LAWYERS WITHOUT BORDERS
AVOCATS SANS FRONTIERES
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Canada

The Colombian Peace Negotiations

Observations on the Preliminary Agreement on Victims.

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ABBREVIATIONS

Criminal Code	Colombian Criminal Code
CSTJRN	Comprehensive System for Truth, Justice, Reparation and Non-Repetition
ELN	National Liberation Army
FARC-EP	Revolutionary Armed Forces of Colombia – People's Army
General Agreement	General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace
ICL	International Criminal Law
IHL	International Humanitarian Law
IHRL	International Human Rights Law
Preliminary agreement on Victims	Draft of Preliminary agreement on the Point on Victims, 15 December 2015
PT	Peace Tribunal
RS	Rome Statute
SJP	Special Jurisdiction for Peace
The Unit	Special Unit to Search for Persons Disappeared in the context and as a result of the Armed Conflict
Truth Commission	Commission for the Elucidation of Truth, Coexistence and Non-Repetition
Verification Chamber	Chamber for the Verification of Truth, Responsibility, and Determination of the Facts and Conduct

PREFACE

Lawyers without Borders Canada (LWBC) has been working actively in Colombia since 2003 to promote and protect human rights and the fight against impunity. LWBC supports the work of lawyers who work to defend human rights, in the hope of ensuring full respect for the rights of those victims who are most affected by the armed conflict. It offers support to litigation in emblematic cases, providing international accompaniment and in-country training.

This report is part of a project supported by the European Union that LWBC implements jointly with Brussels-based Avocats sans frontières (ASF) to strengthen implementation of the principles of the Rome Statute of the International Criminal Court in Colombia. LWBC places great emphasis on the "principle of complementarity", which implies, above all, promoting the efforts of victims to use domestic legal mechanisms to ensure the investigation and punishment of those most responsible for crimes against humanity, and war crimes, committed in Colombia.

In December 2014, LWBC published the report "Peace with Transitional Justice: Contributions of International Law to Colombia", which analysed the international obligations of the Colombian state and the rights of victims from the perspective of the possibility that a framework of transitional justice might emerge as a result of the peace negotiations between the Colombian government and the FARC-EP guerrilla organisation[1].

Since then, LWBC has continued its work monitoring the advances in the peace negotiations between the parties, and highlighting the importance of the Preliminary Agreement on Victims signed on 15 December 2015 as a historic step forward in the recognition of the victims of the armed conflict. This report focuses on the Preliminary Agreement and other related advances. It aims to present the principal mechanisms of transitional justice contained in the Comprehensive System for Truth, Justice, Reparation and Non-Repetition and to make observations that it hopes will contribute to guaranteeing that it ends up complying with international standards. At no point does the report lose sight of the fact that the agreements have not been finalised, and that, as the parties put it, "nothing is agreed until everything is agreed".

By publishing the report LWBC aspires to contribute to the consolidation of an eventual legal framework that is consistent with the international obligations of the Colombian state and to ensure that it protects the rights of victims. LWBC will continue its monitoring activities in Colombia and hopes to make a constructive contribution to the efforts of the state to guarantee the rights of victims to justice.

Pascal Paradis
Executive Director
LWBC

1 LWBC, *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional*, available (in Spanish only) at http://www.LWBCanada.ca/uploads/publications/uploaded_informe-paz-con-justicia-transicional-version-lancement-2014-11-25-pdf-61.pdf.

EXECUTIVE SUMMARY

For decades, the Colombian armed conflict has been the scenario of gross human rights violations, many of which remain in impunity. On 15 December 2015, in Havana (Cuba), the Colombian government and the Revolutionary Armed Forces of Colombia – Peoples' Army (the FARC-EP) agreed the terms of the Preliminary Agreement on Measures to Guarantee the Rights of Victims of the conflict to Truth, Justice, Reparation and Non-Repetition. Since that date the international community, human rights organizations and Colombian civil society groups have engaged in a wide-ranging debate on the terms of the agreement.

International experience indicates that all processes of transitional justice imply the creation of transitory judicial and extrajudicial mechanisms in order to ensure the transition toward peace and/or democracy. While it is important to recognise that perfect justice is unachievable, impunity is a violation of international law inasmuch as it implies a failure on the part of the state to guarantee rights that are recognised by human rights treaties. For LWBC peace and justice are not opposing values, and the fight against impunity is a necessary condition if national reconciliation is to be achieved and future crimes prevented.

In general terms, agreement has been reached at the negotiating table on transitional justice mechanisms for grave crimes, amnesties or general pardons for political and linked crimes and the implementation of public policies in areas such as agrarian development, drugs policy and political participation. Mechanisms have also been agreed for the construction of confidence and other measures to ensure the implementation of the agreement.

This report seeks to provide a consistent description of the partial agreements and legislative and jurisprudential proposals made or promulgated up to June 2016 following agreement at the negotiating table in the field of transitional justice for victims of gross human rights violations and/or grave breaches of IHL. Its emphasis is on legal measures. Additionally, in order to evaluate potential tensions between the agreement and the international legal framework, and to illustrate the principal challenges and concerns identified, the report examines the punitive mechanisms included in the Preliminary Agreement of 15 December that created the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (the CSTJRN, or the "Comprehensive System"). The analysis applies a complementary and concurrent vision of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL).

The report presents the measures taken in favour of victims since the origins of the peace talks, emphasizing the elements of the CSTJRN with particular focus on the Special Jurisdiction for Peace. It pays special attention to the mechanisms established to implement the system, examining aspects of its selection procedures and priorities, its investigation strategy, amnesties and pardons for former members of the FARC-EP, the differential treatment proposed for state agents and former guerrilla fighters, the ways in which criminal charges will be brought, and the proposed system of sanctions. Finally, the report draws a series of conclusions, including the following, urging the Colombian authorities to:

- Regulate the scope of political crimes, adhering to the prohibition of amnesties for gross human rights violations or breaches of International Humanitarian Law.
- Pay special attention to defining conduct involving the elements of international crimes, in particular those defined in the Colombian Criminal Code.
- Ensure that the procedures used for selecting and prioritising cases are only applied in excep-

tional cases, and that adequate oversight mechanisms allow for the effective monitoring of the decision to investigate such cases or not.

- Employ a convergent and complementary application of IHL and IHRL, consistent with the Rome Statute, when criminal responsibility is being evaluated.
- Ensure that the interpretation of those most responsible is consistent with international law.
- Ensure that the punishments proposed within the framework of the Comprehensive System are consistent with the requirement to ensure genuine trials, in particular in cases in which alternatives to prison are ordered.
- Gauge the expectations of victims in order to determine the special treatment provided for in terms of punishment and ensure that the execution satisfies the principal goals of r restitution and reparation as stated by the agreement.
- Define the competence of the Special Jurisdiction for Peace, guaranteeing that the components of the Comprehensive System are interconnected by relations of conditionality in order to ensure the special treatment envisaged within it are sustainable.
- Raise awareness of gender-based violence, crimes that affect the majority of women in contexts of armed conflict.
- Implement policies to ensure the investigation and prosecution of cases of sexual violence meet international standards.
- In terms of the justice component, any evaluation of the legitimate use of force in non-international armed conflict should include the principles of distinction, proportionality and precaution, and ensure that the burden of proof to ensure the legitimacy of proceedings are applied to the person responsible for the attack.
- Ensure increased participation by victims in the Comprehensive System and in the process to develop the regulations governing the matter.
- Create a fund to cover the costs of representation and advice for victims of cases falling under the Special Jurisdiction for Peace.
- International bodies such as the OTP should continue to monitor the working of the Special Jurisdiction for Peace once it enters into operation, in order to guarantee the existence of genuine trials of the international crimes for which it has jurisdiction.

1. INTRODUCTION

Lawyers without Borders Canada (LWBC) is an international non-governmental organization for cooperation. Its mission is to offer support to initiatives to defend the human rights of vulnerable groups and persons, in order to strengthen access to justice and the right to legal representation. LWBC has had a presence in Colombia since 2003. For more than five years it has worked to promote the principles of the Rome Statute (RS) of the International Criminal Court (ICC), offering support to litigation in emblematic cases, providing international accompaniment and in-country training.

Through its field presence, LWBC's work on processes of transitional justice[2], involves the active analysis of legislative and other measures, that impact on the protection and recognition of the rights of victims of the most serious crimes[3]. In fulfilling its mission in Colombia, it has monitored the advances of the peace negotiations between the Colombian Government and the FARC-EP, in particular in relation to the transitional justice mechanisms intended to benefit the victims of gross human rights violations and/or grave breaches of IHL committed within the context of the armed conflict.

There is no doubt that the peace negotiations mark one of the most important moments in the history of Colombian politics. The talks with the FARC-EP, with the additional prospect of peace with the ELN[4], would bring the official end of the Colombian conflict and provide an opportunity to establish a democratic opening in the country, resolve conflicts without the silencing of opponents and agree changes in pursuit of a lasting and stable peace. In the presence of gross and systematic violations of human rights, the punishment of those responsible becomes a *sine qua non* if national reconciliation is to be achieved and future crimes prevented.

In the case of Colombia, impunity is a phenomenon that concerns the international community, and determining whether the agreement complies with international commitments on human rights and the fight against impunity has become a priority for LWBC. As the final agreement has not yet been adopted, its contents have not yet been incorporated into the legal system. The measures for victims agreed hitherto are merely contained in reports on progress and, therefore, a final view on their compatibility with the international legal order will depend on the manner in which they are finally agreed, consolidated and implemented. Nevertheless, for LWBC the process up to now represents a significant advance in recognizing the responsibility of all the parties involved in the perpetration of grave crimes, and a historically important step toward ensuring that millions of victims in Colombia enjoy the right to

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2 The UN has stated that transitional justice comprises "(…) the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation", Report of the Secretary General, 3 August 2004, *The rule of law and transitional justice in conflict and post-conflict societies.*

3 See, among others: AFSC (2016), *Estudio de casos a luz del principio de complementariedad del Estatuto de Roma: Mecanismos de Impunidad* (only available in Spanish); AFSC (2014), *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional;* AFSC (2013), *Análisis jurídico del Acto Legislativo 02 de 2012* (only available in Spanish) AFSC (2015), *Amicus Curiae en apoyo a la inconstitucionalidad del Acto Legislativo 01 de 2015* (only available in Spanish).

4 On 30 March 2016 the Colombian government and the National Liberation Army (ELN) agreed in a parallel process to establish a public discussion intended to reach a final agreement to end the armed conflict and to bring about the transformations required to achieve peace and equity. To this end they agreed an agenda comprised of the following six points: i) the participation of society in the construction of peace; ii) democracy for peace; iii) transformations for peace; iv) victims; v) the end of the conflict, and, vi) implementation and the establishment of rules governing the conduct of the talks. The points on which there was agreement included the question of victims, on which the parties indicated that, "*[i]n the construction of a stable and lasting peace it is essential to recognise the victims and their rights, and for their cases to be processed and resolved on the basis of truth, justice, reparation and commitments to ensure non-repetition and that the crimes are not forgotten. Taken together, these aspects form the basis for forgiveness and are steps toward a process of reconciliation.*" It remains to be seen how the agreements on victims reached in the negotiations with the FARC-EP will be incorporated into the talks between the government and the ELN. (Gobierno de Colombia & ELN, (2016), *Acuerdo de diálogos para la paz de Colombia entre el Gobierno nacional y el Ejército de Liberación Nacional*.

Truth, Justice, Reparation and Non-repetition.

Having created millions of internally displaced people and hundreds of thousands of victims who have been forcibly disappeared, murdered or obliged to seek refuge abroad, the Colombian armed conflict has been qualified as one of the most violent in the world. To date, according to official figures, it is estimated that the armed conflict has produced at least eight million victims, of whom approximately seven million are internally displaced, at least 45,000 have been direct victims of enforced disappearance and more than have been 30,000 kidnapped, in a context also involving other crimes, such as sexual violence, forced recruitment, extrajudicial executions, massacres, selective murders and other grave abuses[5].

The ambiguity surrounding the point at which the Colombian armed conflict began, and the multiple actors involved in the commission of grave crimes -including, at least, state agents and guerrilla and paramilitary groups– is evidence of the complexity of the matter Some consider that its origins date to the agrarian conflicts of the early 20th Century, others to the violence of the 1950s, while the most cautious to the founding of the principal guerrilla groups in 1964[6].

In its attempts to end the armed conflict the Colombian state has reached agreement over the years with various armed organizations. The FARC-EP and the ELN are the last remaining active guerrilla organizations in the Americas that retain significant military capacity. Following the failure of the process between the FARC-EP and the government of Andrés Pastrana (1998-2002), the implementation of Plan Colombia[7], the security policies pursued under the government of Álvaro Uribe (2002-2010), and the rise and expansion of the paramilitary phenomenon, military operations against the guerrilla organizations were stepped up, leading to their retreat and to the deaths of some members of their high command.

Starting in 2011, the FARC-EP and the Colombian government initiated a secret exploratory phase intended to establish the basis of a new process of dialogue. The signing on 26 August 2012 of the *General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace* (hereafter, the "General Agreement"), established a negotiating agenda of six points and set out the rules governing the conversations[8]. The talks took place in Havana (Cuba). Cuba and Norway acted as guarantors, and Venezuela and Chile as accompanying countries; the process was also broadly supported by the international community[9].

Since the initiation of the talks, the parties have achieved partial agreement on **i)** a policy for integrated agrarian development, **ii)** political participation, **iii)** a solution to the problem of illicit drugs and **iv)** victims. In addition, important agreements have been reached on matters contained within points **v)** the end of the conflict and **vi)** implementation, verification and endorsement of the agreement once it is made public. It should be noted that partial agreement refers to the remaining existence of reservations or "points for discussion". For example, under agrarian development the precise meaning of the term

5 Figures from the National Victims' Unit, available at: http://cifras.unidadvictimas.gov.co/Home/General.

6 Uprimny, Rodrigo & Saffon, Maria (2007), *Uses and Abuses of Transitional Justice Discourse in Colombia*, PRIO Policy Brief, 6. Oslo: PRIO

7 Plan Colombia is a bilateral agreement between the governments of Colombia and the United States, established to provide substantial assistance intended to increase Colombia's counternarcotics capabilities and to contribute to strengthening other state institutions (Embassy of the United States in Bogotá – Colombia. Plan Colombia, available at: http://bogota.usembassy.gov/plancolombia.html).

8 The rules governing the functioning of the negotiations stipulate that nothing shall be agreed until everything is agreed. Thus at the time of witting no formal agreement between the FARC-EP and the Colombian government exists. However, the *draft preliminary agreements, communiqués* and *joint reports* have made the advances achieved during the talks available to the public. It should be pointed out that the contents of these partial agreements may be broadly interpreted, and that a final agreement is required to establish their meaning with certainly. (Gobierno de Colombia & FARC-EP (26 August 2012) *Acuerdo General*.

9 Gobierno de Colombia & FARC-EP. (15 December 2015), *Borrador de pre-acuerdo*.

"latifundio" is yet to be discussed[10].

Topic	Made public
Integrated agrarian development policy	26 May 2013
Political participation	6 November 2013
End of the conflict	Partially, 23 June 2016
Solution to the problem of illicit drugs	16 May 2014
Victims	15 December 2015
Implementation and verification	Partially, 23 June 2016

Agenda for the Negotiation of the General Agreement: before 30 June 2016.

LWBC has emphasised the need to achieve a final Peace Accord as soon as possible, as it is a prerequisite if important advances that have already been made are to be implemented. This reflects its belief that such an agreement would contribute to the building of confidence in the process on the part of the population. However, it is aware that ending a conflict as complex and long-lasting as Colombia's is no easy task. It has expressed its profound concern at the recent wave of murders of human rights defenders and social leaders and, given the situation, calls on the relevant authorities to take appropriate measures to prevent the repetition of this kind of violation.

10 Gobierno de Colombia & FARC-EP. (6 June 2014). *Borrador de pre-acuerdo*.

2. TRANSITIONAL JUSTICE MECHANISMS FOR VICTIMS OF THE COLOMBIAN ARMED CONFLICT

In recent years, the fight against impunity for gross violations of human rights has become one of the central concerns of International Criminal Law (ICL) and in particular of the RS and the ICC[11]. Furthermore, according to IHRL, states are obliged to guarantee and respect recognised rights. This includes the duty to prevent, investigate, judge and, when appropriate, punish all gross violations that may have been committed. In addition, under IHL the obligation to punish gross violations committed in the course of a non-international armed conflict derives from customary international law[12] and constitutes a principle of international law.

Gross violations of human rights and grave breaches of IHL are not subject to statutes of limitation and society and victims enjoy the right to Truth, Justice and Reparation and guarantees of Non-repetition. Furthermore, such violations acquire particular importance for ICL when they constitute crimes against humanity or war crimes (as defined by the RS). This is because, according to the principle of complementarity, the ICC is only able to intervene to ensure that they do not go unpunished when the state has shown a lack of willingness or demonstrated itself incapable of punishing those responsible.

Thus, in cases of gross violations of human rights and grave breaches of IHL[13] impunity is a legitimate concern of the international community inasmuch as it constitutes a violation of international law, given the failure of the state to guarantee rights that are recognised in human rights treaties.

The fight against impunity, and transitional justice, are based on four basic principles that constitute the foundations of IHRL, namely: **i)** the obligation of states to punish the perpetrators of gross violations, **ii)** the right to knowledge of past abuses and the whereabouts of the disappeared, **iii)** the right of victims to reparation and **iv)** the obligation of the state to guarantee non-repetition of such atrocities in the future[14].

