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Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups[*]

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The majority of chapters in this volume make some reference to the 2003-2005 peace negotiation process in Colombia. The reason for this common reference is partly that the chapters originated in a seminar held in Bogotá, Colombia, in June of 2007, and most speakers felt compelled to reflect on the particular complexities of the Colombian case. But the seminar location aside, the Colombian attempted transition to peace provides a uniquely relevant, difficult, and interesting case to study the interactions between violence, politics, peace, and law in transitional contexts. The main purpose of this introductory Chapter is to outline critically the political process behind the production of the legal framework that made peace negotiations possible in Colombia, in particular the sanction of the Justice and Peace Law (JPL) in Congress in 2005. In keeping with the core theme of the 2007 seminar, the account will underline the synergies and tensions between the political process and the law. A second aim of the Chapter is to provide a broad sketch of the main features of the Colombian transitional legal framework. The Chapter is then organized as follows: Section 1.1 provides an account of the politics behind the transitional legal framework, from the time peace talks began in 2003 to the first official "confessions" at the end of 2006. Section 1.2 discusses the main features of the framework and reviews some of the criticisms it has received. Section 1.3 provides a brief assessment of the overall process and concludes.

[*] I would like to thank Jon Elster and Maria Paula Saffon for useful comments and suggestions.

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1.1. The Trajectory of the Legal Transitional Framework[1]

In July of 2003, representatives of the Colombian government and of the United Self-defence Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC) signed a ceasefire and demobilization agreement.[2] Aside from the ceasefire, the AUC agreed to gradually demobilize its troops, with full demobilization to be completed by the end of 2005, while the government agreed to set conditions for a peace agreement and to reintegrate the demobilized combatants into civil life. The paramilitary groups agreed to the ceasefire, to concentrate their leaders and the bulk of its troops in predefined areas, and to a massive demobilization process – which included turning in all weapons – prior to any clear arrangement as to the concrete conditions for their transition into civil life. No document produced at the early stages of the process mentioned any type of accountability measure to be implemented in an eventual reintegration process, nor were the specific terms of a peace accord anticipated. Probably the paramilitary chiefs' sympathy for president Uribe and his policy of "democratic security" made them think that the terms of the transition would be mild; it is not unlikely that informal agreements between government officials and paramilitary leaders were made to this effect prior to the formal peace negotiations.[3] The government, on the other hand, carried on the process

[1] Note that the term "legal transitional framework" will be used in a positivistic vein, simply to denote the legal measures that have *in fact* been enacted in pursuit of the demobilization of non-State armed actors. The term should not be read as implying that the legal transitional framework satisfies basic principles of transitional *justice*, or that a deep regime transition is in fact taking place in Colombia at this time. These are contentious claims in the current Colombian public debate, as the discussion in Section 1.3. will show.

[2] The AUC is an umbrella organization created to unite paramilitary fronts that acted more or less autonomously; for a thorough study of paramilitarism in Colombia see Mauricio Romero, *Paramilitares y Autodefensas, 1982-2003*, Editorial Planeta Colombiana, Bogotá, 2003. The laconic text of the agreement, which came to be known as the Agreement of Santa Fe de Ralito, may be found at: http://www.c-r.org/our-work/accord/colombia/key-texts.php

[3] As Uprimny and Saffon suggest in their contribution to this volume. If there was an informal agreement, a key question is why the paramilitaries would think that the government would deliver its side of the bargain; Monika Nalepa's Chapter offers a possible answer. Another key question is whether the government *could*

without a consolidated legal framework, and was forced several times, following domestic and international pressures, to make the conditions of AUC's demobilization tougher than initially intended. The process was far from steady. When conditions were readjusted and made tougher, paramilitary chiefs threatened to quit the process and resume war, which predictably produced widespread public fear.

The current transitional legal framework is the direct product of three actors, which entered the process at critical moments: the executive, Congress, and the Constitutional Court. Indirectly, the legal framework resulted from the pulls and pushes of different political forces, particularly the AUC chief commanders, national NGOs and organizations of victims, international official organs such as the United Nations High Commissioner of Human Rights, and international NGOs such as Human Rights Watch.[4] It should be no surprise that the law as it stands is not fully satisfactory to any of the involved parties. A central element of contention throughout the process has been the level and types of accountability measures that the transition must include. On the one hand, the government's peace negotiators have in general been oriented to assuring the integrity of the process, their central consideration being *peace in the short run*, particularly that the demobilizations end in a well-functioning reintegration process, that arms are laid down and crime and violence are kept low. On the other hand, the Colombian high courts, some members of Congress, NGOs acting on behalf of victims, and some influential international actors have been the main forces propelling demands for *justice*

indeed deliver its promise; the roles of the Colombian Constitutional Court and of the US in the process, to be discussed below, provide reasons to think the answer is negative.

[4] The UN High Commissioner for Human Rights (UNHCHR) has followed the peace process closely. Its 2006 and 2007 country reports have lengthy passages on the process and its laws; see, e.g., UNHCHR, 2005 Report (E/CN.4/2006/9), Annex V, §§16-26; UNHCHR, 2006 Report (A/HRC/4/48), §§ 28-32. See also the manifold documents and legal studies issued by the UNHCHR office in Colombia, in particular "Considerationes sobre la Ley de Justicia y Paz", Bogotá, 2005, available at: http://www.hchr.org.co/publico/comunicados/2005/cp0535.pdf. Human Rights Watch makes constant reports on Colombia; for an overview, see Human Rights Watch, "Some and Mirrors. Colombia's Demobilization of Paramilitary Groups" (2005).

and long-term peace, often in direct opposition to the government. Overall, with time the transitional framework moved away from an emphasis on peace and very little accountability to incorporate larger requirements of truth, justice and reparations (at least *de jure*; it is still to be seen whether the levels of accountability *de facto* achieved at the end of the process will be close to what the main transitional law (JPL) requires).

The government took the first steps in the elaboration of the transitional legal framework. In December of 2002, Congress approved Law 782, which president Uribe crafted with the specific purpose of starting negotiations with the AUC. The law, which is still valid, empowers the government to carry on peace talks, specifies conditions and benefits for demobilized members of armed groups, and gives amnesty for so-called political crimes – sedition and rebellion – and for crimes linked to these. However, the law does not give amnesty for serious crimes such as massacre, forced disappearances, terrorism, kidnapping, and murders *hors de combat*.

