

Transitional justice for rank-and-file combatants in Colombia: insights from Law no. 1424

By Silke Pfeiffer

■ Executive summary

As the Revolutionary Armed Forces of Colombia and the Colombian government negotiate a viable transitional justice formula, they will need to devise a solution for combatants who do not fall into the category of being most responsible for the most serious crimes, but are involved to a lesser extent with serious crimes. Despite the differences in the context and actors involved, they are well advised to draw on lessons learned from the implementation of Law no. 1424. In 2010 this transitional justice scheme altered the deal that was originally offered to demobilised paramilitary combatants not covered by the Justice and Peace Law. Combining judicial and administrative proceedings, it takes them to court, but exempts them from prison in exchange for truth-telling and other obligations. As of 2014 the implementing institutions have made headway in processing over 24,000 registered individuals, most of them former rank-and-file paramilitaries. However, a number of challenges have mirrored the problems that marked the law's genesis, as well as poor inter-institutional alignment. The loss of trust following changes to the rules has strained the processes of truth-telling and reintegration, and ordinary and transitional justice proceedings are not in tune. There are trade-offs in the way in which the various transitional justice and reintegration provisions are applied and connected. Seizing the opportunity of an entirely different negotiation scenario, today's protagonists have the chance to address the shortcomings of Law 1424. If it is to create appropriate reintegration incentives while effectively upholding victims' rights, a deal will need to connect judicial and non-judicial formulas in a coherent, strategic and implementable way.

Introduction

Dealing with the legacy of a violent past counts among the greatest challenges in post-conflict situations. In their third year of negotiations to end half a century of armed conflict, the Revolutionary Armed Forces of Colombia (FARC) and the Colombian government are struggling to lay the foundation for this task. Already they have agreed on such substantial items as rural development, political participation and measures to deal with the drug problem. A comprehensive and coherent deal on transitional justice would not only take the negotiations to the brink of a successful conclusion, but would also be key to making a peace agreement sustainable.

This report looks at a crucial, yet often overlooked problem: a solution for rank-and-file members of armed groups. Because discussions tend to centre on the (doubtless important) issue of those most responsible for the most serious crimes and their incentives to reach a negotiated settlement with the government, less attention is paid to the

situation of a much greater number of combatants.

Their prospects for reintegration will, however, ultimately be decisive to halting post-conflict violence. Yet the process of creating appropriate reintegration incentives is compounded by the fact that a considerable number of them will have participated in serious crimes.

The report approaches this issue by analysing the implementation of Law no. 1424 (Congreso de Colombia, 2010). Passed in 2010, it complements the centrepiece of the transitional justice package offered to right-wing paramilitaries, the 2005 Justice and Peace Law (Congreso de Colombia, 2005). Contrary to the latter, which mainly involves paramilitary commanders, Law 1424 creates a transitional justice mechanism that primarily applies to demobilised rank-and-file members of paramilitary organisations.

One has to be careful when using the transitional justice model that governed the demobilisation of the para-

militaries as a reference for the current discussions. There are fundamental differences between the groups involved and the respective political circumstances. Despite these caveats, there is room for lessons from the implementation of a law that has gone largely unnoticed by a great majority of Colombians, but which has had significant implications for some 30,000 former combatants and their prospects and incentives for remaining on the civilian track.

The report starts by explaining the genesis and main features of the 1424 model. After discussing initial results, the following section analyses the challenges that implementation of the law has encountered. The final section discusses the lessons that can be drawn for the current process with the FARC.