In scenarios occurring against a backdrop of a past of large-scale abuses, and where efforts are being made to ensure the re-establishment of democracy and/or peace, or a transition toward them, states may employ a range of different judicial or extrajudicial mechanisms to fulfil their international obligations. These include the creation of truth commissions, special reparation programmes for victims, and the creation of special jurisdictions to hear cases of human rights violations.

Concerning the adoption of judicial measures, comparative law and Colombian law recognise the possibility of adopting exceptional procedures that might contribute to achieving and maintaining peace and/or democracy without this implying the abolition of the rights of victims to Truth, Justice, Reparation and guarantees of Non-repetition, and which are intended to satisfy these as effectively as possible[15].

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11 Ambos, Kai (2005), *Estudios de Derecho Penal Internacional*. Leyer.

12 Henckaerts, Jean-Marie & Doswald-Beck, Louise (2007), *El Derecho Internacional Humanitario Consuetudinario*. Volumen I: Reglas, Ed. CICR, Buenos Aires. See also: AFSC (2015), *Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano.*

13 In cases of human rights violations impunity does not only involve the absence of punishment, but has at least three additional dimensions, which are intimately linked to the idea of an absence of justice. First, impunity exists when society and victims do not learn of the extent and reasons for the abuses suffered, second, when victims are not granted reparation and third when preventive measures are not taken to ensure non-repetition. (Tayler W. [1997]. *La problemática de la impunidad y su tratamiento en las Naciones Unidas).*

14 United Nations High Commissioner for Human Rights. (2014), *Transitional justice and economic, social and cultural rights.*

15 Report of the United Nations Secretary-General (3 August 2004),*The rule of law and transitional justice in conflict and post-conflict societies*

The Colombian Constitutional Court (CCC) has indicated that in scenarios of transitional justice the absolute character of the rights of victims of gross violations of human rights and/or grave breaches of IHL enters into tension with the achievement of peace. According to the jurisprudence on the matter, these conflicting values and principles must be weighed up so that the tension may be resolved in the most effective manner possible[16].

In spite of the fact that international law has not explicitly incorporated the legitimacy of the goal of recognising peace as a human right,[17] the international community has accepted the importance of the principle, and several instruments have referred to it. The definition of its nature varies, some considering it to be **i)** a collective international intention[18], **ii)** a third generation right inherent to humanity[19] and **iii)** an individual right[20]. In Colombia, the Political Constitution has defined peace to be both "a right and a duty" (CP, art. 22) and a goal of the Colombian state (PC, Preamble).

The most recent precedent for the implementation of a process involving transitional justice mechanisms in the country occurred in 2005 with the controversial demobilization of the paramilitary fighters of the *Autodefensas Unidas de Colombia* (AUC). This model granted *alternative sentences*-[21]that suspended prison terms for those responsible for grave crimes, replacing them with a maximum sentence of eight years if the beneficiary contributes to achieving peace, collaborates with the legal authorities or facilitates the pursuit of truth, reparation and rehabilitation for victims, under the special procedures established byte Justice and Peace Process[22].

16 Corte Constitucional, Sentencia C-370 de 2006 M.P. Manuel José Cepeda, Jaime Córdoba Triviño, Rodrigo Escobar Gil y otros& Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt, entre otras.

17 **Universal:** United Nations General Assembly, *Report of the open-ended intergovernmental working group on a draft UN declaration of the right to peace*, UN Doc A/HRC/27/63 at paras 22, 32, 52 (2014) & United Nations General Assembly, *Report of the open-ended intergovernmental working group on a draft UN declaration of the right to peace*, UN Doc A/HRC/27/63 at para 80 (2014),**Regional:** Luarca Declaration on the Human Right to Peace (2006), the Bilbao Declaration on the Human Right to Peace (2010) and the Barcelona Declaration on the Human Right to Peace (2010); The Santiago Declaration on the Human Right to Peace (2010); The Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (Article 38) and The African Charter of Human and Peoples' Rights (Article 23.1). **National:** Corte Constitucional C-370 de 2006 M.P. Manuel José Cepeda, Jaime Córdoba Triviño, Rodrigo Escobar Gil y otros; Sentencia T-008 de 1992, M.P. Fabio Morón Díaz, Sentencia T-102 de 1993 M.P. Carlos Gaviria Díaz; sentencia C-225 de 1995 M.P. Alejandro Martínez Caballero; Sentencia C-578 de 2002 M.P. Manuel José Cepeda Espinosa.

18 Preamble to the United Nations Charter; Preamble to the Universal Declaration of Human Rights; Preamble to the Charter of the Organization of American States, among others, cited by the Constitutional Court, Sentencia C-370 de 2006 M.P. Manuel José Cepeda, Jaime Córdoba Triviño, Rodrigo Escobar Gil y otros.

19 Anteproyecto del Pacto Internacional que consagra los Derechos Humanos de Tercera Generación, elaborado por la Fundación Internacional de los Derechos Humanos. For Colombia, see Corte Constitucional, Sentencia T-008 de 1992, M.P. Fabio Morón Díaz.

20 The Oslo Declaration on the Human Right to Peace, approved by the 29th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, 21 October to 12 November 1997.

21 Here, it is important to clarify that that, strictly speaking, the procedure did not involve alternative sentences (i.e. *alternatives to prison*), but reduced custodial sentences.

22 Corte Constitucional, Sentencia C-370 de 2006 M.P. Manuel José Cepeda, Jaime Córdoba Triviño, Rodrigo Escobar Gil y otros.

2.1 The treatment of victims in the negotiations with the FARC-EP

The General Agreement states that the indemnification of victims would be the focal point of the negotiations. However, before dealing with this question (Point 5 of the General Agreement), on 7 June 2014 the FARC-EP and the Colombian government produced a joint "Declaration of Principles"[23], which was intended to act as guide for discussing and implementing the measures on victims. This was an attempt to ensure the integral satisfaction of victims' rights to Truth, Justice, Reparation and guarantees of Non-repetition[24].

In order to contribute to the discussion, the parties agreed to create the Historical Commission on the Conflict and its Victims[25], which produced 14 experts' reports, intended to identify **i)** the origins and multiple causes of the conflict; **ii)** the principal factors and conditions that have facilitated and contributed to the persistence of the conflict and **iii)** the worst effects and impacts on the population[26].

Actions intended to build confidence have also been agreed with the FARC-EP. These include humanitarian measures to search for, locate, identify and ensure the dignified handover of the remains of persons believed to have disappeared as a result of the armed conflict[27]. Actions have also been carried out to decontaminate territories and clear them of ordnance[28], measures to de-escalate the war[29], and to ensure the demobilisation of child soldiers from the FARC-EP, including special measures to attend to them once they have left the group[30].

The talks in Havana have utilised three participation mechanisms: forms, forums and consultations[31]. The mechanisms for responding to victims were expanded, and several events were organised to develop this focus. Regional forums were organised jointly with the National University and the United Nations, in Villavicencio on 4 and 5 July, Barrancabermeja on 10 and 11 July, Barranquilla, on 17 and 18 July 2014, and a national forum in Cali, on 3, 4 and 5 August 2014.

Five groups, each made up of 12 victims representing different categories of abuse[32], travelled to Havana to give their testimonies and offer recommendations to the negotiating table[33]. On 2 June 2016, the parties announced that on 20 and 21 June the negotiating table would be visited by representatives of indigenous peoples, the Roma, Afro-Colombian communities, *raizales* (the creole-speaking population of the islands of San Andrés and Providencia), blacks and *palanqueros* (inhabitants of *palenques* or communities established by escaped slaves during the period of slavery), in order to hear

23 Gobierno de Colombia & FARC-EP (7 June 2014), *Comunicado Conjunto*.

24 These principles are: **i)** recognition of victims; **ii)** recognition of responsibility; **iii)** satisfaction of the rights of victims; **iv)** participation of victims; **v)** clarification of the truth; **vi)** reparation of victims; **vii)** guarantees of protection and security; **viii**) guarantees of non-repetition; **ix)** reconciliation and **x)** a rights-based focus. (Gobierno de Colombia & FARC-EP (7 June 2014), *Comunicado Conjunto*.

25 The Historical Commission on the Conflict and its Victims emerged as an agreement between the government and the FARC-EP, with the aim of contributing to understanding the complexity of the historical context of the internal conflict and to provide inputs will be useful to the delegates when discussing the different points of the General Agreement, Gobierno de Colombia & FARC-EP (5 August 2014], *Comunicado Conjunto*. The Commission is made up of a technical team of experts named jointly by the parties to ensure plural membership and views. It differs from the Commission for the Elucidation of Truth, Coexistence and Non-Repetition agreed by the CSJTRN and isn't, strictly speaking, a truth commission.

26 Gobierno de Colombia & FARC-EP (5 August 2014), *Comunicado Conjunto*.

27 Gobierno de Colombia & FARC-EP (18 October 2015), *Comunicado Conjunto*.

28 Gobierno de Colombia & FARC-EP (12 July 2015), *Comunicado Conjunto*.

29 Gobierno de Colombia & FARC-EP (12 July 2015), *Comunicado Conjunto*.

30 Gobierno de Colombia & FARC-EP (15 May 2016), *Comunicado Conjunto*.

31 Alto Comisionado para la Paz (2016), *Proceso de paz. Acuerdo sobre las Víctimas del conflicto*.

32 Jessika Gómez Rodríguez (2015), *Las víctimas, su incidencia en la Mesa de Negociación de la Habana,* available at: www.arcoiris.com.co/wp-content/uploads/2015/08/Las-v%C3%ADctimas-su-incidencia-en-la-Mesa-de-Negociaciones-de-La-Habana.pdf.

33 Alto Comisionado para la Paz (2016), *Proceso de paz. Acuerdo sobre las Víctimas del conflicto*.

their recommendations, which were to be included in the discussion on implementation, verification and endorsement of the Final Agreement[34].

In addition to the agreements reached in Havana, at the initiative of the government the Colombian Congress has approved, and continues to approve, a set of legislative measures. The government has argued that a legal framework is required to facilitate the implementation of the agreements, while the FARC-EP have insisted that any measure that is taken within the framework of the negotiation must be agreed by both parties and that, in consequence, the legislative initiatives that have been taken might contradict the General Agreement and put the peace process at risk[35].

Among the most important unilateral decisions taken by the state was the Legal Framework for Peace (Legislative Act 01 of 31 July 2012, hereafter "LFP"), which introduced a constitutional reform permitting the adoption of a model of transitional justice intended to give differential treatment to members of illegal armed groups and state agents in the process to end the armed conflict, and to achieve a peace that guarantees non-repetition, security for the Colombian population and the highest degree of protection of the rights of victims[36]. Unless the Colombian Congress adopts another constitutional reform this framework will potentially operate as a relevant constitutional parameter, subject to the controlling role of the Constitutional Court[37]. The role of the Court will be particularly important when it comes to examining the constitutionality of agreements such as laws granting amnesties or pardons, or any plebiscite organised to approve them.

In the area of criminal justice, the LFP authorises the creation of a series of transitory legal-penal institutions that could potentially operate in a scenario of transitional justice. Thus, it permits **i)** the elaboration of selection and prioritisation criteria to enable efforts to be focused on the criminal investigation of those most responsible for systematically-committed crimes against humanity, genocide or war crimes[38]**; ii) the introduction of** conditional waivers of criminal proceedings; and **iii)** the conditional suspension of the implementation of sentencing, the application of alternative punishments, extrajudicial sanctions and special forms of compliance[39].

The constitutional framework mentioned above was reviewed by the Constitutional Court in a case that was unconnected with procedural controls of constitutional reforms. It established a set of criteria that should be used to interpret the ruling[40]. It is this *authorised interpretation* that permits the

34 Gobierno de Colombia & FARC-EP (2 June 2015), *Comunicado Conjunto*

35 In a public communiqué dated 12 August 2014 the FARC-EP set out their position on the Legal Framework for Peace (Legislative Act 01 of 2012), Constitutional Court Decisions C-579 of 2013, and C-577 of 2014 and the project to call a referendum currently under examination by the Constitutional Court. They indicated that these instruments form part of a "legal spider's web" that are intended to trap inexperienced members of the insurgent group. They suggested, furthermore, that they constituted a form of domination that attempted to reduce levels of state responsibility and increase those of the FARC-EP.

36 Congreso de Colombia. Acto legislativo 01 de 2012.

37 The safeguarding of the integrity and supremacy of the Constitution is entrusted to the Constitutional Court (CC. Art. 241).

38 With reference to the requirement that a systematic element should be present, note that this is not an obligatory element of war crimes. According to the ICC Pre-Trial Chamber in the case of *The Prosecutor v. Jean-Pierre Gombo* (Decision of 15 June 2009), this element is not a pre-requisite if the Court is to exercise its jurisdiction, but operates instead as a "practical guideline" (par. 211). Equally, LWBC's 2014 report *Paz con Justicia Transicional* indicates that establishing a necessarily systematic nature of war crimes would reduce the jurisdiction of the ICC and might lead to confusions between war crimes and crimes against humanity that do demand the existence of this element. According to the report, *"Perhaps the only coherent interpretation is to bear this aspect in mind as a selection criterion, but not as a way of characterising these crimes" (pp. 29-30).* For its part, the Colombian Constitutional Court has ruled that "(…) war crimes have an element of systematic violence, which is not to say that these are mass crimes but that they have a connection with the armed conflict, as part of an organised plan or policy" (Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt).

39 Congreso de Colombia. Acto legislativo 01 de 2012.

40 Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt.

constitutionality of the reform to be established. Therefore, for the purposes of the analysis of the agreements, these criteria, along with LFP, might also serve as points of reference when it comes to examining the constitutionality of what has been agreed.

Of particular importance to the recognition of the rights of victims is the criterion developed by the Constitutional Court, according to which LFP should be interpreted to ensure, in the case of all victims and as a minimum, the following guarantees: **i)** the transparency of the selection and prioritisation procedures employed, **ii)** a serious, impartial, effective investigation, carried out in a timely manner and with the participation of the victim(s), **iii)** the existence of an appeal procedure allowing decisions on the selection and prioritisation of cases to be challenged, **iv)** specialised advice, **v)** the right of victims to truth, which -in the event that a case has not been prioritised- should be guaranteed using non-criminal legal and extrajudicial mechanisms, **vi)** the right to reparation, and, **vii)** the right to learn of the whereabouts of the remains of loved ones[41].

The question of victims was dealt with by the parties during discussion of point 5 of the General Agreement, on which a draft agreement was reached on 15 December 2015. This draft decided **i)** the creation of a Comprehensive System for Truth, Justice, Reparation and Non-Repetition (CSTJRN), and **ii)** a commitment to promote, respect and guarantee human rights (hereafter, the "Preliminary Agreement on Victims").

The measures included in the CSTJRN for victims of gross violations of human rights and grave breaches of IHL include institutions commonly found in processes of transitional justice designed to promote a transition to peace. Particularly important among these mechanisms are criminal penalties such as individual, alternative sentences, which imply the imposition of punishments that are generally less severe than those contemplated by the ordinary criminal justice system, and the adoption of prioritisation and selection criteria that, in certain cases, permit investigations to be focused and permit criminal proceedings to be waived in certain cases.

On 12 May 2016, the Colombian government and the FARC-EP announced that they had reached agreement on mechanisms to ensure security and legal certainty, the reincorporation of former guerrilla members into the legal order, and the effective implementation of the eventual Final Agreement. To this end, the Colombian Congress is currently debating a project to reform the Constitution. The proposed reform declares that the Final Agreement is a special accord adhering to the terms established by Common Article 3 of the Geneva Conventions. In addition, in order to ensure that the Accord will be implemented the agreement includes a commitment by the government, *once the Final Agreement has been signed, to advance a constitutional reform that would incorporate the agreement on the Special Jurisdiction for Peace into the Constitution*[42].

41 ibid.

42 Gobierno de Colombia & FARC-EP (12 May 2016), *Comunicado Conjunto*.

2.1.1 The Comprehensive System for Truth, Justice, Reparation and Non-Repetition

The Comprehensive System will consist of different legal and extrajudicial mechanisms intended to provide integral satisfaction of the rights of victims and which will be implemented in a coordinated and complementary manner (par. 4)[43]. According to what has been settled up to this point, efforts will be made to ensure that the different components of the System are interconnected by way of conditional relations and incentives to agree to and maintain any special legal treatment that may be contemplated (par. 7). It would include a diversity and gender perspective in an effort to respond to the patterns of victimisation in different territories and population groups, in particular in relation to women and children (par. 5). Although not stated in an explicit manner, the CSTJRN is planned to cover, as a minimum, everyone who had participated directly or indirectly in the armed conflict and who had committed acts "in the context of [the armed conflict] or during it" (par. 2)[44]that constituted "grave breaches of IHL and gross violations of human rights" (par.s 2 and 9).

The CSTJRN will be formed of bodies agreed between the parties: the Truth, Coexistence and Non-Repetition Commission[45], the Special Search Unit for Persons reported as Missing in the context of and due to the conflict[46], the Special Jurisdiction for Peace (SJP), already agreed,[47] and potential integral reparations measures for the construction of peace[48] and guarantees of non-repetition[49].