In order to deal with serious crimes, which amount to serious violations of International Human Rights Law and International Humanitarian Law, the government initially introduced a bill in Congress in August of 2003 – the so-called "Alternative Penalties Law" – which aimed to fill the gaps left by Law 782. The Alternative Penalties Law was made with virtually no consultation to members of civil society, congressmen, or international actors, and was extremely lenient: it did not condition legal benefits on full and truthful confessions, it did not specify mechanisms for reparation to victims, and the alternative penalties it contemplated were in fact not punitive at all.[5] As could be expected, the proposal was received badly by the public, particularly by domestic and international NGOs, by the Colombian Attorney General and by some members of Congress, and was withdrawn by the gov-

[5] The draft bill (Art. 11) listed as alternative penalties exclusion from public office, prohibition of holding and/or owning weapons, exclusion from certain regions of the country, and prohibition to approach victims. There was no word about prison sentences. For more on the bill see Catalina Díaz, "Colombia's Bid for Justice and Peace", in *International conference Building a Future on Peace and Justice*, Nuremberg, 2007, p. 16.

ernment. Under the leadership of Senator Rafael Pardo a more plural deliberative process followed, with congressional hearings and regional audiences open to a wide public. At the end of this consultation process, two main bills were competing in Congress, one a revised version of the government bill and the other a more stringent bill introduced by Senator Pardo and a few other members of Congress.[6] The bills were debated from April of 2004 onwards; the draft version of the JPL was officially presented by government to Congress on February of 2005 and became law in July of that year.

While deliberation was ongoing in Congress, the demobilization process saw little progress. In 2003, two groups and a total of 1,036 combatants demobilized, the most noted of which was the *Cacique Nutibara* bloc, demobilized in November of 2003 in the city of Medellín.[7] One year after the signature of the formal demobilization agreement, in July of 2004, ten representative paramilitary leaders finally gathered in a "concentration zone" where peace negotiations proper were to take place. Once concentrated, a chronogram for demobilizations was drawn and demobilizations resumed at the end of 2004. From November of 2004 to February of 2005 almost 4,000 AUC members demobilized. Many among the demobilized troops, particularly its leaders, had ordered or committed precisely the types of serious crimes about which there was legal uncertainty. Thus, extremely important (arguably irreversible) steps in the demobilization process were taken under complete legal uncertainty, with no terms of individual accountability and liability specified for serious crimes that were often committed.

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6 Pardo gives a summary of the draft law he proposed – which turns out to be strikingly similar to JPL after the Colombian Constitutional Court's revisions – in his contribution to Cynthia Arnson, *The Peace Process in Colombia with the Autodefensas Unidas De Colombia–Auc*, Woodrow Wilson International Center for Scholars, Washington D.C., 2005, p. 18.

7 All data on dates and numbers of demobilized troops come from the consolidated table in MAPP/OEA, 8th Report, Annex A. MAPP/OEA reports are available at http://www.mapp-oea.org. More detailed information on demobilizations is available from the Colombian High Commissioner of Peace, at: http://www.altocomisionadoparalapaz.gov.co/web/index.asp (last accessed August 2007).

As a matter of fact, such decisive steps taken in spite of legal uncertainty has been a distinctive mark of the transitional process. It has mostly paid off for the government – and arguably for the AUC – as it has been a way of putting pressure on Congress and other State organs to follow suit, with some amount of arm-twisting involved. In February of 2005, with about 5,000 paramilitary troops commencing their reintegration process and over 10,000 in the brink of demobilization, the AUC decided to put the process on hold and wait for Congress's approval of the JPL.[8] Similarly, by the end of 2005, when the Constitutional Court was studying demands against the JPL, there were already about 14,000 demobilized troops, the legal situation of many of which depended decisively on the Court's pronouncement. Paramilitary leaders had at the time full access to the public media and hence to the opportunity of making public threats, which they effectively did.[9]

As the trajectory so far suggests, the main locus of (dis)agreement in the peace negotiations has been the law. Instead of a finalized and duly signed peace accord, the process produced the Justice and Peace Law. Even though the AUC chiefs had earlier rejected the milder Law of Alternative Penalty as overly strict and unduly blind to their political status, when the JPL was passed in Congress prominent paramilitary chief Salvatore Mancuso publicly stated that the Law

8 See MAPP/OEA, 5th report, §4.

9 In this regard, it is illustrative how the Constitutional Court's public announcement of its ruling on JPL somehow came two months before the release of the official written sentence, and was made in two steps. In the first step it was said that in cases for which a sentence had already been made (typically *in absentia*), benefits of JPL would not apply. In the second official pronouncement, which was delivered as a clarification, it was said that past sentences would be put on hold and reactivated only if the requirements to obtain the JPL benefits were not satisfied (see Section 1.2.2. below for details). There was the rumour that there had been some recanting by the Court due to political pressures, as the process was indeed very near collapse after the first pronouncement. Be this as it may, the two pronouncements, which were made by different Court Justices, certainly showed deep fissures inside the Court. For the Court's president's version, see Maria Isabel Rueda, "¿Es cierto que la corte 'reculó' con el fallo de la Ley de Justicia y Paz?" ["Is it true that the Court recanted in the JPL sentence?"], *Revista Semana*, 27 May 2006.

was in fact "sufficient" for them.[10] Indeed, later on the paramilitary chiefs claimed that the original version of the JPL, prior to the Constitutional Court's revisions, was a closed deal between the government and the AUC, and in this vein AUC leaders declared that changes to the original Law were a breach of promise. The truth is that the executive was in no position to deliver the Law as a peace accord, and moreover, given the foreseeable international and domestic political reactions, probably did not intend to do so either. The Colombian Constitution empowers the Constitutional Court to review all legislation upon demands of unconstitutionality, and, as could be expected, several demands were filed against the JPL. The Court reviewed and pronounced its main verdict on the JPL on June of 2006, changing some key provisions and making it tougher overall (see Section 1.2 below for details).