Transitional justice for demobilised rank-and-file paramilitaries

From legal limbo to Law 1424

The transitional justice model that accompanied the demobilisation of the paramilitary umbrella organisation known as the United Self-defence Forces of Colombia (AUC) was not created in one stroke. It developed over time as a bone of contention between those seeking to create the greatest possible incentives for demobilisation and those defending victims' rights. Following two years of political deliberations and the collapse of an initial deal between the administration of former president Álvaro Uribe (2002-10) and the AUC, the Justice and Peace Law (JPL) or Law no. 975 was passed in 2005 as the main legal framework. It established that those combatants believed to have committed crimes against humanity and war crimes had to undergo prosecution, albeit with the prospect of reduced prison sentences in return for demobilisation and contributions to truth-telling and reparation processes. Accordingly, some 4,000 mainly high-, middle- and low-level commanders registered for legal treatment under the JPL. The largest share of fighters – over 30,000 demobilised paramilitary combatants – were initially offered pardons on the grounds of what had been legally codified as the commission of political crimes (Congreso de Colombia, 2005: art. 71).¹ They were instructed to join the government's reintegration programmes.

However, four separate Constitutional and Supreme Court rulings between 2006 and 2010 frustrated this approach and threw thousands of former combatants into a legal limbo. Among these rulings, a 2007 Supreme Court decision established that paramilitary affiliation could not be considered a political crime because this implied acting against the existing constitutional and legal order, which was not the case with the paramilitaries (Corte Suprema de

Justicia, 2007); instead, the ruling established paramilitary affiliation as conspiracy or aggravated conspiracy. In the following year the same court declared conspiracy a crime against humanity, thereby definitely ruling out pardons (Corte Suprema de Justicia, 2008). A 2010 Constitutional Court ruling finally discarded the application of the opportunity principle in the case of illegal armed groups (Corte Constitucional, 2010). The principle allows prosecutors to suspend or desist from prosecution under certain circumstances. Clearly, there was no way around prosecution.

With the prospect of rearmament resulting from the rulings, Congress rushed to hammer out a solution for the demobilised rank-and-file paramilitary members. Passed within two weeks after the 2010 Constitutional Court ruling, Law 1424 established an administrative, i.e. non-judicial, mechanism for demobilised combatants involved in conspiracy and other minor crimes related to their former paramilitary affiliation.² All such former combatants had to undergo a full and ordinary judicial trial, including conviction. Yet they could expect a suspension of arrest warrants and a conditional exemption from imprisonment if they complied with a series of conditions: committing to telling the truth about their paramilitary past by signing a truth agreement with the government; proving their satisfactory participation in the government's reintegration programme; not being involved in other crimes post-demobilisation; and undertaking 80 hours of community service. Legal benefits would become permanent on the successful completion of the truth-telling and reintegration processes (CMH, 2013; Presidente de la República, 2011). A successful Constitutional Court revision put an end to the state of legal limbo and initiated the implementation of Law 1424 in October 2011 (Corte Constitucional, 2011). By the December 2011 deadline 24,841 former paramilitaries had registered for the process (ACR, 2011).

The truth-telling scheme

The organisation that was charged with the truth-telling component was the National Centre for Historical Memory (CMH). Since its foundation as the Historical Memory Group in 2005, the organisation has devoted itself to reconstructing conflict-related gross human rights violations, initially as part of the multi-sectoral National Commission for Reparation and Reconciliation under the auspices of the vice-presidency and, since 2011, pertaining to the presidential Department for Social Prosperity.

Experienced in gathering victims' perspectives and testimonies, the CMH now also deals with perpetrators. The task of its newly created Truth Agreements Division (DAV) is twofold. On the one hand, it establishes a basis for resolving individuals' legal situation. For this purpose it issues positive or negative certifications based on a set of

1 Because the criterion for entering the JPL process was suspected implication in serious crimes and not rank, there are rank-and-file members in the JPL group as well as mid- and low-level commanders in the 1424 proceedings. The bulk of 1424 applicants are, however, former rank-and-file paramilitaries.

2 These crimes are the illegal wearing of uniforms and insignias, the illicit use of transmitters and receivers, and the illegal carrying of fire arms or munitions for the exclusive use of the armed forces or for personal defence [art. 1].

criteria for assessing the contributions of former combatants provided in hour-long interviews. On the basis of these certifications the judicial authorities accede to or render permanent the person's legal benefits, i.e. freedom from imprisonment, or revoke them. In terms of its second mission, the DAV responds to victims' and society's right to truth: relevant information from the interviews will be condensed into public reports.

