its security forces from the paramilitaries. For example, the GOC has stepped up military efforts to kill and capture AUC fighters (between 1997 – 1999, 1.63% of the paramilitary force was killed in action and 12.63% was captured),³⁷ prosecuted officers for collaboration with the paramilitaries, and dismissed officers accused of human rights violations.³⁸ Nonetheless, there are still credible reports showing “that certain Colombian army brigades and police detachments continue to promote, work with, support, profit from, and tolerate paramilitary groups, treating them as a force allied to and compatible with their own.”³⁹

The paramilitaries are gaining political influence in local and national spheres and have made allies in both houses of the Colombian Legislature. In regions where the state is absent or weak, paramilitary leadership replaces the state in the regulation of economic activity and the provision of security.⁴⁰ Locally and regionally, the paramilitaries heavily influence – by a variety of means – who is elected into public office.⁴¹ Top paramilitary commanders have declared that about one in three national legislators are under AUC control.⁴² A Congressman put the number somewhat lower at forty or fifty congressional members (of 265 total) who are believed to be “with” the AUC and reliant on them for reelection.⁴³

36. ROMERO, *supra* note 19, at 34 – 37.

37. RABASA & CHALK, *supra* note 1, at 57. *See also* Rojas et al., *supra* note 24, at 290-91.

38. RABASA & CHALK, *supra* note 1, at 58.

39. HUMAN RIGHTS WATCH, THE SIXTH DIVISION: MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA 1 (2001), available at <http://www.hrw.org/reports/2001/colombia/6theng.pdf> [hereinafter MILITARY-PARAMILITARY TIES]. For reporting on recent instances of cooperation, see SMOKE AND MIRRORS, *supra* note 8, at 21-22.

40. SMOKE AND MIRRORS, *supra* note 8, at 16.

41. *Id.* (illustrating paramilitary say-so over who runs and holds office with April 2005 AUC order to kill Congressman who refused to stop campaigning in certain region).

42. One top commander estimated that 30% of congressional representatives were under AUC control, while another commander stated that 35% were “friends” of the AUC. Juan Forero, *Rightist Militias are a Force in Colombia’s Congress*, N.Y. TIMES, Nov. 10, 2004, at A3 (“It is increasingly clear that the political coalition the paramilitary forces have created is at the apex of its power.”); Rojas & Patino, *supra* note 29, at 307-08; ICG 2005 REPORT, *supra* note 17, at 18.

43. Forero, *supra* note 42, at A3. Some legislators, however, have confirmed the AUC’s estimates. ICG 2005 REPORT, *supra* note 18, at 18.

3. Drugs and the Colombian Conflict

Colombia produces roughly three-quarters of the cocaine sold globally, along with some heroine,⁴⁴ much of which is sold to the United States. It is estimated that the paramilitaries control 40% of Colombia's cocaine trade or more than a quarter of all cocaine sold in the world.⁴⁵ Both the FARC and the AUC are heavily dependent on the drug trade, which provides for between 70 – 80% of their income.⁴⁶ The linkage to the drug trade largely determines the geography of the conflict, as guerrillas and paramilitaries vie for territorial control of coca-producing land, transport routes and border areas.⁴⁷ The groups have the option of either forcibly taking ownership of the territory⁴⁸ or establishing control over its inhabitants. The urge for territorial dominance has pitted both groups against each other and against the unfortunate inhabitants of whichever region is caught in the cross-hairs; the latter are terrorized into allegiance, punished harshly if accused of supporting the opposing group, and frequently chased off their land.

B. New Efforts to Stop the Conflict

Colombia started the wave of peace talks with insurgents that

44. See, e.g., *Plan Colombia – The Sequel*, THE ECONOMIST, Aug. 23, 2003, at 28 (reporting that Colombia supplies 70% of the world's cocaine and some heroine). Eradication efforts show some successes, including a 58% reduction in coca cultivation between 2000 and 2003. *Squeezing the Balloon, Not Popping It*, THE ECONOMIST, Aug. 6, 2004, available at http://www.economist.com/agenda/displayStory.cfm?story_id=3079622. However, the trend slowed considerably with only a 7% reduction occurring between 2003 and 2004. Moreover, there is little sign of a reduction in supply of cocaine to the United States, suggesting that drug traffickers may have retained large inventories of cocaine and that new areas used for coca cultivation may remain undetected. *Hand Picked: New Twists in the War on Coca*, THE ECONOMIST, Sept. 1, 2005, available at http://www.economist.com/displayStory.cfm?story_id=4352195.

45. HUMAN RIGHTS WATCH, COLOMBIA'S CHECKBOOK IMPUNITY (2003), available at www.hrw.org/background/americas/checkbook-impunity.htm.

46. For a comprehensive analysis of the role of the drug trade in the Colombian conflict, see generally RABASA & CHALK, *supra* note 1.

47. See Camilo Castilla, *Dimensiones Territoriales del Conflicto Armado Colombiano*, in VIOLENCIA, PAZ Y POLITICA EXTERIOR EN COLOMBIA 65, 78-90; RABASA & CHALK, *supra* note 1, at 55.

48. The GOC estimates that 40% of the best agricultural land in the country is in hands of drug-traffickers, including paramilitaries. Juan Forero, *Colombia's Landed Gentry: Coca Lords and Other Bullies*, N.Y. TIMES, Jan. 21, 2004, at A4. A Colombian NGO estimates that the AUC accumulated 5 million hectares of land between 1997-2003. HUMAN RIGHTS WATCH, COLOMBIA: LETTING PARAMILITARIES OFF THE HOOK 5 n.15 (2005), available at <http://hrw.org/backgrounders/americas/colombia0105/colombia0105.pdf> [hereinafter HRW 2005 REPORT].

spread throughout Latin America in the 1980s and 1990s.⁴⁹ The GOC negotiated a truce with several guerrilla groups in 1984 and six separate demobilizations in the late 1980s and 1990s. The most recent attempt to demobilize the FARC ended badly in 2002 when it was discovered that the guerrillas were using a government-sanctioned “demilitarized zone” to hide kidnapping victims and to grow and process cocaine.⁵⁰ It is widely believed that the FARC were never interested in a political settlement to a lucrative war that they were not losing.⁵¹

In 2002, Alvaro Uribe won the presidential election on a campaign that promised a harder line on guerrillas. His administration has followed a two-track approach to ending the conflict: wearing down the FARC and negotiating with the AUC.⁵² On the first track, the GOC has enhanced the operative and intelligence capacities of its armed forces by increasing its defense budget, adding more troops and police, and updating its military equipment.⁵³ The administration launched a military campaign, Plan Patriota, into traditional FARC strongholds in southern Colombia and pushed guerrillas away from urban centers, bucking the FARC’s announced policy of “urbanizing” the conflict.⁵⁴ The GOC has also increased police presence in rural areas by establishing new units in 158 municipalities.⁵⁵ More controversially, the GOC has instituted a community watch system in the countryside made up of “part-time peasant soldiers.”⁵⁶

These efforts are showing some results: the homicide and kidnapping rates have fallen, as has the number of new internally-

49. See Jesus Antonio Bejarano, *Reflections on Colombia*, in COMPARATIVE PEACE PROCESSES IN LATIN AMERICA, *supra* note 10, at 159, 201.

50. See Wilson, *supra* note 23, at A01.

51. See, e.g., Chernick, *supra* note 10, at 166 (“[G]uerrillas’ reluctance to negotiate peace represents their transformation from ideological guerrilla movements into large and successful criminal enterprises.”)

52. See Juan Forero, *Haven Offered to 2 Militias in Colombia, If They Disarm*, N.Y. TIMES, Aug. 3, 2004, at A7 (explaining GOC strategy to co-opt paramilitaries and battle guerrillas).

53. See ICG 2005 REPORT, *supra* note 18, at 12 (noting that the defense budget was at a historical high of 4.9% of GDP in 2004).

54. See, e.g., Scott Wilson, *Colombia’s Hit-and-Run War; Rebels’ New Tactic Avoids Contact with Army; Focuses on Cities*, WASH. POST, March 27, 2002, at A12. See also *Colombia’s Anti-Guerrilla War: Victories But No Waterloo*, THE ECONOMIST, July 17, 2004, at 36 (reporting on successful disruption of FARC’s “planned ‘siege’ of Bogota” and describing Plan Patriota).

55. *You Do the Maths*, THE ECONOMIST, Jan. 8, 2004, available at http://www.economist.com/research/backgrounders/displaystory.cfm?story_id=2335570.

56. *Id.*

displaced persons.⁵⁷ By keeping the FARC out of urban centers, the GOC has obstructed their access to food and communication between fronts.⁵⁸ While some analysts believe that a switch in the balance of military advantage will inch FARC commanders to the negotiation table,⁵⁹ the FARC has yet to show any interest in talks with the Uribe administration. Instead, the FARC seems to be adapting to changed circumstances by ceding territorial control in its traditional strongholds – where the GOC has concentrated its counterinsurgency forces – and attacking elsewhere.⁶⁰

On the second track, the GOC announced its plans to engage the AUC in peace talks and established a Peace Commission for that purpose in 2002,⁶¹ following the AUC's declaration of a unilateral (and frequently violated) cease-fire.⁶² In July 2003, the AUC and the GOC signed the Santa Fe de Ralito Accord⁶³ that outlines a schedule for full demobilization of the AUC by the end of 2005.⁶⁴ In July 2004, the GOC granted the AUC a "Location Zone" in Santa Fe de Ralito, where commanders could reside during the course of the peace talks without fear of arrest.⁶⁵ The first demobilization of 874 members of the Bloque Cacique Nutibara (BCN) in November 2003 cast into doubt the whole process when it came to light that the paramilitaries had recruited young men from the

57. *Id.* (reporting 2003 murder rate lowest since 1986; kidnappings down from 2,986 in 2002 to 2,043 in 2003; "new internal refugees caused by the violence" fell to 156,188).

58. See Jaramillo, *supra* note 16.

59. See generally Castilla, *supra* note at 47, at 66 (stating that the advantage gained by armed forces makes negotiation viable). See also *Colombia's Anti-Guerrilla War: Victories But No Waterloo*, THE ECONOMIST, July 17, 2004, at 36 (describing efforts to push back guerrillas).

60. ICG 2005 REPORT, *supra* note 18, at 10 ("[T]here are no clear indications that the FARC's capacity to recruit and attack selected military and civilian targets outside major cities has been significantly weakened.").

61. Resolución 185, 45.046 D.O., 23 de Diciembre de 2002 (Colom.), available at http://www.altocomisionadopalapaz.gov.co/g_autodefensa/resolucion.htm. (instituting the Exploratory Peace Commission and naming governmental delegates).

62. The Colombian Commission of Jurists recorded 1,899 paramilitary killings from the start of the cease-fire through August 2004. HRW 2005 REPORT, *supra* note 48, at 4.

63. Acuerdo de Santa Fe de Ralito para Contribuir a la Paz de Colombia, 23 de Julio de 2003 (Colom.), available at <http://www.mediosparalapaz.org/index.php?idcategoria=2402> (last visited December 5, 2005) [hereinafter Santa Fe de Ralito Accord].

64. *Id.* para. 2.

65. Upon opening the Location Zone, the GOC conditionally suspended arrest warrants for a dozen AUC commanders involved in the talks. See PEACE PROCESS IN COLOMBIA, *supra* note 1, at 4.

street to pose as AUC members for the duration of the ceremony.⁶⁶ After a second, smaller ceremony in 2003, the demobilizations picked up pace (and credibility) in the second half of 2004. By the time the Peace and Justice Law was passed in June 2005, more than 5000 paramilitaries had surrendered their weapons and renounced armed conflict.⁶⁷

1. Current Talks: What Does the GOC Want?

The GOC gives two justifications for engaging the AUC in peace talks. First, the GOC argues that their demobilization will simplify the conflict;⁶⁸ in the words of a U.S. official: "It's like taking pieces off the board."⁶⁹ The second claim is that neutralizing the paramilitaries will facilitate a political settlement with the FARC. In the past, the AUC has vehemently opposed negotiations between the GOC and the FARC.⁷⁰ Given the country's history of "revenge killings" of demobilized combatants, the FARC has reason to fear that the GOC will not be able to guarantee the security of ex-guerrillas as long as the AUC still wield power. It is axiomatic in Colombia that as long as there are guerrillas, there will be paramilitaries; the GOC seems to believe that the reverse holds true also.

2. Current Talks: What Does the AUC Want?

The AUC was driven to the negotiating table by new threats and lured there by the potentially fleeting circumstance of having powerful allies, or at least sympathizers, in both the legislative

66. Resolución 216, 24 de Noviembre de 2003 (Colom.), available at http://www.altocomisionadoparalapaz.gov.co/juridicos/resoluciones/2003/216_2003.pdf (declaring start of peace talks with the BCN); Santa Fe de Ralito Accord I (declaring a cessation of hostilities agreement and demobilization of 874 paramilitaries of the BCN). See *Dystopia Disarmed?*, THE ECONOMIST, Dec. 4, 2004, at 37. See also *Revelaciones Explosivas*, *supra* note 21 (reporting on leaked recording of Peace Commissioner reprimanding AUC commanders for Nov 2003 demobilization, calling it a "public embarrassment").

67. As of August 2005, the number of paramilitaries demobilizing subsequent to the passage of the new law brings the total number up to close to 5800. Molinski, *supra* note 2. (reporting on July demobilization of the self-titled "Heroes of Monte Maria").

68. Wilson, *supra* note 31, at A16.

69. Wilson, *supra* note 23, at A01.

70. See, e.g., *Colombian Rebels Put on Military Show Ahead of Summit*, CNN, Feb. 8, 2001, available at <http://archives.cnn.com/2001/WORLD/americas/02/08/colombia> (quoting letter from AUC commander to president calling for "an end to the joke which you are subjection Colombians to by your wrong policy of negotiation").

and executive branches of the GOC.⁷¹ The United States became a threat to the AUC when it labeled them terrorists⁷² and requested the extradition of a handful of top-ranking paramilitaries on drug charges.⁷³ The Colombian armed forces pose an increasing threat of death or capture, as their willingness to battle the paramilitaries increases in tandem with their military capacity. Unlike the FARC, who are well-hidden in rural areas, many AUC commanders are landowners or businessmen with more public habits.⁷⁴ One analyst asserts that any AUC commander could be captured by the armed forces within a period of six months.⁷⁵ Finally, AUC commanders have acquired enormous power – political and economic – and are interested in laundering their wealth⁷⁶ and legitimizing their position. These motivations translate into a list of demands that seem to be prioritized roughly as follows: (1) immunity from extradition; (2) lenient treatment by domestic authorities; (3) retention of accumulated wealth; (4) maintenance of capacity (e.g. infrastructure, networks) to continue lucrative activities; and (5) non-disclosure of information concerning prior crimes, other combatants or other criminals.

III. COLOMBIAN LAWS GOVERNING PEACE TALKS

The Colombian legal framework for demobilizations is set forth primarily in Ley 418 of 1997 (as extended and modified by Ley 548 of 1999 and Ley 782 of 2002) and Decreto 128, which together offer most illegal combatants a significant break for voluntarily demobilizing, whether individually or in a group. The demobilization laws pardon two categories of which all combat-

71. See *supra* notes 35-43 and accompanying text.

72. The U.S. Department of State designated the AUC a foreign terrorist organization in 2001. The designation makes it unlawful for anyone in the U.S. to provide the AUC with material support; requires that all AUC assets be blocked; and allows the U.S. to deny visas to its members. The decision was based on “numerous acts of terrorism, including the massacre of hundreds of civilians, the forced displacement of entire villages.” The designation order notes also that in 2000 at least seventy-five massacres were attributable to AUC members. LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES, *supra* note 19, at 342.

73. See *infra* note 242 and accompanying text.

74. Sergio Jaramillo, *La Paz con los Paras es Posible*, SEMANA (Colom.), Oct. 2, 2004, available at <http://semana2.terra.com.co/archivo/articulosView.jsp?id=82162>.