The main Constitutional Court's ruling on the JPL – C-370 of 2006 – marked a key moment in the peace process and unleashed a deep crisis. The Court stated that the broad purpose behind the JPL was valid, but added that the Law had to be more stringent in order to comply with constitutional and international legal standards. In the Court's view the balance between peace and justice sought by the Law was not in line with the Colombian Constitution. In consequence, the Court took over the task of re-balancing the Law in a way that would not affect excessively the rights and interest of victims, and that would protect sufficiently the broad values of peace and justice.[11] The Court struck down some crucial passages in the Law, making it overall tougher. Among the changes that worried paramilitary chiefs were the following: time spent in a "concentration zone" would not count as part of the penalty; all assets (not only illegally obtained assets) should

[10] Carmen Andrea Becerra, "Crónica de una ley hecha a la medida" ["Chronicle of a tailored law"], *Le Monde Diplomatique, Edición Colombia*, October 2006. The paramilitaries publicly declared early in the process that they wanted a high profile political negotiation, not a mere plea bargaining, and, moreover, that they would not spend one single day in jail ("Comunicado De Las Autodefensas Sobre El Proyecto De Alternatividad Penal", *Revista Semana*, 11 April 2004). At the end, the political pressures for a regime of reduced penalties was overwhelming; here the shadow of the International Criminal Court but especially the US played a decisive role.

[11] For details on the Court's balancing act, see C-370, §5.

be available for reparations; a false confession is sufficient reason to lose all JPL benefits; paramilitary groups and crimes linked to paramilitary activities have no political status. These had all been contentious elements at the time the JPL bill was debated publicly and in Congress.[12]

In August of 2006, shortly after the Court's pronouncement, president Uribe gave the order to put all paramilitary chiefs under temporary custody in a small town called La Ceja. The order was presented publicly as a disciplinary measure in reaction to the misbehaviour of some paramilitary chiefs which had caused much public outrage, but was in all likelihood also linked to the Court's ruling. Most chiefs complied with Uribe's order, but a few decided to leave the process at that point. Foremost among these was Vicente Castaño, who by all accounts was assassinated a few months later, allegedly by his own bodyguards. The government's assurance to the paramilitaries that ways would be found around an eventual unfavourable Court ruling were not to the complete satisfaction of all paramilitary commanders. After his escape Castaño declared that the government had broken the peace agreement, and that he would turn himself back in only if the government stuck to the original accord, which, he claimed, was more lenient and included a no-extradition-to-the-US proviso.[13] Castaño's claims are hard to assess because the executive kept the terms of the original agreements undisclosed, but at any rate, even though the process was at the brink of collapse shortly after the Court pronouncement, at the end it did not collapse. Several reasons may explain this: the paramilitaries may have felt they already had invested too much in the process and they may have consequently updated their expectations and come to see the strengthened Law as acceptable; or maybe they

[12] For a rich sample of these deliberations see UNHCHR, 2005 Report (E/CN.4/2006/9), Annex V, §§16-26, and Rodrigo Uprimny and Maria Paula Saffon, "La Ley de 'Justicia y Paz': ¿Una Garantía de Justicia y de Paz y de no Repetición de las Atrocidades?" ["The Law of 'Justice and Peace': Guarantee of Justice, Peace and no Repetition of Atrocities?"], in Rodrigo Uprimny *et al.* (eds.), *¿Justicia Transicional Sin Transición? Verdad, Justicia Y Reparación Para Colombia* [*Transitional Justice without Transition? Truth, Justice and Reparation for Colombia*], DeJusticia, Bogotá, 2006.

[13] "La Historia Secreta" ["The Secret Story"], *Revista Semana*, 4 November 2006.

just believed that the government would somehow manage to remove the Law's new teeth in its application (for some teeth removals, see Section 1.2.2. below).

One thing the Castaño affair shows clearly is that extradition to the US has been the most decisive international legal instrument throughout the whole process. As is well known, paramilitary groups have been implicated to varying degrees in the production and shipment of illicit drugs to the US, and during negotiations several of their most prominent chiefs had pending requests of extradition to the US for charges of drug trafficking.[14] Paramilitary chiefs really feared the normal extradition path to the US (normal as opposed to the special route of making deals *ex ante* with US authorities, which drug-dealers sometimes do[15]), and president Uribe typically managed crises in the process very effectively by threatening to lift the suspension of extradition orders. The main reason why extradition could be used to such good effect is that, according to the Colombia Constitution, the president has discretion to decide upon duly petitioned cases of extradi-

[14] According to a 2006 estimate by the International Crisis Group (ICG), fifteen top members of the AUC had extradition orders pending. See ICG, "Tougher Challenges Ahead for Colombia's Uribe", in *Crisis Group Latin American Briefing*, International Crisis Group, Bogotá/Brussels, 2006, p. 6.

[15] See "Las Autodefensas Queremos Negociar Con Los Gringos" ["The Self-defence Groups want to Negotiate with the *Gringos*"], *Revista Semana*, 7 October 2006. Two prominent Colombian journalists have shown that plea-bargains between US officials and drug traffickers have not been rare. The bargains are made behind the back of Colombian authorities and thus sidestep extradition procedures. To many drug traffickers this path has been attractive and some paramilitary commanders have attempted to take it. However, the human rights record of paramilitary groups plus the labelling of AUC as a terrorist organization by the US government in 2000 seems to have foreclosed this alternative path. See Edgar Téllez and Jorge Lesmes, *Pacto En La Sombra: Los Tratos Secretos De Estados Unidos Con El Narcotráfico* [*Pact under Shadows: The Secret Deals of the US with Narcotraffic*], 1. ed., *Colección Premio De Periodismo*, Planeta, Bogotá, 2006.

tion.[16] Extraditions can be made for all and only conducts that are criminal in Colombia, except for so-called political crimes (Article 35).