By signing truth agreements, the demobilised combatants commit to contributing to 'clarify the configuration of groups at the margins of the law ... the general context of their participation in them, and all incidents and actions they know of based on their affiliation' (Congreso de Colombia, 2010: art. 3). In this sense, and in contrast to the interrogations carried out under the JPL, which focus on individual responsibility for gross human rights violations, the main focus of the DAV interviews is on the over 40 paramilitary structures that formed the AUC in the various regions; on patterns of violence, relations with state agents and other networks; and on recruitment and training modalities, among others.

Importantly, and this again contrasts with JPL rules, the DAV interviews are confidential. To complement the information from these interviews the DAV may collect contributions from victims and other sources. According to the agency, reports will be produced in the course of 2015 and will be made public starting in 2016.

Results

Over three years into the implementation of Law 1424 the process is up and running. The various agencies in charge of the various aspects of implementation have taken up their work, albeit at different paces. At the DAV considerable resources have gone into preparation. Concepts have been developed, and interview and evaluation tools created. The agency has produced (publicly available) reports about individual paramilitary structures and particular regions that are to provide a base line to contextualise and assess the information provided by the demobilised combatants. An operational structure was set up consisting of a national and 11 field offices staffed by 150 personnel. By the end of 2014 some 1,400 certifications had been issued.³ The comprehensive report *Yo aporto a la verdad* (CMH, 2014) sets out concepts, methods, early results and initial implementation challenges.

The Colombian Agency for Reintegration (ACR), which is in charge of liaising with the demobilised combatants (a large number of whom are still active in its reintegration programmes), has taken up new functions in terms of Law 1424. Beyond verifying criminal records and other conditions for participation in the process, it signs the truth agreement as the representative of the government and requests judicial benefits if appropriate. According to its

files, over 13,000 signed truth agreements had been submitted to the DAV by November 2014, while over 10,000 and over 1,700 conditional legal benefits had been solicited via the Prosecutor General's Office (PGO) and the courts, respectively (ACR, 2011).

In November 2014 the PGO reported that it was investigating some 21,600 demobilised paramilitary combatants not covered by the JPL. By that time the courts had reportedly sentenced some 2,500 former fighters. The new Transitional Justice Unit in the PGO is staffed by prosecutors working on the JPL and others working on 1424 cases.

Beyond these core institutions, the Mission to Support the Peace Process of the Organisation of American States, which from the early stages of the process has been monitoring the demobilisation of the paramilitaries under JPL rules, has supported the implementation of Law 1424. Together with the ACR it has held events to acquaint demobilised combatants with the new scheme and their obligations under it. It has also supported process design and inter-institutional cooperation in the implementation of the law.

According to the DAV it is to be assumed that a considerable number – likely several thousand – of the over 24,000 former combatants who originally signed up for the Law 1424 process will remain outside this process. Some registered without having taken part in the paramilitary demobilisation programme, while others have failed to comply with the requirements of the reintegration programmes, many have fallen back into crime, and more than a few have died.

Challenges

The implementation of Law 1424 has encountered a series of challenges that are related to the circumstances of its genesis and to issues with its design.

The price of changing a deal

As explained above, Law 1424 responded to a particular context. Following the higher courts' rulings regarding the legal treatment of those not suspected of serious crimes, thousands of individuals stood at risk of ending up in jail when they had originally been presented with a different scenario. Judicial authorities started moving ahead with prosecutions that in some cases led to convictions and imprisonment. While Law 1424 rescued the former paramilitaries from their legal limbo, the changes to the original deal and years of uncertainty caused a considerable loss of trust on their part. This has become a burden for the truth-telling and reintegration processes.