75. *Id.*

76. See, e.g., HRW 2005 REPORT, *supra* note 48, at 4 (suggesting that failure to require disclosure of assets acquired by paramilitaries will permit “legalization of the status quo”). See also Wilson, *supra* note 23, at A01 (citing GOC report that paramilitaries are exploiting peace process to protect drug profits and “legalization of part of their fortune”); *Colombia’s Paramilitaries and Drug Lords*, *supra* note 25.

ants stand accused: conspiracy and all crimes of rebellion or sedition.⁷⁷ The law offers security guarantees to combatants and their families (nicely coupled with life insurance), urgent care, social security, educational assistance, income-generating projects and cash support.⁷⁸ The pardon is revoked if the beneficiary commits any crime within two years of demobilizing.⁷⁹

Prior to the Peace and Justice Law, however, Colombia's laws did not pardon or otherwise mitigate punishment for atrocities (serious violations of international human rights and humanitarian law), acts of barbarism, terrorism, kidnapping, genocide, and homicide outside of combat.⁸⁰ A Colombian NGO estimated that the paramilitaries are responsible for 14,000 atrocities.⁸¹ It is obvious why the AUC did not feel it could take comfort in the prior legal framework. Many of them would be ineligible for pardon and sentenced to lifetime imprisonment upon surrender to the authorities. The impetus in passing a new demobilization law was the perceived need to treat *all* combatant crimes with sufficient leniency to persuade the paramilitaries to demobilize.

The Uribe administration submitted to Congress a first draft demobilization law in August 2003 to address crimes that were not pardonable under Ley 418.⁸² The "Penal Alternatives Bill" required individual trials and sentencing for any combatant accused of crimes not automatically pardoned under the existing demobilization laws.⁸³ If the combatant committed himself to meeting all obligations under the proposed law, the President was empowered to request that his sentence be commuted and he be released immediately on parole.⁸⁴ If at any point in the five years

77. Decreto 128, art. 13, Ministerio de Defensa Nacional, 45.073 D.O., 22 de Enero de 2003 (Colom.), available at http://www.altocomisionadoparalapaz.gov.co/documentos/decreto_128_03.pdf; Ley 418, art. 50, 43.201 D.O., 26 de Diciembre de 1997 (Colom.), available at http://www.secretariasenado.gov.co/leyes/L0418_97.HTM. What conduct is included under the automatic pardon is not clear. For example, during one demobilization, the paramilitaries asked whether killing a FARC civilian informant was pardonable, and the authorities were unable to answer. *Dystopia Disarmed?*, *supra* note 66.

78. Decreto 128, arts. 14 -20.

79. Ley 418, art. 63.

80. Ley 782, art. 19, 45.043 D.O., 23 de Diciembre de 2002 (Colom.), available at http://www.altocomisionadoparalapaz.gov.co/juridicos/ley_782.pdf.

81. *De Un Cacho*, SEMANA (Colom.), June 18, 2005, available at <http://semana2.terra.com.co/opencms/opencms/Semana/articulo.html?id=87978>.

82. Juan Forero, *Colombia Plans to Ease Penalties for Right-Wing Death Squads*, N.Y. TIMES, Sept. 15, 2003, at A7.

83. Penal Alternatives Bill, arts. 7-9, modified by Pliego de Modificaciones al Proyecto de Ley Estatutaria 85 de 2003, Senado (Colom.).

84. *Id.* art. 12.

following his release on parole, the ex-combatant were to commit a crime, including a parole violation, or otherwise fail to perform any legal obligation under the law, the law provided for mandatory revocation and re-instatement of the full sentence.⁸⁵ The law contained two kinds of legal obligation in effect during parole: compliance with a penal alternative (such as ineligibility for government jobs, denial of a license to carry weapons, mobility restrictions to a certain geographical area) and contributions to reparations (such as monetary payment, public apology, community service, truth-telling and cooperation with the authorities).⁸⁶ After five years of good behavior, a judge could declare the ex-combatant a free citizen.⁸⁷

Uribe promptly withdrew the draft in response to strident opposition to its excessive leniency.⁸⁸ In April 2004, the Executive branch offered a second version, titled the "Peace, Justice and Reparations Law," with sentences lasting between five and ten years, to be served in some kind of institution designed especially for the task. The new proposal also established more judicial and administrative manpower to the project of demobilization by setting up a special court, a dedicated prosecutorial unit, and a team of judges/parole officers tasked with monitoring compliance by ex-combatants.⁸⁹ Uribe's new proposal not only failed to satisfy most critics of the prior version, but lost him the support of the paramilitaries who threatened to walk out of negotiations if the new terms on "jail" time remained on the table.⁹⁰

Although at least five drafts of the demobilization law circulated through Congress, the debate centered around two of them: Uribe's proposal and a bill introduced by a bipartisan group in the Senate.⁹¹ The latter draft, the Senate Proposal, provided for har-

85. *Id.* art. 20.

86. *Id.* arts. 21-24, 29, 31.

87. *Id.* arts. 18-19.

88. See also Juan Forero, *Colombia Proposes 10-Year Terms for Paramilitary Atrocities*, N.Y. TIMES, Nov. 16, 2004, at A11 ("[P]lan prompted a chorus of criticism from foreign diplomats, the United Nations, human rights groups and some of Mr. Uribe's own allies . . .").

89. *Id.*

90. The AUC issued a communique outlining their objections to the new draft on April 14, 2004. *Comunicado de las Autodefensas Sobre la Reforma al Proyecto de Alternatividad Penal*, reprinted in EL TIEMPO, April 15, 2004, available at <http://semana2.terra.com.co/archivo/articulosView.jsp?id=77846>; see also Martinez, *supra* note 3 (reporting on Mancuso's warning that peace negotiations threatened by proposals involving punishment).

91. For a comparison of the two proposals, see HRW 2005 Report, *supra* note 48, at 9-15.

sher sanctions, stricter conditionality and a more explicit focus on victims' rights to reparations and to participate in the judicial proceedings.⁹²

The outcome of these congressional deliberations was the Peace and Justice Law, passed by the Congress on June 22, 2005 and promptly signed into law by President Uribe.⁹³ The Peace and Justice Law does not supercede demobilization laws, but adds to Colombia's legal framework for demobilization by addressing those crimes that are expressly excluded from pardon under the prior laws.

To understand how current Colombian law structures demobilization and judicial process, it is useful to simulate a typical demobilization.⁹⁴ Say the commander of "Block X" wants to demobilize. The AUC negotiators will provide the GOC with a list of names⁹⁵ of those Block X individuals who wish to demobilize with their commander.⁹⁶ Several days prior to the scheduled demobilization ceremony, Block X will gather at a "concentration zone," where the fighters will fill-out paperwork; provide dental records, finger prints, and photographs for later use in background checks; and receive a demobilization identification card entitling them to benefits under the law.⁹⁷ Meanwhile, once the Attorney General's

92. *Id.* See also Rafael Pardo, *Key Issues in the Negotiations Process*, in PEACE PROCESS IN COLOMBIA, *supra* note 1, at 17, 18-19 (summarizing the Senate Proposal, spearheaded by Senator Pardo).

93. The law will certainly be challenged in Colombia's Constitutional Court. Some analysts predict that it will be overturned on grounds that it denies victims their constitutionally-protected rights. *De Un Cacho*, *supra* note 81. Whatever the Court decides, it is possible that those who demobilize under the Peace and Justice Law will retain any privileges granted to them. See *id.* See also SMOKE AND MIRRORS, *supra* note 8, at 9 (noting probability that benefits already granted under law would be permanent as Court's rulings are not retroactive).

94. For an excellent summary of Ley 418 (as modified by Ley 782) and the Peace and Justice Law's treatment of collective demobilizations, see SMOKE AND MIRRORS, *supra* note 8, at 26-28.

95. Aliases are not provided to authorities on this list or at any point in the process. Human Rights Watch has criticized the GOC for this omission and asserted that many of those responsible for serious crimes are known to other combatants and victims only by their aliases. SMOKE AND MIRRORS, *supra* note 8, at 6.

96. The laws do not require a commander to ensure the demobilization of all troops under his control in order to be eligible for the benefits under the law. This feature has been roundly criticized because it leaves paramilitary structures (and partial manpower) intact while giving commanders a clean slate. See, e.g., CCJ JUNE BULLETIN, *supra* note 6, at 2 (criticizing law for failure to require "responsible leader to make a commitment to demobilize a group").

97. HIGH COMMISSIONER FOR PEACE IN COLOMBIA, 2004 STATUS REPORT ON COLLECTIVE DEMOBILIZATIONS, available at <http://www.altocomisionadoparalapaz.gov.co/desmovilizaciones/2004/balance.htm> [hereinafter GOC 2004 STATUS REPORT].

Office (AGO) receives the list of names, it is tasked with conducting a background check to determine whether each fighter has been indicted or is under investigation or suspicion of unpardonable crimes.⁹⁸

At the ceremony, the demobilizing combatants hand over their weapons and renounce armed conflict.⁹⁹ If the demobilized combatant is cleared by the AGO (which has been the case in the vast majority of demobilizations to date), he is then free to relocate to wherever he chooses.¹⁰⁰ He will be assigned to a regional "reference center," which coordinates the remaining judicial formalities, as well as the provision of benefits to ex-combatants in the region.¹⁰¹ At some later point, the ex-combatant is called to the reference center to meet with the AGO for an interview, during which he is asked to make a "spontaneous statement"¹⁰² concerning his prior status as a paramilitary and his knowledge of any crimes, as well as to hand over any illegally-acquired assets for the purpose of paying reparations to victims.¹⁰³

The spontaneous statement seems to provide an ideal opportunity for establishing a truthful record of the conflict, obtaining information to dismantle the AUC-linked criminal networks, and building cases against those most responsible for egregious crimes. The language of the law suggests that the AGO interrogate the ex-fighter as to his knowledge of crimes.¹⁰⁴ In fact, there are no incentives for the ex-fighter to "spontaneously" admit to any involvement or knowledge because there is no penalty for neglecting to do so, unless the omission is made in bad faith – a nearly impossible standard to prove according to Colombian jurists.¹⁰⁵ Otherwise, Article 25 provides that if a crime is later discovered, the combatant may accept the charges, his sentence

98. Peace and Justice Law, art. 16, 45.980 D.O., 25 de Julio de 2005 (Colom.).

99. GOC 2004 STATUS REPORT, *supra* note 97.

100. As the Peace and Justice Law only targets those accused of unpardonable crimes, combatants not so accused are pardoned under the pre-existing legal framework for demobilization. In the case of collective demobilizations, Ley 418 provides for government assistance to demobilized combatants to relocate, including, in exceptional cases, through application for asylum in foreign countries. Ley 418, art. 50, para. 3, 43.201 D.O., 26 de Diciembre de 1997 (Colom.).

101. HIGH COMMISSIONER FOR PEACE IN COLOMBIA, REPORT ON REFERENCE CENTERS, available at http://www.altocomisionadoparalapaz.gov.co/desmovilizaciones/2004/index_centro.htm.

102. The spontaneous statement, or "version libre," is an unsworn statement. Peace and Justice Law, art. 17.

103. *Id.*

104. *Id.*

105. See *De Un Cacho*, *supra* note 81.

may be increased by 20% depending on the gravity of the crime, but his total sentence (for all crimes admitted and those later discovered) cannot exceed the eight-year maximum established by the law.

Nor are ex-combatants who are cleared after the initial background check interrogated, unless (a) they admit to knowledge of a crime during their spontaneous statement (this had happened two or three times according to the Chief Prosecutor as of April 2005)¹⁰⁶ or (b) evidence derived from other sources suggests that the ex-combatant possesses useful information (this had yet to lead to a single interrogation as of April 2005).¹⁰⁷ As a result, the interview is conducted for the purely technical purposes of generating an admission of paramilitary membership by the ex-combatant and a pardon for the crimes of conspiracy and sedition by the AGO.¹⁰⁸

Some paramilitaries will not be allowed to go home. When the initial background check alerts the AGO to indictments, charges or suspicions of unpardonable crimes, the person so accused is sent to the Location Zone to await further judicial action.¹⁰⁹ Given the numbers of massacres and other atrocities attributed to the paramilitaries as a group, it is remarkable that analysts predict that only 100 – 200 (1% – 2%) of all paramilitaries who demobilize as a result of the current talks will find themselves in this situation and fall under the new law.¹¹⁰ At the Location Zone, the accused is required to provide a spontaneous statement and to hand over any illegally acquired assets.¹¹¹

If the AGO wants to press charges against an ex-combatant for unpardonable crimes, either on the basis of a pre-existing indictment, investigation or suspicion, or on grounds provided by the combatant himself during his spontaneous statement, the Peace and Justice Law imposes drastic time constraints. The

106. SMOKE AND MIRRORS, *supra* note 8, at 31 (reporting April 2005 interview with Prosecutor assigned to AUC cases).

107. *Id.*

108. Unless the combatant references specific crimes in his spontaneous statement, the Attorney General asks only for the combatant to identify his block, the region in which it operated and his commander; and provide the date on which he joined the AUC, his role and his reason for demobilizing. *Id.*

109. Peace and Justice Law, art. 18, 45.980 D.O., 25 de Julio de 2005 (Colom.).

110. As of April 2005, some 5000 paramilitaries had demobilized and only twenty-five were held at the Location Zone. SMOKE AND MIRRORS, *supra* note 8, at 4. See also CCJ JUNE BULLETIN, *supra* note 6, at 2 (estimating that only 100 will be charged under the Peace and Justice Law).

111. Peace and Justice Law, arts. 18-19.

prosecution has 36 hours from the issuance of the spontaneous statement to press charges for any crimes that may be reasonably inferred from the statement or from any other evidence then available.¹¹² After pressing charges, the prosecution has sixty days to bring the case to trial.¹¹³ According to Colombian jurists, the time constraints are unrealistic even in the context of ordinary crime; given the volume of potential cases here, their complexity, and the difficulty in obtaining evidence, the constraints make it almost inevitable that charges will be brought only against those fighters who were already under investigation at the time of demobilization.¹¹⁴

If the AGO is able to bring the case to trial, the ex-combatant may forego the process by accepting the charges,¹¹⁵ and so become eligible for a reduced sentence. Regardless of the degree or frequency of the crimes, the judge must sentence the defending combatant to no fewer than five and no more than eight years.¹¹⁶ Up to eighteen months spent in a concentration or location zone during the AUC-GOC negotiations counts toward the sentence.¹¹⁷ Ex-combatant detainees may also be eligible for further reductions for work or study carried out during confinement.¹¹⁸

Although the Peace and Justice Law appears tougher than prior executive proposals in that it requires some sort of confession and forfeiture of illegally acquired assets, these new provisions are ineffectual. A combatant who fails to confess to a crime that is later attributed to him does not lose his benefits, and a combatant who does not hand over illegally acquired assets loses nothing if authorities later discover those assets, except the assets

112. *Id.* art. 17.

113. *Id.* art. 18.

114. See CCJ JUNE BULLETIN, *supra* note 6, at 3 (arguing that time periods provided "to investigate massive and systematic violations of human rights. . . are absolutely insufficient" and calling proceedings a "sham"); SMOKE AND MIRRORS, *supra* note 8, at 8, 52 (calling deadlines "completely unrealistic" and predicting that charges will be brought only against those whom the Attorney General was already prepared to prosecute).

115. Peace and Justice Law, art. 19.

116. *Id.* art. 30.

117. *Id.* art. 31.

118. It is not clear whether the ex-combatants will be eligible for further reductions. The Peace and Justice Law purports to exclude these additional reductions. *Id.* art. 30. Some legal analysts predict that such an exclusion is unconstitutional because it violates the equality principle. If ex-combatants may apply for work and study reductions, the total sentence served for serious crimes may be little more than two years. SMOKE AND MIRRORS, *supra* note 8, at 54, n.139.

themselves.¹¹⁹ Probably, these new, largely illusory provisions were traded off against confinement times, which were reduced from a maximum of ten years in Uribe's second proposal to a maximum of eight in the law adopted by Congress. The executive branch has yet to designate the location in which these sentences will be served, but the GOC has suggested that ex-combatants will be sent to agricultural facilities.

IV. OUTLINE OF AN ECONOMIC APPROACH TO PUNISHMENT OF COMBATANTS

In the debate surrounding the law, the positions on punishment are often framed in a way to preclude agreement. Those advocating leniency justify their stance with reference to the demands of the paramilitaries,¹²⁰ while those pushing for more severe punishment and stricter conditionality base their position largely on the moral and legal imperatives of punishing human rights violations. Expressed in these terms, there is no overlap or "zone of possible agreement" between the two views. The maximum punishment that the paramilitaries would accept in the negotiations falls short of the minimum punishment required under the legal and moral doctrines invoked. This paper attempts to recast the debate by outlining the goals of the Colombian peace process, rather than assuming that the overriding aim is the demobilization of the AUC, and evaluating the punishment regime provided in the Peace and Justice Law in terms of its effectiveness in advancing those goals.

