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THE COLOMBIAN PEACE PROCESS WITH THE FARC: A MAPPING OF VULNERABILITIES

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EXECUTIVE SUMMARY

This policy paper examines what are, currently, the biggest vulnerabilities of the peace agreement signed by the Colombian government and the guerrilla movement known as the Revolutionary Armed Forces of Colombia (FARC) in November of 2016. The triumph of Iván Duque—candidate of the Centro Democrático party (the party of former President Álvaro Uribe) and a leading voice of the “no” campaign against the accord—in the elections of June 2018, together with the likely majoritarian alliance of the political parties who have publicly opposed the peace agreement, make the future of the accord a central question in Colombia.

The paper starts by examining the measures taken by the Santos administration to make the agreement legally binding, both nationally and internationally. It then discusses the implications of the decision of the Constitutional Court regarding the constitutionality of the legislative act implementing core sections of the agreement. It explains that, while the Court weakened the accord’s legal binding by limiting the extent to which it could be incorporated into the constitution, it did safeguard the agreement in the medium term by requiring that the next three administrations implement it in the spirit in which it was signed.

We then examine the routes through which those opposed to the agreement could decide to undermine it. First, we look at what we call the apocalyptic options: the convening of a referendum aimed at eliminating the constitutional reforms that have been passed in order to implement the agreement and the convening of a constitutional assembly. We then turn to those areas where changes can be undone via regular legislative procedures or by policy implementation. The paper narrows down the analysis to three areas seen as the most critical: the transitional justice system, the compatibility of the sentences of FARC leadership and their political participation, and the question of illicit drugs. For those set on undoing significant parts of the agreement, the focus will likely be on the Special Jurisdiction for Peace (JEP). After examining how the JEP has been weakened vis-à-vis its original conception in Havana, we detail why the *uribismo* wants to remove the military from the JEP’s jurisdiction: first, by arguing against the equivalency between crimes the military might have committed in the course of the war and those committed by the FARC, and then by questioning the impartiality of some of the judges chosen for the JEP. Removing the military from the JEP would critically undermine the concept of a transitional justice system designed to think holistically about the multiple actors and responsibilities of this complex conflict.

The paper then examines the challenges involved in finding a way for the FARC leadership to serve their sentences while at the same time guaranteeing their right to participation, especially considering those FARC members who were chosen to fill the ten seats in Congress

assigned to them by the agreement. The paper analyzes the political pressures the JEP faces to guarantee justice is served while simultaneously respecting the need to uncover the truth. We examine the repercussions the agreement, and efforts to overturn or undermine it, will have for the future of the FARC as a political party.

We then turn to the question of illicit drugs and examine two main issues: first, the possible impact of Duque's campaign promise to eliminate the legal understanding of drug trafficking as a political crime, which entails amnesty or lighter sentences for those involved in drug trafficking with the purposes of financing the rebellion. While the legal repercussions of this reform seem minimal for the FARC, the legal uncertainty that this brings to the process could be dangerous to its implementation. Second, we examine Duque's proposal to eliminate programs for coca growers to voluntarily eradicate their illicit crops and instead make all eradication compulsory. Forced eradication efforts in Colombia in the past have shown that this method is not effective in reducing the amount of coca entering the market. Moreover, recent developments indicate that eliminating the voluntary programs would further endanger already vulnerable populations.

The paper ends with a quick examination of a final strategy that the new administration could use, i.e., further slowing the pace of implementation, and briefly examines the problems with the reincorporation process.

INTRODUCTION

This policy paper examines what are, currently, the biggest vulnerabilities of the peace agreement signed by the Colombian government and the guerrilla movement known as the Revolutionary Armed Forces of Colombia (FARC) in November of 2016. The current political scenario paints a complicated picture for the peace process: Iván Duque—candidate of the Centro Democrático party (the party of former President Álvaro Uribe) and a leading voice of the “no” campaign against the accord—won the June 2018 elections with a margin of 12 percent over Gustavo Petro, the left-wing candidate and former mayor of Bogotá. Also, the political parties that have publicly opposed the peace agreement will likely be able to build a majoritarian coalition in Congress, thus making the future of the peace agreement a central question.

The most pessimistic perspective foresees the next administration completely undoing some of the basic principles of the agreement by eliminating the judicial benefits that the FARC will receive for entering into the transitional justice system, seeking to imprison the FARC Secretariat and some of its mid-level commanders, limiting or completely eliminating the channels created to facilitate the FARC’s political participation, and undoing the agreement to work with coca growers on the voluntary eradication of their crops. This path would closely resemble the promises of some of the members of the Centro Democrático party to “*hacer trizas el acuerdo*,” (“*shred the agreement to pieces*”)¹ but would fall short of the most radical proposals pushed by former candidate Rafael Nieto and others, who threatened to revoke the amnesty of FARC soldiers.² In the course of conducting interviews as part of the research for this paper, we did not find anyone who thinks that undoing the demobilization of FARC members is realistic at this point, although further slowing the already sluggish pace of the implementation of the reincorporation mechanisms could be a way to sabotage the peace process without openly saying so (an issue we discuss in more detail later on). This paper examines in some detail what the most *explosive* moves to undermine the agreement could be, understanding that what actually happens will depend on the alliances that the new president establishes in Congress and how key developments—such as the legal fate of Jesús Santrich, a member of the FARC Secretariat—get resolved. With an agreement as complex as this one, the list of vulnerabilities could be very long; we thus focus here on those we think could do more damage to the ongoing process and, as such, to the prospects of peace in Colombia.

¹ Ivan Cuervo, “Hacer trizas el acuerdo,” *El Espectador*, June 1, 2017.

² Rafael Nieto, interview by authors, Bogotá, (October 4, 2017).

POLITICAL PANORAMA

Duque won the second round of elections comfortably after securing the support of all major traditional political parties, with the exception of those in the left and some sectors of the centrist Alianza Verde. He will enter office, thus, counting on the likely support of the majority in Congress. The election of March 2018 resulted in the following composition of the Senate and House of Representatives:

Senate

Party	No. of Seats
Centro Democrático (pro Duque)	19
Cambio Radical (pro Duque) ³	16
Partido Conservador (pro Duque)	15
Partido Liberal (pro Duque, divided)	14
Partido de la U (pro Duque, divided)	14
Alianza Verde (opposition)	10
Polo Democrático (opposition)	5
Decencia (opposition)	4
Mira (opposition)	3
Indigenous representatives (opposition)	2
FARC (opposition)	5
Total	107

³ Cambio Radical's leadership did not officially endorse Iván Duque; however, they acknowledged having shared their government plan, which they said coincided with many of Duque's priorities.

House of Representatives

Party	No. of Seats
Centro Democrático (pro Duque)	35
Partido Liberal (pro Duque, divided)	35
Cambio Radical (pro Duque)	30
Partido de la U (pro Duque, divided)	25
Partido Conservador (pro Duque)	21
Alianza Verde (opposition)	9
Decencia (opposition)	2
Opción Ciudadana (pro Duque)	2
Polo Democrático (opposition)	2
Mira (pro Duque)	2
GSC Colombia Justa Libre (pro Duque)	1
Coalición Alternativa Santandereana AS (opposition)	1
Movimiento Alternativo Indígena y Social – MAIS (opposition)	1
FARC (opposition)	5
Total	171

Although political alliances in Colombia can by no means be taken for granted, it is likely that the right-wing coalition in the Senate can count on the votes of Centro Democrático (19), Partido Conservador (15), Cambio Radical (16), and Mira (3) for a total of 53 votes, giving them a majority. In the House, initial calculations would give those opposing the peace process at least 89 out of 171 votes, without including any congressmen from the Partido de la U, a highly optimistic (and unlikely) scenario. The alliance led by the Centro Democrático party, then, has the numbers to pass important reforms in Congress undoing some of the peace process elements. That said, doing so will not be fast; many of the laws, statutes, and legislative acts that were enacted as a means of implementing the agreement were approved via “fast track,” a modality of congressional work that expired in 2017. Thus, any reforms would have to be done through regular amendment procedures; in other words, it would take twice the time. Any threats, then, to “destroy” the peace process are somewhat mitigated by the legal procedures established in the Colombian constitution. It is also important to note that, due to a recently enacted reform, Gustavo Petro, the runner-up in the second round of the presidential election, will gain a seat in Congress and is likely to become a natural leader for the opposition and certainly a leading voice defending the peace process.

