

# **Law in Peace Negotiations**

Morten Bergsmo and Pablo Kalmanovitz (editors)

2009

**Forum for International Criminal and Humanitarian Law (FICHL)**  
International Peace Research Institute, Oslo (PRIO)

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ISBN 978-82-7288-306-4

## PREFACE BY THE SERIES CO-EDITOR

This volume contains papers presented at the seminar “Peace and accountability in transitions from armed conflict” held in Bogotá on 15 and 16 June 2007. The seminar was co-organised by the Vice Presidency of Colombia, the National Commission for Reparation and Reconciliation of Colombia, Universidad del Rosario and PRIO (its Forum for International Criminal and Humanitarian Law).

The Forum seeks to contribute to scholarship and practice. To this end, we not only organize or co-organize seminars and other activities, but we also promote seminar findings and other publications through this Publication Series. We aspire to place high quality products on an Internet-based platform that is open and freely accessible to all, including those in less resourceful countries. We are therefore pleased to Internet-publish the papers presented at the June 2007 seminar. Both the seminar and this volume were made possible by financial support from the Norwegian Ministry of Foreign Affairs.

The open-mindedness and high level of the Colombian interventions at the seminar were striking. Their papers in this volume are clearly reasoned. The armed conflicts and peace processes in Colombia, on the other hand, are consistently referred to in the transitional justice discourse as factually not easily accessible. This rhetoric of complexity can operate on several levels. Some non-Colombians may feel that the effort required to be factually relevant to the Colombian situation exceeds their will to intellectually engage the complex problems of peace and justice in the country. Or they may be tempted to address fundamental principles, concepts or law with few, if any, strings to Colombian reality. Applied transitional justice is so fact-sensitive that outsiders are necessarily disadvantaged in the Colombian discourse. Colombians must decide which ideas coming from the outside are useful for Colombia – just as Colombians alone can answer for the serious problems of peace and justice in their country.

The rhetoric of complexity can also serve as a screen that prevents open confrontation with the root causes of the protracted armed violence in Colombia and the full extent of suffering among her subjects. Take the massive forced displacement of civilians within the country. By drawing on data from the Colombian Commission of Jurists, *Kalmanovitz* points out in his introduction that

[u]p until October 2007, the aggregated area of all estates given by the paramilitaries to the government in the context of JPL proceedings is 3,642 hectares. The most moderate estimate of the aggregated area of land abandoned by people displaced by the conflict is 2.6 million hectares, *which means that the total returned land makes about 0,13% of the abandoned land* (italics added).

How far does the power of those who control unreturned land reach?

*Elster* frames the issue elegantly in his book chapter:

[...] Fearon (Stanford University) made the following perceptive remark. “If a conference on political conflicts in Colombia had taken place here forty years ago, the name most frequently cited would have been Marx. Today, it is Hobbes.” In Colombia today, Hobbesian violence rather than Marxian exploitation is perceived as the main social ill. To create a durable peace, however, it is not enough to address the issue of violence by measures of transitional justice. One will also have to address the issues of exploitation, inequality and poverty by measures of

distributive justice. Land reform is even more needed today than in the past, as vast land properties are concentrated in the hands of drug-lords and paramilitary leaders.

*Elster* is indeed the only contributor to this book who mentions Marx. Marx may not be the answer to Colombia's crises of peace, security and justice. But I do think land reform and economic redistribution is a critical part of the answer. Colombian transitional justice will not get as far as it aspires to without a greater measure of distributive justice. Absent a genuine programme of social and economic justice, sustainable transition appears unlikely.

The contributions by *Arjona* on the nuanced reality of local orders in communities affected by armed conflict and by *Saffon and Uprimny* on the political use and abuse of the transitional justice discourse in Colombia both provide important reminders of the human factor in the Colombian story – good and bad. Human beings are at the centre of all social transitions. Suffering in armed conflicts tends to be so massive that the personal dimension is overshadowed by broader patterns of victimization. The scale of suffering invites quantification and analytical generalisation. But human suffering is always individual. Although the face of suffering has its rightful place in any discourse on war, peace and justice, the victims of armed conflict – who often lack the sophistication and education of capital cities – rarely participate in transitional justice seminars.

Against this background it is important that the foundational contributions to this volume by *Petersen and Zukerman* and *Mockus* focus on the human conditions of anger and forgiveness respectively. They point to questions of lasting importance, while opening new frontiers of research and inquiry. *Mockus* draws us in by suggesting that,

[a]s a start, it may be a good idea to come together in asking humanity for forgiveness for all the things we Colombians have done to each other, for not having done enough to prevent the propagation of the “anything goes” rationale, and for all the times in which we could have collaborated with justice or acted to protect the rights of others but we failed.

