



Transition in Colombia

By: Sergio Jaramillo, High Commissioner for Peace

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To understand the legal dilemmas of the peace process and transitional justice, it is necessary to understand the concept of 'transition'. I shall therefore first talk about what the Colombian transition would consist of, and then about the dilemmas of justice.

But I would like to start by mentioning two basic premises. The first is that Colombia has been at war for 50 years; that is an *unacceptable* situation. The second is that we have before us the best opportunity in our history to end it. I say this because I have been engaged with the FARC for more than a year in Havana and I am convinced that the opportunity is *real*.

We therefore face a time for decisions such as only arises once in a generation. That is something we *must not* forget.

This opportunity did not appear out of nowhere. As President Santos said: "the stars are aligned"; but they are not aligned by magic, but rather because President Santos has patiently put together a process that has moved forward step by step.

The first step was to recognize that a disease cannot be cured, nor a problem solved, if things are not called by their proper name. The name of this problem is 'internal armed conflict' –an internal conflict, by the way, with the FARC and the ELN, and not with anyone else.

The second was to put the victims front and centre, with the Victims Law. The guarantee of their rights is the basis of the process.

The third was to create a favourable international setting, ensuring that the region acts in support of peace in Colombia, and not as an impediment. That is what the President and his Foreign Minister have achieved through their strategy of promoting regional integration.



The fourth was to open up a Constitutional space for transitional justice, the so-called Legal Framework for Peace, to which I shall refer later.

The fifth was to start a careful, methodical peace process whose centre of gravity is the idea of *ending the conflict* in order to move to a phase of peace building –that is, to a phase of *transition*.

The idea of the transition is a consequence of the first point of the General Agreement we signed with the FARC last August, which states: “*We have agreed: 1. To start direct, uninterrupted talks (...) aimed at reaching a Final Agreement to end the conflict, which contributes to the construction of a stable, lasting peace*”. It is one thing to sign an agreement that formally puts an end to the conflict; and another, to start the subsequent peace building phase, to which the agreement “contributes”.

It means that until such time as this Final Agreement is signed, nothing will change in the field: there will not be a cease fire and there will be no demilitarized zones. But it also means that, once we sign, everything will change, because we would move on to the phase of construction of peace without arms –without the pressure and coercion of arms. We will be moving into the *transition*. One could say that that is the real beginning of the peace process, rather than the end.

The basis of the transition will be the agreements we reach in Havana pursuant to the points of the General Agreement, which do not cover all aspects of national life. It has five substantial points –plus a sixth point on guarantees– which relate *directly* to the termination of the conflict and form a ‘hard core’ of problems which must be resolved to make peace possible, regardless of the political colour or ideology of each side. All the other issues are part of the political contest won with votes in a democracy.

President Santos has explained these points; I will summarise them briefly.

Agrarian development: the Government considers that, without a profound transformation of the rural sector that breaks the vicious circle of violence in rural areas –causing poverty and creating more violence– in order to establish a virtuous circle of development and stability, we won’t be able to guarantee that the conflict will not be repeated.

Political participation: all successful peace processes in the world lead to a *transformation* of the armed groups into political movements, which is precisely what the transformation of a conflict consists of. That transformation is underpinned by



guarantees. Guarantees for the groups, so they can participate on a level playing field and with no risks to their safety; and guarantees for society, to break forever the link between politics and weapons, as the President has said.

The end of the conflict: this is a process of *termination*. With the signing of the Final Agreement –as we agreed in the General Agreement– an integral and simultaneous process will begin in which the FARC will lay down their weapons and reintegrate into civilian life, and security guarantees are put into operation.

The problem of drugs: the peace process will not solve the problem of organized crime, but can contribute to a radical reduction in its territorial presence and, above all, to the removal of tens of thousands of Colombians from the trap of growing illegal crops.

The rights of the victims: I shall refer to this later.

Lastly, implementation, verification and approval: moving on to the transition depends more than anything else on establishing a robust system of guarantees. Once again, I refer to guarantees for both the FARC and for society.

Strictly speaking, in Havana we are not negotiating these points; we are building up agreements that establish the conditions and tasks that each side involved will have to fulfil to make the construction of peace possible.