LEGAL BINDING

It is important to briefly examine the measures taken by the government to make the agreement legally binding before turning to the possible methods of undermining it. The peace agreement between the government of Colombia and the FARC included a complex path for formalizing the final agreement within democratic institutions in Colombia, as well as via different international processes, meant to solidify and shield what was agreed upon by the parties.⁴ These steps, as defined by the government, included two international measures and three domestic ones. In the international arena, the first step was to have the final agreement “signed as a Special Agreement under Common Article 3 of the Geneva Conventions and deposited, after its signature, before the Swiss Federal Council in Berne,”⁵ and the second step was to have “the President of the Republic [...] make a unilateral declaration of the State to the United Nations communicating this Final Agreement and requesting its incorporation in a document of the United Nations Security Council in the terms established in the Agreement dated 11 May 2016.”⁶ Both these steps were taken to give the agreement international legal standing, but there is some debate regarding the effectiveness of these measures.

The parties’ decision to make the accord a special agreement under the Geneva Conventions was a controversial move that was made without certainty as to the legal implications of such a decision. One of the principal challenges with regard to special agreements is that there is no unified view on which legal framework, domestic or international, they fall under.⁷ One view posits that special agreements are part of domestic law. This was the opinion of the Colombian Constitutional Court in a 1995 case: according to Decision C-225/95 on International Humanitarian Law, special agreements are not treaties, as they are not signed between subjects of international law. Rather, because they are signed between parties to an internal conflict, they are subject to international humanitarian law (IHL). Under this view, the special agreement is legally binding, but the state could potentially legislate it in a way that unilaterally alters or annuls the agreement. The Court also stated that these special agreements can strengthen the commitment of the parties and help establish verification mechanisms that could result in greater compliance with the agreement, as they constitute a “juridical-political possibility that is especially useful in contexts of peace negotiations, insofar as it contributes not

⁴ Oficina del Alto Comisionado para la Paz, “Preguntas y respuestas en torno al acuerdo sobre seguridad jurídica del Acuerdo final.” Available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/Paginas/Preguntas-y-respuestas-en-torno-al-acuerdo-sobre-seguridad-juridica-del-Acuerdo-final.aspx>

⁵ Oficina del Alto Comisionado para la Paz, “Texto completo del Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera.” Available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/Texto-completo-del-Acuerdo-Final-para-la-Terminacion-del-conflicto.aspx>

⁶ Ibid.

⁷ Ezequiel Heffes and Marcos Kotlik, “Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime,” *International Review of the Red Cross* no. 895/896 (December 2015). Available at: <https://www.icrc.org/en/international-review/article/special-agreements-means-enhancing-compliance-ihl-non-international>

only to alleviating the fate of the victims of war, but also to fostering consensus and increasing reciprocal trust between enemies.”⁸

Some scholars, on the other hand, argue that special agreements fall under the jurisdiction of international law. Heffes and Kotlik have argued that special agreements are a way of enhancing compliance with IHL in non-international armed conflicts.⁹ This would provide the parties with the opportunity to implement ad hoc enforcement mechanisms that are not subordinated to a particular state. The incorporation of foreign jurists in the JEP would seem to support this view, although the jurisprudence of the Colombian Constitutional Court on the specific role given to foreigners within the JEP is a bit unclear.¹⁰ Furthermore, some jurists argue that special agreements are not legally binding agreements but rather commitments by parties to the conflict to respect or implement obligations under IHL or human rights law. As they are not international treaties, they do not prevail over national law.¹¹ How effective, then, this move is in terms of legally binding of the agreement is uncertain.

Similarly, the legal connotation of incorporating the agreement into a United Nations Security Council resolution is vague. According to Article 25 of the UN Charter, member states “agree to accept and carry out the decisions of the Security Council.”¹² Yet, the binding effect of Security Council resolutions depends on the language and intent of the resolution and is usually limited to resolutions related to Article VII of the UN Charter. In the case of Colombia, the resolution authorizing the UN Observer Mission¹³ that includes the final agreement is unlikely to be understood as generating legal responsibilities on the part of the parties involved.

The three domestic steps designed by the government to legally bind the agreement were: first, to incorporate the agreement into the national legal system as an ordinary law with a vote for approval or disapproval of the entire text by a qualified majority in Congress and with constitutionality control; second, to incorporate the agreement into the constitutionality block; and third, to create a special legislative procedure for peace that established concrete roles in order to make the agreement’s implementation operational, including constitutional reforms, statutory laws, special laws, ordinary laws, and decrees. The last of these was done through the

⁸ Corte Constitucional de la Republica de Colombia, Sentencia No. C-225/95. Available in Spanish at: <http://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm>

⁹ Heffes and Kotlik, “Special agreements.”

¹⁰ Kai Ambos and Susann Aboueldahab, “Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?” EJIL: Talk!, December 19, 2017. Available at: <https://www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/#more-15745>

¹¹ See paragraph 860 of the International Committee of the Red Cross commentary of Common Article 3, which would seem to support this view: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169951

¹² United Nations, Charter of the United Nations, 1 UNTS XVI (October 24, 1945).

¹³ United Nations Security Council resolution 2261, “Identical letters dated 19 January 2016 from the Permanent Representative of Colombia to the United Nations addressed to the Secretary-General and the President of the Security Council” (January 25, 2016).

“fast-track” method laid out in the Legislative Act for the Implementation of the Peace Agreement.

These three steps had to be reviewed by the Constitutional Court, which did so in its Decision C-331-17 on “Instruments to facilitate and ensure the implementation and normative development of the final agreement for the termination of the conflict and construction of a stable and durable peace.”¹⁴ This decision, which the news portal *La Silla Vacía* called the “valium decision” because it appeased fears on both sides of the political spectrum, made constitutional Legislative Act 01 of 2017 (which introduced a set of amendments to the constitution to implement the peace agreement) and validated the fast track as a special procedure for implementing the peace agreement. However, the Court annulled two important aspects of the fast-track procedure, contained in subparagraphs (h) and (j) of Article 1: first, that the bills processed by fast track in Congress would have to be voted in block, both in the plenary sessions and in commissions, and second, that any modification to the bills introduced by congressmen would need to have the government’s endorsement in order to be included. The Court argued that these two provisions placed disproportionate limitations on Congress’ decision-making capacity, which were incompatible with the “democratic principle of separation of powers.”¹⁵ This decision has resulted in slower and more difficult implementation of the agreement, a less cohesive implementation process, and a lack of confidence on the part of the FARC vis-à-vis the government’s commitment to the peace agreement.¹⁶

The Court also declared unconstitutional the incorporation of the peace agreement in the constitutional block as a whole, although it welcomed the incorporation of specific issues via constitutional reform. Although this decision weakened the legal binding of the agreement significantly, the Court specified that the next three governments will have to implement the agreement. The Court said that guaranteeing twelve years of legal security for the agreement obliges the state to implement the content and final goals of the agreement in good faith, while giving future administrations some freedom to decide how to do it:

The institutions and authorities of the State have the obligation to comply in good faith with the provisions of the Final Agreement. Consequently, the actions of all the organs and authorities of the State must be consistent and integral with the agreement, preserving the contents, commitments, spirit and principles of the final agreement [...]