The *Commission for the Elucidation of Truth, Coexistence and Non-Repetition* (hereafter, "The Truth Commission") will attempt to uncover the truth about what has occurred and to contribute to elucidating gross violations of human rights and grave breaches of IHL. It will therefore seek to offer a broad explanation to the whole of society of the complexity of the conflict, promoting recognition of the victims and the responsibility of those involved, and seeking to encourage peaceful coexistence in the regions, as a measure of non-repetition[50].

The Truth Commission will operate for a period of three years and will be made up of eleven commissioners whose number may include up to three foreigners, chosen according to a process of nomination and election, in order to ensure impartiality and independence. It will be an extrajudicial mechanism that will prepare a final report, with recommendations. Its activities will not be judicial in nature and will not lead to the prosecution of anyone who appears before it. None of the information it receives or produces may be transmitted to the judicial authorities, who will, in addition be unable to

43 See: "The Comprehensive System rests on the basis of the principle of recognizing victims as citizens with rights; on acknowledging that the full truth about what occurred should be sought; on the principle of recognizing responsibility on the part of all of those who took part, directly or indirectly, in the conflict and were involved in one way or another in severe human rights violations and/or severe breaches of International Humanitarian Law; on the principle of satisfying victims' rights to truth, justice, reparation and non-repetition, rooted in the premise that impunities shall not be interchangeable, additionally taking into account the basic principles of the Special Jurisdiction for Peace, among which there is a provision stating that "damages caused shall be repaired and restored whenever possible" (Gobierno de Colombia & FARC-EP (15 December 2015). See also: "International experience demonstrates that the effectiveness of these measures is greater if they are applied in an articulate and complementary manner. For that reason, the System intends to be comprehensive, in order for the measures to achieve the maximum justice and accountability for the human rights violations and the infringements on IHL occurred throughout the conflict. The comprehensive nature of the Systems contributes as well to the elucidation of the truth about the conflict and to the construction of historical memory", (Gobierno de Colombia & FARC-EP *Borrador Conjunto* (15 December 2015), *Borrador Conjunto*, p. 4.

44 Henceforth, references in brackets refer to paragraphs in the Preliminary Agreement on Victims [*Pre-Acuerdo sobre Víctimas*], 15 December 2015. pp. 21 a 45.

45 Gobierno de Colombia & FARC-EP (4 June 2015), *Informe Conjunto*.

46 Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

47 Gobierno de Colombia & FARC-EP (23 September 2015), *Comunicado Conjunto*.

48 Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

49 ibid.

50 ibid.

request any information from it[51].

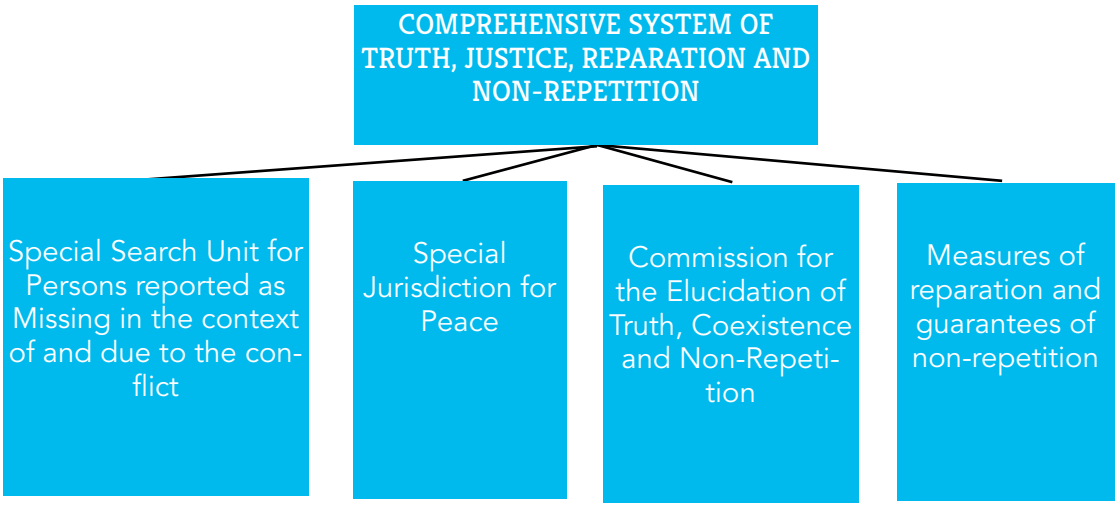
The Truth Commission will employ a diversity focus that will seek to identify the differential ways in which the armed conflict has affected women, children, and ethnic and other particularly vulnerable groups. Additionally, special measures for victims are projected to include the possibility that they participate in the nomination of commissioners, provide information and participate in the spaces established to ascertain the voice of civil society. It has, furthermore, been indicated that victims might be included in the committee established to monitor and verify the implementation of the Commission's recommendations. The committee will begin to operate once the final report has been published[52].

The *Special Search Unit for Persons reported as Missing in the context of and due to the conflict* (hereafter "the Unit") will be established to direct, coordinate, and contribute to humanitarian actions intended to search for and identify all persons who have been reported as disappeared in the context of the armed conflict and, when possible, to locate and hand over their remains. According to the terms agreed by the parties, the Unit will provide family members with detailed reports on the information it has been able to ascertain and, when possible, will hand the remains over in a dignified manner. Additionally, victims will have access to psychological support, and will be able to participate in the search for, location and dignified handover of remains and to make recommendations about the structure of the Unit[53].

Within the framework of the CSTJRN, everybody who caused harm as a result of gross violations or breaches would be ordered to provide reparation. Reparation measures will include, early in the process, public acts to recognise collective responsibility, and will seek to strengthen reparation programmes for victims that are currently being implemented by the Colombian state. In this way, it is hoped to strengthen the collective reparation processes and initiate the return of victims currently living abroad, the rehabilitation of communities, the availability of psychological support services and advance concrete measures such as the provision of employment opportunities, and material compensation. The response will also include, among other measures, attempts to coordinate collective return and land restitution processes[54].

It has been stated that the CSTJRN will contribute to guaranteeing the non-repetition of atrocities committed within the Colombian armed conflict by: **i)** recognising victims as citizens, **ii)** recognising events that occurred during the conflict and clarifying, and rejecting, gross violations of human rights and grave breaches of IHL, **iii)** combatting impunity and, **iv)** promoting peaceful coexistence based on the recognition of responsibility of those who have committed abuses. It has been agreed that the guarantees of non-repetition will be the result of the coordinated implementation of the components of the Comprehensive System and of the measures agreed in discussions of the point on the end of the conflict[55].

51 ibid.
52 ibid.
53 ibid.
54 ibid.
55 ibid.



i) The Special Jurisdiction for Peace (SJP)

The SJP will act as the judicial component of the Comprehensive System. Although the nature of its jurisdiction is yet to be defined with clarity, it is clear that it will be able to hear cases concerning conduct engaged in "*on the occasion of, caused by, and in direct or indirect relation with, the armed conflict*" (par.s 32 and 33), and in particular in relation to conduct considered to constitute "*grave breaches of IHL or gross violations of human rights*" (par. 9). Attempts will also be made to ensure that those wishing to gain access to the special legal dispositions of the Comprehensive System[56]will have to offer the whole truth[57], provide reparations for victims and guarantee non-repetition (par. 13).

Although the jurisdiction of the SJP for individual cases has not been fully determined, it is clear that at the least, former guerrilla fighters who sign the agreement, state security agents accused of crimes "*related to the armed conflict and committed as a part of it*" (par. 32) and civilian third parties who have financed or collaborated with paramilitary groups and who "(…) *participated in a decisive or habitual manner in the commission of crimes* (…)" that fall under its eventual jurisdiction, could be compelled to appear before it (par. 32).

Furthermore, the SJP will have the authority to offer amnesties or pardons to persons who are subject to investigation or punishment for the crime of rebellion (membership of a subversive organisation) or other crimes related the conflict even though they do not belong to rebel armed groups (par. 32). The SJP will also be able to review or overturn sentences, punishments and disciplinary or administrative proceedings for conduct "*directly or indirectly related to the armed conflict*" (par. 33). It may act in a similar manner in respect of persons who have faced criminal charges for engaging in peaceful protest, the defence of human rights or for their leadership roles in social organisations (par. 35). The SJP will, furthermore, be able to determine the treatment to be given to previous sentences imposed by the ordinary justice system on persons who have been imprisoned, tried or convicted of belonging to or collaborating with the FARC-EP, including the extinction of responsibility in cases where sentences are considered to have been served (par. 50 b as stated in art. 3.3 of the General Agreement). At the

56 Special treatment is understood to consist of the individual and alternative punishments foreseen in section 60 (par.13). Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

57 "Offer the whole truth" means providing exhaustive, detailed information, when possessed of it, concerning the acts committed and the circumstances in which they occurred, as well as necessary and sufficient information for responsibility to be assigned so that the rights of victims to reparation and non-repetition may be satisfied (par.13). Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

request of the convicted person it will be able to review sentences handed down by the courts that they claim were for conduct that did not occur or for manifest errors in legal decisions concerning conduct that was "*related to the armed conflict and committed as a part of it*" (par. 57 b).

The SJP will be made up of **i)** the Peace Tribunal (hereafter "PT", "Peace Tribunal" or simply "Tribunal"); **ii)** the Chamber for the Verification of Truth and Responsibility and the Identification of Acts and Conduct (hereafter "Verification Chamber"); **iii)** the Amnesty and Pardons Chamber; **iv)** the Chamber for the Determination of Legal Status and, **v)** the Investigation and Indictment Chamber (par. 46). The jurisdiction will be responsible for two kinds of proceeding: **a)** those where perpetrators have acknowledged the truth and recognised their responsibility and **b)** those where truth and responsibility have not been acknowledged or recognised (par. 45).

The right to a defence may be exercised before the SJP either individually or collectively through the organisation to which the individual belongs (par. 46). The State will provide a free and independent system of legal advice and defence to low-income individuals, who will be able to apply for support from existing legal defence mechanisms (par. 46). All aspects of due process will also be respected (par. 14). Colombia's state institutions as a whole will be responsible for ensuring administrative autonomy and adequate, independent, funding for the system. For these purposes an executive secretariat will be created that will be responsible for administering the area (par. 16).

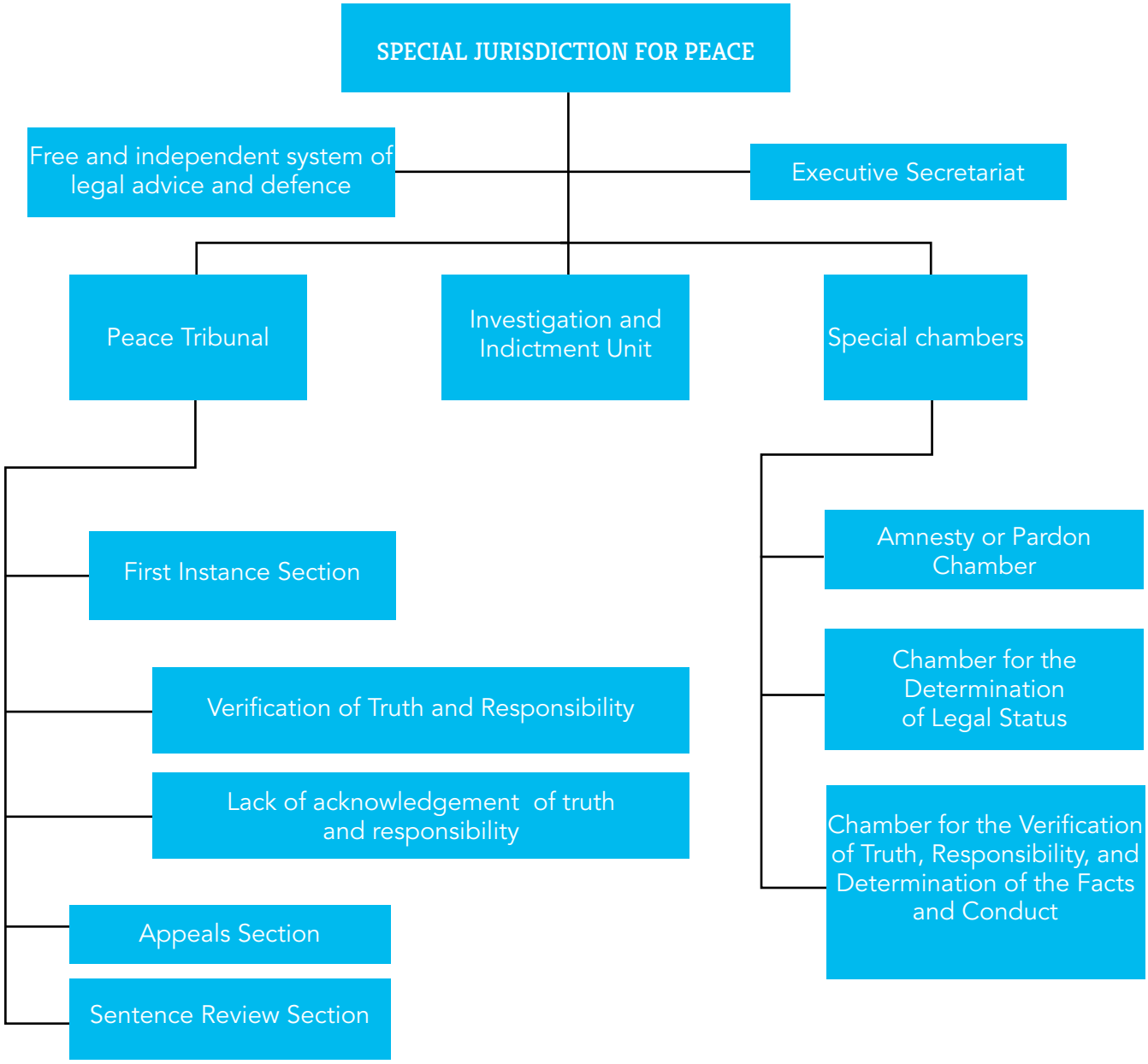
While the SJP will be made up principally of Colombian judges, up to six foreign judges can also be invited to join it (par.s 65 and 66). The selection criteria stipulate that the judges should enjoy the confidence of the Colombian population and that gender equity and ethnic and cultural diversity should be taken into account in their selection. Judges of the different chambers and sections of the Peace Tribunal will be obliged to subscribe to the regulations of the SJP, which will establish the grounds for legal impediment and recusation of judges (par. 46).

a. The Peace Tribunal[58] will be an independent and preferential judicial body with capacity to investigate, judge and, when applicable, punish serious crimes. Although the scope of its jurisdiction has yet to be clearly defined, according to the agreed terms it will have the power to hear cases concerning the conduct of persons who participated "directly or indirectly in the armed conflict" (par. 32) and "in particular" (par. 9) of those who perpetrated gross violations of human rights and grave breaches of IHL (joint interpretation, par.s 9 and 32). Although material jurisdiction appears still to be undefined, Joint Communiqué No. 60, which announced the creation of the SJP, appears to limit its jurisdiction *particularly [to] the most serious and representative crimes*[59], though it does not expressly define what is meant by the terms "most serious" or " representative". The duration of the Tribunal's jurisdiction is also yet to be determined, as is the question of whether it will be able to hear cases of crimes committed beyond national borders.

As stated above, according to the terms of the Preliminary Agreement on Victims, the Peace Tribunal will only hear crimes committed by state agents that were *"related to the armed conflict and committed as a part of it*" (par. 32). On the matter of civilian third parties, the PT will have jurisdiction over the financing of, or collaboration with, paramilitary groups, only when this has constituted a "*decisive or habitual participation*" in the commission of crimes falling under its jurisdiction (par. 32).

58 The PT will be made up of national and international judges, namely 20 Colombians and four foreigners. The qualifications to serve will be the same as those required of judges in Colombia's superior courts.
Six judges shall sit in each chamber (Structure [*Conformación*] 65, 66, 68) Gobierno de Colombia & FARC-EP. (15 December 2015), *Borrador Conjunto*.

59 Gobierno de Colombia & FARC-EP (23 September 2015), *Comunicado Conjunto*.



It has been remarked that when it comes to evaluating the responsibility of civilian third parties for financing or collaborating with paramilitary groups the reference to "*decisive or habitual participation*" might limit the jurisdiction of the SJP over business people or politicians linked in a discontinuous or intermittent manner to acts that led to deaths or disappearances, or to cases in which their participation was not decisive. According to the agreed criteria, such cases would not be included in the Comprehensive System, making it impossible that the testimony of such people would be able to contribute to the whole truth[60].

60 Deputy Public Prosecutor, Jorge Fernando Perdomo, available at: www.eltiempo.com/politica/justicia/entrevista-con- el- vicefiscal- generaljorge- fernandoperdomo/16483255 ; Equipo Jurídico Pueblos (2016), *Ambiguo y decepcionante acuerdo-Itinerario para la impunidad de crímenes de Estado*. p. 7.

In addition, the Preliminary Agreement on Victims makes it clear that the jurisdiction will not affect presidential immunity[61], and if information emerges that points to the responsibility of a head of state it will be passed to the Chamber of Representatives (the body responsible for investigating and trying such cases) at the point at which it feels such action to be appropriate, and after having made the necessary enquiries (par. 32). In the case of the president, Colombia´s former Public Prosecutor has clarified that immunity would be maintained except in cases committed before or after his mandate began, and in which acts or omissions ended up favouring paramilitaries[62].

The Peace Tribunal will be made up of: **i)** the First Instance Section in cases of Acknowledgement of Responsibility; **ii)** the First Instance Section in cases of Absence of Acknowledgement of Responsibility; **iii)**the Sentence Review Section, and **iv)**the Appeals Section[63] (par. 52).