A. *Overview of Existing Literature*

The paper borrows from writers on transitional justice, a field that was developed to respond to the legal challenges of political transitions from authoritarian and military regimes to democracy, which often involve internal armed conflict. This growing body of literature is tapped so as to incorporate considerations that are unique or uniquely significant to post-conflict contexts, but also to tailor traditional doctrines, like deterrence, to the circumstances of armed combat and large-scale violations of human rights. The literature is also useful in that it sheds light on the positions

119. SMOKE AND MIRRORS, *supra* note 8, at 8 (calling the requirement that demobilizing fighters hand over their wealth "toothless").

120. The Peace Commissioner, for example, justified leniency with the following (circular) reasoning: "We have to offer benefits . . . Why? Because we need to persuade them." Forero, *supra* note 30, at S.4, p.3.

taken by those pushing for more severe sanctions. "Steeped" as it is in "moral theory, political theory and science, or highly theorized international law,"¹²¹ transitional justice literature provides the vocabulary in which much of the debate is now expressed by practitioners.

However, the applicability of transitional justice to this paper and to Colombia generally is qualified in several respects. As a result of its human rights and international humanitarian law origin, transitional justice generally deals with crimes carried out by the state directly or with more state complicity than is the Colombian case. Likewise, the literature gives more weight to international legal norms, the role of international courts and the cross-border effects of punishment decisions than is afforded to these issues here, where the focus is on Colombian welfare.

On the premise advanced by Posner and Vermeule that doctrines rooted in domestic law can and should be put to more frequent use in the analysis of transitional justice,¹²² this paper also draws heavily from law and economics thinking on criminal law, particularly from literature relating to plea-bargaining and the utilitarian justifications for punishment.

B. The Transitional Justice Approach to Punishment

On the question of punishment of human rights violations, transitional justice literature is moving in the direction of more accountability through more punishment.¹²³ The position is grounded largely on what many writers see as an emerging duty to prosecute these crimes under international law,¹²⁴ complemented by the notion that surviving victims have certain rights – to truth, to reparations, and possibly to retribution – that necessi-

121. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 764 (2004).

122. See *id.* (arguing that transitional justice writers "have gone wrong by virtue of an insufficient appreciation of the ordinary law of consolidated democracies").

123. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 30 (2001) (attributing the rise in accountability to "desire for justice, as well as utilitarian objectives of post-conflict peace-building").

124. See, e.g., Diane F. Orlentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, in TRANSITIONAL JUSTICE 375 (Neil Kritz ed., 1995); Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress and Nontreaty Sources of the Obligation to Investigate and Prosecute*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 24, 39 (Naomi Roht-Arriaza, ed., 1995).

tate punishment.¹²⁵ Despite the well-established history of amnesties,¹²⁶ they are now under attack by international and human rights organizations, diplomats and legal scholars who argue that they are immoral, illegal or ineffective or all of the above.

Not all transitional writers agree that prosecution is legally required or optimal in all transitional contexts.¹²⁷ The economic approach, which has enjoyed little popularity among transitional justice writers, is most frequently invoked to counter the assertion that prosecution is the appropriate approach to past crimes.¹²⁸ By highlighting the cost of prosecution, an economic approach acknowledges the potential for tension between the goals of justice and peace, such that where the needs of the latter (defined narrowly as the absence of hostilities) are more pressing, prosecution may be bypassed.¹²⁹ This challenge to the so-called "prosecutorial preference" has forced both sides of the debate to buttress their arguments with forward-looking, utilitarian considerations. A more rigorous application of the economic approach is found in Miriam Aukerman's article, *Extraordinary Evil, Ordinary Crime*,¹³⁰ which compares prosecutorial and non-prosecutorial

125. See generally Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1439-40 (2002).

126. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 22 (2002) (stating that amnesties have been granted in thirty-five countries since the end of World War II).

127. See, e.g., Carlos S. Nino, *Response: The Duty to Prosecute Past Abuses of Human Rights Put into Context*, in TRANSITIONAL JUSTICE, *supra* note 124, at 417 (noting that state practice counters notion of emerging international norm to prosecute); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 514-21 (explaining that international law provides little textual support for obligation to punish).

128. See, e.g., Ruti Teitel, *How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses*, in TRANSITIONAL JUSTICE, *supra* note 124, at 146 ("[T]he decision to punish or not to punish will depend on a society's calculus of its future needs.").

129. See, e.g., Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMPT. PROBS. 81, 92 (1996) (noting some circumstances where alternatives to prosecution, such as truth commissions, may be justified by pressing social needs). The trade-off language is also invoked proposing a non-prosecutorial response. President Uribe answered concerns about lenient treatment for grave crimes by asserting that for Colombia, "definitive peace is the best justice." Peter Slevin, *Colombian President Defends Amnesty for Paramilitary Troops*, WASH. POST, Oct. 1, 2003, at A17. Likewise, a high-level GOC negotiator stated that the GOC was seeking to "establish an adequate balance between the interest of justice and the interest of peace." Cesar Sabogal, *No Blanket Amnesties for Paramilitaries*, AGENCE FRANCE PRESSE INTERNATIONAL NEWS, July 2, 2004, available at LexisNexis Academic.

130. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for*

responses to grave violations of human rights in terms of their impact on retribution, deterrence, rehabilitation, restorative justice and social solidarity,¹³¹ concluding that prosecution may not be the best tool for peace or justice in certain circumstances.¹³²

C. *Goals of the Colombian Peace Process*

The peace process refers to the negotiations with armed actors, but also to "peace-building," meaning "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."¹³³ The specific goals that should be taken into account to determine optimal sanctions include: (1) to *obtain* the cessation or diminution of hostilities with paramilitaries and guerrilla groups; (2) to *maximize* societal acceptance of governmental action relating to the negotiations; and (3) to *minimize* the probabilities of: (a) a re-emergence of any demobilized non-state armed group; (b) an emergence of any new non-state armed group; (c) the employment by non-state armed actors of warfare tactics that are considered highly detrimental to the country's wellbeing, including war crimes and crimes against humanity; (d) commission of common crimes by demobilized combatants; (e) vigilantism; and (f) costs, particularly those that the Colombian government must cover from its own purse, i.e., without foreign assistance.

D. *Possible Sanctions*

The punishment options that are available to a government in its design of a sanctions regime for IAGs include: a blanket amnesty; individual pardons; suspended sentences; alternative non-monetary and non-confinement sanctions, such as public shaming or bans on political participation; monetary sanctions; non-prison privation of liberty; domestic imprisonment; and extradition in applicable cases. In addition, a sanctions regime can:

Understanding Transitional Justice, 15 HARV. HUM. RTS. J. 39, 43 (2002) (challenging "the assumption that prosecutions are always the best way to pursue justice in societies in transition by arguing that the choice between prosecution and non-prosecution alternatives depends on what one is seeking to achieve").

131. *Id.* at 45, 53-91.

132. *Id.* at 96.

133. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING: REPORT OF THE SECRETARY-GENERAL PURSUANT TO THE STATEMENT ADOPTED BY THE SUMMIT MEETING OF THE SECURITY COUNCIL ON 31 JANUARY 1992 11 (UNITED NATIONS 1992), *quoted in* Kees Kingma, *Assessing Demobilization: Conceptual Issues*, in DEMOBILIZATION IN SUB-SAHARAN AFRICA 23, 25 (Kees Kingma ed., 2000).

vary the punishment for different classes of combatants or crimes; devise combinations of different sanctions; and trade off options as part of its negotiations with the combatants. In other words, like social and economic benefits to combatants, sanctions can be “packaged” to best meet the goals of the peace process.

V. EFFECTIVENESS OF PUNISHMENT OPTIONS IN ACHIEVING PEACE PROCESS GOALS

A. *Cessation of Hostilities*

In the absence of an outright military victory, the demobilization of IAGs, and the legal framework that governs their post-conflict treatment, is the result of negotiation. Given that the paramilitaries’ negotiating agenda was primarily, if not exclusively, targeted to allowing them to leave the battlefield without facing legal sanctions, it is questionable whether such a negotiation could ever be expected to produce agreement on an optimal level of punishment.

This section starts by analogizing the GOC-AUC negotiations to both self-reporting and plea bargaining models in the domestic law context. On assumptions of rational behavior, both models predict that a socially advantageous agreement can be reached. Two arguments are developed to challenge the prediction. First, when the assumptions of rationality are relaxed to reflect psychological biases and agency problems, it seems less likely that the paramilitaries would have agreed to any offers in the range of what is reasonable for the GOC. Second, even if the models hold and negotiations produce outcomes that roughly maintain pre-existing deterrence, that pre-existing level may be sub-optimal. The tentative conclusion is that given the ongoing nature of Colombia’s armed conflict and the limited negotiation goals of the paramilitaries, negotiated settlement was not a promising route to the cessation and prevention of hostilities in Colombia.

For simplicity, we assume that there are two possible outcomes to peace talks between a government and an IAG: either the parties will agree on terms of demobilization and continue to demobilize or one or both parties will terminate the talks and combat will be resumed.

1. Application of Models for Self-Reporting and Plea-Bargaining to Negotiations

Self-reporting occurs when a person who has violated the law

comes forward to the authorities to report the violation and to submit to the relevant sanctions.¹³⁴ A risk-neutral violator will be willing to self-report when the sanction with self-reporting is lower than the expected sanction without self-reporting (the expected sentence discounted by the probability of escaping detection). In theory, the self-reporting sanction does not need to be much lower to encourage a rational violator to turn himself over to the authorities.¹³⁵ The corresponding marginal loss in deterrence is likely outweighed by savings on enforcement costs and mitigation of harm,¹³⁶ or its cessation, if the violation would continue without self-reporting.

Colombia's laws promising leniency to individual combatants who come forward voluntarily represent an attempt to induce self-reporting.¹³⁷ In the single-combatant scenario, once a fighter identifies himself to the authorities, he is subject to the law as it stands. Group demobilizations do not fit as neatly under the scholarship on self-reporting because groups have the option of coming forward without surrendering to the authorities, i.e., they can condition their submission to the law on their approval of its terms.

The negotiation aspect of our issue is better explained by analogy to plea-bargaining, where the failure to agree on a plea leads the parties to the battlefield instead of the courthouse. Like self-reporting, the basic model for plea bargaining theorizes that the sanction that will be satisfactory to both parties is determined by the expected sanction without bargaining (the expected sentence discounted by the probability of acquittal).¹³⁸ Similar to self-reporting, plea bargaining is considered to be socially advantageous because it produces results that "largely reflect the substantive outcomes that would have occurred at trial anyway," without the costs of trial.¹³⁹

Stephanos Bibas criticizes the rational-actor model of plea bargaining for neglecting to account for distortions that can result in the rejection of reasonable offers.¹⁴⁰ A quick review of these dis-

134. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 522-24 (2004).

135. *See id.* at 523.

136. *See id.* at 523-24.

137. *See, e.g.*, Decreto 128, Ministerio de Defensa Nacional, 45.073 D.O., 22 de Enero de 2003 (Colom.).

138. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004).

139. *Id.*

140. *Id.* at 2464.

tortions suggests that they are likely to figure prominently in the peace talks between governments and IAGs, with the result that IAG negotiators will frequently refuse reasonable offers by their governmental counterparts.

2. Distortions that Influence Negotiations

First, the fighters are likely to be overly optimistic about their chances of escaping capture in combat. Bibas refers to numerous psychological studies that “show that people are consistently too optimistic and therefore overconfident in their chances of achieving favorable outcomes.”¹⁴¹ Excessive optimism or confidence is heightened by the perception of having some measure of control over outcomes,¹⁴² which is certainly the case among combatants contemplating military outcomes.

Although the usual effect of optimism is to inflate expectations, obfuscate the rational calculus of negotiations and hinder agreement,¹⁴³ this optimism may be exploited to favor settlement. Bibas discusses one avenue for exploitation that emerges in the domestic context and has a potential application to the Colombian peace process. In criminal plea bargaining, optimism concerning favorable outcomes means it is easier for parties to agree on a plea that is expressed as a charge (with an uncertain sentence to be determined by a judge) rather than as a stipulated sentence,¹⁴⁴ because the latter arrangement does not allow either side to “indulge its over-confidence” to overvalue the bargain.¹⁴⁵ If applied to the government-combatant negotiations, Bibas’s insight would suggest that the government should incorporate more uncertainty into the bargain to enhance the chances for agreement. The proposition, albeit counterintuitive given a generalized preference for certainty,¹⁴⁶ has some support in recent develop-

141. *Id.* at 2498.

142. *Id.* at 2501.

143. Jennifer Gerarda Brown, *The Role of Hope in Negotiations*, 44 UCLA L. REV. 1661, 1674 (highlighting tendency of optimistic negotiators to over-estimate their counterparts’ reservation price and so walk away from good deals).

144. Bibas, *supra* note 138, at 2499.

145. *Id.* at 2501 (“The consequence [of excessive optimism] is that the parties prefer charge bargains to sentence bargains. Scholars have criticized charge bargains as inferior to sentence bargains because they are less transparent. This opacity, however, contributes to the allure of charge bargaining, allowing each side to indulge its overconfidence.”).

146. Over-optimism alters combatants’ risk perception, but does not tell us anything about the utility or disutility they derive from taking risks. It is possible for risk aversion to overwhelm the effect of over-confidence such that a combatant would not favor an uncertain deal over a certain one with equal, let alone lower, sanctions.

ments in Colombia. The fact that, prior to June 2005, paramilitaries were willing to demobilize in large numbers without any certainty as to their legal status is difficult to explain unless we assume that they are hyper-hopeful for a favorable resolution.

Uncertainty may be introduced in a number of ways. For example, demobilization laws can give the courts flexibility to determine the duration of each sentence and the location in which it is served. The Peace and Justice Law moves in the opposite direction by establishing a narrow range of confinement terms and reserving to the Executive the right to designate the place of confinement. Nonetheless, the practical difficulties in charging and trying ex-combatants add an element of randomness to the judicial process that leaves room for optimism. Likewise, possible sanctions that are outside the control of the negotiating parties (for example, future exercises of international jurisdiction) generate uncertainty. The optimism hypothesis implies that combatants will accept a bargain with larger expected sanctions than they would agree to if imposed with certainty.¹⁴⁷

A second distortion arises due to the unusually high rates for discounting future costs (like capture, imprisonment, and death) that combatants can be expected to apply. Bibas notes a general tendency to discount future losses more heavily than future gains, but asserts that some kinds of violators have higher than average discount rates.¹⁴⁸ He links high rates to "impulsiveness," which in turn correlates with being young, male, low-income and engaged in violent crime,¹⁴⁹ all of which are characteristic of the paramilitaries.¹⁵⁰ This second distortion pushes in the same direction as the first: combatants may reject reasonable offers if accepting them means facing immediate losses.

A third distortion that reduces the probability of agreement on reasonable terms is created by agency problems. In the current

One possible answer is to assume that members of illegal armed groups are risk preferers. Bibas cites support for the proposition that recidivist criminals are at least less risk-averse than the population at large. *See id.* at 2509.

147. Another source of uncertainty on the bargain side is the possibility that the offer of lenient treatment will be nullified under a future administration or that it will be disregarded by a foreign court or international tribunal. *See infra* notes 250-252 and accompanying text. Combatants would tend to underestimate the chances of conviction under such circumstances.

148. Bibas, *supra* note 138, at 2504-06.

149. *Id.* at 2506-07.

150. *See* GOC DEMOBILIZATION REPORT, *supra* note 5 (reporting results from survey of demobilizing combatants showing that 72% is under thirty years of age, 12.5% illiterate, 50% has completed the fifth grade and 88% has no assets).

negotiations, the top fourteen paramilitary leaders are tasked with representing their own interests and those of thousands of foot soldiers in their charge. For the purpose of negotiating a demobilization package, the interests of combatant leaders and foot soldiers are rarely aligned. On the question of punishment, for example, the optimal regime is likely to require harsher sanctions for leaders than for the rank and file.¹⁵¹ A reasonable offer on this basis might be acceptable to almost all combatants, but still be turned down by the leadership.

The above discussion suggests that agreement on reasonable offers is unlikely because combatants will tend to hold out for irrationally good deals, i.e. sub-optimal levels of punishment. The agreement between the GOC and the AUC on punishment is consistent with this analysis if the deal is, as many analysts contend, irrationally good for the AUC.¹⁵² Agency problems affecting government negotiators help explain a tendency on their part to offer sub-optimal sanctions. President Uribe's team may have been willing to make irrational concessions in order to succeed in demobilizing the paramilitaries, a policy that started with the Uribe administration and has been defended vigorously against the skepticism of the media, vocal Colombians and the international community. Having largely staked its reputation on bringing an end to the conflict, the GOC may be unable or unwilling to cut its losses as its commitment to the policy is gradually escalated. Moreover, many of the long-term consequences of excessive concessions at the bargaining table will not materialize under the current administration's watch.¹⁵³

3. The Sub-Optimality of Reasonable Outcomes

Even assuming that the rational-actor model holds and that the parties could reach an agreement that roughly reflects the expected sanctions without negotiations, such an agreement may not be optimal. The problem arises if expected sanctions without

151. See discussion on limits to deterrence and marginal deterrence.

152. See, e.g., SMOKE AND MIRRORS, *supra* note 8, at 2 ("[T]he Colombian Congress approved a demobilization law that gives paramilitaries almost everything they want.").