¹⁴ Corte Constitucional de la Republica de Colombia, Sentencia C-331/17, “Instrumentos para facilitar y asegurar la implementación y desarrollo normativo del acuerdo final para la terminación del conflicto y construcción de una paz estable y duradera” (Instruments to facilitate and ensure the implementation and normative development of the final agreement for the termination of the conflict and construction of a stable and durable peace). Available in Spanish at: <http://www.corteconstitucional.gov.co/relatoria/2017/C-331-17.htm>

¹⁵ Corte Constitucional de la Republica de Colombia, “Comunicado No. 28” (May 17, 2017). Available at: <http://www.corteconstitucional.gov.co/comunicados/No.%2028%20comunicado%2017%20de%20mayo%20de%202017.pdf>

¹⁶ Rodrigo Uprimny, “Corte, ‘fast track’ y paz,” *La Silla Vacía* (May 28, 2017). Available at: <http://lasillavacia.com/blogs/corte-fast-track-y-paz-61117>

and it governs from its promulgation until the end of the three complete presidential periods following the signing of the Final Agreement.¹⁷

It is interesting to note that in all of our interviews with analysts and politicians, no one referred to the twelve-year framework established by this decision as a reference point. Naturally, the legal precedent is important, and it will allow those defending the peace process to try to stop legal challenges to its implementation. However, it does not seem (for now, at least) to be a deterrent to those who want to significantly alter the content of the agreement.

In this context, then, the opposition has two options for modifying the agreement: either go for what we call here the “apocalyptic options” discussed below or undo the process bit by bit. Given the composition of the recently elected Congress, the right-wing alliance might have enough votes to start undoing some of the key elements of the peace process. This process, however, will not be fast: Article 375 of the 1991 constitution determines that Congress can reform the constitution with votes in two ordinary and consecutive legislative periods, with approval of the majority of the parliamentarians. That said, given the polarization in the country around the topic, and the way in which it has fueled much of the political campaign of the Centro Democrático party, many analysts expect that this will be a central part of the new administration’s agenda.

THE APOCALYPTIC OPTIONS

One possibility is that the new government will decide to attack the process in the most visible and damaging way. The most likely routes for what we call here the *apocalyptic options* are the following: convening a constitutional assembly or calling for a referendum (*referendo derogatorio*). On October 17, 2017, the Registraduría Nacional del Estado Civil (National Civil Registry) authorized the request introduced by Centro Democrático congressmen Paloma Valencia, Paola Holguín, and Alvaro Hernán Prada to begin the collection of signatures to allow for the repeal, via referendum, of three legislative acts related to the peace agreement that were approved by the fast track in Congress: Legislative Act 01 of 2017 that created the Special Jurisdiction for Peace, Legislative Act 02 of 2017 that shielded the agreement by incorporating it into the constitution, and Legislative Act 03 of 2017 allowing the political participation of the FARC.

The Centro Democrático party would need to collect at least 1,783,686 signatures in less than six months. If these are then verified by the Registraduría, the referendum would need to

¹⁷ Corte Constitucional de la Republica de Colombia, “Comunicado no. 51” (authors’ translation) (October 11, 2017). Available at: <http://www.corteconstitucional.gov.co/comunicados/No.%2051%20comunicado%2011%20de%20octubre%20de%202017.pdf>

be approved by the Supreme Court. Once these steps are fulfilled, the president would have to convene a referendum within a period of six months. The legislative acts would be repealed if a majority were achieved and 25 percent of the electoral census (which has a total of 8,918,430 people) votes: around 2.2 million people.¹⁸ If Centro Democrático wins the referendum, the legislative acts would be removed from the constitution. Repealing the three legislative acts would be a fatal blow to the peace process, as this would go straight to the core of the agreement. Dismantling the Special Jurisdiction for Peace and removing the possibility for the FARC to participate in politics would take away any incentive for the FARC to continue its commitment to this process. It seems, however, that the Centro Democrático party has decided, for now, to let this option lie dormant, as there are no traces of any serious campaign, which they would have to conduct in order to collect the needed number of signatures. This route does, in any case, remain a possible future option they could resort to.

The other alternative is to convene a constitutional assembly, something that both the Centro Democrático party and leftist candidate Gustavo Petro have publicly considered. For those opposing the peace process with the FARC, a constitutional assembly is seen as the most expedient way to “*hacer trizas ese maldito acuerdo*” (“shred that damn agreement to pieces”).¹⁹ This option is alarming because such an assembly would not be restricted to changing elements related to the peace process, but would open the door to all kinds of reforms to the political regime. This would be the ideal opportunity for the *uribista* coalition to push back on a number of issues on which they have lost in Congress (such as gay marriage and the elimination of the presidential reelection) and design a constitution which is much less progressive than the one approved in 1991. In that occasion, the National Constituent Assembly ended up closing Congress and serving as the legislative branch, something that is also currently occurring in Venezuela. Convening a constitutional assembly in a country with such a high degree of polarization as Colombia would be like opening Pandora’s box.

We now turn to the three issues we think must be highlighted in terms of vulnerabilities of the process: first, the transitional justice system, in particular the JEP; the questions of freedom and political participation for the FARC; and the issue of illicit drugs.

THE TRANSITIONAL JUSTICE SYSTEM

The transitional justice model created by the 2016 peace agreement is called the Integrated System of Truth, Justice, Reparation and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR), and it is formed by three institutions: the Commission for

¹⁸ Prensa Centro Democrático, “Tres cambios, Colombia está lista para el referendo derogatorio” (October 17, 2017). Available at: <http://www.centrodemocratico.com/?q=articulo/tres-cambios-colombia-esta-lista-para-el-referendo-derogatorio>

¹⁹ Fredy Alexander Chaverra Colorado, “El peligro de una constituyente uribista,” *Las 2 Orillas* (March 21, 2018).

the Clarification of Truth, Coexistence and Non-Repetition (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición), the Unit for the Search of Missing Persons Due to and in the Context of the Armed Conflict (Unidad para la Búsqueda de Personas dadas por Desaparecidas en el Contexto y en Razón del Conflicto Armado), and the Special Jurisdiction for Peace (Jurisdicción Especial de Paz, widely referred to as JEP). Of these three bodies, the most controversial has been, by far, the JEP, which is the most likely to face pushback.

The question of justice has been at the core of Colombians' polarization surrounding the peace process, and one of the main arguments for those who voted "no" in the referendum of October 2016 was that the agreement guaranteed impunity for the FARC. The agreement establishes that those who were part of the conflict will have their cases examined by the JEP and can receive between five and eight years of an "effective restriction of freedom" if they: a) join the transitional justice mechanism early on; b) fully declare their crimes; and c) engage in reparations to the victims.²⁰ While these guidelines are similar to the sentences that the right-wing paramilitaries received in the so-called "Justice and Peace Law" of 2005, the fact that the FARC leadership would not serve jail sentences has been a point of contention throughout the process.