Importantly, the principle of double jeopardy or *non bis in idem* normally applies to crimes for which extradition is requested, and therefore if a case is taken by or decided in the Colombian penal system, it can no longer be the basis for an extradition request. On this basis, paramilitary chiefs made several attempts to close the possibility of extradition to the US. One illustrative attempt made was to include in JPL an article that gave the formation of self-defence groups a political status. This would have "connected" – in a technical legal sense – their drug-related crimes to a political crime, and in this way made drug crimes, through a shady legal argument, extradition-proof.[17] If it is granted that drug trafficking is connected to the formation of self-defence groups – e.g., in a means-to-end relationship – then a key proviso in Law 782 that gives pardons for political crimes and "connected" (non-atrocious) crimes would apply.[18] As per the double jeopardy constraint, drug crimes tried (but pardoned) in Colombia could not be tried abroad. There was no occasion to see the US government's reaction had this attempt succeeded because the Constitutional Court struck down the political status article of JPL and in this way gave the strategy a fatal blow. Nonetheless, alternative strategies of avoidance may still be available. For example, it is currently unclear whether the JPL framework can be applied to *all* cases that do not fall under Law

[16] The Supreme Court has the faculty to decide whether a petition is duly made. Recent Colombian jurisprudence on extradition, on which my analysis is based, may be found in the Constitutional Court sentence SU110 of 2002.

[17] The shady argument – or rather one of them – boils down to the claim that paramilitary groups engaged in drug trafficking *in order to* surpass the military power of the guerrillas, which were themselves, it should be noted, involved in the drug business. Note that, according to the definition in the Colombian Code of Criminal Procedure, for crimes A and B, one way in which A is connected to B is if A *is a means to* B.

[18] According to Maria Paula Saffon (personal communication), even though the law as it stands is silent as to whether drug-trafficking can indeed be considered as connected to a political crime, there was significant resistance in Congress to have it treated as such. But the silence of the law in this regard clearly leaves open the possibility of making the connection.

782 or only to atrocious crimes and serious human rights violations (the JPL is surprisingly silent on this regard). It is unclear, then, whether cases of drug-trafficking may or may not enter the JPL framework.[19]

In any case, politically speaking it is clear that the Colombian government would never issue a blanket "extradition amnesty", as some paramilitary chiefs requested at some point. The reason is not only that this would seriously compromise relationships with the US, but also that the government would have lost its most powerful stick in the process. In this sense, resistance by the US has been very useful to the government: it has allowed president Uribe to tie his hands profitably. The stick, moreover, has been instrumental not only to keep chiefs at bay during the negotiation process but also to discipline them after the process consolidated, when they were in jail waiting for their cases to be processed. Events showed all too clearly Uribe's willingness to actually *use* the stick when a handful of top paramilitary chiefs were indeed extradited to the US in May of 2008. The main reason for the extradition, Colombian officials have said, is that these paramilitary chiefs continued to carry on illicit drug business from jail.[20] It is still to be seen whether the extradition will have a discouraging effect on all

[19] The issue seems to hinge mainly on the interpretation of JPL Art. 2 which reads: "This law regulates matters of investigation, prosecution, punishment, and judicial benefits with respect to those persons linked to illegal armed groups as perpetrators or participants in criminal acts committed *during and on occasion of* their membership in those groups, who have decided to demobilize and contribute decisively to national reconciliation" (emphasis added). Nothing in the Law precludes the inclusion of drug trafficking as one of the criminal acts committed "during and on occasion" of membership.

[20] In a cataclysmic move by Uribe, top paramilitary chiefs Salvatore Mancuso, Jorge 40, Don Berna and Hernán Giraldo were all sent, along with ten others, to the US – all on the very same day and on board of the very same plane. Perhaps ironically, victims organizations opposed the extradition. They feared that once the paramilitaries were under custody of a US court, the process of truth-telling, reparations and punishment would not go on. It is still to be seen (October 2008) whether the US judiciary will somehow cooperate with Colombian authorities so that the process can continue. There is indeed something perverse in the public message sent if these men were tried for drug trafficking instead of serious violations of Human Rights.

relevant others (they may be already too entangled in the drug business to be able to leave it at will), and also whether or how it will hamper the transitional justice process.

One may wonder whether indictments from the International Criminal Court (ICC) could not eventually have a similar political and strategic effect as US extradition requests, all the differences between the two jurisdictions notwithstanding. My overall impression is that the shadow of the ICC has so far been relatively minor in the Colombian process. The late paramilitary commander Carlos Castaño – Vicente's brother, at some point the leading man behind the AUC and a strong early advocate of peace negotiations – seems to have been acutely aware and fearful of transfers to The Hague, but his case is exceptional.[21] Even though paramilitary commanders are certainly aware of the risk of transfer to the ICC, and even though this perception possibly had some role in their change of mind about spending time in jail, that risk has been overshadowed by the formalized and imminent extradition requests from the US government.[22] The US has unsurpassed means to monitor the paramilitaries' conduct, and has a strong expectation that they spend some time in prison. On the other hand, the perceived remoteness of the ICC may have to do in part with the fact that, when ratifying the Rome Statute in 2002, Colombia appealed to the transitional provision in article 124, which means that ICC jurisdiction over war crimes will begin only at the end of 2009. So things are likely to be different in future processes, for example with the FARC or ELN guerrillas.

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[21] See "Habla Vicente Castaño" ["Vicente Castaño speaks"], *Revista Semana*, 5 June 2005.

[22] Cf. Díaz, "Colombia's Bid for Justice and Peace", pp. 7, 14. Díaz's illuminating analysis of the peace process tends to overplay, I think, the role of transfers to the ICC. The ICC did make a brief intervention at an early stage of the peace process, in April of 2005, when it sent an official letter to the Colombian government to the effect that the Court was aware and worried about serious violations of human rights in Colombia (see "El brazo largo de la justicia", *Revista Semana*, 3 April 2005.) Admittedly the letter arrived at a critical moment, when the JPL draft was discussed in Congress, but, as far as public appearances go, the ICC has been absent throughout the rest of the process.

1.2. Accountability in the Legal Transitional Framework

The Justice and Peace Law is a transitional justice law and as such seeks to strike a balance between the imperatives of peace and the imperatives of justice. The purpose of the law is, as article 1 says, "to facilitate the processes of peace and individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims' rights to truth, justice, and reparation".[23] Thus, the Law states the victims' rights to justice, truth, and reparation as its three main substantive axes, which are supposed to operate as constrains in the process of reincorporation into civil life of former combatants. These axes aim to capture widely accepted standards of international law on the rights of victims of armed conflict. However, as critics of the Law have repeatedly observed, the important issue is not what the Law aims or declares to aim but what concrete mechanisms it puts into place for the satisfaction of these rights.[24] The following discussion of such concrete mechanisms will be divided into two subsections, substance and procedure. To the latter belong issues such as the terms of prosecutorial investigation and the special trial procedures and to the former the special regime of penalties and reparations.[25]

Before considering issues of substance and procedure, a few words about the Law's place in the larger legal transitional framework are in order. Currently, legal support for demobilizations and for reincorporation into civil life of members of illegal armed groups comes from two main sources, Law 782 of 2002 and the JPL. Aside from these laws, the jurisprudence of the Constitutional Court (especially,

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[23] I quote from the English translation of the JPL made by the Colombian Commission of Jurists, on file with the author.