153. President Uribe's move to amend the constitution to allow him to run for a second term, starting in 2006, was successful in Congress, but may falter in the Colombian Constitutional Court. See generally ICG 2005 REPORT, *supra* note 18. Successful peace talks with the AUC will help Uribe gain re-election. *Id.* On the other hand, if Uribe expects to be in charge for another five years, he should be expected to take a longer view of the risks generated by over-generous deals at the negotiation table.

negotiations are an inadequate measure of optimal sanctions once we take into account the need to deter future harm. Assuming that paramilitaries are making a fair living while running a small risk of capture, incapacitation or death, they will rationally demand a deal that is more lenient than the GOC should afford. In other words, even if self-reporting, plea-bargaining and negotiating outcomes roughly *maintain* existing levels of deterrence, the GOC cannot hope to use negotiations to *increase* deterrence, i.e. to take a tougher stance on combatant crime than it is taking presently. The paramilitaries would never agree to it. Rather than match the expectations that paramilitaries have concerning the sanctions that would be imposed absent an agreement, the GOC may need to change those expectations on the battlefield.

In summary, government-combatant negotiations should not be expected to result in an agreement on sanctions that reflect the expected sanctions without negotiation. If an agreement does result, as it has in Colombia, the result does not provide a conclusive answer to the question this paper seeks to address: how much punishment *should* the GOC insist – at the risk of terminating negotiations – on imposing on the paramilitaries?

B. Goals Related to Deterrence

The goals of minimizing the probabilities of an emergence of new non-state armed groups or a re-emergence of existing ones, as well as decreasing the incidence “common” criminal conduct by demobilized combatants, can be analyzed under deterrence doctrines. Deterrence refers to the tendency of the imposition of sanctions to deter present and potential illegal combatants from engaging in the kinds of criminal conduct at issue here.¹⁵⁴ It is premised on the idea that an individual contemplating the commission of a crime will weigh the benefits of a crime against its costs, including the expected value of the sanction, which is the product of its magnitude and the probability of imposition. In this model, punishment is part of the “price” of a crime facing the prospective criminal so that any increase in punishment works to decrease his expected return.¹⁵⁵

Deterrence is not necessarily an important consideration to all peace negotiations. If a government considered a conflict to be an exceptional event which could be terminated by means a suc-

154. SHAVELL, *supra* note 134, at 515-19.

155. See, e.g., CENTO VELJANOVSKI, *THE NEW LAW AND ECONOMICS* 84 (1982).

cessful settlement, it would be rational to give little weight to the effect of punishment on potential future violators. But this is not the case in Colombia, where about one half of the existing armed combatants are not even at the negotiating table and conditions for conflict still prevail.

1. General Deterrence

General deterrence refers to the tendency of potential violators to be deterred by the expected sanctions from engaging in criminal conduct.¹⁵⁶ The decisions reached in the course of the GOC's negotiations with the paramilitaries will effect the deterrence of (1) paramilitaries not represented in the talks, (2) members of guerrilla groups, and (3) all persons who may join an IAG in the future.

a. Is Combatant Crime Deterrable?

A threshold question is whether the nature of combatant crimes or the military context in which these are perpetrated precludes application of a doctrine that is premised on rationality. The least persuasive challenge to the application of the doctrine is that human rights violators are un-deterrable because they do not think what they are doing is wrong. In an article on new approaches to transitional justice, Chandra Lekha Sriram describes deterrence as being "based on the assumption that the perpetrator believed or understood that the action was wrong and expected such wrongdoing would result in negative consequences."¹⁵⁷ In fact, only the latter is necessary for deterrence.¹⁵⁸ Sriram's conclusion, that as long as perpetrators believe their actions are morally right, "then such abuses are un-deterrable, since potential abusers will see such punishment as unjustifiable"¹⁵⁹ is flawed for the same reason. To be deterred, it is not necessary for illegal combatants to behave reasonably; it is only necessary that they be capable of calculating the costs and benefits of their decisions.

A related challenge is that the horrific nature of the crimes is

156. See SHAVELL, *supra* note 134, at 515.

157. Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 394 (2003).

158. One might think it terribly unfair for a police officer to give one a ticket for speeding given one's mastery over one's car at any speed, and yet still be persuaded to stay within the limit for fear of that ticket.

159. Sriram, *supra* note 157, at 394.

conclusive proof of the perpetrator's irrationality. This might be wishful thinking. History gives us a handful of crazed genocidaires (Hitler, for example), but many of the worst human rights violators are more accurately described as "manipulators,"¹⁶⁰ who make calculated decisions to commit atrocities. As Ehrlich argued, "preference for risk, immorality and a penchant for violence, while increasing the likelihood that a person would choose to commit a crime under a given set of incentives, do not necessarily rule out the ability to make self-serving choices."¹⁶¹

Nonetheless, these tendencies do make deterrence harder. Risk-preference dilutes the threat of future costs; a "penchant for violence" increases the value of crime to the combatant; and "immorality" neutralizes the effect of societal norms proscribing harmful conduct. Combined with the excessive optimism and tendency to discount future costs heavily, these traits require higher expected sanctions to influence combatants' conduct. In extreme cases, they may render deterrence unworkable as a practical matter by requiring a higher expected sanction than the authorities can deliver.

A military context has a blunting effect on a combatant's ability to make rational decisions, which appears negatively related to the decision-maker's rank. High-ranked combatants can be expected to make rational decisions because they are able to exercise their will to a larger extent than those under them. A military leader, moreover, is expected to devise strategy that reflects the costs and benefits of a given course of action; there is no *a priori* reason to assume that leaders would not weigh the expected sanctions for themselves and their troops in their strategic decisions.

Low-ranked combatants are a different matter. They are much less likely to act on their own cost-benefit analyses given that military training and discipline encourage deference to commanders on questions of strategy. This intuition is supported by the willingness of courts to exonerate foot soldiers from some crimes under the doctrines of duress and superior orders. In reviewing a duress defense invoked by a member of the Bosnian

160. Aukerman illustrates the point by noting that while fanatics like Hitler are probably undeterrable, some leaders like Milosevic are "manipulators, not fanatics, and might be restrained by credible threats." Aukerman, *supra* note 130, at 68.

161. Isaac Ehrlich, *On Positive Methodology, Ethics and Polemics in Deterrence Issues*, 22 BRIT. J. CRIMINOLOGY 124, 127 (1982).

Serb army, Judge Cassesse of the Appeals Chamber of the International Criminal Tribunal of Former Yugoslavia (ICTY) noted:

In evaluating the factual circumstances which may be relevant to duress, according to a trend discernible in the case-law, there may arise the need to distinguish between the various ranks of the military or civilian hierarchy. [T]he lower the rank of the recipient of an order accompanied by duress, the less is likely that he enjoyed any real moral choice.¹⁶²

Judge Cassesse further cites to an earlier opinion that correlates lower rank to a greater "sense of compulsion" and observes "that the whole concept of the military is to a certain extent coercive."¹⁶³

If a combatant lacks "moral choice" and cannot act according to his own perceptions of right and wrong, he also lacks capacity to act on his assessment of costs and benefits. Moreover, in a military setting deterrence is countered by more immediate pressures and incentives. Jaime Malamud-Goti asserts that the internal structure of military body overpowers external pressures:

Deterrence is unlikely to be effective in cases where military personnel engage in human rights violations. The threat of a hypothetical conviction does not discourage criminal behavior within a military body. Immediate and certain approval from comrades overrides any reason for complying with legal standards or any fear of the consequences of engaging in criminal behavior. The certainty of approval and support from comrades and superior officers neutralizes the deterrent effect of a possible criminal sanction. Approval or disapproval from the military environment is much stronger than rejection from society at large.¹⁶⁴

162. Prosecutor v. Erdemovic, Case No. IT-96-22-T, Joint and Separate Opinion of Judge Cassesse, ¶ 45 (Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-adojcas971007e.htm>. Not all writers or judges agree that military discipline precludes rational decision-making. A post-World War II judge observed: "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent It is fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do" THE EINSATZGRUPPEN CASE, 4 TRIALS OF WAR CRIMINALS, 470-71, quoted in Jeanne L. Bakker, *The Defense of Obedience to Superior Orders: The Mens Rea Requirement*, in TRANSITIONAL JUSTICE, *supra* note 124, at 441, 446.

163. *Erdemovic*, Case No. IT-96-22-T at n.107 (citing R. v. Finta, [1994] 1 S.C.R. 701, 838 (Can.)).

164. Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals*, in TRANSITIONAL JUSTICE, *supra* note 124, at 189, 196. In a different article, Malamud-Goti emphasizes the peer-pressure exerted by other soldiers, finding an inverse relationship between the tightness of "bonds of comradeship" – and

Finally, while I argue above that the horrific nature of the crimes at issue does not *reveal* a pre-existing inability to make self-serving choices, continuous exposure and involvement in these crimes may *result* in such an inability.¹⁶⁵

If foot soldiers are incapable of rational decision-making, expected sanctions will not deter them from participating in specific criminal acts any more than the prospect of punishment deters the insane. On deterrence grounds, therefore, it may be reasonable to forego prosecution of foot soldiers. Perhaps to placate those pushing for more punishment, the Peace and Justice Law does not formally exempt foot soldiers and they are theoretically at risk of being sentenced to confinement for their participation in unpardonable crimes. However, the Colombian demobilization laws create a *de facto* exemption for foot soldiers by allowing them to obtain a pardon without confessing their crimes and through the imposition of unrealistic deadlines on prosecutorial action. The *de facto* – *de jure* gap is unfortunate. If foot soldiers were granted conditional immunity from their unpardonable crimes (e.g. by re-defining these crimes to include an element of instigation, planning, ordering) the GOC could require them to disclose their involvement and knowledge of all unpardonable crimes. The law does not require any disclosure at present. The High Commissioner for Peace has cited the laws against self-incrimination and duress to explain this odd omission in the law.¹⁶⁶ Equally plausible, however, is the idea that the Attorney General could not take tens of thousands of confessions for crimes that the Peace and Justice Law requires his office to prosecute. If the GOC does not plan to prosecute foot soldiers, it lost an opportunity to obtain valuable information from them by failing to provide formal grounds for their immunity.

Deterrence of foot soldiers may still be possible if it can target the potential criminal at an earlier point in time, i.e., before he is engulfed by those circumstances that render him irrational. Consider Shavell's argument that while the defense of diminished responsibility (e.g. insanity and youth) may be justified under the deterrence doctrine, "[t]he imposition of liability could induce

therefore the force of peer pressure – and an officer's rank. Jaime Malamud-Goti, *Dignity, Vengeance and Fostering Democracy*, 29 U. MIAMI INTER-AM. L. REV. 417, 423 (1998).

165. See, e.g., Akhavan, *supra* note 123, at 12 ("Individuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty.").

166. SMOKE AND MIRRORS, *supra* note 8, at 57.

these parties to act differently and thereby reduce dangers over which they later would have no control."¹⁶⁷ A strict approach to drunk driving illustrates the point: severe penalties designed to encourage a prospective drunk driver to make alternative transportation arrangements before becoming intoxicated are justified even if the driver will not be deterred later on.

In light of the above, governments facing internal armed conflict should devise and publicize a punishment scheme for foot soldiers to deter prospective combatants from *joining* an IAG. Whether the decision to join is deterrable depends on the combatants' reasons for joining. Those who join because they or their family members are threatened with bodily harm are virtually undeterrable, but those who have a grievance against the opposing group are theoretically deterrable and those who join to improve their financial situation can be analyzed under a straightforward application of the deterrence doctrine.¹⁶⁸

In the case of the paramilitaries, the economic motive plays a large part in the decision to join the AUC.¹⁶⁹ In a survey among the first group of AUC demobilized combatants, nearly one in four said he had joined the AUC for economic reasons.¹⁷⁰ Likewise, Humans Rights Watch, after asking demobilized combatants from around the country why they had joined the AUC, reported: "[T]he one reason we heard most frequently was that they simply wanted a job, and the paramilitaries paid better than most."¹⁷¹

Since combatants may not know or believe that they will later

167. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1254-55 (1985).

168. Using data from 152 civil conflicts from 1965-1995, Paul Collier and Anke Hoeffler illustrate an inverse statistical relationship between economic opportunities available to young men and the risk of internal armed conflict in a society. They posit that an increase in the opportunity cost of joining and remaining in an IAG reduces the returns to armed groups. The best evidence adduced is from the Russian Civil War (1919-1920), where desertion rates were ten times higher in the summer than in the winter because soldiers worked on their farms during the summer. PAUL COLLIER & ANKE HOFFFLER, *JUSTICE-SEEKING AND LOOT-SEEKING IN CIVIL WAR* 4 (1999).

169. Gustavo Villegas, *Key Issues in the Negotiations Process*, in *PEACE PROCESS IN COLOMBIA*, *supra* note 1, at 32 (presenting and explaining survey results). See *infra* note 145 for specific statistical findings.

170. Villegas, *supra* note 169, at 32. When asked why they had joined the AUC, the ex-fighters answered as followed: 23% cited economic reasons; 25% claimed revenge for the death of a family member; 25% cited threats; 7% explained that problems at home were to blame; and 20% offered other reasons. *Id.* There is some doubt as to the reliability of these statistics because many suspect that the AUC recruited "street thugs" for the demobilization. See *supra* note 65 and accompanying text.

171. SMOKE AND MIRRORS, *supra* note 8, at 18 (noting that AUC foot soldiers earn more than per capita GDP in Colombia).

be coerced into punishable acts, there is a strong argument for meting out some punishment for merely joining an IAG. In most post-conflict contexts, it is not feasible to provide large numbers of combatants with full judicial process or to incarcerate them, but demobilizing combatants can be required to confess their crimes, share information and provide community service or a comparable penalty. Under Colombian laws, any foot soldier who is not accused of the unpardonable crimes (e.g. violations of human rights, kidnapping, and homicide outside of combat) is granted a pardon that is conditioned only on abstention from criminal conduct in the two years following demobilization.¹⁷² In light of cost considerations and the logic of marginal deterrence, it is impractical to imprison 20,000-40,000 members of Colombian IAGs, but the existing framework is more lenient than necessary on foot soldiers who are not required to plea bargain for their pardon by confessing their crimes and providing information to the Government.

b. Influencing Combatants' Assessment of Sanctions

The magnitude of sanctions imposed on demobilizing combatants enters into the deterrence calculus of non-demobilizing combatants indirectly. Because the combatant has control over the probability that these particular sanctions will be applied, a belief that he will never volunteer to demobilize lowers the probability of their imposition to zero. It follows that there is a cut-off level of severity (subject to personal preferences and circumstances) above which a combatant will cease to consider voluntary demobilization as an option because he perceives the sanctions to be larger than those he risks as an active combatant. Theoretically, any increase in sanctions above that level would have no additional deterrent effect. The GOC can affect a change in the combatants' cut-off level only by increasing the expected sanctions without an agreement, i.e., by capturing more combatants and/or punishing them more severely.

Reaching that critical level of severity would affect incentives, however. It would produce the same result as if the GOC made a

172. Ley 418, art. 63, 43.201 D.O., 26 de Diciembre de 1997 (Colom.). Given the paramilitaries' human rights record, it seems likely that a sizable number of foot soldiers are guilty of crimes that are not officially subject to pardon. However, considering the fact that the law does not require a confession together with the severe time constraints on the prosecution for pressing charges (thirty-six hours) and bringing the case to trial (sixty days), the safest bet is that foot soldiers will be free to go.

credible declaration that it would never again negotiate with armed actors. Essentially, it removes one possible outcome for combatants. On a list possible final outcomes to participation in an armed group, as perceived by a person who is thinking about joining one, voluntary demobilization is likely to be less negative than most others (e.g. death, incapacitation, capture by an opposing armed group or the military) and less positive than only one (victory). All else being equal, taking voluntary demobilization off the menu should decrease the expected value of participation. In fact, refraining from negotiating an easy out for combatants may be the most powerful tool available to the GOC to deter people from joining armed groups.¹⁷³

c. Special Occasion Leniency

Considering the benefits to Colombian welfare of ending hostilities with the paramilitaries, it is worth asking the deterrence question from another angle. It is granted that more severe sanctions would be ideal, but, unfortunately, circumstances in post-conflict societies are far from it. So the more appropriate issue may be how much deterrence is sacrificed when the GOC underpunishes the paramilitaries. In theory, if an authority establishes a rule of leniency that applies only to the exact circumstances of a specific, unrepeatable situation, that rule would generate no deterrent effect whatsoever. The fact that a car owner is not penalized for failing to pay a parking meter on Sundays does not make her less likely to pay a meter on Mondays. Likewise, a one-time-only offer by a local library to receive all books without requiring the payment of any late-return fines should not lead a borrower to be late in returning books once that offer expires.