Take for example the case of the victims. The General Agreement contains –for the first time– a point on victims' rights. But this is not a case of *negotiating* the rights of the victims. Since last year, we have told the FARC repeatedly that what we are doing is trying to agree on how the Government and the FARC will assume their responsibilities towards victims in the context of an end to the conflict.

The centre of gravity of the process, I reiterate, is the idea of turning over a new leaf and entering a new phase, which we have called Phase III and which, in reality, constitutes the transition. The point is thus to remove the conflict and the problem of arms from the road ahead in order to be able to *implement* and to be able to *reconstruct*. The purpose of the transition is, precisely, to permit transformation and reconstruction.

If the term 'reconstruction' seems out of place to some people, it would be enough for them to visit some rural schools in eastern Antioquia Department, abandoned and



ruined as they are by displacement, or to see the squalid settlements on the banks of the Atrato River, which have been isolated and harassed so many times by armed groups. Rural Colombia has to be reconstructed.

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What does the transition consist of? The first element of the transition is that it is temporary. We must set ourselves a goal measured in time –a goal of ten years, for example– in which to make all the things that are being agreed upon a reality.

The second is its exceptional nature. The effects of 50 years of conflict cannot be reversed in the normal course of things. We have to double our efforts and use every type of exceptional measures and mechanisms: legal measures, extraordinary resources and new institutions on the ground that work with sufficient intensity and impact to achieve the goals of the transition.

The third element –the most important– is territoriality. Allow me to say the following: if one thinks back carefully, there has never been a true peace process in Colombia. There have been successful processes in the past with different *groups* –M-19, EPL, CRS– but there has not been a process of *territorial* peace. A peace process has never been established that truly takes root in the regions and brings a final end to the conflict, which is President Santos' vision and obsession.

The historical mistake has been to think that a process simply consists of the demobilization of certain groups, without thinking of transforming the territories or of radically changing conditions on the ground.

Let us take the example of Urabá. There are people there who demobilized from the EPL in the early 90's only to join several paramilitary groups which in time sprang up – the ACCU, Bananeros, Elmer Cardenas, Heros of Tolova– and are today still rampaging round the gulf and southern Cordoba Department, under the label 'Urabeños', dedicated to drug trafficking.

Peace is not a matter of receiving a gun and handing over a taxi or a bread shop. It is, I repeat, a case of removing arms from the road forward in order to be able to transform certain territories and reconstruct the social contract in the regions. To guarantee that there will be no more war. And that, in the Government's opinion, can be achieved in two ways.



One is to expand the scope and strengthen the effectiveness of the institutions in the territories. This process has been under way for some time and it is expensive and difficult, but citizens of Catatumbo, Arauca or Putumayo have to feel that the Government values their rights as much as those of the inhabitants of Bogotá or Medellín.

The other is to build from the ground up, supported by the strength and capacity for organization of the communities. In Colombia, there are more than enough admirable examples of peace building from ground level, but one thing is what can be done in the midst of the conflict, and quite another is what can be achieved when there is no conflict and no armed groups harassing the population.

This leads me to a fourth element of the transition, which is participation.

As I said, in Havana we are putting together agreements which will form the basis of the transition. But those agreements only establish the 'what'. For the 'how', things will have to be done on the ground, with priorities that are not going to be decided on by the Government and the FARC, but by all the citizens in the regions in a later phase of transition in one great exercise of participation and joint construction of peace.

This, it goes without saying, will be an unarmed exercise. One could say that, to gain the right to participate in the transition, weapons will first have to be abandoned. That is the vision behind the General Agreement of last year: when it is signed, the laying down of arms and the implementation of what was agreed on will start simultaneously.

The joint construction of peace requires us to open the regions up to new spaces for participation, debate and peaceful democratic deliberation among people who treat each other as equals in their rights and freedoms –among authorities, communities, victims, farmers, ranchers, entrepreneurs, tradesmen and also reintegrated ex-combatants– to discuss how we are going to implement the things agreed upon.

We also have to think about new forms of community organization in order to make a success of the transition within the present politico-administrative organization of the State, which is not under discussion. For example, if programmes for new roads, irrigation projects, small water supply systems to distribute drinking water are to be developed, it is perfectly feasible for it to be the communities that organize



themselves to prioritise, build, administer and maintain these works under the supervision of the municipal authorities.