The JEP has also received criticism from strong supporters of the process. Organizations such as Dejusticia and the International Center for Transitional Justice (ICTJ) have pointed out that its structure is too big and overly complicated, with thirty-eight judges, three chambers, an investigative wing, and a tribunal with several sections. Besides its task to administer justice, it also has additional functions such as providing support to victims.²¹ This has resulted in an extraordinarily high percentage of the budget earmarked for the transitional justice system having to be allocated to the JEP, to the detriment of the system's other components.²² Human Rights Watch has also criticized this portion of the agreement by stating that "the justice provisions of the accord could result in confessed war criminals not receiving meaningful punishment for the grave crimes for which they were responsible," and that the vague description of "effective restrictions on freedoms and rights," and how they should be monitored and enforced, could mean that these limitations might not "constitute a meaningful punishment in light of the gravity of the crimes."²³

The JEP was weakened by the November 2017 Supreme Court decision, which, although it declared much of the law regulating the jurisdiction constitutional, decided that so-called "third

²⁰ Oficina del Alto Comisionado para la Paz, "Texto completo del Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera." Available at: <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Paginas/Texto-completo-del-Acuerdo-Final-para-la-Terminacion-del-conflicto.aspx>

²¹ Rodrigo Uprimny, "¿Cuál estructura para la JEP?" *El Espectador* (January 19, 2018). Available at: <https://www.elespectador.com/opinion/cual-estructura-para-la-jep-columna-734372>

²² Colombian academics, interview by authors, Bogotá, (April 2018).

²³ José Miguel Vivanco, "Colombia: Fix Flaw in Transitional Justice Law," Human Rights Watch (October 9, 2017). Available at: <https://www.hrw.org/news/2017/10/09/colombia-fix-flaws-transitional-justice-law>

parties” could not be forced to testify or be part of the cases studied by this mechanism. This means that those citizens who, without being part of the armed groups themselves, had “contributed in any direct or indirect way in the commission of crimes within the context of the conflict”²⁴ could voluntarily present themselves to the transitional justice system and, if complying with all the requirements of truth, reparation, and non-recurrence, could receive lighter sentences than those established in the law. Given the extent to which right-wing paramilitary groups had ties with private sector actors, the possibility that the JEP would investigate the involvement of so-called “third parties” became a source of great fear for businesspeople in conflict areas and a reason for right-wing parties in Congress to vote against the law creating the transitional justice system.

The decision of the Court also excludes all public servants that are not part of the armed forces from the jurisdiction of the JEP. The particularly salient political point of contention here was whether former presidents could be judged by the JEP because of their decisions while in power. The Court made clear that they cannot be judged by the JEP (and also excluded other public servants with exceptional status, or “*fuero*,” in the constitution, such as the attorney general, *procurador*,²⁵ *contralor*,²⁶ magistrates of the high courts, ministers, congress members, governors, and mayors, and specified that the JEP cannot examine accusations against former presidents.²⁷

While the decision of the Constitutional Court eased political opposition, it also meant that the JEP will only be judging armed actors and the military, thereby excluding from its examinations any of the third-party actors that have been involved in the conflict. This minimalistic version of the JEP’s jurisdiction goes against the spirit of what was decided in Havana, which thought of the transitional justice system as the space where the country could come to terms with a conflict that went way beyond a confrontation strictly between the military and armed groups. This has been compounded recently by a very public internal debate between the secretary and the president of the JEP, in what seems to be a struggle over power and the internal dynamics of the organization. This, together with a public debate regarding the use of resources destined for the implementation of the peace process, has resulted in an erosion of the JEP’s legitimacy in a moment when it needs all the political support it can get.

In this context, where could the JEP be further weakened if the new sitting president is so inclined? One of the main threats is the possible removal of the military from the jurisdiction of the JEP. The JEP’s jurisdiction over crimes committed by the military is already limited by the way

²⁴ Corte Constitucional, “Comunicado no. 55.” (November 14, 2017). Available at: <http://www.corteconstitucional.gov.co/comunicados/No.%2055%20comunicado%2014%20de%20noviembre%20de%202017.pdf>

²⁵ Appointed official charged with overseeing the public conduct of those in authority or in charge of exercising public office.

²⁶ Appointed official charged with ensuring the proper use of public resources.

²⁷ Ibid. [Our translation]

in which Congress addressed the question of command responsibility. Colombian lawmakers' interpretation of command responsibility, according to some jurists, goes against this precept's treatment under international law.²⁸ The Legislative Act 01 of 2017 asserts that commanders can only be tried by crimes committed by men under their authority if: a) the atrocities took place in the territory where the unit under their command was assigned; b) the commander had the legal and material capacity to produce and modify orders and make sure these were fulfilled; c) the commander had the effective capacity to develop and execute operations in the area where the crimes were committed; and d) the commander had the material and direct capacity to take the needed measures to prevent or repress the criminal conduct of his subordinates, as long as he/she had knowledge of the crimes. Human Rights Watch expressed concern regarding the incompatibilities between the Colombian interpretation of command responsibility and the standards used by international tribunals,²⁹ and the International Criminal Court (ICC) also questioned the law's ruling that commanders could only be found guilty if the four conditions listed above occurred *concurrently*.³⁰

In spite of this, several Centro Democrático senators and their backers have argued that the JEP is not fit to try military personnel who committed crimes in the course of the conflict, and that they should be tried in a special *sala* (chamber) of the Supreme Court dedicated solely to this. In a bill presented to Congress last year, Senators Alfredo Rangel, Paloma Valencia, and Thania Vega proposed the creation of a special sub-*sala* in the Court that would, for twelve years, have exclusive responsibility for investigating and judging all members of the security forces for crimes committed in the course of military or police activity between 1980 and 2018. This sub-*sala* would also review any sentences against members of the security forces decided by regular tribunals for these crimes, or by the military penal justice system, if the sentence was a jail period of over five years. The judges in this sub-*sala* would have to be either members of the security forces in active duty or active reserve.³¹

The Centro Democrático senators' arguments for this are several: one of their core criticisms of the agreement's approach is that it is unfair to judge as equals those militaries who were, according to them, defending the nation and might have committed crimes in that attempt,

²⁸ Rodrigo Uprimny, "Responsabilidad del mando y JEP: un debate complejo y polarizado," *La Silla Vacía* (February 27, 2017). Available at: <http://lasillavacia.com/blogs/responsabilidad-del-mando-y-jep-un-debate-complejo-y-polarizado-59906>

²⁹ "Carta sobre 'responsabilidad de mando' en la legislación de implementación del acuerdo de paz," Human Rights Watch (January 25, 2017). Available at: <https://www.hrw.org/es/news/2017/01/25/carta-sobre-responsabilidad-de-mando-en-la-legislacion-de-implementacion-del-acuerdo>

³⁰ "El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad," *Semana* (January 21, 2017). Available at: <https://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820>

³¹ Congreso de Colombia, "Proyecto de Acto Legislativo No. ____ de 2017 Senado." Available at: <http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/proyectos%20de%20ley/2017%20-%202018/PAL%20010-17%20Sala%20Penal%20Militar.pdf>

and the guerrilla fighters, who they see as mere criminals. In their explanation of the bill's motives, the senators write:

it is inadmissible that within the framework of the so-called Special Peace Jurisdiction (JEP) agreed in Havana, it is intended to equate the Public Force with the terrorist group of the FARC. The legitimate Public Force of the State is being equated with a terrorist group, whose *raison d'être* has been the destruction of the State through the use of barbaric violence that violates human rights. This jurisdiction expects the military and police to appear with terrorists before the same court, to be prosecuted with the same procedures and to be subject to the same type of sentences. This equalization undermines military honor, delegitimizes the institutions that have defended the State and undermines democratic institutions. We believe that equality between unequals is an iniquity.³²

A second argument is the lack of trust in the magistrates themselves. The judges of the JEP were chosen by a five-member selection committee whose composition was established in the peace agreement,³³ and they chose a list of judges that took into account gender balance, fair representation of ethnic minorities, and the judges' regions of origin. The JEP magistrates come from a variety of ideological affiliations, some having worked with the military penal justice system and some having been affiliated with human rights organizations. The announcement of the names, however, generated a frenzy among the opposition, who said that the chosen judges could not "offer guarantee that the members of the security forces will receive a fair and impartial judging,"³⁴ rendering the JEP unsuitable to judge them.