Based on a *Resolution on Conclusions* produced by the *Verification Chamber, the First Instance Section for Cases of Acknowledgement of Truth and Responsibility* will evaluate conduct that has been recognised by perpetrators and responsibility for the conduct in question, and will decide on the appropriate punishment. Thus, the Section will confirm that the decision corresponds to the legal descriptions of crimes that cannot be granted amnesty or pardon (par. 53 a). When correspondence is found, alternative sentences will be applied, in conformity with the punishment ordered by the decision (par. 53 b). If no correspondence is held to exist the Section will communicate its decision to the individual who recognised responsibility so that they may be heard. The views of the Verification Chamber will also be heard once this stage has been completed, after which the Section will pass sentence (par. 53 a).

The Section will be required to establish the conditions and manner in which the punishment will be carried out. It will refer to the List of Sanctions included in the Preliminary Agreement on Victims, in fulfilment of the proposed punishments contained in the *Resolution on Conclusions* (par. 53 c). It will also be required to oversee and verify that sentences are implemented properly (par. 53 d).

The First Instance Section in cases of Absence of Acknowledgement of Responsibility will be responsible for hearing and, as appropriate, absolving the accused or finding them guilty (par. 54 a), and for imposing sanctions in cases where they have failed to recognise the truth or their responsibility, or where recognition has been late (par. 54 b). In cases where perpetrators have acknowledged the truth and recognised their responsibility before the first sentence orders punishment, reduced prison sentences may be imposed (par. 54 c).

In carrying out its responsibilities the Section will have jurisdiction over accusations presented by the Investigation and Indictment Unit and may, at the request of this body, adopt remand and precautionary measures (pars 54 e and f). As well determining sentences it may decide that the conduct in question meets the criteria for receiving an amnesty or pardon, in which case it will remitted to the Amnesty or Pardon Chamber or, when the legal definition states that the accused should be neither found guilty nor absolved, to the Chamber for the Determination of Legal Status (par. 54 g). The Section may also impose symbolic obligations or acts of reparation on the state, or on organisations, along with measures to ensure non-repetition (par. 54 d).

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61 Colombian presidents enjoy a special immunity according to which their actions can only be investigated by the Accusations Commission of the Congress. When the accusation concerns criminal allegations, trials must be heard by the Supreme Court of Justice; other accusations are heard by the Senate.

62 Foro ACORE (6 October 2015), *Jurisdicción Especial Para La Paz*.

63 At the conclusion of its activities the Tribunal will establish a section to guarantee the stability and effectiveness of the resolutions and sentences it has adopted, and to ensure their implementation (par. 52). The agreement states that if lawsuits emerge after the Tribunal has ceased to function the mechanism will be reconstituted: if the case is found to have merit, the Investigation and Indictment Unit will be re-established as will whatever chambers and sections are deemed necessary (See: section 53 par. 7). Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

The Chamber for the Determination of Legal Status may require the Sentence Review Section to re-examine a sentence in order to bring it into line with the punishment stipulated in the List of Sanctions, and to decide -without prejudice to previously-ordered punishments- whether or not it has been duly implemented. At the request of the individuals who have already been sentenced the Section may also review sentences in cases where the act in question did not occur, where there was a clear error in the original legal evaluation of the case, where the act involved actions carried out in the course of the conflict or in relation to it, or where they were associated with social protest (par. 58 b). In addition, in cases of doubt, any Chamber will be empowered to decide whether conduct related to financing has been associated with the act of rebellion (par. 58 c).

Similarly, the Section may pronounce on requests by the Verification Chamber that individuals should appear before it and decide which body is most appropriate to hear the case (par. 58 e). Exceptionally, it will have to power to review decisions or sentences imposed by the SJP (par. 58 d). It will also have the role of resolving conflicts between bodies that are a part of the Special Jurisdiction in cases where the Director of the Unit and the presidents of the chambers fail to agree on a solution (par. 58 f). Finally, it will decide on decisions taken by other authorities, whose effect would be to render measures adopted by the system ineffective (par. 58 g).

The Appeals Section will be the second instance body responsible for resolving appeals against any decision taken by the Special Jurisdiction (par. 52). Furthermore, if the sentences of any of the sections violate the fundamental rights of victims an appeal may be lodged before it; a response will be required within 10 days of the appeal being received (par. 52).

b. The role of the Chamber for the Verification of Truth, Responsibility, and Determination of the Facts and Conduct will be to receive reports[64] from the Office of the Attorney General[65], Military Criminal Jurisdiction, the Accusations Commission of the House of Representatives, the Procurator General's Office, the Comptroller General's Office and from any other jurisdiction operating in the country[66], on all current investigations into conduct engaged in as a part of, or in the context of, the armed conflict, including in cases where they have reached trial or have concluded (par. 48 b). The Chamber will also be able to receive requests from victims' and human rights organisations and from judicial or administrative bodies, concerning conduct engaged in in relation to the conflict (par. 48 c).

The Chamber will notify individuals who have been mentioned in a report or in a Statement of Recognition, requiring them to provide a voluntary version of the events in question (par. 48 e). Once this stage has been completed, the Chamber will compare the submissions it has received. It will inform the accused if it considers there to be sufficient grounds to be believe that a given conduct did occur, that the individual in question participated in it, and that it involved crimes that cannot be amnestied. Individuals can then decide whether to appear and to accept the truth and their responsibility[67], or wheth-

64 These reports should organise the incidents according to alleged perpetrator or those convicted of the offence, and should also place the conduct in question categories, without classifying them in legal terms. The Chamber may order them to be presented according to the most representative cases (par.s 48 b and d). Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

65 Its reports will include certified copies prepared by the Justice and Peace Jurisdiction, the transitional justice jurisdiction in the demobilisation of the paramilitary groups in the 2000s (procedure #32) Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

66 In addition, Military Criminal Jurisdiction, ordinary jurisdiction and administrative bodies with faculties to order punishment should all provide reports of relevant sentences, which should be accompanied by the relevant decisions and resolutions (par. [48 b]) Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

67 Acknowledgement of truth and recognition of responsibility may be individual or collective, and presented to the Chamber for the Verification of Truth and Responsibility and the Identification of Acts and Conduct either orally or in writing within one year (extendable, only in the case specified in par. 47, by two periods of three months each). The Chamber can decide that the act of recognition should be public, in the presence of victims' organisations (par. 47). Note that collective acknowledgement is governed by special rules established in par.s 47 and 48 r. See: also, special case 48 j par.s 2 and 58 t.

er to defend themselves against the accusation (par. 48 h) If they do not acknowledge their responsibility fully the Chamber will have the power to hear the case again, with the warning that if the accused fails to provide the whole truth the case will be returned to the Investigation Unit (par. 48 q).

The agreement states that the Office of the Attorney General, and all other investigating authorities in the country, will continue with their investigations until the Verification Chamber announces publicly that it will present its conclusions to the Peace Tribunal in three months' time. At that point all prosecuting authorities will be required to hand over their resolution of conclusions. Once the notification has been endorsed, the Chamber will indicate the cases for which responsibility has been accepted, so that the investigations into them may be closed (par. 48 j).

In addition, the Preliminary Agreement on Victims states that it is the function of the Verification Chamber to decide whether the alleged facts and conduct fall under the Special Jurisdiction, namely, that they occurred "on the occasion of, caused by, and in direct or indirect relation with, the armed conflict" (par. 48 a). The Verification Chamber should also provide the Amnesty and Pardons Chamber with a list of persons who have benefited from such measures, based on a list prepared by the FARC-EP and cross-checked previously by the Verification Chamber (par. 48 l). It should also present the Chamber for the Determination of Legal Status with a list of persons or conduct that will not be granted amnesties or pardons and that will not be included in the *Resolution on Conclusions*. A second list of persons who will not be found criminally liable will also be made available (par. 48 p).

c. Informed by the recommendations of the Verification Chamber the Amnesty and Pardons Chamber will, furthermore, apply the terms of the Special Jurisdiction to crimes for which amnesties or pardons can be applied (par. 49). Prior to this, by official request or at the behest of the party, the Chamber will be able to grant these benefits to persons who have already been convicted or subjected to investigation. Cases where the request concerns crimes that cannot be granted amnesties or pardons will be referred to the Verification Chamber (par. 49).

d. The Chamber for the Determination of Legal Status will be tasked with defining the situation of those who will not receive amnesties or pardons and whose cases have not been sent to the Tribunal (par. 50 a). It will also take other decisions required to determine the legal situation of persons whose cases are being handled by the SJP (par. 50 d). Also, at the request of the party, it will be able to determine the legal situation of persons who, while they do not belong to a rebel organisation, are currently under investigation for conduct that falls within the competence of the Special Jurisdiction (par. 50 f). In this event, it will take its decision without referring to the Amnesty or Pardons Chamber or the Verification Chamber. It may also decide to end all criminal or administrative action, or opt to apply a different legal mechanism (par. 50 f).

In particular, in cases that involve the exercise of the right to protest or states of disturbance (*conmoción interna*), the Chamber will be able to apply mechanisms to end proceedings, so as to extinguish criminal responsibility. In these cases, state authorities, social and human rights organisations and initiatives that form a part of the Agrarian, Peasant, Ethnic and Popular Summit will provide information to the Chamber when they refer to the following crimes: riot, obstruction of the public highway, throwing dangerous substances, violence against public servants, interrupting public transport, third-party property damage, assault, and other crimes included in the Citizen Security Law (par. 64).

Furthermore, the Chamber will be able to define the treatment that will be given to sentences imposed previously by the ordinary justice system in cases concerning persons who have been imprisoned, tried or convicted because they belonged to or collaborated with the FARC-EP. This includes the

Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

extinction of criminal responsibility for persons who are considered to have served their sentences, (par. 50 b, in agreement with the General Agreement), the determination of potential procedural mechanisms for those who fail to acknowledge the truth or their responsibility (par. 50 c), and will categorise the relation between their conduct and the armed conflict (par. 50 d).

e. The Investigation and Indictment Unit[68] will be tasked with investigating and indicting before the PT persons whose cases have been remitted to the Verification Chamber, the Chamber for the Definition of Crimes, or the Review Section of the Tribunal (par. 51 a). It will also have the power to decide on protection measures for victims, witnesses and other participants in proceedings (par. 51 b). In cases where persons have failed to acknowledge the truth and recognise their responsibility, it will be able to request *remand and precautionary* measures from the First Instance Section of the Tribunal (par. 51 c). Finally, when it considers that investigation or indictment are not required, it may refer the case to the Chamber for the Definition of Crimes or to the Amnesty Chamber (par. 51 e).

ii) Amnesties and pardons

Art. 6.5 of *Protocol II of the Geneva Conventions* will be applied when it comes to offering amnesties (par. 37). Thus, amnesty and pardon will be granted in the case of political and linked crimes committed as part of acts of rebellion by persons who were members of rebel groups and to those who have been accused or convicted of political and linked crimes by decisions of the ordinary justice system (par. 23). Amnesties granted to rebels will be conditioned only by their decision to end their rebellion and to adhere to the terms of the Final Agreement (par. 10) (including the surrender of weapons and reincorporation into civilian life). The agreement emphasises that the granting of an amnesty does not excuse recipients from the duty to contribute as individuals to the clarification of the truth (par. 27).

Crimes that can and cannot be amnestied or pardoned will be clearly established by law (par. 26); the law will also define the criteria used to define linked crimes[69] (par. 38). When it comes to defining these, the *principle of favourability* will be applied when not prohibited by international law (par. 26). Linked crimes may include, *for example*, rebellion[70], riot[71], illegal possession of arms, deaths in combat that are compatible with IHL and conspiracy to further the aims of rebellion (par. 38). Persons investigated and punished for rebellion or linked crimes will be covered by the same criteria without there being a requirement for them to be recognised as rebels (par. 38).

The nature and extent of conduct that cannot receive an amnesty or pardon under the terms of the RS, IHL and IHRL will be clarified (par. 40). As set out in the RS, excluded conduct shall include crimes against humanity, genocide, grave war crimes, hostage-taking or other serious denial of liberty, extrajudicial executions, enforced displacement, rape and other forms of sexual violence, the abduction of underage children, enforced displacement and the recruitment of children (par. 40). Nor will crimes

68 Structure (67 and 68), Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

69 Linkage will consist of two criteria, one exclusive and the other inclusive. Concerning the first, international crimes shall be excluded, as established by international law and stated by the RS. In cases where the criteria of linkage have not been clearly defined by the Amnesty Law, the agreement states that the doctrine of the Amnesty Chamber and the Review Section should be applied. Concerning the second criterion, linked crimes will include i) crimes specifically related to the evolution of rebellion committed in the context of the armed conflict, and the arrest of fighters in the course of the conflict; ii) crimes in which the victim is the state and the current constitutional order, and iii) conduct intended to facilitate, support, finance or hide the development of the rebellion (par. 39) Gobierno de Colombia & FARC-EP (15 December 2015), *Borrador Conjunto*.

70 Ley 599 de 2002, Art. 467. "Rebellion. Persons who use arms with the intention of overthrowing the government or to suppress or modify the current constitutional order shall six and nine years and be fined between 100 and 200 times the current legal monthly minimum wage".

71 Ley 599 de 2002, art 469. "Riot. Persons who, in a turbulent manner, violently demand that the authorities carry out, or omit to carry out, some act that is proper to it, shall be sentenced to between one and two years in prison".

defined by the RS (par. 25), or common crimes unrelated to rebellion, be subject to amnesty, as established by the Amnesty Law (par. 41).

Concerning the inclusion of "grave war crimes" as a class of war crimes that cannot be amnestied or pardoned, note that these are not equivalent to gross breaches or violations of IHL. While it is true that all are violations of international law, war crimes have special connotations in the field of international criminal law that other violations do not. Furthermore, though the distinction is not entirely clear, it is not admissible to argue for the existence of grave war crimes, as all war crimes, by definition, are grave. This explains why they cannot be the subject of amnesties or pardons[72].

The President of Colombia clarified the question of the possibility of granting amnesties to members of the armed forces when he said that, "members of our Armed Forces who have not committed grave crimes -that is, war crimes and crimes against humanity- will benefit from the *renunciation of criminal action*, which in practical terms is the equivalent of an amnesty"[73].

Nowadays, there is a broad consensus among the international community on the illegitimacy of generalised unconditional amnesties. LWBC believes it to be positive that persons who commit gross human rights violations or grave breaches of IHL cannot benefit from general amnesties or be pardoned without conditions[74]. It is therefore important that the definition of crimes that are linked to political crimes does not ignore or dilute this prohibition, as the inclusion of grave conduct within the group of linked crimes is, in terms of amnesties or pardons, a violation of international law.

For the purpose of the granting of amnesties and pardons, and for the definition of conduct that is linked to political crimes, it is important to note the challenges deriving from the fact that extrajudicial executions or sexual violence carried out in the context of the armed conflict are not identified with *nomen iuris* as crimes, despite their great importance to processes of transitional justice[75].

iii) Selection and Prioritisation criteria

For several years now, international and some national jurisdictions have shown an increasing tendency to prioritise and select cases that should be investigated by justice systems[76]. The real impossibility of any legal system being able to resolve all cases has led, among other things, to the establishment of criteria such as *seriousness* and *representativeness* in an effort to advance policies for the management by selecting and prioritising only some of them. Prioritisation allows investigations to be developed according to a set order, while selection allows the authorities to decide not to prosecute certain cases[77]. Colombia has experience in the selection and prioritisation of cases in the ordinary jus-

72 AFSC (2015), *Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano.*

73 Militares no tendrán amnistía, pero sí renuncia a la acción penal. *El Tiempo,* available at: http://www.eltiempo.com/politica/proceso-de-paz/proceso-de-paz-militares-no-tendran-amnistia-pero-si-renuncia-a-la-accion-penal/16512216

74 AFSC (2014), *Paz con justica transicional. Aportes para Colombia desde el derecho internacional.* Chapter 7.

75 AFSC (2014), *Paz con justica transicional. Aportes para Colombia desde el derecho internacional.* Chapter 2. See also: Law 1719 of 2014 which applies in particular to sexual violence associated with the internal armed conflict (art. 1) and, above all to Section II on crimes against persons and property protected by International Humanitarian Law, such as rape of a protected person under the age of 14, enforced prostitution of a protected person, sexual slavery of a protected person, trafficking of a protected person with the intention of exploiting them sexually, forced nudity of a protected person and enforced abortion of a protected person.

76 See, for the cases of Bosnia Herzegovina, International Criminal Tribunals in the Former Yugoslavia and Rwanda, and International Criminal Court. See also: Morten Bergsmo and María Paula Saffon (2011), *Enfrentando una fila de atrocidades pasadas: ¿Cómo seleccionar y priorizar casos de crímenes internacionales centrales?,* in Kai Ambos (coordinador), Selección y priorización como estrategia de persecución en los casos de crímenes internacionales, un estudio comparado. GÍZ: Bogotá. pp. 23 to 112.

77 AFSC (2014), *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional.* Ch. 2. See also:

tice system and in the area of transitional justice, and it will be important to learn from this[78].