[24] See Uprimny and Saffon, "La ley de 'justicia y paz': ¿una garantía de justicia y de paz y de no repetición de las atrocidades?" in Rodrigo Uprimny *et al.* (eds.), *¿Justicia Transicional Sin Transición? Verdad, Justicia Y Reparación Para Colombia*, Bogotá, Dejusticia, 2006.

[25] My discussion does not intend to be exhaustive but rather to highlight central accountability mechanisms in the Law, and also to discuss some of the main criticisms it has received. For an excellent and thorough juridical analysis of the Law, see Florian Huber, *Ley de Justicia y Paz: Desafíos y Temas de Debate*, FESCOL, Bogotá, 2007.

but not exclusively, the Court's ruling C-370 of 2006), and a series of governmental decrees are the building blocks of the legal transitional framework. Nominally at least, the current legal transitional framework applies to members of any type of armed group,[26] be it a leftist guerrilla organization or a rightist self-defence group.[27] Recourse to the laws may be had individually or collectively, that is, the laws and decrees do not apply exclusively to members of groups that have demobilized as a whole but also provide incentives to favour individual defections from active armed groups.[28]

As pointed out in the previous Section, Law 782 of 2002 creates the legal space for conducting peace talks and demobilizations. It also offers amnesties to former combatants who have been sentenced or

[26] The definition of "armed group" in Law 782 is very broad. Art. 3(1) gives two defining conditions: to have a responsible command structure that effectively exercises control over a territory, and to be able to carry "sustained and planned" military operations. Note that the Law makes no explicit mention to wearing uniforms or carrying weapons visibly, although it does say that such groups ought to conform to the norms of international humanitarian law.

[27] I say that the legal framework is open to all groups "at least nominally" because the design of Law 782 was tied to the project of having peace talks with the paramilitary groups and, more importantly, because the JPL was the result, to a large extent, of the particular vicissitudes of the peace negotiations with the paramilitaries in 2003 and 2004, as the previous Section has shown. For an analysis of the extent to which the JPL was tailored for the AUC, see Leopoldo Múnera Ruiz, "Procesos de paz con actores armados ilegales y pro-sistémicos", *Revista Pensamiento Jurídico* 17 (2006), pp. 68-69.

[28] This has been deemed a flaw of the JPL on the grounds that by allowing individual defections instead of demanding collective demobilizations, the law "ensures that the power structures of illegal armed groups keep functioning" (Rodolfo Arango, "La Ley de Justicia y Paz en perspectiva iusfilosófica", *Revista Pensamiento Jurídico* 17 (2006), 39; see also UNHCHR, "Considerationes sobre la Ley de Justicia y Paz", Bogotá, 2005, §1; and CCJ, "Without Peace and without Justice", Colombian Commission of Jurists, Bogotá, 2005, § 2.1. As it stands, however, the argument is flawed, as it is clear that giving incentives for defection is a way of undermining the well-functioning and existence of armed groups. For example, according to recent (June 2008) estimates by the Colombian Commissioner for DDR, Frank Pearl, over 8,000 guerrilla fighters have demobilized through this channel, which has without doubt contributed to the weakening of their groups.

charged of so-called political crimes such as rebellion, sedition, rioting, and crimes connected with these. However, it does not – and could not, given the jurisprudence of the Constitutional Court – give amnesty for serious violations of human rights, e.g., for kidnapping, disappearances and massacres committed in and outside combat. The JPL takes care of the cases for which Law 782 does not provide amnesty.[29] Thus, the JPL creates a special regime of criminal and civil justice to deal with gross human rights violations committed by members of illegal armed groups. Of the total 31,689 AUC members who officially demobilized, only 2,812 (less than 9%) appear in the government's list of candidates for JPL benefits,[30] which is not to say that this ratio reflects the ratio of serious to less-serious crimes committed, for those who did not apply to JPL may have opted for a sort of gamble, hoping that their serious crimes will not be discovered. If serious crimes are eventually discovered (which is not easy given the resources of the National Prosecutor's Office and the number of cases), then their perpetrators will be processed under the harsher regime of ordinary criminal justice; this is the strategic core of the JPL. It should also be noted that law 782 does not consider any reparative measure. Claims of reparation are decided either on the basis of the JPL or of ordinary Colombian Civil Law. The JPL deals with reparations for serious violations of Human Rights and Humanitarian Law, ordinary law deals with ordinary torts.

1.2.1. Procedure

Candidates to the benefits of the JPL must be included in an official list that the government submits to the National Prosecutor. The JPL created a special unit of the Prosecutor's Office — the "Justice and Peace Prosecutor's Unit", which is exclusively in charge of the JPL cases. For those included in the list, the first step is to render a "free version" before a special prosecutor. In free versions, a former combatant must "describe the circumstances of time, manner, and place in

[29] Note that, as was said above, it is not wholly clear whether the JPL can take care of *all* such cases, particularly of drug-trafficking, which is not pardoned by Law 782 either.

[30] "En qué va la Ley" No. 3, Fundación Ideas para la Paz, Bogotá, 2007.

which they have participated in the criminal acts committed on occasion of their membership" to an illegal armed group (JPL, Article 17). Goods that can be used for reparations must also be declared at the free version. Each free version is announced publicly twenty days prior so that those having a claim of reparation against the alleged perpetrator or a personal stake in the process can be present. Victims present at the free audiences can suggest questions to the prosecutor and provide information relevant for the eventual indictment. Free versions, however, are not open to the public; it is necessary to be a *certified victim* to be present.