In fact, the opposition in Congress has already tried to curtail the work of the JEP by creating some limitations on who can be a judge: those who in the last five years have been legal advisers in cases related to the armed conflict, or those who have brought suits in human rights international courts against the Colombian state or have advised those who have done so, are no longer eligible to serve in the JEP. This has meant that, when President Santos oversaw the oath ceremony for the judges earlier this year, eight of the chosen judges were unable to join their colleagues, as they are still waiting for a decision from the Constitutional Court regarding the legality of these restrictions.³⁵

³² Ibid. [Our translation]

³³ Comité de Escogencia, "El Comité de Escogencia Concluye su Labor." (authors' translation) (December 18, 2017). Available at: <http://www.comitedeescogencia.com/#>

³⁴ Congreso de Colombia, "Proyecto de Acto Legislativo No. ____ de 2017 Senado."

³⁵ Corte Constitucional, "Comunicado no. 55." [Our translation] Available at: <http://www.corteconstitucional.gov.co/comunicados/No.%2055%20comunicado%2014%20de%20noviembre%20de%202017.pdf>

RESTRICTIONS TO LIBERTY/POLITICAL PARTICIPATION

As mentioned before, one of the central arguments of the opposition campaign in support of the “no” vote was that the peace agreement allowed for impunity for the FARC.³⁶ The agreement:

extends an amnesty for political and related crimes, such as rebellion, sedition, mutiny, the lawful killing of enemy combatants and the illegal possession of weapons. However, pursuant to international standards, this amnesty makes an exception for international crimes and serious human rights violations, including crimes against humanity, serious war crimes, torture, the taking of hostages, enforced disappearances, extrajudicial executions, sexual crimes, forced displacement and the recruitment of child soldiers.³⁷

The agreement designs a model of restorative justice in which those who are guilty of international crimes and serious human rights violations voluntarily bring their cases to the JEP and, in exchange for telling the truth, receive alternative sentences and some “restrictions to liberty.” A central point of contention with the opposition is not only the length of the sentences the FARC might receive, but where and how these “restrictions to liberty” would take place. These sanctions should have “restorative and repairing functions” and would range between five and eight years. While the agreement doesn’t specify what exactly the sanctions will entail, it does say that they will be “an effective restriction to freedom and rights, such as the freedom of residence and movement.”³⁸ Former President Uribe has called this arrangement “disguised impunity,” because:

the government has assured us that atrocities will be judged and sentenced, but immediately admitted that those responsible for these crimes won’t go to jail and will enjoy political eligibility. This goes against the [Inter-]American Convention on Human Rights, against the Statutes of the International Criminal Court and is a bad example. The history of impunity is the history of the creation of new violences.³⁹

The FARC was clear during the negotiation process in Havana that they would not accept regular jail terms,⁴⁰ and while that is not spelled out as such in the agreement, it has been broadly

³⁶ Thania Vega de Plazas, “Todo no puede ser impunidad para las FARC” Centro Democrático (November 20, 2017). Available at: <http://www.centrodemocratico.com/articulo/columna-todo-no-puede-ser-impunidad-para-las-farc>

³⁷ Mark Kersten, “Meeting International Standards: Amnesty in the Colombian Peace Deal.” *Justice in Conflict* (October 14, 2016). Available at: <https://justiceinconflict.org/2016/10/14/meeting-international-standards-amnesty-in-the-colombian-peace-deal/>

³⁸ Alto Comisionado para la Paz, “Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera” (November 24, 2016), 164. Available at: <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

³⁹ Guillermo Olmo, “Alvaro Uribe: ‘El acuerdo de Santos con las FARC no es paz, es de impunidad,’” *ABC Internacional* (March 31, 2016). Available at: http://www.abc.es/internacional/abci-alvaro-uribe-acuerdo-santos-farc-no-impunidad-201603300234_noticia.html

⁴⁰ “Guerrilleros de las Farc no irán a prisión si se firma la paz: ‘Timochenko’” *El País* (August 16, 2013). Available at: <http://www.elpais.com.co/judicial/guerrilleros-de-las-farc-no-iran-a-prision-si-se-firma-la-paz-timochenko.html>

agreed that this is the condition that emerged. During the negotiation stage between the government and the opposition leadership after the “no” vote won the plebiscite of October 2, an idea surfaced that the FARC members could serve their sentences in what have been called “agricultural colonies,” which would be safeguarded by the National Penitentiary and Prison Institute (INPEC). This idea, which was put on the table by then conservative presidential candidate and now Vice President-elect Martha Lucía Ramírez, has not been formally incorporated into any guideline but remains a referent of what the opposition could agree to as a minimum standard.

There is a particularly complicated issue here, namely that because of the delays in the creation of the JEP, the FARC members who occupy the ten seats reserved for them in Congress will not have stood before the transitional justice body before swearing in. This will likely result in two challenging situations: first, the JEP will have to decide on sentencing guidelines that could make it challenging for the FARC representatives in Congress to be present in Bogotá. If the idea of the “agricultural colony” remains the baseline that the opposition is willing to accept, this interpretation of “restrictions to liberty” would interfere with the FARC’s ability to participate in politics, given that they would need to be based in Bogotá to attend sessions of Congress. Because the FARC chose several of their best-known leaders⁴¹ (members of the Secretariat who are likely responsible for serious crimes committed during the conflict) to fill some of the ten seats assigned to them in Congress, this would mean that they would have to find new people to replace them if those chosen were required to serve sentences. It seems unlikely that the Secretariat would agree to these conditions, which, they would argue, go against the spirit of what was signed in Havana.⁴²

The JEP could also decide to give precedence to conditions that facilitate the FARC’s participation in politics with a proposal that has become known as “Congress as jail.” This would involve a model in which FARC participants attend Congress sessions during the day, are “restricted” at night, and dedicate their weekends to the kind of restorative justice projects (demining, etc.) that the transitional justice mechanism would define. Proponents of this agreement have argued that to guarantee that this concession to the right to political participation does not trump the need for justice, the penalty should be counted by stages, i.e., if a congressman is serving his or her sentence only on the weekend or when Congress is not in session, the time served should be calculated according to the days in which he or she is engaged in the reparative justice projects and not by calendar year starting on the day the sentence is announced.⁴³ While this kind of arrangement would technically respond to all of the agreement’s

⁴¹ The FARC chose Iván Márquez, Pablo Catatumbo, Victoria Sandino, Carlos Antonio Losada, and Sandra Ramírez to sit in the Senate, and Jesús Santrich, Byron Yepes, Marco León Calarcá, Olmedo Ruíz, and Jairo Quintero to sit in the House.

⁴² Colombian politicians close to the FARC, interview by authors, Bogotá, (October 2017).

⁴³ This is an idea that was brought forward by Fundación Ideas para la Paz: <https://colombia2020.elespectador.com/politica/la-formula-para-que-las-farc-hagan-politica>

requirements, it is unlikely that it will be seen by much of the public (and the right-wing parties) as satisfactory. It is not unreasonable to assume that there would be strong political reactions to such an arrangement.