*Kreß and Grover* and *Stahn* show that the international lawyers have not only discovered the international discourse on transitional justice, but they have commenced more systematic doctrinal analyses of legal principles of particular relevancy to transitional justice.

*Hartmann's* chapter may not be as academic as other contributions, but she is an investigating journalist who has penetrated the political context of the ex-Yugoslavia war crimes process more deeply than most. Her propositions are as unconcealed as were the interests behind the recent Balkan wars naked. Courageously, she ends her paper by stating:

When impunity is no longer a key to peace, *then* justice will start to operate as a deterrent to crimes and war.

Is criminal justice for atrocities a mere passing experiment? Or is it the start of an historic normalisation of the administration of armed conflict – towards more rule of law? The visions differ sharply. As does our approach to the wealth of facts on the co-existence between international criminal justice and peace mandates in conflict theatres since 1994. Accessing this material more persistently and systematically will strengthen the empirical basis of the transitional justice discourse. I think that may be helpful.

*Morten Bergsmo*



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## **Infiltration as insurance: committing to democratization and committing peace\***

**Monika Nalepa\*\***

### **1. Introduction**

Many important features separate the dilemmas of transitional justice in East Central Europe (ECE) from those of Colombia. Countries such as Poland or Hungary endured authoritarian rule for a little over forty years, while Colombia is still suffering from over forty years of civil war. The goal of this short paper, however, is to focus on the similarities between the ECE and Colombia and to see how lessons learned from the ECE transitions and from settling accounts with the former communists can be applied to the Colombian government's dealing with demobilizing paramilitaries and guerrilla groups. I believe that the problems with making the enforcement of the Justice and Peace Law (JPL) credible to demobilizing paramilitaries resemble those of making promises of refraining from transitional justice credible to the outgoing communist regimes of East and Central Europe. The Colombian problem with credible commitments to amnesty has become particularly important in the light of opinions from human rights groups and the UNCHR criticizing the JPL. In summary, these criticisms amount to pointing out that paramilitaries should be held accountable for human rights violations and that the benefits awarded to demobilizing paramilitaries are too generous. Such opinions put a strain on the prospects of conducting similar negotiations with other armed groups in Colombia, such as the ELN or the FARC. How can the Colombian government make credible promises of amnesty or partial amnesty made to these groups? I begin this chapter with a brief description of the Justice and Peace Law (JPL). This is followed by a simple analytical model to present the nature of credible commitments in the context of paramilitary demobilization. The problem of making commitments credible is much more general than settlements in the aftermath of armed conflict. It has been applied, for instance, to pacted transitions from communism to democracy that took place in ECE in 1989-1999. I use a solution to the commitment problem from the ECE transitions – the “Skeletons in the Closet” model – to illustrate how infiltration of negotiating elites may serve as an insurance mechanism that makes promises of amnesty credible in the context of demobilizing fighters ending civil wars.<sup>1</sup> In the empirical part of the paper, I first show applications of the Skeletons model from Poland and Hungary, and next I discuss how the model could apply to Colombia. In the final section I consider explanations for the most recent developments in Colombia: that paramilitaries from the *Autodefensas Unidas de Colombia* (United Self-defense Forces of Co-

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\* I am most grateful to Pablo Kalmanovitz who provided me with comments and resources at all stages of this project's development. I thank for feedback the participants of the *Law in Peace Negotiations* conference organized by the Vice-Presidency of Colombia, PRIO (FICHL) and the National University, Bogotá, Colombia. Carla Martinez provided invaluable research assistance.

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<sup>1</sup> The complete model is presented in Monika Nalepa, “Skeletons in the Closet: Transitional Justice in the Post-Communist World”, Houston, TX: Rice University, 2007.

lombia, AUC) who have been participating in the judicial procedures established by the JPL have been revealing in their testimonies that the current Colombian government was infiltrated with links to paramilitaries and to violations of human rights.

## 2. The Justice and Peace Law

The JPL (Law No. 975 of 2005) is an innovative transitional justice mechanism which combines three elements of transitional justice procedures – amnesty, reparations and truth revelation into one procedure. Passed in June 2005, it extends partial amnesty to demobilizing members of the AUC. In order to qualify for sentence reduction, paramilitaries must confess all crimes committed by them, as well as members of their unit and surrender illegally acquired assets. While testimonies are used to investigate human rights abuses committed by the paramilitaries, the surrendered assets are used to compensate victims or, if the direct victims are deceased, the next of kin. The Law was aimed to “facilitate the processes of peace and individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims’ rights to truth, justice, and reparation” (Chapter 1, Principles and definitions). In practice, it offered a three-tiered transitional justice system that provides perpetrators with a sentence reduction and benefits in exchange for the disclosure of truth and illegally acquired assets. By combining the three elements of truth, justice and reparations in one system, the JPL presented itself as an advancement over incentives-based truth-revelation procedures, as illustrated by the amnesty committee of the Truth and Reconciliation Commission, that combined justice in exchange for truth.<sup>2</sup>