Those spaces for democratic deliberation may also be spaces for *reconciliation*. Not in the sense of forgiveness, which is for each person to decide on according to his or her own conscience and heart, but in the sense of acceptance by everyone of the same rules of the game –in the sense of working for this common purpose, which is to build peace in the territories.

What is involved, therefore, is to achieve a true *mobilization* of society around peace in a phase of transition.

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I shall now move on to the second part: the dilemmas of justice.

The idea of a transition is also a *normative* idea: one 'transitions' towards compliance with, or the restoration of, or the strengthening of, a certain order or certain rules of the game, which in turn are the measure of success of the transition. It is at this point that the efforts in reconstruction of the transition meet the dilemmas of justice.

If reconstruction after half a century of conflict has several dimensions, justice –justice understood as the set of fundamental principles and rules that guide and limit the conduct of politics and society– will also necessarily have to have several dimensions. More dimensions in any case than we have been accustomed to calling 'transitional justice'.

I will begin with the most practical dimension, which I shall call the problem of territorial justice. This is everything that has to be done in the territories to restore and protect property rights. The Government has already begun the programme of land restitution in order to return to those who were displaced and are the rightful owners what was theirs and what the conflict took from them. This would have a much greater impact in a scenario of transition without conflict.

Similarly, the conflict served –as is well known– for the best land in the country to be acquired with drug money and money from all types of illegal activities; and for enormous quantities of common land to be taken away from the State through violence and corruption.



In both cases, what is needed is to *reverse the effects of the conflict* on the territory and ownership of land. For that, exceptional expeditious legal mechanisms have to be implemented during a limited time of transition.

This effort must also lead to a strengthening of the reach of the justice system and of the rule of law in the national territory, which is the true guarantee of non-repetition: the protection of citizens' rights by the law.

A second dimension of justice in the transition, which we do not usually refer to, is distributive justice. If we are aiming for *territorial* peace after half a century of conflict, that peace must be inclusive and must satisfy the needs of all: those of the victims, of course, but also the needs of those people who, although they were not direct victims, suffered the effects of the war in the country. We must not forget all those who did not leave their farms, who suffered from the conflict, who were impoverished because of the conflict and who need special attention.

Above all, we must distribute land, together with the public goods and skills to make use of it. For this, we have to carefully weigh up the rights of the direct victims and the needs of the most deprived in rural areas.

I shall simply call the third dimension transitional justice, in its usual sense: the satisfaction of the rights of the victims in a transition. To that end, the Government promoted, with Congress, first the Victims Law and later the Legal Framework for Peace, which is a constitutional amendment. I have two comments in this regard.

First: the Framework says that it is the Executive who will 'activate' that Constitutional amendment through a statutory law. That has not occurred and it will not occur until President Santos so decides. I say this to emphasise that the entire current discussion of the Framework is necessarily purely speculative. The Government has not taken a decision, nor has a bill been filed.

Second: in all this speculation, the concept of impunity is much abused. Impunity is necessarily measured according to the degree to which the rights of the victims are satisfied. We think that the mistake has been to concentrate simply on the perpetrators. The victims should be the centre of attention –as is obligatory under the Framework– so that there is the maximum possible compliance with their rights during the transition.



I shall not discuss all the elements of the Framework –its exceptional nature, the inclusion in the Constitution of the rights of victims, its proposal of a holistic solution that includes all the parties to the conflict–, I wish only to emphasise its central aspect, which is the idea of an comprehensive strategy.

‘Comprehensive’ in two senses: a strategy that includes and considers the rights to truth, justice and reparation; but also comprehensive in the sense that its scope covers the greatest number of violations that have been committed.

Those who insist on the contrary, on thinking that the violations of 50 years of war can be investigated on a case by case basis, are frankly lying to themselves. What we would reach in the end would be *de facto* impunity. We already know that if we were take that approach we would never finish, and that we have to do this in a more intelligent way.

The Government has already begun this task with the Victims Law. However, if we sign a Final Agreement we would be in an entirely different scenario. It would provide an extraordinary opportunity to put that comprehensive strategy into operation in a truly transitional phase, a phase of closure.