Another possibility is to require that the political participation of the FARC is contingent upon the completion of their sentencing. There were several supporters of the peace process, such as Claudia López (senator and vice presidential candidate for the centrist Coalición Colombia party), who argued that, at the very least, the FARC's political participation should not start until their cases in the JEP have been finalized, as this sequence would not only guarantee justice but would also bring the process some badly needed political legitimacy.⁴⁴ Even after the negotiation following the “no” vote, however, the negotiators decided that sentencing through the transitional justice system would not curtail the FARC's rights to participate in politics. This issue, to be sure, has not disappeared from the political debate, and some of the FARC's victims, among others, have continued to try to delay the participation of the former guerilla group in politics until that happens.⁴⁵ Several congressmen have expressed sympathy with this argument, and Duque has said “*no podemos permitir que puedan participar en política, es un adefesio, sin haber reparado a las víctimas, haber dicho toda la verdad y haber cumplido las penas,*”⁴⁶ so this is an issue that could certainly come up again during the next legislative session.

Whether the FARC leadership is able to participate in politics while serving the sentences decided by the JEP will be a determining factor for the future of the FARC as a political party. If FARC leadership is not allowed to participate in politics while serving their sentences, or if these sentences involve alternative incarceration schemes like the agricultural colonies, this would be a significant blow to the FARC as a political party. The FARC still heavily relies on its traditional leaders to maintain cohesion, and the divisions already seen in the Secretariat in the weeks after the imprisonment of Jesús Santrich are a sign of how difficult it will be to maintain unity in the post-conflict environment. Furthermore, the FARC's poor electoral results in the congressional elections showed that their political support is extremely weak.⁴⁷ This, together with the various problems associated with the reincorporation process, greatly minimize the FARC's chances of strengthening its voice in the political arena. The question now is whether other political parties

⁴⁴ “El punto candente de la JEP en el que coinciden Claudia López y Álvaro Uribe,” *Semana* (October 4, 2017). Available at: <https://www.semana.com/Item/ArticleAsync/542717?nextId=542602>

⁴⁵ “¿Farc debe pagar penas antes de hacer política?” *Kien y Ke* (October 17, 2017). Available at: <https://www.kienyke.com/politica/farc-debe-pagar-penas-antes-de-hacer-politica-jep>

⁴⁶ “We can't allow them to participate in politics, which is abhorrent, before they have made reparations to the victims, have told the truth, and have fulfilled their penalties.” [Our translation]. “Uribismo impulsara reforma para que el narcotráfico no sea delito político” RCN (March 28, 2018). Available at: <https://www.rcnradio.com/politica/uribismo-impulsara-reforma-para-que-el-narcotrafico-no-sea-delito-politico>

⁴⁷ “En su debut, FARC obtuvo poco más de 85.000 votos,” *El Tiempo* (March 12, 2018). Available at: <http://www.eltiempo.com/elecciones-colombia-2018/congreso/resultados-de-la-farc-en-elecciones-al-congreso-del-11-de-marzo-de-2018-192746>

will be able to fill the void and represent the interests of the marginalized communities that the FARC (thought they) did.

ILLICIT DRUGS

The issue of how to handle the growth and trafficking of illicit crops continues to be a polarizing question, and one that lies at the core of the implementation of the peace agreement. There are two main issues related to this topic: one, the possibility that the coming administration will decide to declare that drug trafficking cannot be judged as a crime connected with rebellion; and two, the continuation, strengthening, or weakening of the current voluntary drug eradication program as designed in the peace agreement.

The role of illicit drugs in the Colombian conflict is a very complex topic, and a detailed analysis of this issue surpasses the objectives of this paper. It must be said, however, that the FARC's involvement with the trafficking of illicit drugs has been central not only to the Colombian public's perception of this group but also to the way they are seen by national and international authorities. The increasing involvement of the FARC in drug trafficking following the peace negotiation of El Caguán,⁴⁸ has further undermined their already waning legitimacy, as many Colombians see this enterprise not as a way to finance the rebellion but as a route to political enrichment. Former President Uribe often calls the FARC "the biggest drug trafficking cartel in the world,"⁴⁹ although there is no reliable data to back this claim. The US government has often characterized the FARC in this manner as well, and the recent demand for extradition of FARC Secretariat member Jesús Santrich for attempts to export several tons of cocaine to the US is just the most recent expression of this position.

Over the course of the civil war in Colombia, there have been extensive discussions on whether drug trafficking should indeed be judged as what is known as *delito conexo*, i.e., a regular crime that is treated like a political crime, because it is committed for the purposes of supporting rebellion. This is of crucial importance because the amnesty law approved by Congress covers "political crimes" as well as any connected offenses.⁵⁰ As Hayner has written, "this legal notion had a long history in Colombia and internationally, although the parameters of what would be covered were not at first clear."⁵¹ That said, the Colombian Supreme Court, via Decision 42534

⁴⁸ For more information on the peace negotiations of El Caguán, please refer to: Renata Segura and Delphine Mechoulan, "Made in Havana: How Colombia and the FARC Decided to End the War," New York, International Peace Institute, February 2017. Available at: <https://www.ipinst.org/wp-content/uploads/2017/02/IPI-Rpt-Made-in-Havana.pdf>

⁴⁹ Juan Morenilla, "El gobierno ha concedido todo a las FARC, otra cosa es que surja la paz." *El País* (March 30, 2016). Available at: https://elpais.com/internacional/2016/03/29/colombia/1459262775_784547.html

⁵⁰ Ministerio de Justicia y del Derecho de Colombia, Ley de Amnistía, "Indulto y Tratamientos Penales Especiales" (Ley 1820 de 2016).

⁵¹ Priscilla Hayner, *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict* (New York, NY: Routledge, 2018), 205.

on April 30, 2014, recognized drug dealing as a crime connected to rebellion, as long as it occurs with the specific objective of financing rebel organizations and not the personal enrichment of individuals. The Court has also said that, rather than purposefully excluding the activity of drug trafficking from the transitional justice system, they want to make sure that “pure traffickers” don’t try to infiltrate the process.⁵² Given this legal precedent, the agreement between the FARC and the government states that “to decide regarding the connection between political crime and crimes related to crops used for illicit purposes, the criteria established by Colombian domestic case law shall be taken into account, applying the most favorable law.”⁵³

Duque placed this practice of judging drug trafficking as a political crime at the center of his criticisms of the agreement and said in his campaign that, if he wins, “we will prohibit, through the constitution, understanding of drug trafficking as a political connected crime. Drug trafficking will not be subject to amnesty.”⁵⁴ The legal repercussions of doing this are not clear, but the legal insecurity that this statement brings to the process could be a serious threat to the implementation of the agreement.

When Duque announced his intentions of pushing a constitutional reform to end the consideration of drug trafficking as a political crime, many in the media speculated that this would mean the immediate detention, and likely extradition, of many FARC commanders. *Semana* said, “ending the connection with political crime would imply, in few words, that their leaders - including the 10 who will arrive at Congress on July 20 - would go to jail and not to a seat in the Capitol.”⁵⁵ Such a move would not be so straightforward, however. A constitutional reform of this kind would not only take some time, but more importantly, it would not be applied retroactively. This means that those who were part of guerrilla movements *in the past* and trafficked drugs to sustain those rebel movements could not now be judged for trafficking that occurred then. If they do continue trafficking after the signing of the agreement, at least in the case of the FARC, passing the proposed constitutional reform would have no further impact, because the accord explicitly states that any crime committed after the signing in November 2016

⁵² Diego Tarapués, “¿Puede considerarse al narcotráfico como delito político conexo en el contexto de pacificación del conflicto armado colombiano?” *El Mercurio* (October 23, 2017). Available at:

<http://www.elmercurio.com/Legal/Noticias/Opinion/2017/10/23/Puede-considerarse-al-narcotrafico-como-delito-politico-conexo-en-el-contexto-de-pacificacion-del-conflicto-armado-colombiano.aspx>