The Preliminary Agreement on Victims will *formally* assign to the Chamber for the Determination of Legal Status the task of determining the potential procedural mechanisms for selecting and prioritizing (only) individuals who do not acknowledge the truth or recognise their responsibility (par. 50 c). Furthermore, it may be inferred from the terms of the agreement that selection and prioritisation criteria have been introduced, as is clear from the following positions:

a) The Joint Draft on Victims states that the consequences of grave violations *are more serious* when victims belong to a vulnerable group that requires special protection, such as ethnic communities, the very poor, the disabled and the displaced (par. 7). In addition, the Preliminary Agreement on Victims establishes that when it enters into operation, the justice component will emphasise the needs of women and children, who suffer the effects of violations disproportionately (par. 8).

b) In carrying out their duties, the Chamber for the Verification of Truth, Responsibility, and Determination of the Facts and Conduct, the Chamber for the Determination of Legal Status and the Investigation and Indictment Unit will take into account the need to ensure that the most serious and representative conduct does not go unpunished (par. 50 g), (par. 51 d), (par. 48 s).

c) The Verification Chamber will receive reports from national authorities and will be responsible for the organisation of all current investigations into crimes committed during the course of the armed conflict. The reports should organise the incidents according to alleged perpetrator or those convicted of the offence, and should also categorise the conduct under examination, without classifying them in legal terms. The Chamber may order them to be presented according to the most representative cases (par. 48 a, b, c and d). The Chamber may also be required to proffer a Resolution of Conclusions, which should focus on the most serious and representative conduct (par. 48 o).

In any case, the Preliminary Agreement recognises that the voice of victims should be heard when the basis of the selection and prioritisation criteria are being agreed (par. 20), though it does not establish the mechanisms to ensure this participation occurs.

In the following section LWBC proposes a series of criteria that should be taken into account when developing these criteria. The proposals are based on the understanding that it is the overall duty of the state to investigate, judge and, when applicable, punish all gross violations and grave breaches and that they should only be applied exceptionally, and in cases where perpetrators have failed acknowledged the truth and recognise their responsibility.

Morten Bergsmo and María Paula Saffon (2011), *Enfrentando una fila de atrocidades pasadas: ¿Cómo seleccionar and priorizar casos de crímenes internacionales centrales?*, in Kai Ambos (coordinador), Selección and priorización como estrategia de persecución en los casos de crímenes internacionales, un estudio comparado. GIZ: Bogotá. pp. 23 to 112.

78 Forer A & López, C (2011), *Selección y priorización de casos como estrategia de investigación and persecución en la justicia transicional en Colombia*. In Selección and priorización como estrategia de persecución en los casos de crímenes internacionales Kai Ambos (Coordinator), pp. 243-249, page 529; www.scielo.org.co/pdf/rfdcp/v42n117/v42n117a08.pdf.

Criteria covering Victims

The categories of victims whose dramatic circumstances are the result of the actions of armed actors and who experience high levels of vulnerability -such as peasant farmers, indigenous people, afro-descendant communities, children, women, the displaced, journalists, trade unionists, human rights defenders and social leaders- might see the crimes committed against them prioritised by the SJP. Another criterion that might be borne in mind is the number of victims produced by the criminal acts in question, without this excluding the possibility that a conduct that prejudiced a single victim might be evidence of the existence of a systematic plan

Faced with such a large group of victims, it is important to be realistic about the investigatory capacity of the system and to recognise the relevance of other selection and prioritisation criteria such as those mentioned below[79]. During the course of its activities in Colombia, LWBC has witnessed the disproportionate impact of violations against vulnerable groups and considers it to be positive that the new system considers that the serious impacts are *more serious* when the victim belongs to a vulnerable group.

Criteria covering perpetrators: those most responsible

There is no doubt that an important criterion in the jurisdiction of the SJP will be the possibility of focusing investigations on those who are most responsible for the most serious and representative crimes, a restriction that does not appear to be included in the draft Preliminary Agreement on Victims, but that might be introduced in the procedural mechanisms governing selection and prioritisation.

The Constitutional Court has indicated that the Colombian state would not be failing to meet its responsibilities were it to prosecute only the crimes of those most responsible, as **i)** the concentration of guilt in those most responsible does not imply that crimes against humanity, genocide and *systematically committed war crimes* would go un-investigated, but allows that only those who played a key role in ordering the acts should be accused; and **ii)** such an approach would contribute effectively to dismantling criminal macro-structures and revealing the patterns of mass violations of human rights, and guaranteeing non-repetition[80]. LWBC considers that investigations should focus on individuals with most responsibility[81]. It has been confirmed that the most responsible:

> "May be either the head of a group or also anyone who, because of the role they played within the organisation, might have played an essential role in the commission of crimes. Indeed, the parameter of the most responsible is an ascending criterion that permits the inclusion not only of individuals who might have played a decisive role in the crime but also of other persons, through the application of criteria such as "Command Responsibility" or through their domination of the apparatus of organised power (*organisationsherrschaft*)[82].

79 For example, in Colombia there are more than six million registered victims of enforced displacement. The figures demonstrate the major risks associated with prioritising a vulnerable group such as the displaced population.

80 Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt.

81 This reflects the current policy of the other national and international tribunals and recent experiences in Colombia. See: the cases of Bosnia Herzegovina and the experiences of the International Criminal Tribunals in the Former Yugoslavia and Rwanda, and the ICC. See also: Morten Bergsmo and María Paula Saffon (2011), *Enfrentando una fila de atrocidades pasadas: ¿Cómo seleccionar and priorizar casos de crímenes internacionales centrales?*, in Kai Ambos (coordinador), Selección y priorización como estrategia de persecución en los casos de crímenes internacionales, un estudio comparado, GÍZ, Bogotá, pp. 23 a 112. It should be remembered that the aims of the ICC, as a complementary jurisdiction, are different from the general obligations of the Colombian state to investigate, judge and, when appropriate, punish, all gross violations that might have been committed in its territory. See also: AFSC (2016), *Estudio de casos a luz del principio de complementariedad del Estatuto de Roma: Mecanismo de impunidad en la Justicia colombiana.*

82 Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt

Thus, focusing investigations on the most responsible can help to distinguish between those individuals who organise, lead and design operations and those who execute the plans and perpetrate crimes inasmuch as they are members of complex organisations that are responsible for carrying out gross mass violations[83]. In the majority of cases those most responsible should be individuals who have created and led the structures that are responsible for these violations. It will also be important to look beyond the existence of structures and to ensure that the individual acted with sufficient criminal intent[84]. This might mean not only those who acted as leaders of groups or factions, but also individuals who are involved in international crimes or serious crimes[85]. Given the breadth of this definition, it will be important to ensure that practical meaning is given to the term "most responsible", in order to avoid it becoming confused or so extensive that the criteria fail to limit the number of persons who could be adequately investigated by the new system[86].

Additionally, focusing efforts on this category of perpetrator can be more efficient in situations in which large numbers of people are involved[87]. The formula might also contribute to ensuring that the structures are dismantled, and help ensure that the crimes are not repeated[88]. Given the complexity of the Colombian conflict, there will also be individuals of most responsibility who financed or collaborated with paramilitaries, even though they might not have been involved directly in commissioning the crimes committed by them[89]. According to the Preliminary Agreement on Victims, these people should also be included in the category of the most responsible and, if they are not, they should be prioritised by the ordinary justice system.

LWBC believes that the criteria established to evaluate the answerability of the most responsible should, at the very least, include aspects such as their position in the hierarchy of the organisation involved in committing the criminal act, their role in strategic decision making, the degree to which they were aware of the actions of their inferiors and their direct participation in the events. This focus should not necessarily be limited to the responsibility of the security forces and members of the FARC-EP, but also consider other persons with responsibility, such as individuals who financed or collaborated with paramilitarism.

Objective criteria: gravity and representativeness

It will be important to develop clear criteria on the meaning and scope of the terms *gravity* and *representativeness* that appear in the agreement. Some international and national experiences that can help illustrate the meaning of these terms. In its analysis of LFP the Constitutional Court indicated that the factors that indicate gravity and representativeness might include *"the place, the time, the form of commission, the victims or social groups affected, the perpetrators, the scale of the crime or available evidence"*[90].

83 AFSC (2015), *Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano.*

84 ICTJ (2012), *Propuesta de criterios de selección y priorización para la ley de Justicia y Paz en Colombia.*

85 Gonzales, D (2015), *Serie de documentos de trabajo N. 42, Documento preliminar sobre la ruta jurídica en relación con la desmovilización de las FARC*. Universidad Externado de Colombia: Bogotá, available at: http://icrp.uexternado.edu.co/wp-content/uploads/2015/10/DOC-DE-TRABAJO-42.pdf.

86 Gustavo Emilio Cote Barco and Diego Fernando Tarapués Sandino (2013), *El Marco Jurídico para la Paz y el análisis estricto de sustitución de la Constitución realizada en la sentencia C-579 de 2013*, in Kai Ambos (Coordinador), Justicia de transición y Constitución, análisis de la sentencia C-579 de 2013 de la Corte Constitucional. pp. 256 and 257.

87 ibid.

88 AFSC (2015), *Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano.*

89 ICTJ (2012), *Propuesta de criterios de selección y priorización para la ley de Justicia y Paz en Colombia*

90 Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt

According to the Attorney General's Office gravity includes both the degree of impact on fundamental rights such as public safety or the environment and the means used to commit the crime, the context, the impact on the community, and the existence of patterns of crime. In addition, alongside gravity, the Attorney General's Office views representativeness as an objective criterion that, given the limited possibilities of the criminal law to investigate all gross violations in situations of transitional justice, its role is to illustrate the symbolic, the rituals and the scenarios of horror, in an attempt to ensure they are never repeated and to uncover the truth[91].

For its part, at the international level the *raison d'être* of the ICC is to pursue those most responsible for the most serious mass crimes that have not been subject to genuine investigations by the competent national authorities. In other words, it exists to deal with international crimes that share characteristics with the crimes that fall under the jurisdiction of the SJP. According to the Prosecutor of the ICC (hereafter "OTP"), an analysis of gravity depends on quantitative and qualitative aspects[92] and may include the scale, nature, manner of commission of the crimes, and their impact[93].

LWBC believes that in the case of Colombia, given such a broad panorama of gross human rights violations, of which many might be considered representative and symbolic, it is very important to define a policy that provides clarity about the significance and reach of the terms, given their potential impact on the possibility that a case might be selected or prioritised.

Categories of crime

The Constitutional Court has indicated that the model of transitional justice should, at the least, prioritise the investigation and punishment of the crimes of **i)** extrajudicial executions, **ii)** torture, **iii)** enforced disappearance, **iv)** sexual violence against women, **v)** enforced displacement, and **vi)** illegal recruitment of minors when these are categorised as crimes against humanity, genocide or systematically committed war crimes.

These six crimes are categorised as crimes against humanity and war crimes by the RS. Concerning their inclusion, it should be noted that one challenge identified by LWBC is the lack of consistency in the interpretation and grounds of the elements that constitute crimes against humanity that is apparent in national legal institutions.

In addition, an *assessment* of other conduct that merit prioritisation, such as, for example, grave

91 FGN. Directiva 001

92 See: OTP, Policy Paper on Preliminary Examinations, paragraph 61

93 Psychological harm caused to the victims, the geographical or temporal spread of violations; the nature of the crimes (sexual or gender violence and crimes committed against children, persecution, the imposition of conditions of life on a group calculated to bring about its destruction); the manner of commission of the crimes (the degree of participation and intent of the perpetrator if the crime forms part of a plan or organised policy and if its commission resulted from the abuse of official power); elements of particular cruelty (vulnerability of the victims, discrimination, violence; and the impact felt by the victims and their increased vulnerability, the terror instilled, the social, economic and environmental damage inflicted on the affected communities).See: OTP, *Policy Paper on Preliminary Examinations*, paragraphs 62-65. In addition, while the ICC implements a selection and prioritisation strategy that differs from those used by national jurisdictions, in its jurisprudence it has referred to the criterion of gravity. In the Situation on Registered Vessels of the Union of the Comoros, the OTP stated that an investigation should not be initiated. In its decision, it considered that the incursion by the Israeli security forces against a humanitarian flotilla that was heading for the Gaza Strip and in which 10 people died and about 50 were injured, was not sufficiently grave to be admitted by the ICC. Thus, for example, in relation to scale, the OTP recognises that while there is sufficient basis to consider the existence of war crimes, the total number of victims in the incident was relatively small when compared in general terms to other cases. However, the ICC Pre-Trial Chamber emitted a decision requesting the Prosecutor to reconsider her decision not to initiate an investigation of the situation of the Comoros, given that it considered that the OTP had applied the factors of gravity incorrectly. For example, in its analysis of scale Pre-Trial Chamber considered that the facts of the case might imply sufficient gravity (Regulations of the Office of the Prosecutor ICC-BD/05-01-09).

privations of liberty or hostage-taking. In this sense, the crimes indicated are not limited, and should be understood as points of departure[94]. However, in the Colombian Criminal Code extrajudicial execution or sexual violence carried out in the context of the armed conflict are not identified with *nomen iuris* as crimes[95]. But they are of utmost interest in processes of transitional justice and it is important to clarify how they should be classified and how to carry out the categorisation. Thus, for example, it might be said that ordinary jurisdiction does not have an institutional criterion to classify the acts known as "false positives". LWBC has confirmed that the classification of the conduct depends on the official involved, and varies from murder (Criminal Code art. 103), aggravated murder (Criminal Code art. 103 and 104) and murder of a protected person in the context of the armed conflict (Criminal Code art. 135)[96].

Similarly, in order to ensure due process, it is important to guarantee respect for legal principle in cases in which subsumption or the principle of extended legality are used, when the crime was not duly categorised at the point in which the facts of the case occurred[97].

In addition, as it will be necessary to demonstrate that the crimes -and in particular in conduct considered to be grave breaches of IHL or gross violations of human rights (par.s 9 and 32)- were committed during, because of, and in direct or indirect relation to the armed conflict (par. 9, 32 and 33). Especially if they are to fall under the jurisdiction of the SJP, LWBC considers that in the case of crimes including enforced displacement[98]or the extrajudicial executions known as false positives[99], this relationship might be controversial and difficult to establish legally. It is, therefore, important that the guidelines covering the connection with the conflict take into account the distinctive aspects and peculiarities of the crimes that will come under its jurisdiction, and that they have been debated sufficiently, with the participation of the victims.

iv) Differential treatment

The legal frame of reference for the Special Jurisdiction will, principally, be IHRL and IHL (par. 19). In adopting its decisions, the PT's sections, the Chambers and the Investigation and Indictment Unit will carry out the appropriate legal evaluation on behalf of the system. This might differ from those of the legal, disciplinary and administrative authorities (par. 19). In cases where state agents have committed crimes related to the armed conflict and committed as a part of it, the application of the justice component will be carried out in a differentiated manner, offering a balanced, simultaneous and symmetrical treatment of the matter (par. 32), based on IHL (par. 44).

This differentiated treatment for state agents will evaluate the contents of the operational rules of the security forces in relation to IHL. In respect of the criminal evaluation of the responsibility of the FARC-EP the legal framework provided by IHL, IHRL and ICL will be borne in mind. It will also "*take into account the importance of the decisions taken by previous organisation that are relevant to the analysis of responsibilities"* (par. 59).

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94 AFSC (2014), *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional.*

95 Law 1719 of 2014 applies in particular to sexual violence associated with the internal armed conflict (art. 1). Above all, see Section II on crimes against persons and property protected by international humanitarian law, such as rape of a protected person under the age of 14, enforced prostitution of a protected person, sexual slavery of a protected person, trafficking of protected person with the intention of exploiting them sexually, forced nudity of a protected person and enforced abortion of a protected person.

96 AFSC (2016), *Estudio de casos a luz del principio de complementariedad del Estatuto de Roma: Mecanismos de Impunidad en la Justicia colombiana.*

97 LWBC and HUMANAS (2015), *Aportes de las sentencias de Justicia y Paz a los derechos de las mujeres.*

98 AFSC (2015), *Una mirada al desplazamiento forzado: Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano.*

99 AFSC (2016), *Estudio de casos a la luz del principio de complementariedad del Estatuto de Roma. Mecanismo de impunidad en la justicia colombiana.*

The formula designed to cover state agents might be interpreted so as to respect the intention of the parties to apply IHL norms in a selective manner when designing the legal framework for the investigation, trial and punishment of grave crimes. According to the recent evolution of international law and of international tribunals and bodies, IHRL is also applied during national and international conflicts[100]. In this respect, recognising that a selective application of IHL to the criminal trial of members of the security forces might constitute a mechanism of impunity, LWBC has expressed its concern at the mater in the following terms:

> "(…) an application of this kind would not take into account the possibility of the existence of legal gaps, which could be complemented by using the provisions drawn from IHRL or international criminal law in favour of society and victims. Furthermore, an interpretation of this kind would ignore the fact that IHL might regulate matters less favourably than other international legal frameworks, placing victims in a disadvantageous position"[101].

Furthermore, the Colombian Constitutional Court, recognising the international obligation of the state to respect, protect and guarantee the fundamental rights included in international treaties[102], determined that an interpretation that permitted judicial proceedings against members of the security forces for acts committed in the course of the conflict to be conducted disregarding the rule of law would violate the Constitution. It therefore concluded that in these cases *"it is not permissible to exclude the convergent and complementary application of international human rights law"*[103].