Once a free version has been rendered, the prosecutor begins the criminal investigation proper, which includes the verification of the truthfulness and completeness of the perpetrator's confession. At the end of the investigation, charges are made before a Justice and Peace judge. At this point, victims may officially file claims of reparation against the accused. If the accused accepts the charges (that is, pleads guilty), the judge pronounces a sentence; if the charges are not accepted, the case exits the JPL framework and goes to the ordinary criminal system. After charges are accepted, the case splits into its punitive and reparative components. The perpetrator may dispute particular claims of reparation and conciliate with a victim on reparative arrangements. Sentencing is in the hands of the Justice and Peace judge and may be appealed before the Supreme Court.

The Constitutional Court made two key revisions to the JPL procedures. First, in the original version the prosecutor had an extremely tight deadline to verify the free version; the Court ruled that the time given should be sufficient to carry out a full prosecutorial investigation. Second, the Court widened the scope of the status of victim and in this way made free versions and individualized reparations in principle more accessible.

1.2.2. Substance

The main benefit offered by the JPL is a reduced sentence, with the reduction conditional on the satisfaction of certain requirements (JPL may be described in a nutshell as a *law of conditional reduced penalties*). Under the regime of so-called "alternative penalties" (JPL, Arts.

29-31), sentences cannot exceed eight years or be less than five years. To have a sense of the reduction's size, note that under the Colombian penal code the sentence for aggravated homicide – of which a majority of applicants for the JPL benefits would probably be guilty – is fifty years in prison, and sentences for other crimes may be added to up to sixty years, which is the permissible maximum. Procedurally, a judge decides at the end of the JPL process what the penalty is according to the ordinary penal code, and then grants the benefit of a reduced sentence if applicable. The reduction is conditional throughout the sentence period and also over a "proof period" at the end of the sentence period; during this time a failure to satisfy the Law's requirements activates the longer ordinary sentence.[31] If all requirements are met after the period in question, the record of the beneficiary is cleared and he goes free.

The requirements to enjoy the JPL benefits are of two classes, access requirements and keeping requirements.[32] Satisfaction of the *access* requirements makes someone a suitable candidate for having the benefits (JPL, Arts. 10, 11); satisfaction of the *keeping* requirements is necessary to reach the last stage in the process, when the criminal record is cleared and the person goes free (JPL, Article 29). Among the main access requirements for combatants demobilizing as a group are that his group is not organized for the sake of drug trafficking, that the group is dissolved (which presumably includes handing in weapons, although the Law is not explicit), that assets sufficient for reparations are handed in to the state (in particular all illegally obtained assets), and that all kidnapped persons are freed.[33] For combatants demobilizing individually, the second requirement above is replaced with

[31] The Constitutional Court intervened to assure that *all* previous sentences were added to the (latent) ordinary penalty (see C-370, § 6.2.1.6). For a gloss of the intricate jurisprudential issues involved see Uprimny et al. (eds.), *¿Justicia Transicional Sin Transición?*, pp. 208-15.

[32] The terms "access"' and "keeping" are not in the Law.

[33] In keeping with the imperative to obtain vital information, the Court also made stricter the access requirements. To the original access requirement of liberating kidnapped persons, it added the requirement of disclosing all information about disappeared persons (C-370, §§ 6.2.2.2.7–11).

the requirement that they provide tactically useful information about their group.

Initially, keeping requirements were left vague in the Law. A key effect of the Constitutional Court's ruling was to define them more precisely and to make them more demanding.[34] As the Law originally stood, keeping requirements consisted mainly in a demobilized person agreeing to "commit himself or herself to contribute to his or her re-socialization through work, study, or teaching during the time that he or she is deprived of liberty, and to promote activities geared to the demobilization of the illegal armed group of which he or she was a member" (JPL, Article 29). The Court ruled that, in addition to this, a JPL beneficiary had to make a full and truthful confession in his free version before the prosecutor, and also that the beneficiary had to stay away from any form of criminal conduct. In the original version of the Law, discovery of undisclosed criminal acts would at most increase the alternative penalty by 20% (JPL, Article 25); the Court held that failure to tell the truth on past crimes was in effect a keeping requirement, that is, it activates the ordinary penalty (which may amount to about a 1,000% increase).[35] In the original version of the JPL, the requirement of non-recidivism applied only to the conducts for which the beneficiary had been condemned; the Court ruled that it should cover all criminal conducts.

One thing that the Constitutional Court did not do was to insist on the imperative of making retribution proportional to the gravity of crimes; indeed, it validated the mild regime of alternative penalties in

[34] For understanding the details of the Constitutional Court's ruling in this respect (and others as well), I have relied on Margarita Zea, "Marco Jurisprudencial de Aplicación e Interpretación de la Ley 975 De 2005", Observatorio Verdad, Justicia y Reparación, ILSA, 2006.

[35] The government may have weakened this requirement in the regulatory decree 3391 of 2006. According to the decree (Art. 12), benefits are lost only if the undisclosed crimes are verified by a judicial sentence *finalized before the end of the "proof period"*. Given that finalizing a judicial sentence typically takes a long time, the requirement of truthfulness may have little bite in practice (see Múnera Ruiz, "Procesos de Paz", p. 90). For more on decree 3391, see "Boletín No. 4: Serie sobre los Derechos de las Víctimas y la Aplicación de la Ley 975", Colombian Commission of Jurists, Bogotá, 2006.

the JPL, in spite of the gravity of the crimes to which the Law applies.[36] The possible effects of such soft regime of penalties may be particularly worrisome given the wave of former low- and middle-level combatants who are at large and could potentially rise in the emerging structure of new illegal armed groups or criminal organizations; it is clear that they should be the primary targets of a strong deterring message. However, the Court is not alone in thinking that a regime of reduced sentences is legitimate. Several voices in public debates have defended some form of amnesties, if not blanket amnesties then some sort of "accountability pardons".[37]

In regard to the way sentences could be served, the Court struck down a provision in the Law according to which the time spent in provisional demobilization areas could be counted as sentence time (up to 18 months). The argument was that conditions in such areas did not fit the character of a punitive seclusion centre. The Court further stated, more generally, that the places where the alternative penalty was to be served had to satisfy standard criteria of the Colombian penitentiary system. However, the government has seemed inclined to water down this element of the Court's decision. One of its regulatory decrees has stated, first, that seclusion centres may hold "restorative programs" that contribute to national reconciliation (Decree 3391, Arts. 13, 19), which may in effect mean that places holding so-called restorative programs – for example industrial plantations (that is, farms) or "voca-

[36] Múnera Ruiz, "Procesos de Paz", pp. 80-82.