⁵³ Oficina del Alto Comisionado para la Paz, “Texto completo del Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera.” Available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/Texto-completo-del-Acuerdo-Final-para-la-Terminacion-del-conflicto.aspx>

⁵⁴ “Elige tus propuestas,” Iván Duque Presidential Campaign. Available at: <http://www.ivanduque.com/propuestas/1/3/seguridad/prohibiremos-en-la-constitucion-la-existencia-del-narcotrafico-como-delito-politico-conexo>

⁵⁵ “Iván Duque y una reforma que sí podría hacer trizas el acuerdo con las Farc,” *Semana* (March 29, 2018). Available at: <https://www.semana.com/elecciones-presidenciales-2018/noticias/ivan-duque-quiere-tumbar-la-conexidad-del-narcotrafico-con-el-delito-politico-561974>

would be addressed by the regular justice system. That is, in fact, what is at stake in the case of the accusations against Jesús Santrich, a member of the Secretariat.⁵⁶

It is possible, then, that Duque's proposal was just political posturing during a presidential campaign that was meant to appeal to his followers who are strong opponents of the peace process. That said, there is a specific antecedent on this particular issue that looms over the process: several of the paramilitary commanders who turned themselves in during what was known as the "Justice and Peace" process under the Uribe administration were extradited to the US because of drug dealing accusations.⁵⁷ These extraditions had a huge negative impact on the truth telling component of that process⁵⁸ and resulted, as *The New York Times* asserted, in light sentences and even green cards being awarded to men accused of serious crimes.⁵⁹ This sets a difficult precedent that should worry the FARC Secretariat and those committed to seeing a real transitional justice system implemented in Colombia.

The political repercussions of the decision regarding the Santrich case will also be important. There is enormous political pressure on the JEP to allow his extradition, so to demonstrate the independence of the transitional justice system and as proof that the agreement was not, as its opponents have claimed, "*entregarle el país a las FARC*" ("give the country to the FARC").⁶⁰ Agreeing to allow Santrich's extradition, however, would be to admit once again that drug trafficking takes precedence over serious crimes such as the ones the FARC was involved in during the conflict, thus creating from the outset a huge obstacle to fulfilling victims' rights to truth and even, possibly, justice. People close to the Duque campaign assured us that this statement aims to send a strong message to other armed groups, such as the National Liberation Army (ELN) and the Popular Liberation Army (EPL), regarding future possible negotiations.

The other proposal that was central to the Duque campaign was that eradication efforts should be compulsory, not voluntary. The fourth point of the final peace agreement focuses on finding a solution to the problem of illicit drugs in Colombia. The agreement's framework sets up

⁵⁶ "Santrich es trasladado a la sede del Episcopado," *Caracol Radio* (May 10, 2018). Available at: http://caracol.com.co/radio/2018/05/11/judicial/1526006397_079410.html

⁵⁷ "In 2008, as the hearings were underway, and cutting off key testimony, President Uribe authorized the immediate extradition to the U.S. of over a dozen paramilitary commanders, on drug trafficking charges. Colombian rights groups accused Uribe of intentionally cutting the testimony short to protect those who might be named. Over the next years, some of these commanders, now serving long sentences in U.S. prisons, were able to testify in Justice and Peace hearings through a video link." Hayner, *The Peacemaker's Paradox*, 200.

⁵⁸ "While extremely important to the process in Colombia, these video transmissions did not always work well at an operational level: the audio quality was sometimes poor, and the schedule of appearances was erratic. Prison officials in the US were not always supportive of the participation of their detainees in this foreign process." *Ibid.*, 214.

⁵⁹ Deborah Sontag, "The Secret History of Colombia's Paramilitaries and the U.S. War on Drugs," *The New York Times* (September 10, 2016). Available at: <https://www.nytimes.com/2016/09/11/world/americas/colombia-cocaine-human-rights.html>

⁶⁰ "Uribe: 'le van a entregar el país a las Farc para meterme a mí a la cárcel'" RCN Noticias (September 29, 2015). Available at: <https://www.noticiascn.com/nacional-pais/uribe-le-van-entregar-el-pais-las-farc-meterme-mi-carcel>

a system for addressing the cultivation of crops for illicit use by promoting the voluntary substitution of crops and the transformation of areas where these crops have been the center of economic activity. Decree Law 898 of 2017 established the National Comprehensive Program for the Substitution of Illicit Crops (PNIS),⁶¹ a program designed to support growers' transition to legality through a scheme based on monetary allocations to families, the implementation of an immediate action plan (PAI), and the definition and implementation of the comprehensive community and municipal substitution and alternative development plans (PISDA). However, the capacities of the PNIS are limited and questions have been raised regarding the sustainability of the process, its limited institutional articulation, the lack of security conditions for the populations involved, tensions between different social organizations, and uncertainty about the resources available to implement the rural development agenda.⁶²

One of the principal challenges has been the clash between voluntary substitution and forced eradication strategies. Forced eradication is taking place in many territories where communities have also signed voluntary substitution agreements. The two approaches are supposed to be complementary, as communities subscribe to the voluntary programs and forced eradication is reserved for large-scale plantations controlled by illicit drug trafficking groups and farmers who refuse to participate in crop substitution programs. However, there is no clear differentiation of when each strategy is to be implemented, and forced eradication has moved forward at a faster pace (in part because of pressure from the US) without giving enough time for voluntary programs to take shape. This has increased social unrest in these communities and tensions with the state.⁶³ Furthermore, many social leaders who have been trying to implement the voluntary eradication programs have been murdered by organized crime organizations, which are trying to sabotage these processes at any price.⁶⁴ Duque's proposal to eliminate voluntary substitution programs would break with the spirit of the agreement and make already vulnerable populations more susceptible to violence. The Colombian government has used forced eradication for decades, which has had little impact on the size of the drug markets and has fueled violence.⁶⁵

⁶¹ Presidencia de la Republica de Colombia, "Decreto Ley Numero 896 de 2017" (May 29, 2017). Available at:

<http://es.presidencia.gov.co/normativa/normativa/DECRETO%20896%20DEL%2029%20DE%20MAYO%20DE%202017.pdf>

⁶² Juan Carlos Garzón and José Luis Bernal, "¿En qué va la sustitución de cultivos ilícitos? Informe trimestral # 1," Fundación Ideas para la Paz (July 4, 2017). Available at: <https://www.ideaspaz.org/publications/posts/1536>

⁶³ Juan Carlos Garzón and Eduardo Álvarez Vanegas, "¿En qué va la sustitución de cultivos ilícitos?: Principales avances, desafíos y propuestas para hacerles frente," Fundación Ideas para la Paz Informe trimestral 02 (July-September 2017). Available at: <http://cdn.ideaspaz.org/media/website/document/5a0c456a3dd37.pdf>

⁶⁴ "Asesinatos de líderes sociales aumentaron un 45 por ciento," *El Tiempo* (January 7, 2018). Available at: <http://www.eltiempo.com/colombia/otras-ciudades/asesinatos-de-lideres-sociales-aumentaron-un-45-por-ciento-en-el-2017-168592>

⁶⁵ "Erradicación y conflicto en Colombia," Transnational Institute (May 15, 2008). Available at: <https://www.tni.org/es/art%C3%ADculo/erradicacion-y-conflicto-en-colombia>

THE QUIET OPTION: SLOWING DOWN IMPLEMENTATION

Besides the specific undoing of the parts of the agreement mentioned before, another possible strategy to disrupt the process could be further slowing down the implementation processes that are underway, or failing to put forward in Congress the bills required to move forward with sections of the agreement, many of which have been barely implemented—such as the rural reform—or have proceeded at an alarmingly slow rate. While this option would not result in as much political gain with the opposition’s core supporters as the strategies described above, it would also be less aggressive and thus less controversial with both the national actors defending the agreement and the international community.