In addition, besides IHRL and IHL, the other relevant legal framework here is the Rome Statute. This is not only because Colombia is a state party to the treaty but also because the country is currently under preliminary investigation by the Prosecutor of the ICC, who has stated that, *prima facie*, the grave breaches of IHL and gross violations of IHRL committed by both parties also constitute international crimes that fall within the jurisdiction of the ICC[104]. Therefore, the evaluation of the criminal responsibility of state agents should involve a convergent and complementary application of IHL and IHRL, consistent with the RS, as only in this way will it be possible to *"(…) adopt decisions that grant full legal security to persons who participated directly or indirectly in the internal armed conflict and who are accused of having engaged in acts involving grave breaches of International Humanitarian Law and gross violations of human rights"* (par. 2), which is one of the objectives of the Preliminary Agreement on Victims.

A significant theme that emerges from the Preliminary Agreement on Victims is the possibility of applying IHRL to members of guerrilla groups. In this respect, classical human rights doctrine maintains that IHRL only applies to states and that its provisions are not applicable to private persons or groups of persons, except in the presence of incitement, complicity or tolerance by state officials[105]. However,

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100 OHCHR (2011), *International legal protection of human rights during armed conflict,* New York and Geneva. p.6 & ICJ, Advsory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, A/51/218, 19 June 1996 & Inter-Amercian Court of Human Rights. Case of Bamaca Velásquez. Judgment of 25 November 2000 (Merits), par. 2017.

101 AFSC (2015), *Amicus Curiae presentado a la Corte Constitucional en el marco de la demanda de inconstitucionalidad del Acto 01 de 2015 sobre la reforma al Fuero Penal Militar*. p. 16

102 "For the Court this is the only interpretation compatible with the duty of the state to guarantee and protect the nucleus that is shared by International Humanitarian Law and International Human Rights Law, which, as its jurisprudence has underlined (C-574 de 1992 and C-225 de 1995), are 'complementary rules'". (Corte Constitucional, Sentencia C-084 de 2016. M.P. Luis Ernesto Vargas Silva).

103 Corte Constitucional. Comunicado No 7. 24 February 2016. The Preliminary Agreement on Victims itself points to the same conclusion when it indicates that "[t]he responsibility of the persons appearing before the CSJTRN does not excuse the state from its duty to respect and guarantee full enjoyment of human rights or of its obligations under International Humanitarian Law and International Human Rights Law."

104 AFSC (2016), *Estudio de casos a la luz del principio de complementariedad del Estatuto de Roma. Mecanismo de impunidad en la justicia colombiana;* OF-CPI (2012), *Interim report on the situation in Colombia*

105 O Donnell (1998), *Trends in the application of international humanitarian law by United Nations human rights mech-*

this vision has been extended to certain state and non-state agents who have exercised governmental authority and who also have the duty to respect IHRL[106]. Nevertheless, there is no single criterion, and for this reason, the application of IHRL to guerrilla groups remains an open debate.

According to art. 21 (par. 1) RS, the application and interpretation of the law applicable in cases over which it has jurisdiction should be compatible with internationally recognised human rights. In this sense, it has been argued that human rights should be understood as a principle of interpretation that seeks to ensure the coherence and compatibility of the system[107].

In the context of this discussion, it is clear to LWBC that in the case of the evaluation of the criminal responsibility of members of the FARC-EP, IHRL could play an interpretative and integrating role in the case of crimes included in the Colombian Criminal Code, such as torture and enforced disappearance, which are classified as grave by IHRL. Thus, when it comes to interpreting and applying these crimes human rights law might be used to clarify and establish their constituent elements. In this regard the Colombian Constitutional Court has indicated that:

> The provisions that form a part of the Constitutional Block fulfil several functions in the Colombian legal system. When it comes to establishing limits to interpreting legislative intent in the field of criminal law, the Constitutional Block performs two functions. The first, or *interpretative*, function provides a parameter that guides interpretation of the content of constitutional clauses and identification of the admissible limits that may be placed on fundamental rights. The second, *integrative*, function provides specific parameters in cases where express constitutional provisions are missing; these are based directly on articles 93, 94, 44 and 53 of the Constitution, which take precedence over all other norms. Both functions have been applied by the Constitutional Court in its jurisprudence on the limits to legislative intent in the area of criminal law, either using the provisions included in the Constitutional Block to identify ways in which the Constitution has been flouted, or employing them directly when a specific clause to that effect is absent from the Constitution.[108]

v) The attribution of criminal responsibility

Given the complexity of the mass violations and the challenge of identifying the multiplicity of actors, the varied causes and the different levels of responsibility in the Colombian context, LWBC considers that it would be useful to employ the different modes of attribution of criminal responsibility that have been developed before the ICC and in other contexts, including Colombian[109]. Among the most viable formulae available to attribute individual criminal responsibility in these cases are perpetration

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anisms. In International Review of the Red Cross. *147*. pp. 523 -546.

106 See: Clapham, A (2006), *Human rights obligations of non-state actors in conflict situations*. In *International Review*. 88, ICRC (2003),*International humanitarian law and international human rights law Similarities and differences - Factsheet*, available at: https://www.icrc.org/en/document/international-humanitarian-law-and-international-human-rights-law-similarities-and

107 See: *The Prosecutor v. Germain Katanga and Mathieu NgudjoloChui*, ICC-01/04-01/07, Decision on an *Amicus Curiae* application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-0236, DRC-D02-P-0228 aux autorités néerlandais aux fins d'asile (articles 68 and 93(7) of the Statute) (9 June 2011) at para 62. See also: KritZeegers, *International Criminal Tribunals and Human Rights Law*: *Adherence and Contextualization* (The Hague, Springer: 2016) at 78. In addition, the International Criminal Tribunal for the former Yugoslavia indicated that when IHL does not provide definitions it is possible to refer to instruments and practices drawn from the field of IHRL. However, because of the differences between the normative bodies and the function of a criminal tribunal it has been argued that this interpretation should be applied with caution, so as to avoid ignoring the specific characteristics of each field (*The Prosecutor v. Dragoljub-Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement (22 February 2001).

108 Corte Constitucional, Sentencia C-291 de 2007. M.P. Manuel José Cepeda.

109 See: AFSC (2014), *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional*. capítulo 8.; LWBC and HUMANAS (2015), *Aportes de las sentencias de Justicia y Paz a los derechos de las mujeres.*

and co-perpetration by means of an organized power apparatus (*autoría mediata* and *coautoría mediata*)[110], and command, or superior, responsibility [111], whose development makes evident the intention of international law to punish military commanders who do not bear arms at the moment in which the act is committed, but who are considered to be responsible for the crimes of their subordinates because of their failure to control or prevent them from acting[112].

The Preliminary Agreement on Victims indicates that the evaluation of the *command responsibility* of state agents cannot be based simply on rank, hierarchical position or area of responsibility (par. 44). The role of the state as guarantor of rights should also be borne in mind, as should the presumption that the state exercises its monopoly over the use of arms legitimately (par. 32). Similarly, the criminal responsibility of members of the FARC-EP cannot be founded exclusively on rank or hierarchical position (par. 59). Concerning crimes committed by subordinates, and the ways in which their superiors may be linked to the crime, it has been established that the attribution must be based on: **i)** effective control over the conduct in question, **ii)** knowledge that was available before, during and after the realisation of the conduct and **iii)** the means available to prevent or, once it has occurred, *promote* (or in the case of the FARC-EP *realise*) the appropriate investigations into the facts (par. 44 and 59).

Given that the Preliminary Agreement on Victims includes ICL as a source for evaluating criminal responsibility, it is important to distinguish between the responsibility of *military commanders*[113] and *civilian superiors*[114], a differentiation that is present in the Rome Statute. While there are similarities between the two, the responsibility of a military commander differs from that of a civilian superior in **i)** the status of the superior-subordinate relationship, **ii)** the classification of the control exercised over fighters or subordinates and **iii)** the additional subjective element that is required[115]. For the purposes of the RS, both the commanders of the armed forces and of the FARC-EP may be considered military commanders or superiors who are "effectively acting as a military commander"[116].

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110 It should be stressed that indirect responsibility has been used to attribute criminal responsibility successfully in Colombia, both in the ordinary jurisdiction and in transitional justice. AFSC (2015), *Una mirada al desplazamiento forzado:* AFSC, *Persecución penal, aparatos organizados de poder y restitución de tierra en el contexto colombiano*. (215), *Aportes de las sentencias de Justicia y Paz*.

111 **Command, or superior, responsibility** is a formula for attributing criminal responsibility to superiors who have failed to act to prevent criminal acts committed by their subordinates. The superior shall be responsible for failure to control and supervise subordinates if they commit crimes. This concept creates a direct responsibility of supervision and an indirect one for the criminal behaviour of others. It has been recognised in international customary law, as is clear from international and comparative jurisprudence and the efforts to codify it, as in the RS. See: Ambos, K (1999), *La responsabilidad del superior en el derecho internacional*.

112 Cassese, Gaeta P (2003), *International Criminal Law*. Oxford University Press: Oxford. p. 205.

113 Article 28.1.a) RS. The following factors must be present for responsibility to be attributed to military commanders: 1. a crime is committed or is going to be committed that comes under the jurisdiction of the ICC; 2. the perpetrator was a military commander or person acting as one; 3. the perpetrator had effective command and control, or effective authority and control; 4. the crimes were committed as a result of a failure to exercise control properly over their forces; 5. the perpetrator failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution; 6. the perpetrator either knew, or given the circumstances should have known that the subordinates or forces were committing or were about to commit such crimes

114 Article 28.1.b) RS. The following factors must be present for responsibility to be attributed to civilian superiors: 1. a crime is committed or is going to be committed that comes under the jurisdiction of the ICC; 2. there is a superior-subordinate relationship that differs from command responsibility; 3. the perpetrator exercised effective authority and control; 4. the crimes were committed as a result of a failure to exercise control properly over the forces; 5. the perpetrator failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution; 6. the perpetrator either knew, or given the circumstances should have known that the subordinates or forces were committing or were about to commit such crimes

115 See: Case Matrix Network (2016), *Command Responsibility in International Legal Instruments*. p. 21, available at: https://www.casematrixnetwork.org/fileadmin/documents/reports/CMN_ICL_Guidelines_Command_Responsibility_En.pdf

116 In Bemba, this phrase refers to all those who, despite not having been named formally by law to perform a military command role, nevertheless did so *de facto* by exerting effective control over a group of persons acting within a chain of command. This would include superiors in the regular governmental armed forces and superiors with effective authority and

In relation to the terms of the agreement, concern has been expressed at the inclusion in the Preliminary Agreement on Victims of the criterion of responsibility that demands: "(…) knowledge based on the information available to the person before, during and after the realisation of the conduct in question" (par. 59)[117], inasmuch as it could include a limited manner of evaluating criminal responsibility in comparison with the provisions of international law. According to the Rome Statute, the subjective element demands that the perpetrator knows or ***should have known*** that the subordinates or forces were committing or were about to commit such crimes[118].

The point at which the perpetrator "knew", requires such knowledge to be demonstrated using direct or circumstantial evidence[119]. Such indications might include the number of illegal acts committed, their extent, their generalised nature, their duration in time, the kind and number of subordinates involved, the means of communication used, the *modus operandi* of similar actions, the extent and nature of the command role and the individual's position in the hierarchical structure, and the geographical location of the commander at the time the actions took place[120]. Knowledge may also be demonstrated if, a *priori*, a commander is part of an organised structure with established mechanisms of reporting and monitoring[121].

In addition, the expression "should have known" implies an obligation on the part of superiors to take the necessary measures to ensure that they have knowledge of the actions of their subordinates and to investigate, regardless of the information available at the time the acts took place[122]. Therefore, criminal responsibility may be attributed in cases where information is available that points to the possibility that violations or breaches might be committed by their subordinates[123]. This requirement does not demand that the commander possesses actual explicit or circumstantial knowledge of the potential conduct[124] and may be interpreted to include recklessness for failing to act with due diligence[125]. It has been said that the intention of the RS was to adopt a more rigorous treatment of military than of civilian

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control over non-governmental irregular forces, such as opposition groups or paramilitary units, including armed resistance movements and militias that are organised hierarchically according to a chain of command. ICC (15 June 2009), Decision Pursuant to Article 61(7)(a) and (b) of the RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber IIICC-01/05-01/08-424, par. 409-410.

117 "Under international law, commanders' knowledge includes both actual knowledge and constructive knowledge -that which they should have known or had reason to know. It is essential that both forms of knowledge are covered by the scope of command responsibility set out in the agreement and to be applied by the tribunal" Human Rights Watch (2016),*Colombia: Prosecution of False Positive Cases under the Special Jurisdiction for Peace,* available at: https://www.hrw.org/news/2016/03/28/colombia-prosecution-false-positive-cases-under-special-jurisdiction-peace. See also: Equipo Jurídico Pueblos (2016), *Ambiguo y decepcionante,* available at: http://derechodelpueblo.blogspot.co.uk/2016/02/ambiguo-y-decepcionante-acuerdo.html.

118 Art 28.1.a, RS.

119 ICC (15 June 2009), Decision Pursuant to Article 61(7)(a) and (b) of the RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber IIICC-01/05-01/08-424, par. 430; ICTY, (26 February 2001) Prosecutor v. Kordic and Cerkez, "Judgment", Case No. IT-95-14/2-T, para. 427; ICTY, (15 de marzo de 2006) Prosecutor v. Hadzihasanovicct al, "Judgment", Case No.IT-01-47-T, para. 94.

120 ICC (15 June 2009), Decision Pursuant to Article 61(7)(a) and (b) of the RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber IIICC-01/05-01/08-424,par. 431

121 ibid., par. 431

122 ibid., par. 433

123 See: Jamie Allan Williamson (2008), *Some considerations on command responsibility and criminal liability,* p. 5. available at: https://www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf

124 ICTJ 3 July 2002) Prosecutor v. Bagilishema, Judgement (Reasons), Case No. ICTR-95-1A-A, (Bagilishema Judgement), para. 28. "The should have known is not dissimilar to the traditional had reason to know"

125 ICC (15 June 2009), Decision Pursuant to Article 61(7)(a) and (b) RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II ICC-01/05-01/08-424, par. 433. "more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime"

commanders[126].

Another concern has to do with the fact the Preliminary Agreement on Victims refers to "effective control of the conduct in question" rather than control over the subordinates who engaged in the conduct[127].

The ICC has confirmed that the concept of "effective control" is generally an expression of the existence of a superior-subordinate relation within a hierarchical chain of command[128]. "Effective control" also refers to the ability to prevent, reprimand or punish the commission of crimes, or when applicable, to inform the competent authorities of the matter[129]. Effective control is a question of proof that depends on the circumstances of each case, and for which it is necessary to demonstrate indications that the superior had the power to prevent, reprimand and/or pass the question on to the competent authorities for investigation[130].

Several factors may indicate the existence of effective control, while at the same time demonstrating that in the strict sense it goes beyond mere control over the conduct in question. These elements may include the following: **i)** official position; **ii)** the power to issue or transmit orders; **iii)** the capacity to ensure that orders are followed; **iv)**the position held within the military structure, and the tasks they carry out; **v)** the capacity to order the forces or units under their command (whether of immediate or more distant subordinates) to participate in hostilities; **vi)** the capacity to re-subordinate units or to effect changes in the command structure; **vii)** the power to promote, replace, remove, or impose sanctions on any members of their forces; and **viii)** the authority to send units to the place of hostilities and to withdraw them at any moment[131].

In addition, according to the Preliminary Agreement (par. 32), when dealing with state armed forces "the quality of the state's role as guarantor of rights should be taken into account, along with the presumption that the state exercises its monopoly of the legitimate use of force". In this respect, note that transitional processes seek to ensure the legitimate exercise of the monopoly of the use of force by the state, involving full respect for democratic norms and the principles of good governance[132]. Nevertheless, and without prejudice to respect for individual procedural guarantees, which include the presumption of innocence (par. 14), it is legitimate to ask why this assumption should be applied generally to the security forces in an agreement on transitional justice.

According to IHL, there is no specific presumption covering the legitimate use of force by state agents, and LWBC believes such a presumption might not take into account the realities of Colombia[133] or the goals of a transitional justice process. Thus, in the context of the conflict, IHL applies to all

126 ibid., para 433

127 This examines only the potential "effective control" or "knowledge" of the "**respective conduct**", and conveniently separates one occurrence from the others that form part of chain of evidence. This breaks the sequence of articulated actions, focusing solely on a single conduct -that is the "respective conduct", and on the *iter criminis* or the "course of the crime", which, if examined, would demonstrate the links between institutional mechanisms and practices" (Equipo Jurídico Pueblos (2016), *Ambiguo y decepcionante*. See also: Human Rights Watch (2016), *Colombia: Prosecution of False Positive Cases under the Special Jurisdiction for Peace*.

128 ICC (15 June 2009), Decision Pursuant to Article 61(7)(a) and (b) RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II ICC-01/05-01/08-424,par. 414

129 ibid. para 415

130 ibid. para 416

131 ibid. para 417,

132 Geneva Centre for the Democratic Control of Armed Forces.(2005), *Shaping a Security Governance Agenda in Post-Conflict Peacebuilding*, available at: http://www.dcaf.ch/Publications/Shaping-a-Security-Governance-Agenda-in-Post-Conflict-Peacebuilding

133 According to the General Report of the Centre for Historical Memory, the role of members of the armed forces in attacks on civilians should be condemned and is disquieting, as it is believed they have participated in 158 massacres and

parties[134], and being a state official is no defence when it comes to evaluating criminal responsibility for this kind of crime[135]. In conflict situations, IHL standards establish that the principles of distinction, proportionality and precaution should be used to evaluate the legitimate use of force[136]. Furthermore, in general, when cases involving the violation of IHL are heard in civil courts, the burden of proof governing the legitimate use of force corresponds to the party that carried out the attack[137], and the fact that the presumption of innocence is invoked in the evaluation of individual criminal responsibility[138] does not translate into a legal justification for concluding that the monopoly over the use of force is legitimate.

vi) Punishment in the Comprehensive System

The Preliminary Agreement on Victims has the intention of adopting a punishment model for crimes that goes beyond mere retribution. The terms that have been settled up till now have the essential aim of ensuring that punishment satisfies the rights of victims and consolidates peace. In addition, the principal function of the punishments included in the Comprehensive System will be restorative, designed to repair the damage caused. Its justice component will always involve the individual or collective acknowledgement of truth and recognition of responsibility (par. 60). The SJP will involve three distinct kinds of punishment, namely: individual, alternative and ordinary sanctions.