[37] Ivan Orozco has made by far the most sophisticated defence of amnesty. Simplifying much, in Orozco's view the violence in Colombia has been horizontal, i.e., all sides in the conflict have been equally violent, and so there is ultimately no legitimate authority to punish; as everyone has been to some degree involved in violence, Orozco says, the focus should be on reconstruction rather than retribution (Iván Orozco Abad, *Sobre Los Limites De La Conciencia Humanitaria. Dilemas de la Paz y la Justicia en America Latina*, Universidad de los Andes, CESO and Editorial Temis, Bogotá, 2005. Uprimny has made a moderate defence of pardons. For him, pardons are valid only if they are clearly necessary for future peace and made on a case-by-case basis. Pardons should not be given in cases of serious wrongdoing, when there is high responsibility for atrocities, and if they do not otherwise produce dividends for truth elucidation and justice (Uprimny et al. (eds), *¿Justicia Transicional Sin Transición?*, pp. 28-29).

tional training" programmes – could count as prisons for former combatants. Second, the government's decree holds, in what appears to be downright contempt of the Court, that the unconstitutionality regarding time spent in "concentration areas" does not apply retroactively (decree 3391, article 20), which seems to mean that such time will after all count towards the sentence.[38]

Turning now to reparations, the JPL follows standard doctrine of international human rights law by holding that reparations can be satisfied in several ways: it may be restitution of assets, payment of compensation, access to rehabilitation procedures, and guarantees that the crimes will not be repeated (JPL, Article 8).[39] The primary duty to repair falls first on the shoulders of the perpetrators and second on the State. The Law institutes a "reparation fund" to which perpetrators, the State, and international donors are expected to contribute. The National Commission of Reparation and Reconciliation (CNRR) – also a

[38] It is hard to see where such use of the non-retroactivity principle could stop, for all changes introduced by the Court took place after the paramilitaries submitted to the terms in the original version of the Law. On the jurisprudential issues surrounding the use of the non-retroactivity principle in this and similar situations, see Constitutional Justice Beltrán's dissenting opinion in C-370, §5.2. According to Beltrán, retroactivity is rather a non-issue because at the time of the Court's ruling no JPL process had officially started. While it may seem far-fetched to claim that JPL was enacted law before any processes had started, the National Commission of Reparation and Reconciliation, for example, was indeed created prior to the Court's ruling. In this sense at least, there is little doubt that the Law was indeed enacted prior to the Court's ruling (I owe this point to Maria Saffon). The legal issues regarding the uses and abuses of the non-retroactivity principle are far beyond this footnote's scope; for a recount and more detailed analysis, see "Siguiendo el Conflicto: Hechos y Análisis de la Semana" No. 45, Fundación Ideas para la Paz, Bogotá, 2006.

[39] The jurisprudence of the Inter-American Court of Human Rights has been particularly relevant in the Colombian context, as well as the expert reports submitted to, and the resolutions issued by, the United Nations Commission on Human Rights (after a long process of discussion and negotiation, the expert reports by Theo van Boven and M. Cherif Bassiouni eventually led to the Commission's Resolution 2005/35 of 19 April 2005, stating the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law").

creature of the JPL – has issued general criteria for the judicial use of the reparation funds, whose allocation is in the hands of the Justice and Peace judges.[40] Further criteria from the CNRR for non-judicial (that is, administrative) reparations are expected any time, which should address the likely fact that reparation claims will be massive.

The legal procedure by which reparations are to be made begins with a claim from a victim or by a prosecutor on his or (most likely) her behalf to the effect that a wrong has been committed for which a remedy is due. In making the claim, evidence has to be produced before a judge, who decides whether the claim can be incorporated into the alleged perpetrator's file (JPL, Article 23). This proceeding has been criticized for putting an excessive burden on the victims, as it assigns to them the main responsibility of instituting a claim of reparation. It is clear that by making victims the main source of reparative claims, there is an additional incentive for former combatants to force them into silence, more so given that the Law explicitly stipulates that a victim's failure to exercise his or her right to claim reparations does not affect in any way the perpetrator's enjoyment of benefits (JPL, Article 23(2)). Threats to the leaders of victims' organizations have indeed been common, and some have ended tragically.[41]

The Constitutional Court contributed significantly to make the reparations regime in the JPL stricter, and overall more favourable to victims and less to perpetrators. In the original version of the Law, it was required only that illegally obtained assets be handed in for reparations, and also handed only "if they are available" (original Article 11(5)), that is, if they had not been sold or somehow alienated. Similarly, in the original version of the JPL the State's "subsidiary responsibility to repair" (that is, its duty to repair when the wrongdoer is either not indentified or lacking the means to adequately repair) was conditional on the availability of funds; instead of making funds for

[40] The CNRR released its report on criteria of reparations in April 2007. It may be downloaded at http://www.cnrr.org.co/new/interior_otros/RCRPR.pdf.

[41] The murder of Mrs. Yolanda Izquierdo on January of 2007 has perhaps been the most noted one. See Human Rights Watch, "Colombia: Murders Undermine Credibility of Paramilitary Demobilization" (February 2007), available at http://hrw.org/english/docs/2007/02/01/colomb15246.htm.

reparation a priority in the national budget, the JPL downgraded their priority level. The Court ruled, first, that *all* assets of perpetrators should be used to discharge valid claims of reparation; moreover, perpetrators are obliged to hand in enough goods to cover not only the claims made against them individually, but also those made against their groups in cases in which it is impossible to assign individual responsibility (the Court thus instituted a regime of vicarious liability, or as its ruling says, a "solidarity duty" to repair). Second, the Court held that funds for reparation should be given priority in the national budget.

The government and the CNRR have repeatedly said that there should be no over-expectations about reparations, and that the main emphasis should be put on symbolic, collective and administratively allocated reparations, rather than individualized, monetary and litigation-based reparations. As is to be expected, such stance has been strongly criticized by victims groups, NGOs, and international actors. In the regulatory Decree 3390 (Article 17(1)), it is stated that a former combatant's setting up productive projects in violent (or formerly violent) areas that could benefit displaced people and other victims – alongside, of course, the former combatant themselves – can be counted as a reparative measure. The effect of this provision is that former combatants can more easily comply with the access requirement of repairing their victims, but the outcome is likely to be utterly perverse: victims end up employed in plantations run by former paramilitaries, and such employment counts as a form of reparation of the bosses to their employers! The distinction between compensation for work and reparation for a wrong is perversely dissolved.