An issue that is likely to become a central point of contention is the way in which the reintegration of ex-FARC guerrilla fighters progresses. Until now, the reintegration process has been woefully slow because of a fundamental tension between the government and the FARC concerning the best way to move forward; while the FARC has insisted that the reintegration should be “collective,” the government favors an individual approach. The FARC leadership had hoped that organizing “productive projects” in the areas where their soldiers were concentrated as part of the disarmament, demobilization, and reintegration (DDR) process would allow them to maintain affiliations and guarantee the continuation of the organization, now as a political force. In order to do so, former FARC-combatants created economías sociales del común (ECOMUN),⁶⁶ and insisted that economic projects created to provide livelihoods for its members should be geared toward maintaining unity in the “territorial spaces for creation of capacities and reincorporation.” This has proved to be extremely difficult, with a wide-ranging set of obstacles.⁶⁷ Adapting these spaces, chosen for their remoteness as ideal spaces for the disarmament to take place, into places where an economic enterprise can be developed is very difficult due to the lack of roads and essential services such as water and electricity. The FARC has also had difficulties properly designing business plans, and its members have faced discrimination, such as banks refusing to open accounts for them, signaling the difficulties of long-term reconciliation.⁶⁸

Although productive projects have moved forward in a few of these twenty-six spaces with the help of international aid or local universities, the UN mission in Colombia has reported a very high number of *farianos* leaving these areas due to a complete lack of opportunity.⁶⁹ In

⁶⁶ “Economías sociales del común,” ECOMUN. Available at: <http://www.ecomun.co>

⁶⁷ “Informe sobre el estado efectivo de implementación del acuerdo de paz en Colombia,” Kroc Institute for International Peace Studies (November 2017). Available at: https://kroc.nd.edu/assets/257593/informe_kroc.pdf; http://www.defensoria.gov.co/public/pdf/Informe_ETCR.pdf

⁶⁸ “Los problemas del partido Farc para abrir una cuenta en un banco” *El Tiempo* (January 24, 2018). Available at: <http://www.eltiempo.com/elecciones-colombia-2018/congreso/farc-senala-problemas-para-abrir-cuenta-en-un-banco-174726>

⁶⁹ United Nations Security Council, “Report of the Secretary-General on the United Nations Verification Mission in Colombia” (April 2, 2018). Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2018_279.pdf

some cases, these men and women have simply moved to the closest urban area in the hopes of improving their daily living conditions, at the very least. Others have left to join armed “dissidence” groups or other organized crime organizations, while others have returned to their families to restart their lives. It seems that no one is doing close follow-up on the whereabouts of demobilized guerrilla fighters, which will no doubt further complicate any attempts from the state to implement a coordinated set of reincorporation strategies in the long term.⁷⁰ The Agencia Colombiana de Reintegración (Colombian Reintegration Agency, ACR) had tried to proceed with individual reintegration strategies, given that this is the route Colombia has used in previous cases;⁷¹ the FARC, however, did not accede to this route. Together with some serious signs of incompetence on the part of the Colombian state, this has made the reincorporation process much slower than had been anticipated. Some analysts in Colombia think it is likely that a new administration, even one led by Duque, will try to renew and strengthen reincorporation efforts, both to appease the international community⁷² and to limit the number of men and women that might join criminal organizations or other subversive groups. It is unlikely, however, that the new administration will try to be as conciliatory as the Santos administration has been with the FARC, and they might impose individual reincorporation of former FARC members as the only possible strategy.

Finally, the part of the agreement that has been developed the least pertains to rural reform. An in-depth analysis of the complicated reasons this has been the case (which range from state incompetence to the powerful economic interests invested in maintaining the current model of land ownership in Colombia) is beyond the scope of this paper. However, it is important to note that this chapter of the accord (together with the section on illicit drugs) is the only part of the agreement that directly addresses some of the structural conditions behind the historical violence in Colombia. Most of the issues highlighted by the Havana agreement are not revolutionary in the least and should have been addressed decades ago, such as the creation of a *catastro* (land registry) and the formalization of land titles for peasants. Members of Congress we spoke to affirmed that they all have intentions to put forth bills addressing these issues, and they have the hope (and some the conviction) that they can pass these bills with enough support from across the aisle.⁷³

⁷⁰ International Organization for Migration diplomat, interview by authors, Bogotá, (April 2018).

⁷¹ Almost 63,000 armed actors were demobilized in Colombia prior to the peace agreement process with the FARC. “63 mil personas se han desmovilizado en Colombia,” *El Tiempo* (October 27, 2016). Available at: <http://www.eltiempo.com/especiales/cifras-de-desmovilizados-en-colombia-49334>

⁷² “Apartan del cargo a Gloria Ospina, directora del Fondo Colombia en Paz,” *Semana* (April 9, 2018). Available at: <https://www.semana.com/nacion/articulo/fondo-colombia-en-paz-gloria-ospina-no-administrara-mas-el-fondo-colombia-en-paz/563041>

⁷³ Colombian Congressmen and women, interview by authors, Bogotá, (October 2017 and April 2018).

CONCLUSIONS

This paper explores a series of complicated scenarios, but it is important to note that we are not concluding that these are the strategies that a new administration will definitely follow. As the Santos administration demonstrated clearly, the office of the president in Colombia has great autonomy and power, and it is possible that Duque could distance himself from the most extreme voices in his party. There is, in fact, a strong argument to be made that a new government could have the political legitimacy to start an effective negotiation on some stalled processes, such as the reincorporation efforts. It is also in the new administration's best interest to minimize the number of ex-FARC soldiers who could end up joining the ranks of other armed groups or illegal organizations.

It is more likely that the Duque administration will decide to pursue the legislative route to implement some of the changes to the agreement they have promised, rather than the apocalyptic options we describe above. This paper has shown that significant changes to any the three areas that Duque has highlighted as priority for changes—the transitional justice system, FARC sentencing and political participation, and illicit drugs—will have a grave impact on the successful implementation of the peace process as envisioned in Havana. Even more complicated, perhaps, is the adoption of the “quiet option,” which would allow the peace process to recede from national attention while evading the political confrontation of the other channels.

This paper only gives a partial view of the situation, as we do not engage substantially with the other side of the equation, that is, who, will be defending the agreement, and how. Gustavo Petro, who received eight million votes on June 17, will arrive in Congress with the clear mandate of defending the peace process. Petro almost doubled the number of votes in his favor between the first and second round of voting,⁷⁴ despite being a polarizing candidate who many Colombians saw as too radical and too close to the Venezuelan government. The support of his candidacy among important leaders of the Alianza Verde such as Claudia López and Antanas Mockus was in clear opposition to those threatening to undo the peace agreement, among other issues. As such, even though Petro might not have been able to get that many votes in a different circumstance, the June election results have positioned him as the de facto leader of the opposition, who could galvanize the other half of Congress to defend the already achieved progress toward peace and even accelerate the implementation process. Petro and the pro-peace alliance in Congress will need the active support of civil society, including national actors and also very importantly local peace activists, who have a long and significant history of supporting both local and national peacebuilding efforts to end the conflict. The international community will certainly have an important role to play here as well. The support of the United

⁷⁴ “Todo sobre las Elecciones Presidenciales 2018,” Registraduría Nacional del Estado Civil. Available at: <https://www.registraduria.gov.co/>

Nations and other international actors was central to the successful culmination of the Havana negotiations, and has remained integral to the implementation process. These issues provide a framework, then, for our next research project: a mapping of the actors, alliances, and strategies to defend the peace process in what will certainly be a difficult and polarized context, as part of what early social media trends have denominated the #resistance.

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