Firstly, individuals who acknowledge the truth and recognise their responsibility before the Verification Chamber concerning certain very grave infractions will receive *individual sanctions* [*penas propias*] of between five and eight years. These will serve as acts of reparation and restoration. These sentences will constitute an *effective restriction of their freedom* and rights, such as freedom of residence and movement that are necessary for the sentence to be served; personal sentences will also be required to guarantee non-repetition, and it will be stipulated that in no case will it be possible to impose prison sentences or equivalent punishment (par. 60).

The Preliminary Agreement on Victims indicates that the First Instance Section for Cases of Acknowledgement of Truth and Responsibility will decide the way in which the sentence will be executed effectively. Concerning the surrender of weapons and reincorporation of former FARC-EP combatants into society the punishments will be administered according to the terms agreed on the matter (par. 46). In addition, it has been indicated that individual sanctions will include participation in, or implementation of, special programmes that have been designed in the light of the agreements contained in the points on Comprehensive Rural Reform, Political Participation and Substitution and Eradication of Illegal Crops contained in the General Agreement (par. 46).

2,300 selective murders (10% of the total) (Bastaya, 2013).

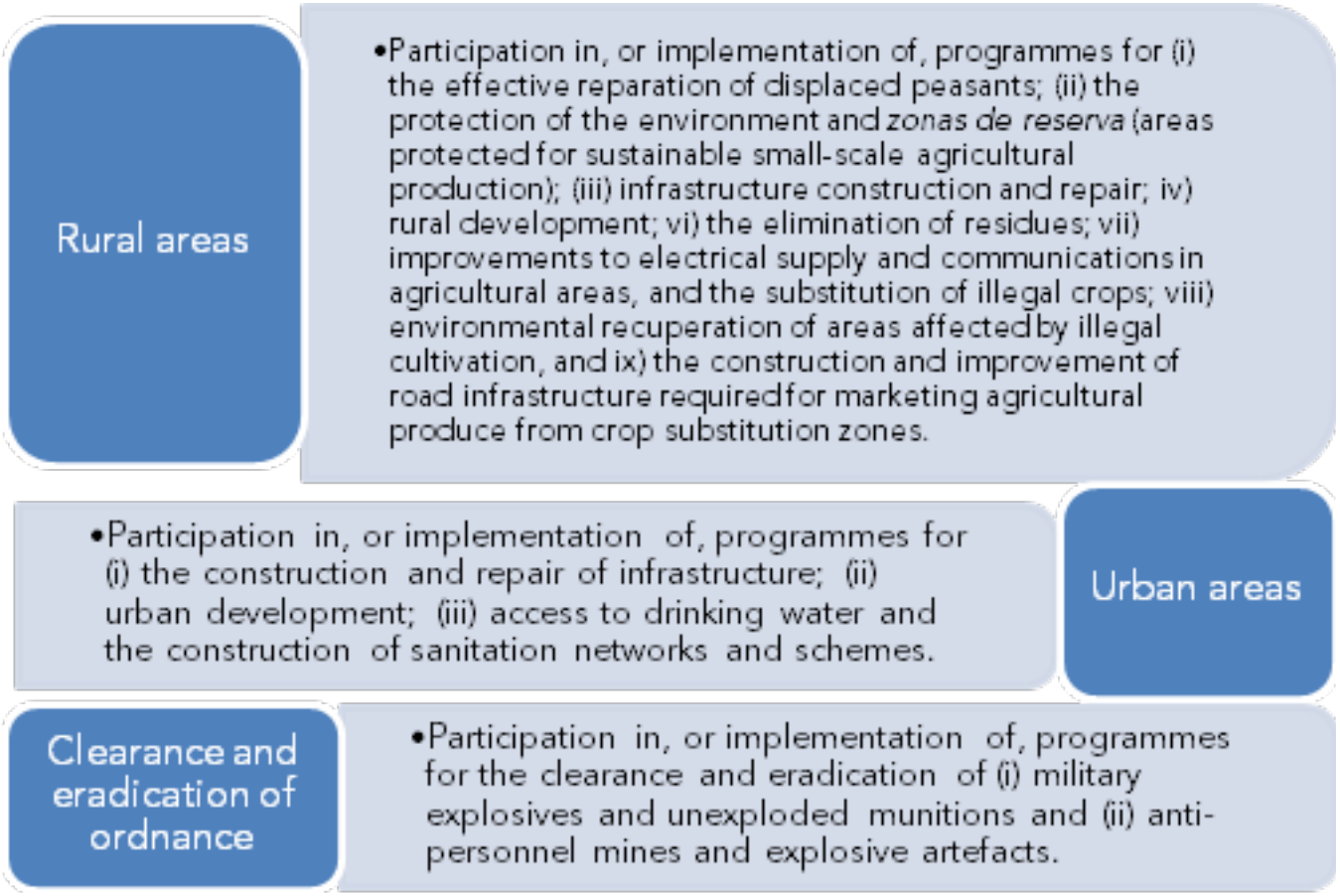
134 ICRC, (November 2013), The Use of Force in Armed Conflicts. Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, pp. 4-5, available at: https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf. This text differentiates between the paradigm of hostilities based on the IHL principles of distinction, proportionality and precaution, which regulate armed conflicts, and the paradigm of *law enforcement* based on IHRL that is applicable to state agents in public order situations and requires that lethal force should only be used when there is no alternative. These principles also state that the level of force should not exceed what is strictly necessary. In both cases the paradigms are based on principles that require certain standards and conduct and that do not presume that the use of force by state agents is either legitimate or illegitimate.

135 ICTY, (22 February 2001),*The Prosecutor v. Dragoljub Kunarac*, "judgment" IT-96-23-T & IT-96-23/1-T, par. 470

136 Jo M. Pasqualucci (2013),*The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge UP, p. 171.

137 Orna Ben-Naftali (2011),*International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: Oxford) p. 230.

138 Article 29.4 Cpenal.



Perpetrators of crimes who appear before the Chamber for the Verification of Truth and Responsibility will be able to present detailed individual or collective projects for the implementation of reparative or restorative activities. These projects will indicate the obligations, objectives, timescales, workdays and places of implementation, as well as indicating the persons who will be involved and where they will live (par. 46). Projects should establish mechanisms for consulting with representatives of victims resident in the area of implementation, in order to gather their views and ensure that they do not oppose the proposals. The consultation mechanism should be approved by the Chamber and will be implemented under its supervision. If they wish, victims may communicate their opinions about the proposed project to the Tribunal. The Tribunal will have full authority to decide whether the project should be implemented. Proposals should be approved beforehand by the Chamber for the Verification of Truth and Responsibility and should be prepared by the Chamber itself if those appearing before it fail to present any (par. 46).

Secondly, the Preliminary Agreement on Victims also foresees *alternative sanctions* (that is, reduced prison sentences), which will be imposed on persons who acknowledge truth and recognise responsibility for very serious conduct before the Indictment Chamber at a late date. Before serving their sentence, they will be required to serve between five and eight years in prison in a sentence designed predominantly to be punitive (par. 60). In no case, will substitute punishments, additional benefits or reductions in sentences that are complementary to the alternative sanction be ordered, and recipients will be required to commit to reintegrating into society by working, undergoing training or studying during the time in which they are in prison. If appropriate, they will also be required to promote activities intended to ensure non-repetition (par. 48).

The rules governing alternative sanctions will also establish the ways in which punishment will be graduated, identifying individuals who have not play a determining role in the most serious and representative conduct. In these cases the individual or alternative sanction [pena propia or pena alternativa] will last a minimum of two years and a maximum of five (par. 60).

Thirdly, ordinary sanctions will be imposed in cases where perpetrators have failed to acknowledged the truth and recognise their responsibility. These sanctions will perform the role envisaged in the rules governing the ordinary criminal system. The prison terms in these cases will not be less than 15 years or more than 20 in cases of grave conduct. Reductions may be ordered in some cases if the individual commits to reintegrating into society by working, undergoing training or studying during the time in which they are deprived of freedom. Once the sentence has been served, individuals will be conditionally released (par. 49).

The Comprehensive System will monitor these sanctions, and the lives and physical integrity of former combatants will be protected by a security and surveillance regime (par. 62). Individuals will be allowed to travel in order to implement the activities agreed as part of their punishment, but only if strictly necessary. However, the body responsible for verifying that the sentences are properly implemented will also have the power to issue permits for travel that that was not authorised at the time the sentence was passed (par. 62). Furthermore, the PT's First Instance Section in Cases of Acknowledgement of Responsibility will have the task of supervising and confirming that sentences are being served as ordered. In this it will be supported by monitoring and verification bodies and mechanisms that will be established for the purpose; these should produce three-monthly reports (par. 53 d).

When it is state agents who are found guilty of commissioning crimes, they will serve their sentences in military garrisons and their sentences will be monitored by the Comprehensive System. In addition, the final form of sentences for this category of persons will be decided before the Final Agreement is signed; it will be in line with the overall model for former FARC-EP members outlined above (par. 60).

Extradition cannot be ordered[139]; nor can incarceration with the purpose of the subsequent granting of extradition for actions or conduct covered by the Comprehensive System that were carried out or occurred out in the course of the conflict or in relation to it up to the point at which it ended. This prohibition applies whether or not crimes are involved that may be amnestied, in particular in cases of political crimes, rebellion or actions linked with these. This principle applies to crimes committed in Colombia or elsewhere (par. 72).

The provisions that (without prejudice to the national-level monitoring procedures agreed by the parties) permit the organisations or entities to which those indicted belong to oversee the effective implementation of punishment in cases where collective responsibility has been acknowledged might be held to imply the existence of disproportionate measures (par. 46). This is particularly important in cases where state agents benefit from special prison regimes [fuero especial carcelario][140]. The possibility of a sentence being deemed served when an activity -such as the completion of a building- is completed could also be disproportionate, as it might imply that final sentences are shorter than agreed (par. 46).

139 This guarantee that there shall be no extradition covers all members of the FARC-EP, and persons who submit themselves to the CSJTRN who are accused of forming a part of the organisation for any conduct engaged in before the signing of the final agreement. Only in relation to acts committed before the signing of the final agreement, when a request for extradition concerning relations of members of the FARC-EP or family members of the second degree of consanguinity or the first degree of affinity, or of a person accused or indicated in an extradition request, may the request be heard by the Second Review Chamber of the Peace Tribunal. This chamber will decide whether the request relates to actions or conduct related to the membership of, or accusations of membership of, the FARC-EP of a relation of the person requested in extradition (par. 72).

140 In Colombia, members of the security forces convicted of imprisonable offences may be held in military installations rather than in the normal prison system.

In Colombia, there seems to be a consensus among a broad range of human rights organisations concerning the importance of the peace negotiations. They have, for example, expressed themselves in favour of the inclusion of victims as fundamental players in the talks, and have accepted the need to adopt a model of justice that goes beyond retribution. One of the most difficult points to resolve has been the question of alternative sanctions that do not involve imprisonment (called individual sentences under the Comprehensive System) for persons who have committed gross violations of human rights and/or grave breaches of IHL and who have acknowledged the truth and their responsibility.

In this respect, there are no provisions or decisions in international law that establish, prima facie, an incompatibility between alternative sanctions and the duty of the state to punish those responsible for such conduct. Therefore, the inclusion of this kind of sanction is not, a priori, unacceptable. However, in order to determine the compatibility of this and other punishments included in the Comprehensive System, a more in-depth examination will be required. This will need to be accompanied by monitoring of the a priori decision concerning applicable penalties and the executive determination of the sanction ordered in actual cases before it will be possible to know whether these are genuine national legal proceedings compatible with the obligation of the state to punish individuals who are responsible for gross human rights violations or grave breaches of IHL. Such an analysis will be particularly important to the OTP's preliminary examination of Colombia.

As the concrete measures of reparation and non-repetition that might be ordered by the SJP as alternatives to prison, the conditions covering provisional restrictions of freedom, the ways in which sanctions will be graduated, mechanisms for monitoring the implementation and fulfilment of punishments, and other measures designed for state agents have not been determined, it is not possible at this stage to carry out an exhaustive analysis of the proposed sanctions.

On the matter of alternatives to imprisonment, it should be stressed that these are instruments of criminal sanction. Under the ordinary legal system it is argued that an attempt will be made to harmonise the punitive objectives of the sanction in order to reintegrate criminals into society[141]. The UN Standard Minimum Rules covering Non-custodial Measures -known as the Tokyo Rules– are soft law measures that indicate that states have the freedom to adopt alternative measures that respond to the social or political needs of society or to the gravity of the crime in question and the personality of the criminal. This international instrument points out that in such circumstances states will attempt to find an adequate balance between the rights of criminals and the interests of society, public safety and the prevention of crime[142].

Additionally, in general terms, punishment is imposed in response to the occurrence of conduct that gravely affects legally protected assets. In addition to the purely retributive function that seeks to castigate the criminal, it is argued that punishment fulfills a general preventive function, permitting individuals not to commit crimes. Also, among other things, punishment is also held to perform a special preventive function, which seeks to stop individuals who have committed crimes from repeating them in the future.

Retribution and general prevention have been the two outstanding functions of international criminal law. Retribution was the principal motive for including the death penalty among the sentencing options available to the Nuremberg and Tokyo tribunals. Alongside retribution, general prevention has to an extent been received positively by the international tribunals for Rwanda and the former Yugoslavia. However, a lack of clarity and confusion remains[143]. In the International Criminal Court, the OTP Deputy

141 Gil, R. E (2011), *Medidas sustitutivas a la pena de privación de la libertad. Derecho y Humanidades*, p. 45.
142 The UN Standard Minimum Rules covering Non-custodial Measures, or Tokyo Rules (14 December 1990), General Assembly, Resolution: 45/1105.
143 Mark S. Drumbl (2007), *Atrocity, Punishment and International Law.* Cambridge University.

Prosecutor has indicated that the punitive goal of sanctions for international crimes should "(…) satisfy adequate objectives linked to the sanction, such as the public condemnation of criminal conduct, the acknowledgement of the suffering of victims, and the dissuasion of subsequent criminal conduct"[144].

On the other hand, in the field of national law, the principle of proportionality[145] has been used by the Colombian Constitutional Court to evaluate the constitutionality of special justice measures adopted in scenarios of transitional justice. Proportionality has been used to balance conflicting principles and to judge whether a measure that implies real impacts on a right is proportional. Thus the Court, recognising that it is impossible to materialise all rights simultaneously in transition contexts, has employed a broad approach to the methods for achieving a balance between justice and peace -understood as objective values- and the rights of victims[146]. Additionally, it has stipulated that such an exercise must necessarily be carried out in the light of specific legal rules and not globally, indicating in this regard that a "(…) concrete appreciation of each [rule] may permit an adequate evaluation of the reasonableness and acceptability of the restrictions proposed, in terms of the corresponding benefit derived from it for society in (...) contexts of transitional justice"[147].

In this manner, during the controversial peace process with the AUC the Court accepted that the introduction of alternative punishments (sentences reduced to eight years for grave crimes) did not disproportionately affect justice, as long as the integrity of the rights of victims was guaranteed[148]. In its examination of the constitutionality of the LFP, the Court established that both in the ordinary and in transitional justice systems the alternative sanctions and special mechanisms for the serving of sentences did not supplant the constitution of the country. The Court argued that these measures focused on the need to achieve compatibility between justice, reconciliation and non-repetition of criminal conduct by employing instruments whose aims went beyond retribution[149].

In addition, the Constitutional Court established that the conditional suspension of the implementation of sentences, extrajudicial sanctions, alternative sanctions and special methods of fulfilling sentences were consistent with the Constitution, always providing they were intended to satisfy the rights of victims to Truth, Justice, Reparation and Non-repetition, and that the state's duty to investigate and

144 Stewart, James (13 May 2015), Presentation by the ICC Deputy Prosecutor, "La justicia transicional in Colombia y el papel de la Corte Penal International", at the forum 'La Justicia Transicional in Colombia y el Papel de la Corte Penal International', organised by the Universidad del Rosario

145 For criminal law, the proportionality of the sanction is a material limit to the punitive power of the state and, therefore, is one of the limiting factors that should be borne in mind when it comes to prosecuting and punishing conduct. The proportionality of the sanction is relevant both at the point in which the *a priori* determination of the applicable sanction is made (abstract proportionality) and when it is judicially applied (concrete proportionality). According to a restrictive interpretation, the proportionality of the sanction implies that its determination corresponds to the gravity of the conduct. In a broad interpretation this correspondence is not the only criterion used to determine proportionality: the degree of guilt is also relevant, as are considerations of criminal law policy. Fuentes Hernán (2008), *El principio de proporcionalidad en derecho penal. Algunas consideraciones acerca de su concretización en el ámbito de la individualización de la pena*.In *Revista Ius Et Praxis*. The origins of the principle of proportionality lie in European public law and has been extended to the Inter-American Human Rights System (IAHRS) (IACHR, Advisory Opinion 5/85), and to the Latin American countries. In particular, the principle was developed by the German Federal Constitutional Court, along with "theory of phases", as a constitutional principle for the protection of rights, which limits state intervention in the area of fundamental rights and freedoms. See: Rainer José & Martínez Francisco & Zúñiga Urbina (2012), *El principio de proporcionalidad en la jurisprudencia del tribunal constitucional*, in Estudios Constitucionales10(1) pp. 65 - 116). Its employment has been criticised on grounds of its subjectivity, and for this reason the utility of other tools for resolving the tensions that are inherent in transitional justice have not been rejected. Orrego, Cristobal (2015), *Principio de Proporcionalidad y Principio de doble efecto. Una Propuesta desde la filosofía del derecho,* in Dikaion, 24-1, 117.