In matters of the truth, one could say that in Colombia, a great deal of *knowledge* is produced –it happens every day in the Historic Memory Centre–, but not much *acknowledgement* of what happened is forthcoming. And there is little *clarity* about what happened to the loved ones of thousands of families of victims of kidnapping and forced disappearance. A phase of transition must necessarily lead to answers being given to those families; a society cannot function with so many open wounds and so many private traumas.

In the case of reparation, the Government has an ambitious programme under way, but if we achieve peace in the territory, there are other things that can be done regarding recognition of the victims, true guarantees of non-repetition, of the reconstruction of trust in the institutions and the law –in the rules of the game– the loss of which is, as Pablo de Greiff has rightly said, one of the worst effects of victimization.

So far as justice is concerned, I wish to mention the following. First, in the case of guerrillas who are in conflict with the State, unlike the paramilitaries who –curiously– lived in judicial anonymity and only came out of it through the Justice and Peace process, we are not starting from scratch; Colombian justice has been implacable with



the FARC and ELN. The people we are talking with in Havana have dozens of convictions and arrest warrants for all types of crimes against their names.

What would be their treatment in a phase of transition? That will depend, precisely, on the comprehensive strategy: an adequate treatment of the rights of victims must be set forth in a law; a law that will be openly, democratically and transparently discussed. It will also depend on what the FARC –and eventually the ELN– are willing to do for their victims. If the perpetrators do not play an active role in the comprehensive strategy, there is no possibility of a solution.

What nobody can say is that there will be impunity. At the moment, the discussion around impunity is a performance –in some cases by those acting in good faith, but in others by a series of people whom I would call ‘eleventh hour “punitivists”, who ten years ago supported amnesties for paramilitary groups and today want to act like the Inquisition.

The Government’s position on this subject is very simple: there will be no general amnesty for these groups in Colombia. The only way forward is a comprehensive transitional justice strategy, based on a set of ‘conditions’ that guarantee its comprehensiveness, to which everyone will have to contribute and which will necessarily be within the framework of the international obligations of the Colombian State.

This also has consequences for the issue of political participation. Here, we must learn to distinguish between future participation in politics by the FARC –and eventually the ELN– as *organisations*, obviously after converting themselves into legal political movements, for which there are no legal impediments, and the participation of *individuals* in politics which will depend on what takes place in those transitional justice processes. As the Government has said, this will be decided on a case by case basis.

I will end with one last legal dimension: the problem of popular approval.

As the President has said, a Final Agreement would have to be approved by direct popular vote or referendum. Every citizen will be able to vote for or against the Agreement; so what we agree to with the Farc will always be conditional on that vote. This will provide an opportunity for those leading the most rabid opposition to the process to express their disagreement democratically, instead of systematically misleading society with false information, which is what they are doing now.



The legal instrument for popular approval has not been decided upon. But what is clear is that it *will not be* a Constitutional Assembly. A Constitution is not drawn up in order to approve some peace agreement; its purpose is to create a new legal order for the nation.

That is not what *this* process is for. The point rather is to *transform reality* in order to put the last link in the chain of the Constitution of 1991, to close the circle and dedicate all efforts of the State and society to bringing about that promise of protection of the fundamental rights set forth in the Constitution.

I wish to stress that we are looking at a real and unique opportunity, perhaps the last opportunity we shall have to put an end, in an organised and productive manner, to the armed conflict in Colombia.

I worry that in the cities sometimes ending the armed conflict is seen as something banal. It is said that the drug-traffickers will not disappear; that there will still be insecurity; that robberies will continue. Clearly, a Final Agreement will not put an end to all the ills of the nation. But nothing, absolutely nothing could be more important for this country than to turn the page on the conflict.

For this, we have to achieve a true social mobilisation in the territories around the idea of the construction of peace. More than an act of faith, we need a collective act of imagination of what the transition could be: a transition with deadlines, with goals and everyone with their sleeves rolled up working towards the same goal.

This is what we are aiming for, not to talk for the sake of talking. The Government has no interest in spending time talking with the FARC in Havana. What we want is to get the Final Agreement signed as soon as possible in order to be able to enter that new phase, which is the daily preoccupation of President Santos.

It will be a phase of transition to which all of us are going to have to contribute, a phase that will not be easy, that may be painful, but which is the best option we have of achieving an end with honour and dignity for us all –I stress: for us all– to these 50 years of war.