In practice, amnesties of this sort can weaken the deterrent effect of the existing regime as U.S. experience with tax amnesties has borne out. The first issue is one of credibility – the ability of the authorities to persuade potential law-breakers that the amnesty is a unique event. No one imagines that the Sunday rule for parking meters might be extended to Mondays; the rule's clar-

173. Of course, the effect on current combatants is to disincentivize their voluntary demobilization. One speaker to the Colombian Congress proposed that the GOC offer lenient treatment (but not an amnesty) to combatants for a limited period of time with notice that, upon expiration, no further negotiation would be possible. The problem, as noted by that speaker and in the above discussion on amnesties, is credibility. Miguel Posada Samper, Statement Before the Peace Commission of the Colombian Senate, Jan. 30, 2004, available at <http://www.verdadcolombia.org/archivos/VerArticulo.php?Id=47>.

ity and consistent application make its uniqueness believable. The history of GOC negotiations turns up half a dozen amnesties in the last fifteen years alone.¹⁷⁴ If the potential (first-time or recidivist) lawbreaker does not believe that a given amnesty is the last one to be offered, the announcement of an amnesty is likely to result in an upward adjustment in his probabilistic beliefs concerning future amnesties. As one writer explains, with respect to tax amnesties, one problem is that "repeatedly resorting to them causes them to be rationally anticipated by citizens, adversely affecting ex ante deterrence."¹⁷⁵ The second issue concerns the signal given by the authorities to potential lawbreakers. When the GOC goes easy on combatants, it signals its eagerness to strike a deal,¹⁷⁶ which diminishes its bargaining position. Moreover, if everyone knows that amnesties create a problem down the line, the authorities are simultaneously signaling their own high discount rates.¹⁷⁷

2. Specific Deterrence

Specific deterrence refers to the tendency among individual criminals on whom sanctions have been imposed to refrain in the future from the criminal conduct that gave rise to the sanctions.¹⁷⁸ It is implicated in the Colombian peace process by the high rate of recidivism among ex-combatants who frequently re-join their old group or find new ones after officially demobilizing.¹⁷⁹

174. See Chernick, *supra* note 10, at 174-85, 196-99.

175. Arindam Das-Gupta & Dilip Mookherjee, *Tax Amnesties as Asset-Laundering Devices*, 12 J.L. ECON. & ORG. 408 (1996) (discussing the problem of anticipated amnesties in the context of tax payment).

176. An analogous point on signaling in the tax context is that amnesties signal government's auditing costs. Auditing and combat both represent the government's means of detection and capture of violators. See *Id.*

177. This insight is also drawn from literature on tax amnesties. See Eric Posner, *The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1800-01, 1813 (arguing that amnesties should be avoided because they favor short-term over higher, long-term revenues and by relying on them, the government signals high discount rates). See also Das-Gupta & Mookherjee, *supra* note 175, at 422 (stating that amnesties signal government's auditing costs).

178. See SHAVELL, *supra* note 134, at 515.

179. ICG 2005 REPORT, *supra* note 18, at 19 (reporting that some paramilitaries join gangs after demobilizing). Surprisingly, some AUC members previously belonged to a guerrilla group; they are thought to join the AUC for protection from their former group or on account of the higher salaries offered to paramilitaries. See *Dystopia Disarmed?*, *supra* note 66, at 37. Human rights groups report paramilitary and gang recruitment efforts targeting demobilized AUC members. SMOKE AND MIRRORS, *supra* note 8, at 45 (citing interview with ex-combatant who reports that recruiters hang out near the demobilization reference center).

Specific deterrence comes into play when the imposition of sanctions results in an upward adjustment in the criminal's perception of the probability or magnitude of sanctions.¹⁸⁰ In the context of a negotiated settlement, the authorities have limited control over the probability variable given that the imposition of sanctions is largely at the discretion of combatant leaders. As applied to leaders, then, it is not very useful to retain a separate value for the probability of sanctions. Foot soldiers, on the other hand, would face a higher probability if the demobilization laws required commanders to account for all their troops in order to obtain demobilization benefits. Despite the insistence of human rights organizations, the international community, and a sizable group in the Colombian Congress¹⁸¹ that paramilitary leaders ensure the demobilization of all troops in their command, the final version of the Peace and Justice Law does not include this requirement, assuaging any fears of rank-and-file combatants that their commanders will turn them over to the authorities.

With regard to the expected magnitude of sanctions, combatants likely expect zero or purely symbolic sanctions given the GOC's prior treatment of demobilizing combatants. The imposition of almost any sanction will increase this value and enhance deterrence.

a. Deterring Common Crime by Ex-Combatants

Post-conflict societies often witness an increase in common crime, attributable in part to the demobilization of combatants.¹⁸² Many former fighters are unable to find legal employment in war-torn economies, lack job skills and are "psychologically accustomed to danger and violence;" all of which contribute to a ten-

180. See SHAVELL, *supra* note 134, at 516-17.

181. The Senate Proposal, for example, would require that benefits be provided to a group rather than to individuals such that a commander's eligibility under law would be conditioned on the demobilization of all troops under his control. See also Pardo, *supra* note 8, at 17, 19 (describing flexibility to demobilize individually or in a group as "loophole" in the law).

182. George R. Vickers, *Renegotiating Internal Security*, in *COMPARATIVE PEACE PROCESS IN LATIN AMERICA*, *supra* note 10, at 389, 399. Vickers observes that the post-conflict situations in Guatemala, El Salvador and Nicaragua were all characterized by economic crisis, unemployment and increased crime, attributing crime to "bad economic conditions and a plentiful supply of guns and people who know how to use them." *Id.* See also Charles T. Call & William Stanley, *Protecting the People: Public Security Choices After Civil Wars*, 7 *GLOBAL GOVERNANCE* 151 (2001) (noting increased violent crime and perceived deterioration in security in aftermath of civil wars in 1980s and 1990s).

dency to engage in crime.¹⁸³ In the context of the ongoing demobilization of the AUC, reports are already emerging showing a return to crime and violence among some ex-fighters.¹⁸⁴

The obvious way to deter demobilized combatants from committing common crime is to increase the probability and magnitude of sanctions that apply to those future crimes. Parole arrangements can increase both values through increased monitoring and the threat of reinstatement of whatever portion of the prior sentence was not served. Given that the deterrent potential of a parole sanction is a product of probability (monitoring) and magnitude (sentence to be reinstated plus new charges), societal welfare is better advanced by enhancing the magnitude of sanctions because it costs less. This may be accomplished in two ways: (1) assessing larger penalties at the sentencing phase, commutable or pardonable on the condition that parole is not violated, or (2) decreasing the portion of the sentence served.¹⁸⁵

3. Marginal Deterrence

Combatant crime is a bundle of criminal acts ranging from conspiracy to commit crime to massacre of civilians. The theory of marginal deterrence suggests that the GOC could create a punishment regime that would deter combatants – who will not be deterred from becoming or remaining combatants – from committing those crimes that it deems most harmful by imposing more

183. See Call & Stanley, *supra* note 182, at 154. A survey of ex-combatants from the November 2003 demobilization of the BCN suggests that more than half of those combatants had been involved in criminal activity or armed combat prior to joining the BCN. Villegas, *supra* note 169, at 32.

184. For example, forty-nine ex-fighters had been killed (as of March 2005) and twenty-eight had been arrested (as of April 2005). ICG 2005 REPORT, *supra* note 18, at 23 n.237. There are also reports that demobilized paramilitaries have been recruited into gangs. *Id.* at 19.

185. This line of reasoning does not suggest that conditional pardons and commuted sentences are superior, for deterrence purposes, to the imposition of full prison terms. There is no evidence showing that the high rates of recidivism/common crime among ex-combatants would hold true if they served prison sentences of standard duration. Caution beyond whatever is warranted by the release of any convict may be unnecessary. The fact that the GOC will lose leverage over released combatants who have served all or most of their sentences may be compensated by their incapacitation during the period in which they posed the largest risk. It is not necessary to endorse a rehabilitative view of Colombian prisons to argue that an ex-combatant released in ten or twenty years is more likely to behave like an ex-convict than an ex-combatant. The criminal networks that remain in post-war contexts may have broken down, the combatant may have lost touch with former comrades and, more generally, the post-war “crime waves” discussed above, *supra* notes 181-182, will have subsided in many cases.

severe sanctions for more severe crimes.¹⁸⁶ Suppose, for example, that the GOC ranked combatant crimes in the following descending order of gravity: massacres of civilians, murders of civilians, sexual violence, destruction of infrastructure, forced displacement of civilians, drug-trafficking and participation in an illegal armed group.¹⁸⁷ The GOC could then create an incentive structure that would persuade a leader who wants to clear a tract of land of its inhabitants to achieve his goal by threatening the residents rather than killing them. Such a structure would require an appreciable difference in the sanctions imposed for either crime. Slight differentiation is unlikely to do the trick.¹⁸⁸ It would be necessary to establish as broad a spectrum of sanctions as possible, reserving the most severe (life imprisonment under Colombian law) for the worst crimes and reducing the sanction with each lesser crime.

One problem with establishing such a structure is that, at some point on the list, the sanction assigned to a crime will be insufficient for deterrence.¹⁸⁹ If ordering a massacre is punished with lifetime imprisonment, where does that leave drug trafficking?¹⁹⁰ In fact, given that targeting leaders may be more effective in reducing the incidence of harmful crimes, the government will spend most of its sanctions "capital" on crimes committed by leaders (instigating, planning and ordering gross violations) and may not have much to dole out when it gets to the crimes committed by the rank and file.

The Colombian demobilization laws leave little room for marginal deterrence. Between pardonable and unpardonable crimes

186. See SHAVELL, *supra* note 134, at 518-19.

187. A proposed order is provided here for illustration purposes only.

188. In fact, the punishment differential often must be capable of more than offsetting the direct benefits to the combatant of committing the additional crime. Analogous to a scenario in domestic crime where a bank robber may murder a witness to reduce the probability of capture for the bank robbery, combatants may perceive higher-ranked crimes as improving their chances of victory or at least strengthening their hand at the bargaining table with the GOC.

189. SHAVELL, *supra* note 134, at 519 ("For the schedule of sanctions to rise steeply enough to accomplish marginal deterrence, sanctions for less harmful acts may have to be so low that individuals are not appropriately deterred from committing these acts.").

190. Note a particular problem that arises when devising a penalty schedule for a specific population: to preserve the marginal deterrence effects, the penalty for drug-trafficking may need to be much lower than it is for drug traffickers who are not combatants. This creates perverse incentives that have already encouraged drug dealers to become combatants in recent months. See *infra* note 177 and accompanying text. The unequal treatment of combatants and non-combatants for comparable crimes also creates a problem for the GOC in obtaining societal approval for its management of the negotiations.

there is a steep step from zero to five years of confinement,¹⁹¹ but within the category of unpardonable conduct, the five-year floor and eight-year ceiling on sentences¹⁹² render difficult any differentiation between perpetrators according to the specific nature of the unpardonable crimes or the number of instances of criminal conduct.

4. Monetary Sanctions

Monetary sanctions have come up in two contexts in the development of the Peace and Justice Law. First, Uribe's original proposal would have allowed for paramilitaries to pay a monetary fine in lieu of jail time.¹⁹³ Human rights groups bristled,¹⁹⁴ and their position finds support in the deterrence doctrine: the gravity of the crimes combined with the fact that the vast majority of demobilizing paramilitaries are judgment-proof¹⁹⁵ (and those who are not are probably drawing wealth from profits accrued through criminal activity) precludes reliance on monetary penalties for deterrence.

Second, the Peace and Justice Law adopted a provision from the Senate Proposal that requires combatants to hand over all assets acquired through criminal activities.¹⁹⁶ However, similar to the provision concerning "spontaneous statements," the mandatory language used is not buttressed by any penalty for failing to hand over assets.¹⁹⁷ If the GOC is able to prove that some unreported asset was acquired illegally, the combatant will be forced to hand that asset over. In fact, that the AUC accepted a provision for forfeiting ill-gotten gains is only understandable in light of the ease with which the provision can be ignored.

191. The crime of conspiracy and all crimes of rebellion or sedition are pardoned under Decreto 128, Ley 418 and Ley 782. Crimes that are not eligible for such pardon are addressed by the Peace and Justice Law, which imposes a minimum sentence of five years. Peace and Justice Law, art. 30, 45.980 D.O., 25 de Julio de 2005 (Colom.).

192. *Id.*

193. Penal Alternatives Bill, art. 19, *modified by* Pliego de Modificaciones al Proyecto de Ley Estatutaria 85 de 2003, Senado (Colom.) (granting immediate parole to combatants who comply with the law); *Id.* art. 24 (listing financial contributions to victims and social organizations as peace-favoring acts that qualify combatant for immediate parole).

194. Human Rights Watch derided the proposed law as offering "checkbook impunity." HUMAN RIGHTS WATCH, COLOMBIA'S CHECKBOOK IMPUNITY (2003) available at www.hrw.org/background/americas/checkbook-impunity.htm.

195. See GOC DEMOBILIZATION REPORT, *supra* note 5 (reporting survey results showing 88% of former fighters have no assets, only 3% have a home).

196. Peace and Justice Law, art. 10.2.

197. See *id.*

A reasonably well-enforced forfeiture provision would be a beneficial complement to other sanctions provided for in the Colombian demobilization laws. As previously noted, commanders have made a fortune from the drug trade. To get a rough sense of the numbers, consider that paramilitaries are thought to control 40% of the country's cocaine sales and that in a single year (1999) Colombia exported 520 metric tons of cocaine, which were sold at a market price of \$100 per gram for gross revenues of \$52 billion. Although these revenues are distributed through long production and distribution chains, AUC commanders are thought to take home 90% of whatever cut goes to the paramilitaries.¹⁹⁸ The AUC is also involved in other lucrative activities, including the sale and smuggling of contraband (such as stolen gasoline and arms), extortion and usurious money lending.¹⁹⁹ Its members have accumulated vast tracts of land,²⁰⁰ livestock, homes and small businesses.²⁰¹

Assuming, for simplicity, that all paramilitaries came into the conflict without wealth, monetary sanctions can do nothing more than "disgorge" profits generated by the criminal activity, thus, even if perfectly implemented, leaving the injurer indifferent between committing the crime and refraining.²⁰² Robert Cooter and Thomas Ulen express the prevailing wisdom: "In general, thieves cannot be deterred by the requirement that they return what they have stolen whenever they happen to get caught."²⁰³

One problem with the thief metaphor is that it fails to capture the organizational aspects of the paramilitary network, which are designed to facilitate the execution of a bundle of crimes, including some high-profit crimes and some high-harm crimes, that may not perfectly overlap. It is useful here to focus on the organization as the target of deterrence rather than the individual. Liza Vertin-

198. Wilson, *supra* note 23, at A01 (citing GOC report).

199. SMOKE AND MIRRORS, *supra* note 8, at 15.

200. See *supra* note 47 and accompanying text.

201. In a December demobilization, the AUC voluntarily handed over assorted assets that illustrate their diversified portfolio, including 105 ranches, 58 houses, 45 mules, 10 houses and some small businesses like pool halls. See Sullivan, *supra* note 26, at A36. The Organization of American States, which is observing/facilitating the negotiations, has suggested that the "loot" be given to victims and family members. *Loot Is Given Up by Colombian Militias*, N.Y. TIMES, Dec. 14, 2004, at A3. As of June 2005, no other demobilizing block had turned over assets. SMOKE AND MIRRORS, *supra* note 8, at 45.

202. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 432 (3d ed. 2000) (defining "perfect disgorgement" as the amount that "leaves the injurer indifferent between the injury with disgorgement and no injury").