Not surprisingly, many demobilised combatants are sceptical of the confidentiality provisions in the DAV truth-telling process. This is compounded by the simulta-

3 Interview with the head of the DAV.

neous running of the judicial process, which works under different rules. The DAV reports that “the interviews often reflect resistance to providing information as well as silence vis-à-vis certain topics. ... We also often perceive fears among the demobilised of the consequences that the information they provide could entail” (CMH, 2014: 215). Add to this a natural tendency to underreport or report versions previously agreed with former superiors, and the output of the truth-telling process risks becoming undermined.

Similarly, ACR representatives report that the changes to the deal and the prospect of convictions have disincentivised reintegration. Given the multiple options for rearmament offered, for instance, by new illegal armed groups – many of them staffed or led by former paramilitaries – ACR staff say they struggle to keep their clients on the legal track.

Ordinary vs transitional justice

A second challenge derives from the conjunction of transitional and ordinary justice mechanisms. Law 1424 is defined as a transitional justice regulation and individual cases are investigated by the transitional justice unit of the PGO. They are judged, however, by ordinary courts spread all over the country. The law does not provide for any specialised courts or magistrates, as happened, for example, in the case of legal disputes related to land restitution. Most of these ordinary courts are reportedly not showing much consideration for the wider context of the cases at hand and the need to align the judicial component with the truth-telling and reintegration dimensions. Many judges reportedly lack knowledge of Law 1424 (Verdadabierta.com, 2014).

Judicial proceedings have therefore operated at their own speed without much coordination. Perhaps the most striking manifestation of the counterproductive coexistence of the two systems is the fact that convictions have implied bans from contracting with or working in the public sector, thereby thwarting yearlong efforts by the ACR to make former fighters fit for the labour market and attract potential employers. Apparently the ACR itself had to dismiss a former combatant hired after successfully completing his reintegration path because of his criminal record. Demobilised combatants complain of being left to the mercy of judges and their acquaintance (or lack of it) with Law 1424. Some knowledgeable magistrates have apparently rejected bans.

Coherence and strategy

Similar to the mismatches between the transitional and ordinary justice dimensions of Law 1424, its implementation has also raised questions about the strategic application of the various transitional justice components, as well as the degree of coherence among justice, truth and reintegration efforts. Many of these issues are also due to the limited leeway that legislators possess following the higher

courts’ rulings. Problems have been compounded by poor inter-institutional alignment.

Firstly, Law 1424 imposes a major burden on the justice system, caused by the rulings of the higher courts. However, the outcome resembles more a box-ticking exercise rather than a meaningful and strategic contribution to victims’ rights. At the time, the JPL established that the group of paramilitaries believed to have committed serious crimes should be determined by the executive. Hence, the selection of those to be treated under the rules of Law 1424 is not the result of a rigorous screening process, but of a convention. Accordingly, 1424 prosecutors tend to centre investigations on minor crimes and try to settle the maximum number of individual cases. In light of the circumstances they are mainly concerned with resolving a legal issue rather than causing more trouble for the demobilised. Seen from an accountability perspective, however, justice becomes a formality when it is likely that a considerable number of demobilised rank-and-file combatants have participated in more serious crimes. Another question concerns the use of judicial resources. In six years of JPL proceedings, the Colombian judiciary struggled to hand down four sentences out of 4,000 cases. It will now need to prosecute and convict thousands of rank-and-file ex-combatants (in an admittedly less complex proceeding), only to then suspend the execution of their sentences.

As for the truth component, in the absence of the publication of the DAV reports, their value cannot yet be judged. One aspect may, however, limit the DAV’s contribution beyond that of resolving the legal situation of demobilised individuals. As things stand, victims do not have access to the interview material. What could once again be owed to a decision to not stir up more trouble than is necessary is also a refusal of a central victims’ demand, i.e. access to truth. Furthermore, it may affect the quality of the reports, because the possibility of verifying or challenging individual versions of the “truth” are left to DAV staff – notwithstanding the competency that the CMH has built up over years of gathering victims’ testimonies and its ability to ask for victims’ contributions.