146 Corte Constitucional, Sentencia C-771 de 2011. M. P. Nilson Pinilla Pinilla

147 ibid.

148 Corte Constitucional, Sentencia C-370 de 2006 M.P. Manuel José Cepeda, Jaime Córdoba Triviño, Rodrigo Escobar Gil y otros.

149 Corte Constitucional, Sentencia C-579 de 2013. M.P. Jorge Ignacio Pretelt

punish gross human rights violations and grave breaches of IHL was maintained[150].

In particular, the Court confirmed that the conditioned waiver of criminal investigation is justified as a means of preventing future violations and achieving lasting peace when balanced by the obligation to investigate, judge and, when appropriate, punish crimes. Additionally, it clarified that according to international standards this mechanism did not apply to those most responsible for systematically committed crimes against humanity, genocide and war crimes, adding that the waiver should be revoked if the requirements established by the provision were not met. These conditions include, as a minimum, the surrender of weapons, the acknowledgement of responsibility, contributing to the clarification of the truth, the integral reparation of victims, the freeing of kidnap victims and the demobilisation of minors[151].

In this manner, consistently with the evolution of Colombian jurisprudence on the determination of the compliance of the punishments adopted by the SJP, the Court will attempt to determine whether the punishments included in the Comprehensive System are appropriate to the task of achieving peace as intended, whether, of all the other measures or similar appropriateness, they are the ones that most favour the rights of victims, and whether the benefits derived from their application are compatible with the rights of victims and of society.

Furthermore, according to international law, the standards contained in IHRL and IHL demand that punishment for those responsible for grave violations should be adequate and proportional[152]. In its sentence in the Case of the Rochela Massacre v. Colombia the Inter-American Court of Human Rights(hereafter, "IACtHR") stressed that in order to comply with the obligations deriving from the American Convention on Human Rights, states must investigate, judge and, when appropriate, punish and repair gross human rights violations. It emphasised that, in order to achieve this goal, they should observe due process and ensure the application of the principle of the proportionality of the sanction and of other principles, such as the granting of a reasonable timescale.

> "With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasise that the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognised by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined. With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonised with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention." (par. 196).

Similarly, in the Case of Gutiérrez-Soler v. Colombia, the IACtHR confirmed that "the State shall refrain from resorting to amnesty, pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction". Furthermore, the concurring opinion of the judge Diego García Sayán in the Case of the Massacre of Mozote and nearby places v. El Salvador, supported by four other judges, considered that the reduction in sentences and the concession of alternative punishments are options that, alongside an adequate balance between the rights of victims and the need to end the conflict, permitted the tensions proper to such circumstances to be overcome.

Other than these considerations, international courts have not formulated explicit positions on the

150 ibid.
151 ibid.
152 AFSC (2014), *Paz con Justicia Transicional. Aportes para Colombia desde el derecho internacional.*

kinds of sanction that are compatible with the international obligation to punish those responsible for grave crimes. In general, imprisonment has been the punishment considered appropriate for international crimes by international criminal tribunals for this kind of conduct[153]. When determining which sanction to apply, reference has also been made to national law[154]. As concerns the ICC, the RS establishes that the maximum sentence is life imprisonment (RS, 77.1); in addition to prison, it also contemplates fines and forfeiture (RS, 77.2). On sentencing, the RS also states that none of its provisions shall affect "(…) the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in [it] (…)" (RS, 80).

The determination of punishment is important aspect of the analysis of admissibility by the ICC (arts 17.1c and 20.3 of the RS). The Rome Statute indicates that the sanctions imposed by national tribunals shall not count as matters already decided by the law when the sentence imposed sought to allow the accused to evade criminal responsibility, and when punishment has not been imposed impartially or independently and the action is incompatible with the intention of bringing the accused before the law[155].

Héctor Olásolo distinguishes three moments in which it might be important to analyse complementarity during the sentence determination process. These points correspond to the a priori determination of the punishment that is applicable to the concrete crime and its implementation. The first moment is when the legislature first classifies the crime, the second when the judge applies the sentence[156] and the last when the sentence is implemented[157].

Concerning preliminary examinations, the Deputy Prosecutor of the OTP has accepted the high degree of discretion enjoyed by states when it comes to determining the punishments that should be imposed, with the proviso that they should always comply with the duty to end impunity for the perpetrators of the gravest crimes[158]. At national level, he has confirmed that a sentence that is manifestly inadequate to the gravity of the crime and the degree of responsibility of the convicted person might vitiate the apparently genuine nature of the proceedings in question[159]. For example, he confirms that suspending the implementation of sentences for persons most responsible for war crimes and crimes against humanity would allow persons to evade criminal responsibility. In respect of the reduction of sentences, the Deputy Prosecutor of the OTP confirms that appropriate action depends on the circumstances of the case that in situations of transitional justice might include, for example: a perpetrator's acknowledgement of criminal responsibility, demobilisation and disarmament, the guarantee of non-repetition, full participation in processes to establish the truth about grave crimes, and a possible temporary prohibition from participating in public affairs. According to the Deputy Prosecutor of the OTP, con-

153 See: Art. 24. 1 Statute of the International Criminal Tribunal for the former Yugoslavia and art. 23.1 Statute of the International Criminal Tribunal for the former Yugoslavia

154 See: Art. 24. 1 Statute of the International Criminal Tribunal for the former Yugoslavia and art. 23.1 Statute of the International Criminal Tribunal for the former Yugoslavia Final & Art, 19 Statute of the Special Tribunal for Sierra Leone.

155 Héctor Olásolo Alonso, *De Los riesgos and precauciones necesarias en la aplicación del principio de complementariedad por la Corte Penal Internacional: el estudio de la determinación nacional de las penas como objeto de análisis de admisibilidad*, in Ricardo Posada Maya (coordinador), Delitos políticos, terrorismo y temas de derecho penal, Editorial UniAndes, Bogotá, 2010, pp. 201-254.

156 LWBC considers that an important element to bear in mind at the point when consideration is given to determining whether the sentence by the Comprehensive System represent a true willingness to pursue the most serious crimes according to a perspective of complementarity, is the room for manoeuvre available to the judge at the time of sentencing.

157 Héctor Olásolo Alonso, *De Los riesgos and precauciones necesarias en la aplicación del principio de complementariedad por la Corte Penal Internacional: el estudio de la determinación nacional de las penas como objeto de análisis de admisibilidad*, in Ricardo Posada Maya (coordinador), Delitos políticos, terrorismo and temas de derecho penal, Editorial UniAndes, Bogotá, 2010, pp. 201-254.

158 Presentation by the ICC Deputy Prosecutor, "La justicia transicional in Colombia y el papel de la Corte Penal International", at the forum 'La Justicia Transicional in Colombia y el Papel de la Corte Penal International', organised by the Universidad del Rosario, May 2015, p. 7.

159 ibid.

siderations such as these "might justify a reduction in sentences that in other circumstances would be proportional to the gravity of the crime and the degree of responsibility of the perpetrator"[160]. He also states that he would take a series of factors into account in order to determine whether the alternative sanctions are compatible with the real interest of ensuring that the accused faces genuine proceedings. These include normal national sentencing practice in the case of crimes coming under ICC jurisdiction, the proportionality of the sentence in relation to the gravity of the crime, and the perpetrator's degree of responsibility, the kind and degree of restrictions imposed on the person's freedom, the existence of mitigating circumstances, and the reasons given by the sentencing judge for punishment ordered.

In its analysis of the LFP, LWBC considered that given the gravity of the offences sanctions for those most responsible for international crimes should include some prison time. However, as that the sanctions proposed for the Comprehensive System are still being analysed to see whether they are consistent with genuine legal proceedings in spite of the fact that they do not include prison sentences[161].

LWBC considers, in addition, that the Comprehensive System could make use of several factors to determine the existence of aggravating or mitigating factors. One important factor would be abuse of authority or of power as a possible aggravating factor, for state[162] and non-state actors alike[163]. These aspects could be examined on a case by case basis, independently of the category of actor involved.

2.2. Treatment of crimes involving gender-based violence, and gender perspective.

The CSTJRN will operate according to a diversity and gender perspective that is intended to respond to the particular nature of victimisation that has occurred in different regions of the country and among different population groups, in particular women, boys and girls. This is reflected in the inclusion of the diversity and gender perspective as a cross-cutting theme and orienting criterion of the Commission for the Elucidation of Truth, Coexistence and Non-Repetition (the Truth Commission) charged with contributing to clarifying what occurred during the armed conflict and promoting a shared understanding of aspects that were previously little understood, including their differential impact on boys, girls and adolescents and on gender-based violence. The Commission will also be charged with ensuring that responsibility for crimes is acknowledged, with the intention of restoring dignity to female victims and, thus, to contribute to consolidating and promoting gender equity. It will also seek to identify the specific ways in which the conflict reproduced historical mechanisms of gender discrimination and stereotypes.

The terms negotiated up to this point suggest that the Commission will create a gender working group tasked with providing the Commission with technical advice, investigations, the preparation of hearings on gender, and other related activities. The working group will also review methodologies in order to ensure that all of the instruments used by the Commission have a gender perspective, and will coordinate with women´s and LGBTI groups.

Thus, the gender component will contribute to strengthening the National Collective Reparation Plans[164] aimed at groups, peoples or local organisations that have been affected by the violation of collective and individual rights. These plans will seek to ensure that a gender perspective is taken into account in order to include the special characteristics of women victims, the recuperation of identity, their organisational potential, and the reconstruction of their capacity to influence local and national

160 ibid.

161 Another possibility would be to determine whether the clause on the "interests of justice" contained in Article 53 of the RS should be applied. See: AFSC (2014*), Paz con Justicia Transicional Aportes desde el derecho internacional.*

162 *The Prosecutor v. Charles Ghankay Taylor*, (30 May 2012) Sentencing Judgement, SCSL-03-01-T, par. 43.

163 *The Prosecutor v. Germain Katanga*, (23 May 2014), Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, par. 75

164 See: Unidad para las Víctimas (2016),¿Qué es la reparación colectiva?, available at: http://www.unidadvictimas.gov.co/es/%C2%BFqu%C3%A9-es-la-reparaci%C3%B3n-colectiva/203 .

policies. This approach will also be followed in the implementation of the strategies contained in the Plan for Psycho-social Recuperation for Coexistence and Non-repetition (par. 53).

Another area in which the inclusion of a gender perspective is apparent is in the composition of the Peace Tribunal, which -like the Investigation and Indictment Unit and the Tribunal's chambers– should be made up of judges selected using gendered criteria. The Investigation and Indictment Unit is of great importance when it comes to guaranteeing the right of access to justice for women survivors of sexual violence committed in the context of the armed conflict, as according to the Preliminary Agreement on Victims, a special team will be established to investigate cases of sexual violence. Additionally, it has been announced that for cases of sexual violence the special procedures established by the RS for collecting evidence in this area will be followed. This should ensure adherence to international standards in the field. These include the principle that the words or conduct of a victim should in no case be deemed to mean consent during the attack of which she has been a victim when force, threat of force or coercion were involved, or when the perpetrator has taken advantage of a coercive environment, thereby diminishing the victim's capacity to give voluntary and free consent[165].

This example is one of the most important aspects of the discussions on the rights of women in these scenarios, as it illustrates the continued presence of gender prejudice and stereotypes that have been present in the arguments of countless judges and public officials in cases of sexual violence[166]. These are arguments that do not adhere to the international instruments on the matter that have been signed and ratified Colombia, including the Rome Statute and the Convention on the Elimination of All Forms of Discrimination against Women.

One way of ensuring greater respect for the rights of women might be to specify the way in which cases are handled and also the manner in which the Unit's special investigation team mentioned above operates. It will also be possible to establish whether the punishment for those responsible for acts of sexual violence and other forms of gender-based violence will be different in terms of duration and kind from those agreed in the talks.

It is important to stress that point 40 of the Preliminary Agreement on Victims adheres to the terms of the Rome Statute in establishing that rape and acts of sexual violence cannot be amnestied, pardoned or receive equivalent benefits. According to the Preliminary Agreement, these forms of conduct will be registered by the Law of Amnesties as offences that cannot be amnestied. Note that the Preliminary Agreement also establishes that the laws passed to establish the scope and reach of such conduct according to the terms set out in the RS, IHRL and IHL. For LWBC, these aspects constitute advances in acknowledging the rights of women survivors of such acts, their access to justice, and the observance of relevant international standards.

In relation to measures to assist the emotional recovery of women victims of conflict the government has made a commitment to increasing its coverage of the population and territory, and to improve the quality of psychological support to aid in the emotional recovery of victims from the specific damage they have suffered, including the effects of sexual violence. To achieve this, the number of local attention centres for victims will be increased and outreach programmes will be established to reach far-flung communities.

According to the agreement, the participation of female victims is fundamental to the discussion of the satisfaction of the rights of victims of gross human rights violations and grave breaches of IHL related

165 However, there has been no clear statement on the specific provisions that will be taken into account, or whether all shall be applicable. For example, it has not yet been clarified whether the victims of sexual violence will be able to participate in all stages of proceedings, as stipulated by the Rome Statute.

166 Sala de lo Contencioso Administrativo. Sección Tercera-subsección B. Exp. Nº 25000-23-26-000-2000-00163-01(21781), C.P: Danilo Rojas Betancourth. 5 de abril 2013

to the conflict, as it is they who have experienced the abuses and can make first-hand context-specific reparation measures. However, it is not clear how this diversity focus involving the participation of women in general, and specifically women who have survived gender-based violence or sexual violence will be implemented. To date, mechanisms to ensure such an approach have not been put in place that will allow women to exercise this right effectively in the framework of transitional justice.

Similarly, this opportunity must be exploited in order to raise awareness of cases of gender-based violence that affect the majority of women living in contexts of armed conflict. This is of vital importance if experiences similar to those that occurred during the Justice and Peace process, in which most acts of violence and sexual violence against women were neither brought to trial nor made visible to the public[167].

Additionally, it is important to work to ensure that such acts are never repeated. This would not only serve to re-establish the rights of affected women but also as means of prevention that limits the reproduction of violent contexts, given that perpetrators rarely acknowledge they have committed these crimes. Similarly, this situation requires concrete investigation measures and specific differentiated treatment[168].

167 LWBC and HUMANAS (2015), *Aportes de las sentencias de Justicia y Paz a los derechos de las mujeres – Estudio de caso*

168 ibid.

3. CONCLUSIONS

LWBC recognises this historic step in the acknowledgement of the rights of victims, and celebrates the efforts of the parties to design an agreement that complies with international law.

LWBC makes the following recommendations both for the process with the FARC-EP and for an eventual agreement with the ELN.

- Regulate the scope of political crimes, adhering to the prohibition of amnesties for gross human rights violations or breaches of International Humanitarian Law.

- Pay special attention to defining conduct involving the elements of international crimes, in particular those defined in the Colombian Criminal Code.

- Ensure that the procedures used for selecting and prioritising cases are only applied in exceptional cases, and that adequate oversight mechanisms allow for the effective monitoring of the decision to investigate such cases or not.

- Employ a convergent and complementary application of IHL and IHRL, consistent with the Rome Statute, when criminal responsibility is being evaluated.

- Ensure that the interpretation of those most responsible is consistent with international law.

- Ensure that the punishments proposed within the framework of the Comprehensive System are consistent with the requirement to ensure genuine trials, in particular in cases in which alternatives to prison are ordered.

- Gauge the expectations of victims in order to determine the special treatment provided for in terms of punishment and ensure that the execution satisfies the principal goals of r restitution and reparation as stated by the agreement.

- Define the competence of the Special Jurisdiction for Peace, guaranteeing that the components of the Comprehensive System are interconnected by relations of conditionality in order to ensure the special treatment envisaged within it are sustainable.

- Raise awareness of gender-based violence, crimes that affect the majority of women in contexts of armed conflict.

- Implement policies to ensure the investigation and prosecution of cases of sexual violence meet international standards.

- In terms of the justice component, any evaluation of the legitimate use of force in non-international armed conflict should include the principles of distinction, proportionality and precaution, and ensure that the burden of proof to ensure the legitimacy of proceedings are applied to the person responsible for the attack.

- Ensure increased participation by victims in the Comprehensive System and in the process to develop the regulations governing the matter.

- Create a fund to cover the costs of representation and advice for victims of cases falling under the Special Jurisdiction for Peace.

- International bodies such as the OTP should continue to monitor the working of the Special Jurisdiction for Peace once it enters into operation, in order to guarantee the existence of genuine trials of the international crimes for which it has jurisdiction.

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