203. *Id.* at 434.

sky's work on criminal gangs (defined as a group of members who work together repeatedly, under a common set of rules, and who share group assets to carry out profitable crime) is instructive.²⁰⁴ The law and economics approach she employs to explain the deterrent effect on criminal gangs differs from the traditional "Becker" approach in that she focuses on the "organizational structure of the production unit rather than on individual decision-making."²⁰⁵

On the question of the deterrent potential of disgorgement in the context of the AUC, Vertinsky's work on U.S. gangs offers the following insight: "The basic idea is that where gangs engage in a range of different activities, some of which are more harmful than others, it may be possible to exploit their interest in protecting one set of activities to reduce the level of other activities."²⁰⁶

To the extent that paramilitaries and other IAGs are motivated to make money from the drug trade and other illegal activities, disgorgement as a penalty for the indiscriminate killing of civilians could be a powerful incentive to find new, less violent ways of doing business. If this is true, disgorgement and other forms of punishment (including imprisonment) could be traded off without sacrificing the level of deterrence of the most harmful crimes.

This conclusion may raise eyebrows – so it is important to note that the deterrence of drug trafficking is not at stake here. The prior demobilization framework in Colombia, which relied on sanctions other than disgorgement, was not effective to deter drug trafficking. The best evidence of this is that a number of Colombian kingpins have signed up as paramilitaries since the demobilization began; one went so far as to purchase an AUC front (or franchise) and take on a *nom de guerre*.²⁰⁷ Also telling is the assertion by government officials from Colombia and the U.S. that AUC drug trafficking has not abated during the period of AUC-GOC negotiations.²⁰⁸ Extradition is a deterrent to drug trafficking, but the GOC appears willing to give commanders immunity from

204. LIZA VERTINSKY, A LAW AND ECONOMICS APPROACH TO CRIMINAL GANGS 111 (1999).

205. *Id.* at 178-179.

206. *Id.* at 32.

207. *Colombia's Paramilitaries and Drug Lords*, *supra* note 25 (reporting that kingpin on the FBI's most wanted list recently bought an AUC block for \$5 million).

208. See Forero, *supra* note 9, at A3 (quoting U.S. counter-narcotics officer's statement: "If you ask me whether we have heard of a reduction of drug trafficking by those very people who were sitting at the negotiating table, I would say, 'No.'").

extradition in exchange for other concessions.²⁰⁹ If disgorgement works as posited above it will incentivize paramilitaries to act less like paramilitaries and more like a garden-variety cartel, which would subject them to the same legal risks faced by non-AUC drug traffickers, but would in no way dilute the deterrent effect of Colombian and international counter-narcotics efforts.

The disadvantages of disgorgement over imprisonment include the failure to fulfill societal preferences for retribution and fairplay, the deterioration in the rule of law, and the disapproval of the international community. The advantages center on cost considerations – monetary sanctions are less costly to enforce than prison sanctions and the funds, as foreseen in the Peace and Justice Law, will bankroll reparations to victims.²¹⁰ The transfer of money from the violators to their victims could create more utility than a governmental transfer of the same amount of money to the same recipients. This is because the utility of reparations turns on questions of perception. It seems fairer that the money be taken from the pockets of wrongdoers. Also, by paying up, violators appear to be both acknowledging their culpability and beginning to make amends.

C. Societal Preferences

A government involved in peace talks should give weight to the preferences of its citizens²¹¹ in the design of sanctions because (a) the fulfillment of those preferences has a direct, positive effect and (b) popular approval of the government's handling of the negotiations puts the peace process on more solid footing and may strengthen the rule of law.

1. The Desire for Retribution

On the question of punishing combatants, many Colombians can be expected to want the paramilitaries to be treated severely.

209. See *infra* notes 246-264 and accompanying text.

210. Articles 43 – 45 of the Peace and Justice Law entitle victims to demand reparations from wrongdoers, if these wrongdoers are held liable for the crimes that caused the victims' injury; or from a state-managed fund, if the wrongdoer cannot be identified or if he is not subjected to judicial process. Peace and Justice Law, arts. 43-45, 45.980 D.O., 25 de Julio de 2005 (Colom.).

211. It is not uncommon for criminal justice systems to incorporate societal preferences into the choice of sanctions. For example, the U.S. Sentencing Guidelines allow for "the community view of the gravity of the offense" and "the public concern generated by the offense" to influence sentencing decisions. Title 28, Judiciary and Judicial Procedure, Part III, Chapter 58, U.S. Sentencing Commission, Section 994 (b)(2)(c)(4) and (5). See generally Aldana-Pindell, *supra* note 125.

Punishment provides satisfaction of that desire and serves as a kind of private remedy to victims.²¹² This justification for punishment coincides with, but is conceptually distinct from, Kantian retribution. While the latter values punishment for its own sake on the basis of moral culpability or "just desserts,"²¹³ the notion advanced in the former is "goal oriented retribution," which values the benefits that punishment generates for victims and third parties.²¹⁴

Shavell observes that the desire for retribution is likely to be strongest as a response to serious crimes and among those most harmed by the conduct.²¹⁵ Empirical data from post-conflict cases supports this intuition. The desire for retribution is a powerful emotion among the surviving victims and family members of victims of gross human rights violations.²¹⁶ Raquel Aldana-Pindell studied cases brought by victims to international courts when their governments failed to prosecute their victimizers to show "the anguish suffered by surviving victims of gross human rights violations that result [sic] from the lack of effective prosecutions."²¹⁷

In Colombia, paramilitaries and guerrilla fighters are suspected of indiscriminate killing of unarmed civilians, including children, sexual violence, forced recruitment of minors and kidnapping – in short, crimes that almost all societies condemn as among the worst. Moreover, a large percentage of Colombians have been harmed in some relatively direct way by the crimes committed.²¹⁸ As a result of the heinous and pervasive nature of the combatants' crimes in Colombia, the desire for retribution can be expected to push strongly for harsh sanctions.

212. *Id.* at 1445-1446.

213. For a good discussion on the differences between backward-looking retribution and retributive motives based on the desires of victims of human rights violators, see *id.* at 1445-51.

214. Malamud-Goti, *supra* note 164 (rejecting pure retribution and utilitarian justifications for punishment in favor of goal-oriented variant whereby victims are redressed by punishment). See also Roht-Arriaza, *supra* note 124, at 16-18.

215. SHAVELL, *supra* note 134, at 537.

216. See, e.g., Aldana-Pindell, *supra* note 125, at 1444 n.245 (citing surveys conducted in former Yugoslavia in late 1990s showing that over 90% of the population wanted perpetrators of war crimes and crimes against humanity to be sentenced to death or lifetime imprisonment).

217. *Id.* at 1414.

218. Some numbers may be useful to get a sense of the pervasive nature of the Colombian conflict. See *supra* notes 1, 12-13 and accompanying text.

2. Fairplay

Social preferences relating to justice often call for fairplay, meaning that sanctions should be roughly equal for the same crime (with allowances for criminal records, etc.) and roughly proportionate to the harm produced.²¹⁹ One of the recurring criticisms of amnesties emphasizes the irony of punishing a pickpocket more harshly than a genocidaire.²²⁰ The concern here has less to do with differentiating among combatants as it does with establishing some semblance of equal treatment under the laws for combatants and common criminals. In other words, a Colombian is unlikely to disapprove of the GOC's decision to punish a FARC terrorist less or more severely than an ELN rapist as long as both are punished substantially more than a joy-riding teenager or a shoplifter. Disutility is created when society feels that the government is acting unfairly.

3. The Role of Condonation

To the extent that a government pursues retributive goals as a means of advancing its citizens' preferences, the rationale for retribution would be undone if those citizens preferred leniency. Further, the erosion of public confidence and rule of law – which is a foreseeable result of failing to apply the laws consistently – is avoided, at least in part, when the government's course of action is backed by a broad majority.²²¹

It is hard to get a read on popular sentiments concerning the punishment of paramilitaries. Anecdotal evidence points in two

219. See, e.g., Aldana-Pindell, *supra* note 125, at 1450 (“[O]n the scale of punishment . . . more wicked crimes should receive proportionately greater punishment than less serious offenses.”).

220. The irony is discussed in Colombia with reference to extradition, which in combination with a lenient regime for paramilitaries means that drug-traffickers will be punished more severely than instigators of massacres. See, e.g., Antonio Caballero, *Los Colados*, SEMANA (Colom.), May 7, 2004, available at <http://semana2.terra.com.co/archivo/articulosView.jsp?id=78550>.

221. Some writers argue that popular support is a necessary condition of amnesties. See, e.g., Carlos Villavicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 216 (requiring “convincing evidence that the majority of citizens freely endorsed the transitional justice policy adopted by the states” before considering the legitimacy of non-prosecutorial approaches). Some of the erosion to rule of law will occur regardless of public acceptance. The sentiment is not approval in a purely positive sense, but resignation to the limits of the government in Colombia to provide its citizenry with a better solution. A preference for leniency is a choice of the least undesirable option. More generally, the rule of law is eroded whenever the government declines to adhere to it, even if the population has given it leave to do so.

directions. On the one hand, President Uribe's record-breaking popularity is probably closely tied to his management of the conflict and the peace process. A Colombian news magazine explained a spike in his approval ratings to 80% in December 2003 as a consequence of popular satisfaction with the first demobilization of paramilitaries that November.²²² Also, the AUC has repeatedly proposed a binding popular referendum on the question of the paramilitaries' punishment, apparently confident that it would come out their way.²²³ On the other hand, local media, non-governmental organizations, congressional representatives and the international community, all of which play an important role in the shaping of public opinion, have been harsh critics of the GOC's lenient stance. It is probably fair to conclude that most Colombians do not approve of leniency as much as they are resigned to it.²²⁴ A resident in a small Colombian town controlled by paramilitaries who demobilized in July expressed what is likely a common sentiment: "What they did was horrible, but something needed to be done to get them to leave, and this peace law seems to have worked in that respect."²²⁵

D. Rehabilitation

Rehabilitation refers to "an induced reduction in a person's propensity to commit undesirable acts."²²⁶ Existing literature gives short shrift to the potential for rehabilitating human rights violators on the grounds that it has been ineffective in domestic contexts²²⁷ or that the class of criminals in post-conflict contexts cannot be rehabilitated. Miriam Aukerman, for example, skims over the rehabilitation issue by alluding to the impossibility of rehabilitating a Pol Pot or a Pinochet.²²⁸ Her treatment of rehabilitation exemplifies the tendency among transitional justice writ-

222. Maria Fernanda Moreno, *La Popularidad de Alvaro Uribe*, SEMANA (Colom.), Nov. 28, 2004, available at <http://semana2.terra.com.co/opencms/opencms/Semana/articulo.html?id=82687>.

223. See Dan Molinski, *Right-Wing Fighters Demobilize*, ASSOCIATED PRESS, Jan 19, 2005 available at http://www.americas.org/item_17551 (noting that AUC is willing to submit to popular referendum on jail time). This may be bravado, of course. Also, a referendum on the topic would inevitably result in widespread intimidation and coercion.

224. See, e.g., *Colombia's Peace Bargain*, WASH. POST, Oct. 3, 2003, at A22 ("Most Colombians believe that such deals are the only hope of ending violence that has killed tens of thousands and made large parts of the countryside lawless.").

225. Molinski, *supra* note 2.

226. SHAVELL, *supra* note 134, at 535.

227. See, e.g., Aukerman, *supra* note 130, at 71.

228. *Id.* at 72.

ers to focus on high-ranking leaders who are guilty of crimes punishable under international law. If we understand rehabilitation of ex-combatants as involving their economic, social and, to some extent, political reintegration into civilian life, a successful rehabilitation program is crucial to the achievement of several goals of the Colombian peace process: preventing the re-emergence of armed groups and post-demobilization common crimes, as well as enhancing the long-run prospects for peace.²²⁹ "Disgruntled ex-soldiers" pose a serious threat to Colombian welfare as they often seek out illegal and violent livelihoods if legitimate ones are not forthcoming.²³⁰ Reintegration concerns influence the design of benefits packages provided to demobilizing combatants, which often include first-phase support (e.g. cash, food, medical attention) and some longer-term assistance (e.g. subsequent cash payments, training, education grants, counseling).²³¹ Colombia's demobilization laws provide for broad reintegration assistance to demobilizing combatants, including civilian documents, medical attention, security guarantees for the soldier and his family, cash, schooling grants, training, small-business assistance, life insurance and job placement services.²³² The major risk is that international donors, who often fund these benefits packages, will continue to withhold funding from the Colombian peace process due to their dissatisfaction with the Peace and Justice Law.²³³

Reintegration concerns should also figure prominently in the

229. See generally WAR FORCE TO WORK FORCE: GLOBAL PERSPECTIVES ON DEMOBILIZATION (Natalie Pauwels ed., 2000) [hereinafter WAR FORCE TO WORK FORCE].

230. *Id.* at 18. Addressing the risks of unsuccessful reintegration in post-conflict contexts, Kees Kingma warns: "People with military skills but without a stable livelihood are particularly easy to mobilize, even for vague political purposes. They might also try to make a living through armed robbery or other illegal activities." Kees Kingma, *Post War Societies*, in WAR FORCE TO WORK FORCE, *supra* note 229, at 221, 229.

231. See Kingma, *supra* note 133, at 28-29.

232. Decreto 128, Ministerio de Defensa Nacional, 45.073 D.O., 22 de Enero de 2003 (Colom.).

233. The big risk for reintegration is not in the law, but in its implementation. The GOC has not earmarked sufficient funds for the benefits package and foreign donors, who withheld funds on grounds of their disapproval of earlier versions of the demobilization laws, still seem hesitant to get involved. With the exception of some stopgap resources from the U.S. Agency for International Development, foreign aid has not been forthcoming. See PEACE PROCESS IN COLOMBIA, *supra* note 1, at 14 ("International assistance to the Colombian peace process has reflected the skepticism surrounding it."). In the absence of foreign aid, reintegration efforts are unlikely to meet the requirements of the legal design for rehabilitation. For example, after the first demobilization in November 2003, the ex-combatants spent three weeks in a demobilization program and then "they were back on the streets." *Disarming, Bit*

design of sanctions. One danger of ignoring them is that a polarized debate between justice/punishment advocates and peace/leniency advocates will generate the kind of middle-ground sanctions that are most damaging to rehabilitation. Public shaming, lustration (removal or bans from government jobs) and economic sanctions are often advanced as striking a balance between the ideals of justice and peace, but their very justification cuts against rehabilitation. For example, in presenting the benefits of truth commission, one scholar noted that they can "achieve punishment-like goals. Their reports can bring shame upon wrongdoers and lead to their ostracism from society."²³⁴ Aukerman also asserted the following: "National truth commissions can generate social opprobrium, turning perpetrators into social outcasts and forcing them to face victims on television."²³⁵

These authors advocate shaming because it advances retributive (and possibly deterrent) goals of punishment without incurring the costs of full-blown prosecution. What is missing from their analysis are the costs generated by failed rehabilitation. Put bluntly, the GOC does not want to scatter about the country tens of thousands of ostracized, unemployable, and probably armed human rights violators. The literature seems to allow a government to pick freely from a list of possible sanctions, but rehabilitation concerns suggest that a government facing combat and crime-prone ex-combatants is much more restricted in its selection of penalties. If it decides to release ex-combatants, it should work to ensure that they are reintegrated into civilian life. At a minimum, this requires legal employment and some measure of communal participation. One writer on the situation in South Africa described the choice as follows: "No society can afford to fail in seeking the appeasement and/or reintegration of perpetrators into society. The alternative is the imprisonment or the elimination of those responsible for past crimes. The South African negotiated settlement excluded that option."²³⁶

Therefore, the GOC's choice was limited to incapacitating combatants or helping them become happy citizens. This does not mean that the GOC should not engage in truth-gathering activities or even prevent ex-combatants from exercising some rights of

by *Bit*, THE ECONOMIST, Jan. 30, 2004, available at LexisNexis Academic. ("Certainly, the amateurish peace process would benefit from outside help.")

234. Landsman, *supra* note 129, at 89.

235. Aukerman, *supra* note 130, at 57 (internal quotations omitted).

236. Villavicencio, *supra* note 221, at 209.

citizenship, including running for public office. It does mean that the GOC should stop well short of tactics that turn ex-combatants into social outcasts.

E. The Special Needs of Transitional Justice

1. The Rule of Law

There are three characteristics of most transitional contexts that augment the effect of punishment decisions on the rule of law: political transition, state complicity and the large scale of the crimes addressed. These characteristics are present in varying degrees in the Colombian situation. The first circumstance, political transition, is barely relevant because the negotiations do not entail any change to the bodies of government, its policies or the constitutional order in Colombia.²³⁷ The second circumstance, state complicity, is pertinent to the Colombian case given the GOC-AUC links previously discussed,²³⁸ but the degree of complicity does not represent the paradigmatic case where the state has perpetuated the crimes at issue (e.g. Guatemala). Thus, while the rule-of-law consequences of a government holding itself above the law are admittedly dire, these consequences are not necessarily implicated in the GOC's treatment of paramilitaries. Neither the GOC's ability nor its obligation to prosecute members of the armed forces and civil servants for collaborating with the AUC is affected by the demobilization laws.