Secondly, there is unresolved tension regarding the use of the information revealed in the interviews. Following an appeal by human rights organisations and two members of Congress, in its ruling on Law 1424 the Constitutional Court modified a previous provision that the information contained in the interviews could not be used against anybody. It can now be used against third persons, excluding the witness him-/herself, his/her family members or other demobilised paramilitaries who have signed truth agreements. However, as things stand, the PGO does not have access to the interviews. According to the DAV, the information received by it via the interviews is “of exclusive and confidential nature and exclusively destined to the production of the reports” (CMH, 2014: 164). Hence, there is no possibility of using the information, be it in the investigations against paramilitary commanders in the

context of JPL trials, or to dismantle political and criminal networks. Seen from a perspective of upholding victims' rights to non-repetition, this is a lost chance to leverage the truth-telling process. It is a sensible option when priority is given to dealing with the security concerns of the demobilised and to getting the most out of the truth-telling process. The DAV has mentioned that access to anonymous material will be provided after a certain period of time (several years), the exact duration of which is currently under discussion.

The tensions between the DAV and the PGO in this regard illustrate difficulties in aligning the various institutions behind shared objectives, a problem that has characterised the implementation of Law 1424 more broadly. The DAV, PGO and ACR have joined the process not only at different paces, but also partly with different prior mandates that have shaped their approaches to the law. While the DAV was founded specifically to establish and carry out the truth-telling component, the ACR had been the main driver behind reintegration for many years. As for the PGO, it launched investigations as soon as the various higher court rulings had established the need for prosecution.

Diverging interests and poor inter-institutional coordination – which, as several observers note, has been improving of late – have caused further trade-offs. For instance, the ACR continues to be mainly concerned about its clients' successful completion of the reintegration path. Referring to its responsibility vis-à-vis victims and society, the DAV for its part claims to apply high standards with regard to the level and quality of the truth revealed in the interviews. Knowing that its certifications ultimately define whether judicial benefits will become permanent, it has an interest in ensuring its leverage. In other words, while the ACR is afraid of the possible impact of negative certifications, for which ACR staff members complain it will take the blame from its "clients", the DAV wants to prevent the process becoming a formality with a guaranteed outcome. While it initially only issued positive certifications, by the end of 2014 the share of negative ones was approximately 10%. (Like all administrative decisions in Colombia, a negative certification can be appealed and will be resolved by the director of the CMH.)

The DAV and ACR also seem to pull in opposite directions with regard to their messages to their "clients". While looking to the future continues to be the prevalent mantra of the reintegration process, the truth-telling process invites people to go back and dig deep into their personal histories.

Lessons for the peace process with the FARC

When discussing the history of Law 1424 in the context of the current peace talks with the FARC, three differences stand out. Firstly, the political context is different. The current peace process faces opposition at home, but

the situation is very different from the controversies that surrounded the demobilisation of the paramilitaries. Secondly, the negotiation agenda goes much beyond the terms of disarmament, demobilisation and reintegration (DDR). This reflects the different nature of the guerrillas, on the one hand, and a different approach by the government towards ending the armed conflict, on the other. Finally, despite deep links with organised crime, the FARC remains an insurgent organisation. Recognising its political nature, Colombian law treats the group differently from the paramilitaries: political crimes are eligible for amnesties or pardons (Colombia, 1991: Cap. III, art. 150). On these grounds hundreds of individually demobilised guerrillas who did not commit serious crimes have joined the government's reintegration programme over the past few years without having to face the courts. The discussion is currently open regarding crimes that should be considered as "connected to" political crimes and could therefore be included in potential amnesties for FARC combatants. Depending on the outcome, a more or less substantial number of guerrillas will not have to be tried.