1.3. Conclusions

The full legal transitional framework began running with its first free versions rendered on December of 2006. Commander Salvatore Mancuso was the first to appear. His declarations caused public stir because they involved high governmental officials – the current Minister of Defence, Francisco Santos, among others – and army officers. The information disclosed by Mancuso added to previous findings on the close links between national and especially regional politicians and

paramilitary groups, which have come to be termed by the Colombian media "the scandal of parapolitics".[42] Several free versions have been rendered after Mancuso's. Media reports, although under surveillance of the Prosecutor's Office, consistently followed the initial steps in the process. By January of 2007, there were over 100,000 cases before the Justice and Peace Prosecutor; up to the end of April, over 50,000 denunciations from victims had been filed.[43] It will probably take a good while before the first JPL sentence is pronounced.

To conclude this Chapter, I would like to address briefly a widespread and general objection to the transitional process, which I believe strikes at the heart of the legal measures taken. The objection is that even if the current process succeeds in meeting its own standards (which itself is far from an easy task), the outcome will not be satisfactory; the reason is that the transitional law as it stands does not cut deep enough. As senator Pardo said in 2005, "paramilitarism is a phenomenon that goes beyond its armed or military manifestation; it is about the accumulation of political and economic power. Those aspects have not been considered in the government's policy or in the peace process".[44] The transitional legal framework may indeed result in a formal dismantling of paramilitary structures, but it is far from clear that it will undercut their influence in communal organizations, local (and to an extent national) politics, governance and economy. The transition may well end up just legalizing ties and powers that originated in crime and coercion instead of dismantling them, and will in this way sanction highly anti-democratic and inequitable forms of political control.

For example, it is to be seen the extent to which the current regime of expropriations and reparations will weaken paramilitary bosses or their allies financially. The prospects are not encouraging. So

[42] See Juan Forero, "Paramilitary Ties to Elite in Colombia Are Detailed", *Washington Post*, 22 May 2007. For more detailed analysis, see Gustavo Duncan, *Acerca de la Parapolítica*, Fundación Seguridad y Democracia, Bogotá, 2007; Leon Valencia, "Paramilitares y Políticos", *Revista Arcanos* 13 (2007).

[43] *El Tiempo*, 7 January 2007.

[44] Arnson, *The Peace Process in Colombia with the Autodefensas Unidas De Colombia–Auc*, pp. 21-22.

far there have been no forced expropriations, only voluntary alienation of a few properties, and it is clear that wealthy paramilitaries can find easy ways to hide their assets or give them away to their kin, friends and allies.[45] The task of tracing these hiding transactions would be daunting for prosecutors. Equally important, it is uncertain that the legal transitional framework will contribute to dissolve the networks and associations that have allowed paramilitaries to become highly powerful regional political figures. Former paramilitary chiefs may continue to have influence in their regions, and may even become official political figures later on, as the transitional framework does not contemplate any sort of lustration or banning mechanisms. One may be inclined to say that the transition from war-lordism to official politics must be an improvement, but this is the case only if official politics are done cleanly, fairly and democratically. So far, the politics of warlords have been done mostly through intimidation, threats to (and murder of) competitors, and purchase of votes.[46] As we know, old habits die hard. Again, what the current process may in effect accomplish is to legalize and legitimize existing paramilitary political powers and their networks of influence.

The bulk of the peace negotiations went into fine, detailed transactions: how much for reparations, how long the punishment, what counts as prison, etc. But, as Antanas Mockus has noted, in the deliberations surrounding the transitional framework, instead of a discussion of public principles there was a discussion of private interests.[47] Officially, judicial truth has been privileged over historical truth; the CNRR lacks enough powers to do otherwise and only the zeal of the

[45] Up until October 2007, the aggregated area of all estates given by the paramilitaries to the government in the context of JPL proceedings is 3,642 hectares. The most moderate estimate of the aggregated area of land abandoned by people displaced by the conflict is 2.6 million hectares, which means that the total returned land makes about 0,13% of the abandoned land. See Colombian Commission of Jurists, *Colombia: El Espejismo de la Justicia y la Paz. Balance sobre la Aplicación de la Ley 975 de 2005*, Bogotá, 2008, p. 201.

[46] For an account of the practices of paramilitary warlordism, see Gustavo Duncan, *Los Señores De La Guerra*, Planeta and Fundación Seguridad y Democracia, Bogotá, 2006.

[47] Antanas Mockus, personal communication (August 2006).

high courts in prosecuting co-opted politicians can produce a broad picture of the links between politics and paramilitarism. Now, attention to details and to the concrete and individualized mechanisms of justice-implementation are no doubt of paramount importance, but in the Colombian process the focus on detailed transactions seems to have come at the cost of a deeper and wider encompassing transitional process. The possibility of so doing is certainly not foreclosed, but it will require a shift of focus and a fair amount of political will.

Someone may say that this objection is over-demanding. After all, only so much can be asked from a transitional process. Indeed, a well established research foundation has argued that, compared with peace processes such as those in South Africa, Guatemala, Peru and Ireland, the Colombian process has comparatively high doses of accountability.[48] Aside from the fact that this assessment completely disregards recent cases in Southeast Asia and Africa, it is framed in the logic of detailed transactions. In addition to a sufficient dose of individual accountability, there are other necessary tasks in the Colombian transitional process, such as purging public offices and the armed forces, drafting a policy of land reform that takes into account the massive forced displacement brought about by the conflict, and reversing the penetration of the paramilitaries into regional politics.

[48] Fundación Seguridad y Democracia, "Informe Especial: El Rearme Paramilitar", pp. 5-10.

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The volume has contributions by experts such as Pablo Kalmanovitz, Jon Elster, Claus Kreß and Lena Grover, David Cohen, Monika Nalepa, Francisco Gutiérrez, Ana Arjona, Roger Petersen and Sarah Zukerman Daly, Marieke Wierda, Florence Hartmann, Carsten Stahn, Maria Paula Saffon and Rodrigo Uprimny, and Antanas Mockus.

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