The third characteristic concerning the scale of the crimes at bar is highly relevant to the Colombian case and warrants a closer look at the rule-of-law concerns posited by transitional justice writers. A nutshell expression of the rule-of-law argument is that the failure to enforce the law today diminishes the capacity of law generally to govern societal conduct tomorrow. The consequent harm is magnified by the gravity of the conduct that the disre-

237. Rule of law considerations are especially important to new democracies that need to show their democratic and law-abiding credentials, while "failure to enforce the law may undermine the legitimacy of a new government and breed cynicism toward civilian institutions." Ortlender, *supra* note 124, at 378. Empirical data on the link between prosecution and the success of a political transition is inconclusive. See generally Aryeh Neier, *What Should be Done About the Guilty?*, in *TRANSITIONAL JUSTICE*, *supra* note 124, at 172 (noting the impossibility of proving or disproving the link between prosecution and the success of a political transition given the empirically-large number of determinants of success). See also Teitel, *supra* note 128, at 150 (suggesting that where prosecution precedes a successful transition it may be "symptomatic" of powerful judiciary and democratic institutions rather than causal factor of successful transition).

238. See *supra* note 39 and accompanying text.

garded law targets and the scale of its non-enforcement. As Diane Orlentlicher explains:

A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct. This may be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale.²³⁹

What is at stake in Colombia are some 15,000 to 20,000 paramilitaries (and potentially a similar number of guerrillas) who are accused of far-reaching and horrific crimes.

The scale of the crimes magnifies the "signal" sent by the GOC and the judiciary to society upon making a punishment decision. The rule of law in Colombia will be negatively impacted by the failure to punish paramilitaries under the following assumptions: (1) punishment decisions signal the GOC's attitude toward the law; (2) this signal, in turn, influences societal attitudes toward the GOC, the peace process, and the law; and (3) changes in attitudes will result in changes in conduct, including diminished compliance with the law.

Negotiations set the tone for the peace process. A commitment on the part of the GOC to democratic ideals, including accountability and human rights, would generate confidence in these ideals and in the GOC's capacity to defend them. Conversely, impunity signals to the population that the rule of law is ineffective and that democratic ideals have been compromised.²⁴⁰ The country is therefore ill-prepared for the challenges of peace-building, and violence is more likely to erupt again.

When society loses faith in the effectiveness or legitimacy of the law, compliance may be negatively affected beyond what can be explained by the decrease in deterrence. This is due to the fact that many people follow the law because they see it as an expression of morally right behavior. Social norms and laws that are perceived as legitimate reinforce one another and create positive incentives for law-abiding citizens.²⁴¹ Lenient treatment blunts the impact of these norms by sending mixed signals as to their

239. Orlentlicher, *supra* note 124, at 377.

240. See *infra* note 246 and accompanying text.

241. Note that the power of social norms to encourage law-abiding behavior is not limited to life-and-death laws. Eric Posner claims that people pay taxes more often than the expected sanction for failing to do so would imply because they are obeying a social norm of behavior. Posner, *supra* note 177, at 1783-84.

wrongfulness.²⁴² Application of the law, on the other hand, reaffirms the message and encourages law-abiding behavior. In the context of paying taxes, for example, one writer argues that people who have followed the rules and paid their taxes get utility from seeing that someone who took the unlawful route is punished for it.²⁴³

Finally, a failure to punish may weaken a government's claim to a legitimate monopoly on the use of force and thus encourage victims of the under-punished crimes to take matters into their own hands. The theory is that punishment satisfies, or at least channels, the urge for revenge and so "discourages vigilantism and strengthens the rule of law."²⁴⁴ Transitional justice literature provides support for the notion that the incidence of violent "self-help" increases in the aftermath of conflict.²⁴⁵

The Peace and Justice Law makes large concessions to the

242. To counter this effect, authorities seek to emphasize the exceptional nature of the regime negotiated with the armed actors. For example, most amnesties do not provide any cover for crimes committed that were not connected to the criminal's participation in the group (outside of the 'scope of employment' so to speak). See Aukerman, *supra* note 130, at 62 (noting South African amnesty applied only to offenses that were associated with conflicts in the past). But maintaining this distinction is not always straightforward. How does the GOC justify providing a lower sentence to a paramilitary drug-trafficker than a garden-variety drug-trafficker? On average, a civilian convicted of drug trafficking in Colombia will be sentenced to eight years in prison. But if the GOC imposes a similar sentence for drug trafficking on combatants, it will (1) fail to get combatants to the negotiating table and (2) lose flexibility to pursue marginal deterrence.

243. See generally Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535 (1991).

244. *Id.* at 572 (quoting OLIVER W. HOLMES, THE COMMON LAW 40-42 (1881)). For application of the theory to transitional contexts, see Malamud-Goti, *supra* note 164, at 427-430 (citing CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996)).

245. See, e.g., Scharf, *supra* note 127, at 513 n.47 (citing example of Haitians committing acts against pardoned members of prior regime). However, the cases cited often fail to isolate revenge as the motivation. For example, Aldana-Pindell refers to the public lynchings that occurred in Guatemala after the peace was signed as support for the argument that punishment is needed to channel the anger and frustration of victims. Aldana-Pindell, *supra* note 125, at 1498. The lynchings in Guatemala, however, were often a response to common crime and were neither committed exclusively by victims nor targeted, generally, at former violators. See, e.g., U.S. DEPARTMENT OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 1999, available at <http://www.state.gov/g/drl/rls/hrrpt/1999/388.htm> (noting mob killings generally target persons accused of property crimes or participation in criminal gangs). See also Will Weissart, *Police Emergency in Guatemala; Lack of Funds Hampers Ability to Fight Crime*, WASH. POST, May 13, 2001, at A22 (attributing high number of mob killings to community frustration over lack of police presence). Vigilantism is as likely to reflect a general decline in compliance, resulting from the rule-of-law effects discussed already, or a societal reaction to worsened security conditions, than a pent-up urge for revenge.

paramilitaries and undoubtedly compromises a host of "democratic ideals." When the law passed, one legislator, who had pushed for harsher sanctions, applied the foregoing analysis succinctly: "The message we are sending today is that crime does pay."²⁴⁶ Yet the effect of the Peace and Justice Law on the rule of law in Colombia may not be as detrimental as some predict. As discussed above, many Colombians seem to condone the GOC's action in letting the paramilitaries off easy. To the extent that Colombians perceive leniency in this context as a necessary evil, the effect on the rule of law may be tempered.

2. Getting at the Truth

Like the rule of law, notions of truth are generally more central to transitional justice than to domestic law. At a minimum, the establishment and publication of a truthful record contributes to welfare in post-conflict countries in two ways: by providing a more accurate history of the causes of conflict (probably minimizing the likelihood of re-emergence of the conflict) and by benefiting surviving victims and family members with answers to specific questions. Additionally, truth may 1) benefit victims through public acknowledgment of the harm they have suffered; 2) punish injurers by shaming them;²⁴⁷ 3) facilitate social catharsis;²⁴⁸ and, most controversially, 4) promote reconciliation.²⁴⁹

Much of the transitional justice literature on the topic of truth is devoted to assessing the relative strengths of truth commissions²⁵⁰ and trials.²⁵¹ There is some consensus that commissions

246. Forero, *supra* note 9, at A3 (quoting congresswoman Gina Parody).

247. See Neier, *supra* note 237, at 180 (arguing that identification of perpetrators is punishment and identification of victims is acknowledgment of their injuries).

248. See Luis Manuel Lasso, *Desafíos y Dilemas Sobre Verdad, Justicia y Reparación*, SEMANA (Colom.), Apr. 16, 2004, available at <http://semana2.terra.com.co/archivo/articulosView.jsp?id=77886>.

249. See Jonathan D. Tepperman, *Truth and Consequences*, 81 FOREIGN AFF. 128, 135 (2002) (citing poll showing 2/3 of South Africans said TRC made them angrier and worsened race relations); but see Priscilla Hayner, *Fifteen Truth Commissions - 1974-1994: A Comparative Study*, in TRANSITIONAL JUSTICE, *supra* note 124, at 225 (asserting that truth commissions favor reconciliation on balance).

250. Truth commissions are bodies established for investigating violations perpetrated by the government or illegal armed groups. Hayner, *supra* note 249, at 225.

251. There is no consensus as to which set-up is more conducive to truth-gathering. The argument in favor of truth commissions is that trials do not encourage confessions and that they produce isolated facts that are not conducive to painting a full picture of the conflict. See, e.g., Landsman, *supra* note 129, at 88. It is also argued, however, that violators may refuse to come forward to truth commissions.

are better for historical truth, while trials are better for factual truth relating to particular incidents, perpetrators or victims.²⁵² This second category of truth is of more immediate interest to surviving victims and family members who seek information from perpetrators of crimes, such as the whereabouts of “disappeared” persons or the location of corpses, and who can obtain utility from making these facts public by clearing their names, if the victim’s innocence is implicated,²⁵³ strengthening their legal case for reparations, or having their stories told.

The most obvious and least debatable defect in the Peace and Justice Law is its failure to generate combatant truth-telling.²⁵⁴ As previously discussed, combatants who are eligible for a pardon are formally required to disclose their crimes, but there is no benefit to them for doing so. Those against whom charges are pressed have some incentive to cooperate with the authorities as the court is entitled to take such cooperation into account when deciding on the sentence,²⁵⁵ but the limited range of sentences may render the incentive insufficient. To encourage foot soldiers and commanders to share information, the GOC could have either required disclosure as a condition to all governmental benefits, including leniency, or rewarded disclosure through the grant of additional benefits, such as more leniency or cash.

The advantage of conditionality is that the full-package of benefits is the biggest carrot the GOC has at its disposal to encourage cooperation. The disadvantage is that a publicly-known legal requirement of full disclosure makes demobilizing combatants vulnerable to resistance from groups and individuals who do not want their secrets revealed, including trafficking networks, combatants at large, commanders and colleagues, members of the armed forces, politicians, etc.²⁵⁶ A combined approach

Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone’s War Crimes*, 17 EMORY INT’L L. REV. 55, 119 (2003).

252. See Margaret Popkin and Naomi Roht-Arriaza, *Truth as Justice: Investigative Commissions in Latin America*, in TRANSITIONAL JUSTICE, *supra* note 124, at 263 (describing truth as involving a personal as well as an historical accounting). See also Aldana-Pindell, *supra* note 125, at 1439-40 (discussing victims’ substantive “right to truth” and the specific information needs that victims have at the end of a conflict).

253. See Aldana-Pindell, *supra* note 125, at 1440.

254. See, e.g., CCJ JUNE BULLETIN, *supra* note 6, at 2 (“Historical truth will not emerge. Truth in the context of this law is limited to partial or incomplete versions in each individual case, while ignoring the connection between them.”).

255. Peace and Justice Law, art. 30, 45.980 D.O., 25 de Julio de 2005 (Colom.).

256. Some members of Colombia’s “elite” are likely to be among those opposed to full disclosure. Hugh Bronstein, *Colombia Paras Disband, Rights Groups Wary*,

would require confession of a combatant's own crimes as a condition to eligibility for benefits, while rewarding any further cooperation. As the authorities will be largely unable to verify the completeness of a combatant's confession, the law can incorporate incentives for truthfulness. For example, the South African model pardons crimes rather than persons, so that only those crimes that have been confessed to the Truth and Reconciliation Commission are subject to pardon.²⁵⁷ The GOC could reward any further cooperation by mitigating the sentence, accelerating parole or providing cash benefits (the latter was already available under prior demobilization law) for information on the group's structure, sources of financing, drug-trade links and crimes perpetrated by other combatants.²⁵⁸

Victims and witnesses can also contribute to the establishment of a truthful record. Despite the benefits generated by truth for victims and society, truth writ large suffers from the market failures of any public good. Given that victims and witnesses incur risk when they speak out against IAGs, they will likely under-report in the absence of appropriate incentives. One incentive is that victims increase the probability of receiving compensation or reparations when they come forward to self-identify and help prove their injuries. Leniency, on the other hand, is a disincentive to victims – their desire for retribution is not satisfied²⁵⁹ and their security risks are increased because the injurer is not incapacitated. For non-victim witnesses, who are not eligible for reparations, seeing wrongdoers punished may be the only incentive to come forward.

The Colombian law provides some encouragement for victims to come forward by offering reparations from two sources. Under Articles 43-45 of the new law, when a combatant accepts the charges against him, victims of those crimes may come forward to claim reparations from the defendant, who will be liable only to

REUTERS, Jan. 18, 2005, available at http://www.boston.com/news/world/latinamerica/articles/2005/01/18/colombia_paramilitaries_disband_rights_group_wary/.

257. See Stephane Leman-Langlois & Clifford D. Shearing, *Repairing the Future: The South African Truth and Reconciliation Commission at Work*, in CRIME, TRUTH AND JUSTICE 222, 227 (George Gilligan & John Pratt eds., 2004) (explaining that amnesty provided immunity from prosecution for the acts described by the amnesty-seeker in his or her application).

258. Uribe's team pushed for more flexibility in prison terms, while advocates of the Senate Proposal insisted, successfully, on a minimum sentence of five years. See HRW 2005 REPORT, *supra* note 48.

259. See SHAVELL, *supra* note 134, at 538 (noting that the retributive desire motivates people to report criminals to the authorities).

the extent that the monetary costs are payable from illegally acquired assets.²⁶⁰

Most victims seeking reparations will not be in the position to demand them of a specific wrongdoer, both because victims may not be able to identify the injurer (or at least not the person with command responsibility) and because the wrongdoer may be one of the vast majority of paramilitaries against whom no charges are levied. Article 43 governs this situation, whereby a victim who is able to prove his or her injuries is eligible for reparations from a state-managed fund – so long as resources are available.²⁶¹

In light of the limited number of judicial proceedings against individual paramilitaries and the uncertainty of resources from the state-managed fund, it may be that the perceived benefits to victims will not outweigh the costs of coming forward. Even if victims do appear, their informational role is curtailed by the perfunctory nature of the proceedings. If most combatants against whom charges are brought accept these charges (which is expected given the powerful incentives for doing so), the expedited proceedings will provide little opportunity for the victims, the wrongdoers or the state to develop a comprehensive, truthful record of the injurious events.²⁶²

VI. EXTERNALITIES

When a top paramilitary commander, Salvatore Mancuso, demobilized in December 2004 he made this statement: “With my soul flooded in humility, I ask the pardon of the people of Colombia. *I ask forgiveness of the nations of the world, including the United States of America*, if by action or omission I offended.”²⁶³ His apology recognizes the claims of the international community to an interest in the outcome of the conflict and negotiations in Colombia and suggests that the AUC takes seriously the threat of external interference.

A. *Cross-Border Effects of Crimes and Punishment*

The idea that certain human rights violations have cross-bor-

260. Peace and Justice Law, arts. 43-45.

261. *Id.* art. 43.

262. See Jose Miguel Vivanco, *The Role of Third Parties and Issues for the International Community*, in PEACE PROCESS IN COLOMBIA, *supra* note 1, at 45, 77 (arguing that anticipated sentence mechanism “makes it less likely that serious, rigorous investigations of very, very complex crimes will be conducted”),

263. Sullivan, *supra* note 26, at A36 (emphasis added).

der effects has been gaining currency at least since the end of World War II. One characterization of the externality focuses on the crimes themselves, which are argued to violate universal values and interests. Another suggests that the failure to punish certain crimes in one country weakens deterrence and rule of law in others.²⁶⁴ The jurisdiction of international law is expanding to reflect the notion that certain crimes generate cross-border effects,²⁶⁵ in part to solve the collective action problem in which each country facing the trade-offs discussed in this paper can be expected to under-punish its criminals.²⁶⁶

Given the focus of this paper is limited to Colombian welfare, it is not important to assess the strength of these arguments; however, the measures taken by the international community to force Colombia to modify its punishment decisions – on the grounds that these externalities exist – are important for our purposes. To push the GOC to more severe punishment than originally contemplated in Uribe's first proposal, the international community has wielded two powerful tools: withholding financial aid and public disapproval. The GOC needs approximately \$130 million to pay for the demobilization (excluding imprisonment costs)²⁶⁷ and substantially more money for peace-building efforts. At a donor's meeting in February 2005, foreign governments conditioned financial aid on the GOC strengthening its penal alternatives bill to require demobilizing combatants to disclose more information and hand-over all illegally-acquired wealth.²⁶⁸

The international community has also been public in its disapproval of leniency in dealing with the AUC. For example, not a

264. See, e.g., Neil Kritz, *Coming to Terms with Atrocities*, 59 LAW & CONTEMP. PROBS. 127, 129 (1996), quoted in Aukerman, *supra* note 130, at 65 (warning that failure to prosecute leaders "can be expected not only to encourage new rounds of mass abuses in the country in question but also embolden the instigators of crimes against humanity elsewhere").