More than differences, however, these points represent opportunities to do things differently from and better than in the past. As such, the following lessons from the 1424 experience should be considered. Perhaps most importantly, that experience illustrates the costs of arranging an unsustainable deal. Changing the rules squanders the necessary trust, while the need to rectify problems over time is likely to cause incoherencies and inefficiencies. Contrary to the circumstances of the paramilitary demobilisation, the current political momentum offers an opportunity to build up a broad national consensus around a comprehensive settlement. The negotiations rely on almost-unanimous international support. While relations between former president Uribe and the higher courts were toxic, today there is room to work with the latter from the outset in order to avoid a situation where a deal does not pass their scrutiny. Negotiators should therefore at all costs avoid agreeing on a deal that reflects their (narrow) preferences only, but will likely be undermined later by political controversy and legal challenges. Moreover, both parties to the negotiations need to provide guarantees regarding the implementation of the agreement so that each side can rely on the other to uphold its part of the deal.

Relatedly, the 1424 process shows the importance of predictability for stakeholders. When entering a reintegration programme former combatants need to have the greatest possible certainty regarding their legal situation. When speaking in front of a future national truth commission, potential deponents need to be assured that there will be no adverse consequences for them if their testimony is truthful. Society and former combatants will need to have certainty regarding access to and further use of the testimonies, e.g. against third persons.

Beyond taking those most responsible for the most serious crimes to court, the country will need to devise a solution for a potentially large number of former combatants who participated in the commission of acts that cannot pass as political or connected crimes. Their prospects and conduct will be decisive for post-conflict stability. In this respect, the 1424 experience shows the limitations of an approach that places this responsibility entirely on the judiciary. In a context of limited capacities, judicial proceedings at best turn into a formality and do not add much value in terms of revealing patterns of violence. At worst a mass of delayed trials becomes an affront to victims' rights. Instead, judicial resources need to be used strategically and transparently based on clear criteria and mechanisms for prioritisation and selection to comply with the core of the state's obligations under international humanitarian and human rights law.

Recognising these limitations, a future Havana settlement will need to complement trials with extra-judicial mechanisms. Pioneering an administrative transitional justice alternative for rank-and-file ex-combatants, the 1424 scheme shows the importance of understanding and appropriately addressing the trade-offs that naturally arise between partly competing agendas. Justice, truth and reintegration efforts need to be connected in a way that is coherent, strategic and implementable. Contrary to the paramilitary demobilisation, the current negotiation agenda is broad enough to embed transitional justice and DDR in a comprehensive peacebuilding strategy in which factors that disincentivise demobilisation and reintegration can be balanced out (ICG, 2014).

Beyond these lessons, the 1424 model has produced a wealth of material and institutional knowledge that could be put to good use. It proves the importance of investing in process design and inter-institutional alignment. The truth generated by the DAV interviews and reports could serve to contextualise the work of a potential truth commission or be used to cross-reference contributions made before it. Useful tools range from interview guides and evaluation and screening tools to educational material and methods.

Conclusion

Law 1424 was designed to get the country out of a tight spot. Several higher court rulings had forced the Colombian state to go back to all demobilised paramilitaries not covered by the JPL proceedings – many of whom had made headway into their reintegration processes – and take them to court. Under these circumstances the transitional justice model established by Law 1424 was certainly the best bet. Three years into its implementation, the institutions in charge of the process have made considerable progress in resolving the former combatants' legal situation and gathering testimonies that it is hoped will add to a better understanding of a key dimension of the conflict.

The challenges surrounding the implementation of the 1424 scheme also demonstrate the importance of focusing from the outset not only on those most responsible for the most serious crimes. Devising a solution for rank-and-file ex-combatants that intelligently balances out accountability and reintegration agendas is at least equally instrumental to preventing rearmament and advance reconciliation. Facing radically different circumstances than in the past, today's negotiators have a great opportunity to develop a comprehensive, coherent and implementable deal that lays the foundations for these goals.

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