The law had not even been implemented when in October 2005, 31 civil society groups lodged a complaint with the Constitutional Court, questioning its legal basis. The Court dramatically increased the costs of failing to disclose the full truth about the nature of the criminal activity in question. In the extreme case, the applicant penalty could be reversed to the original sentence. The sentence reduction was also restricted to apply to non-recidivists only.<sup>3</sup> Since the draft proposed in 2004 by the government, which resulted from many months of negotiations with AUC leaders envisioned even leaner treatment for the ex-combatants, the eventually implemented mechanism landed far from what the AUC had bargained for. The government challenged the Court’s ruling and fought tirelessly for a reversal to the original proposal. Upsetting the expectations of the AUC led to a series of defections, in the summer of 2007, in which paramilitary leaders exposed embarrassing connections of government officials to drug trafficking and to violent paramilitary units. What is really puzzling about this turn of events is why the government of President Uribe fought so hard to keep its end of the deal. After all, once the paramilitaries had disarmed, a more popular decision would have been to crack down on the fighters with harsh transitional justice measures. The Uribe government chose to do otherwise. Why? Over the course of this chapter, I will systematically show that the decision to opt for leniency could be directly related to the infiltration scandals that broke out in late the spring and summer of 2007.

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<sup>2</sup> See Monika Nalepa, “To Punish the Guilty and Protect the Innocent: Comparing Truth Revelation Procedures”, *Journal of Theoretical Politics* 20:2 (2008); Marek M. Kaminski and Monika Nalepa, “Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures”, *Journal of Conflict Resolution* 50 (2006): 383-408.

<sup>3</sup> See Kalmanovitz, Section 2.2 of the introduction to this volume.

### 3. Credible commitments to amnesty

There is a generic problem in human relationships. Consider the following situation between two sides: a violent aggressor and a target of violence.<sup>4</sup> Suppose that the violent side has been using repression to control the behaviour of the target, but now he decides to abandon his violent tactics and resigns control over the means of repression. To protect himself, he thinks to negotiate a pact with the target. According to this pact, the violent side would stop using violence in exchange for the target's promise not to seek justice for the harm that was done to her. The problem is that this pact is not enforceable, since the target is better off seeking justice than keeping her promise of amnesty. Once the violent side retires, he has no means of protecting himself and the target may deal with him as she desires. This stylized fact adequately describes the situation of exchanging promises of benefits for reduced sentencing made to guerrilla groups and to paramilitaries in exchange for surrendering their weapons. This problem is also captured in the scholarly literature on credible commitments.<sup>5</sup> Barry Weingast writes that "to succeed, a pact must be self-enforcing" and that "successful pacts create a focal solution that resolves the coordination dilemmas confronting elites and citizens".<sup>6</sup>

The dilemma also features prominently in pacted transitions to democracy: the literature on negotiated transitions predicts that autocrats concede to democratization only after they are guaranteed the immunity for past misbehaviours.<sup>7</sup> Examples of such institutional guarantees include constitutions that render retroactive legislation illegal or electoral laws that give the outgoing regime an upper hand.

Observers of the ECE transitions will often associate the peaceful nature of those transitions with promises exchanged at the roundtable negotiations between outgoing communists and the incoming opposition. Traditionally, such pacts present outgoing autocrats with the opportunity to extract from the opposition guarantees of amnesty. Hence, in Greece, Argentina, Uruguay and Spain, the local autocrats exchanged control over political institutions for immunity from criminal investigations.<sup>8</sup> In South Africa, Apartheid members were guaranteed the security of their property rights.<sup>9</sup> According to this argument, in those transitions that occurred through pacts between the communist leaderships and the dissident opposition, such as in Hungary, Poland, Bulgaria and Czechoslovakia, the communists offered the opposition, open and free elections in exchange for promises of refraining from transitional justice. In Colombia, paramilitaries from the AUC negotiated with the government the terms of surrendering arms in exchange for significant sentence reductions and benefits in their reincorporation into society. Under the honour code of *pacta sunt servanda* all such willingly entered agreements should be kept. But are they?

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<sup>4</sup> For convenience, I will use the female pronoun to describe the victim and the male pronoun to describe the dominant side of the relationship.

<sup>5</sup> Thomas Schelling, *The Strategy of Conflict*, Harvard University Press, 1980; Barbara Walter, *Committing to Peace: The Successful Settlement of Civil Wars*, Princeton University Press, 2002.