265. See William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907 (2003).

266. See Orlentlicher, *supra* note 124.

267. Sullivan, *supra* note 26, at A36. See also Pardo, *supra* note 8, at 21 (extrapolating costs from BCN demobilization to estimate total costs of \$12,000-15,000 per ex-combatant). The GOC has requested foreign aid to cover \$5700 per capita (or \$114 million for 20,000 ex-combatants). See William Wood (U.S. Ambassador to Colombia), *The Role of Third Parties and Issues for the International Community, in PEACE PROCESS IN COLOMBIA*, *supra* note 1, at 45, 54. The ex-combatants spent three weeks in a demobilization program and then "they were back on the streets." *Disarming, Bit by Bit*, *supra* note 233.

268. See *Next Steps in Colombia*, THE ECONOMIST, Feb. 12, 2005, available at LexisNexis Academic.

single U.N. or E.U. delegate participated in the negotiations, a measure that many saw as a sharp rebuke of the Uribe administration.²⁶⁹ From the U.S., groups of senators have sent President Uribe several letters,²⁷⁰ first to dissuade him from offering the paramilitaries an amnesty, and later to insist on a legal framework that complied with international guidelines on justice, truth and reparations.²⁷¹ This disapproval affects the reputation of the GOC and influences Colombians' attitudes toward the peace talks.

B. Extradition for Drug Crimes

Another externality, emerging from the drug-related activities of Colombia's IAGs, hits the United States the hardest. The U.S., the principal market for Colombian drugs, absorbs 70% of its cocaine and 65% of its heroine; a little less than 90% of cocaine purchased in the United States originates in Colombia.²⁷² The AUC has been accused of trafficking most of the cocaine that makes it into U.S. cities.²⁷³ In a continuing effort to stem the north-bound supply of drugs from Colombia, the United States has funded massive drug-eradication programs, classified eighteen paramilitary leaders as cocaine "kingpins," and issued extradition orders for at least six AUC commanders.²⁷⁴ One of these orders is for Salvatore Mancuso who is wanted in the United States for the export of seventeen tons of cocaine (estimated market value of \$1.7 billion) into the United States.²⁷⁵

Extradition has been a wildcard in the negotiations with paramilitaries. The prospect of extradition played a large part in bringing the AUC to table²⁷⁶ and immunity from extradition has been their most fervent demand. Off the record, the Uribe admin-

269. Constanza Viera, *Colombia: Uribe Says He Hopes to Demobilise Paramilitaries*, INTER PRESS SERVICE, July 6, 2004, available at LexisNexis Academic.

270. Letter from U.S. Senators to Alvaro Uribe (Sept 23, 2003), available at <http://www.lawg.org/countries/Colombia/dearcol.htm> ("[A] clear sign of your government's commitment to shattering the links between members of the security forces and the terrorist paramilitaries would be the aggressive prosecution of high-ranking officers"). See also Viera, *supra* note 269 (citing U.S. Ambassador saying peace negotiations are more of a step forward for drug trafficking than for peace).

271. See ICG 2005 REPORT, *supra* note 18, at 23.

272. Peter Slevin, *Colombian President Defends Amnesty for Paramilitary Troops*, WASH. POST, Oct. 1, 2003, at A17.

273. Forero, *supra* note 9, at A3.

274. *Id.*

275. Slevin, *supra* note 272. Note that financial estimates are based on 1999 prices. See also RABASA & CHALK, *supra* note 1, at 17.

276. Sullivan, *supra* note 26, at A36 (citing view of GOC officials that extradition played a key role in getting AUC to negotiate).

istration has softened on this point.²⁷⁷ On the record, the executive and legislative branches have punted on the issue by leaving it out of the text of the Peace and Justice Law altogether (referring instead to the GOC's continued commitment to abide by its obligations under international law and treaties).²⁷⁸ As discussed below, President Uribe is likely to retain some discretion over the issue of extradition and may even withhold orders. Thus, as with other forms of punishment, the GOC should decide how to trade off extradition against other sanctions.

Relative to other forms of harsh sanctions, extradition generates few advantages in terms of advancing societal preferences (most Colombians seem to oppose extradition as an expression of American imperialism, hypocrisy or meddling)²⁷⁹ and it does nothing to strengthen popular perceptions of the strength or legitimacy of Colombia's democratic institutions. Moreover, extradition could incur numerous costs to a peace process. Attaching a harsh penalty to drug-trafficking limits the GOC's maneuvering room to achieve marginal deterrence through higher sanctions on the many crimes the GOC may deem more serious than selling cocaine to Americans. Also, if Colombia were to decide to release combatants on pardons or suspended sentences, hauling off only drug-traffickers to prison will create a problem of proportionality. As a Colombian columnist noted, requiring drug-traffickers to face criminal prosecution in the United States while "forgiving" those who guilty of massacres sends a perverse message.²⁸⁰

However, the benefits of a sanction that imposes almost no financial burden on the GOC and terrifies combatants more than domestic imprisonment²⁸¹ are not insignificant. First, the extradition option achieves incapacitation and deterrence at a much

277. The Peace Commissioner told AUC negotiators that they should trust Uribe to protect them from extradition. *Revelaciones Explosivas*, *supra* note 21. See also Juan Forero, *Colombia Proposes 10-Year Terms for Paramilitary Atrocities*, N.Y. TIMES, Nov. 16, 2004, at A11 (noting GOC signals of flexibility on extradition). Uribe has said that he will not hand Mancuso over for extradition. See *Popularidad de Jefe Paramilitar Supera Ministro de Defensa en Colombia*, *supra* note 32.

278. Timonazo, SEMANA (Colom.), Apr. 3, 2004, available at <http://semana2.terra.com.co/archivo/articulosView.jsp?id=77657>.

279. Concerning the U.S. demands for extradition, a leading news magazine argued that concern about the opinions of foreigners made negotiation too hard. See Caballero, *supra* note 220. See also Yamid Amat, *Nadie Se Entrega Para Que Lo Extraditen*, EL TIEMPO, April 3, 2004, available at ElTiempo.com (quoting Colombian Monsignor who said that "Nobody turns himself in just to be extradited.").

280. Cabellero, *supra* note 220.

281. See, e.g., Hernando Gomez Buendia, *Las Dos Anomalías*, SEMANA (Colom.), April 7, 2004, available at <http://www.semana.com.co/opencms/opencms/Semana/>

lower cost than imprisoning these combatant/drug-traffickers in Colombia. Also in the event that the GOC ever opts for a no-negotiation stance and seeks victory on the battlefield, the threat of extradition would become a net positive externality on Colombia. Like the probability of suit in a foreign court²⁸² or an international tribunal²⁸³ or a future nullification of an amnesty,²⁸⁴ the prospect of extradition increases the probability of sanctions facing a combatant at almost no cost to the GOC.²⁸⁵

Perhaps most importantly, extradition – more accurately, the GOC's power not to extradite – has given the GOC much-needed bargaining power.²⁸⁶ Uribe has demonstrated his willingness to extradite by sending more suspected drug-traffickers to the U.S. than any of his predecessors.²⁸⁷ On the carrot side, Uribe has repeatedly offered immunity, at least temporarily, from extradition as a reward for sustaining peace talks with the GOC. Uribe announced in 2004, "[e]xtradition in all its rigor will be applied to those not in a peace process."²⁸⁸ His stance was made credible when he carried out a threat to extradite a FARC leader if the guerrillas did not release certain hostages.²⁸⁹

articulo.html?id=77746 ("It's not punishment in Colombia but extradition that keeps the AUC awake at night.") (translation by author).

282. An example of proceedings in foreign courts was provided by a U.S. federal court when it asserted jurisdiction under the Torture Victims Act to hold two retired generals from El Salvador liable for \$54 million in damages for acts committed in the 1980s. David Gonzales, *Torture Victims in El Salvador Are Awarded \$54 Million*, N.Y. TIMES, July 24, 2002, at A1.

283. While few believe that the International Criminal Court would step in given its own jurisdictional limitations and constrained resources, the Prosecutor of the International Criminal Court in Hague did request information on the GOC-AUC negotiations in March 2005. ICG 2005 REPORT, *supra* note 18, at 19.

284. In Argentina, Chile and Peru earlier amnesties have been de facto or de jure nullified. See Juan Forero, *Colombia Plans to Ease Penalties for Right-Wing Death Squads*, N.Y. TIMES, Sept. 15, 2003, at A7. See also Ronald C. Skye, *The Legitimacy of Amnesties Under International Laws and General Principles of Anglo-American Law*, 43 VA. J. INT'L L. 173, 200 (2002-03) (citing judicial events in Chile and Argentina to support proposition that "amnesties do not last").

285. However, even if the GOC were not negotiating more lenient sanctions, it would still be interested in setting the schedule of sanctions to achieve marginal deterrence. A harsh sentence for drug trafficking blunts this tool.

286. Vivanco, *supra* note 262, at 75 ("Extradition constitutes the only leverage in the process and the only reason that paramilitary leaders are taking the negotiations seriously.").

287. Sullivan, *supra* note 26.

288. Juan Forero, *Surge in Extradition of Colombian Drug Suspects to U.S.*, N.Y. TIMES, Dec. 6, 2004, at A3.

289. See *Colombia Extradites Top Guerrilla Leader*, N.Y. TIMES, Jan. 1, 2005, at A9 (reporting GOC extradition of highest-ranking FARC leader in its custody after issuing ultimatum to free sixty-three hostages).

Of course, ignoring U.S. extradition demands generates new costs. The U.S. is concerned that the peace process is affording cover to Colombia's most powerful drug dealers.²⁹⁰ The tools of influence available to the international community generally threaten more harm when wielded by the U.S., which plays a larger role in hemispheric policies and provides Colombia with substantial financial aid.²⁹¹

The Peace and Justice Law manages the extradition issue with some finesse. The Law leaves pre-existing extradition rules intact thereby denying the paramilitaries' demand for express immunity from extradition, and so according at in least part with the U.S. understanding that "no promises regarding extradition are made or implied in any part of the law."²⁹² Nonetheless, the law may shield demobilizing fighters from extradition on two legal theories. First, any ex-combatant who admits the charges against him, or is tried for them, can later defend against extradition as constituting "double jeopardy."²⁹³ Second, if a combatant's involvement in drug trafficking is deemed by the court to be connected to or in furtherance of his status as a paramilitary, such involvement will be classified as a "political crime." Under Colombian law, no citizen may be extradited for political crimes.²⁹⁴ Both legal routes are uncertain and the AUC can be expected to lobby for the President to exercise his discretion not to issue extradition orders. Such uncertainty is ideal inasmuch as the possibility of immunity suffices to persuade the AUC to continue to demobilize without requiring the GOC to surrender its leverage or disregard U.S. wishes.

290. See Forero, *supra* note 9, at A3 ("The biggest concern in Washington is that commanders who are, in essence, drug traffickers will remain largely free to continue moving cocaine.").

291. See *Give Up and You Can Stay Home*, THE ECONOMIST, Jul. 31, 2004, available at LexisNexis Academic (reporting that the United States provides the GOC with \$500 million per annum in military aid); Forero, *supra* note 9, at A3 (noting that from 2000-2005 U.S. provided Colombia with \$3 billion for military and drug eradication purposes).

292. Wood, *supra* note 267, at 52.

293. See SMOKE AND MIRRORS, *supra* note 8, at 9.

294. See *id.* at 56 n.151; ICG 2005 REPORT, *supra* note 18, at 19 n.201. It is also unlawful for persons to be barred from running for public office as the result of political crimes. The GOC argues that this legal route is not open to combatants or the courts because Colombia has signed an international treaty expressly prohibiting the classification of drug trafficking as a political crime and has referred to the treaty in the Peace and Justice Law. Peace and Justice Law, art. 72, 45.980 D.O., 25 de Julio de 2005 (Colom.) (confirming the continuing effectiveness of Paragraph 10 of Article 3 of United Nations Convention Against Drug-Trafficking, Vienna, 20 September 1998).

VII. CONCLUSION

The Peace and Justice Law, Colombia's most recent innovation in its four-decade pursuit of peace with illegal armed groups, reflects difficult trade-offs between distinct and sometimes inconsistent goals of the peace process. Many argue that the trade-offs were ill-advised and that too much was sacrificed in order to achieve a transient peace with the paramilitaries. Although it is too soon to tell what impact the Law will have on paramilitaries, other illegal armed groups or Colombian society, it seems likely that the sanctions and conditions provided in the law will prove too lenient to achieve a net benefit to social welfare in Colombia.

The sanctions regime adopted is largely a product of the negotiations between the GOC and the AUC. A closer look at the dynamics of those talks suggests that they cannot constitute a reliable measure of optimal punishment. Excessive optimism and impulsiveness on the part of the AUC, alongside agency problems that distort the positions on both sides of the bargaining table, will tend to push the solution out of a reasonable range. Moreover, there is no guarantee that a "reasonable offer," i.e., one that would be reached by rational actors, would be optimal in light of the utilitarian purposes of punishment.

Second, our assessment of the effectiveness of punishment options in advancing the goals of the Colombian peace process, particularly deterrence of IAGs remaining on the battlefield and future combatants, suggests that the GOC should push for a level of punishment that is more severe than what the AUC (or any other IAG) would accept under prevailing military conditions. This is essentially the position advanced by the international community and human rights groups who lobbied for more jail time and tougher conditionality on leniency. However, the usefulness of the economic approach is to highlight the natural consequences of such a position. The costs of insisting on harsher punishment include the harm inflicted by the AUC after they walk away from the table and may be measured in civilian deaths, battle casualties, forced displacement and various acts of brutality. The cost also includes efforts by the GOC to devalue the status quo facing IAGs to the point that they prefer harsher sanctions over remaining on the battlefield,²⁹⁵ a cost that may be borne in part by the

295. It is reasonable to rule out an outright military victory over IAGs in the foreseeable future given the historical wherewithal of well-funded, mobile, non-state forces and so to predict that the conflict will be brought to end through some kind of negotiated settlement requiring the consent of IAGs.

GOC and IAGs, but will largely be passed on to civilians as the conflict escalates.

Proponents of more severe punishment rarely address this category of cost realistically. One advocate of the obligation to prosecute human rights violations concludes that apprehensions that punishment will prolong conflict are outweighed by deterrence concerns "in part because the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur."²⁹⁶ Given the AUC's motivation in coming to the negotiating table, prosecution was very probably a decisive factor in Colombia, as it has been in other post-conflict and transitional contexts.²⁹⁷ To move the debate in Colombia forward, those demanding stiffer punishment should acknowledge that a return to battle and an escalation of the conflict may be preconditions to combatants' agreement on higher sanctions.

On the deterrence issue, the argument that combatant crime is inherently undeterrable is unpersuasive. A government can deter the worst crimes by tying the level of punishment to the severity of crime and to the combatant's rank, given that the deterrability of criminal conduct correlates to the degree of decision-making power possessed by the criminal. Since the decision to join armed groups may be a deterrable choice for some people, even lower-ranking combatants who have not committed serious crimes (as defined by the law) should not be let off the hook without any sanction. This group of combatants should be tried and sentenced, with immediate suspension of sentences conditioned on full confession of crimes. These combatants should be required to contribute to reparations through public apologies and community service, but the GOC should also find ways to help ex-combatants reintegrate into civilian life.

As implemented so far, Colombia's demobilization laws fail to generate truth in spite of the availability of a relatively low-cost mechanism for incentivizing combatants to disclose their knowledge. The law could condition the pardon for foot soldiers on a full disclosure, at least of their own involvement in crimes. Instead, the Peace and Justice Law sacrifices a unique opportunity to sat-

296. Orlentlicher, *supra* note 124, at 382.

297. See, e.g., Tepperman, *supra* note 249, at 133. (quoting South African President Mbeki's assertion that "[h]ad there been the threat of Nuremberg-style trials for members of the apartheid state security establishment we would never have undergone a peaceful change"). See also O'SHEA, *supra* note 126, at 22 (noting that amnesties in Chad, Uganda, Philippines, Ghana and Mauritania were used to persuade rebels to come forward).

isfy the specific informational needs of victims, build cases against those guilty of the worst crimes and to construct a truthful, historical narrative of the conflict.