<sup>6</sup> Barry Weingast, "The Political Foundations of Democracy and the Rule of Law", *American Political Science Review* 91, no. 2 (1997).

<sup>7</sup> See Adam Przeworski, "The Games of Transition" in *Issues in Democratic Consolidation*, edited by Mainwaring, O'Donnell and Valenzuela, University of Notre Dame Press, 1992, and *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge University Press, 1992; also Josep Colomer, *Strategic Transitions. Game Theory and Democratization*, The Johns Hopkins University Press, 2000, and "Transitions by Agreement: Modeling the Spanish Way", *American Political Science Review* 85, no. 4 (1991): 1283-302.

<sup>8</sup> Colomer, "Transitions by Agreement".

<sup>9</sup> A.M. Omar, "Foreword" in *Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa*, edited by Rwelamira and Werle, Butterworths, 1996.

For the sake of clarity, let us formalize this problem a little in a simple game that matches both situations described above, pacted transitions as well as demobilization. Figure 1 represents the preferences and choices that players face while negotiating pacted transitions to democracy or while negotiating civil war settlements, assuming that such pacts involve trading amnesty for the surrendering of arms.

There are two players, the Fighters ( $F$ ) and the Government ( $G$ ) and two stages of the game. In the first stage,  $F$  decides whether to accept the offer of surrendering arms in exchange for amnesty or not. If  $F$  does not surrender, the game ends with the status quo payoffs of 0 to everyone. If  $F$  surrenders, in the next stage  $G$  decides whether or not to honour the agreement about providing amnesty. If  $G$  decides to keep the promise, players get a payoff of 1 each. But if  $G$  reneges on the agreement, it gets a payoff of 2, while  $F$  gets a payoff of -1. The three possible outcomes of the game are:

*Status quo (SQ)*: Fighters do not enter the settlement.

*Transition with amnesty (A)*: Fighters enter settlement and receive amnesty.

*Transition without amnesty (NoA)*: Fighters enter settlement but Government reneges on the promise of amnesty.

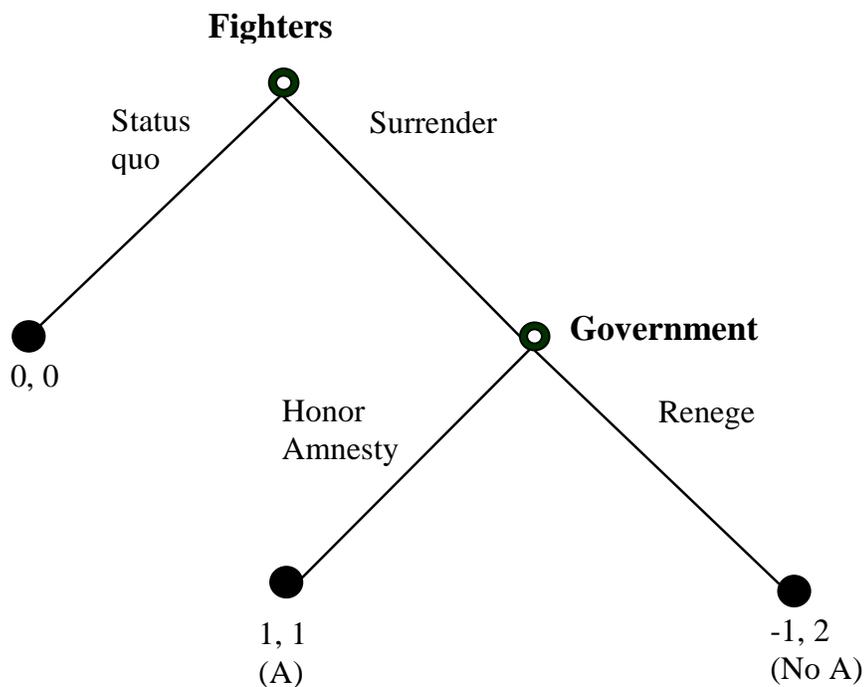


Figure 1: A simple game of credible commitments

As noted above, exactly the same model can be used to represent pacted transitions to democracy such as those accompanying the roundtable negotiations in ECE.<sup>10</sup> Instead of “fighters” we would have “outgoing communist autocrats” and instead of the “government”

<sup>10</sup> Jon Elster, *The Roundtable Talks and the Breakdown of Communism, Constitutionalism in Eastern Europe*, University of Chicago Press, 1996; Nalepa, “Skeletons”.

we would have the “dissident opposition” negotiating the transition to democracy with the communists; “entering settlements” would be replaced with “initiating roundtable negotiations” and “amnesty” would be replaced with “refraining from transitional justice”.<sup>11</sup> The most important result from solving this model is that *SQ* is the unique Nash equilibrium outcome.<sup>12</sup> However, in real life, we also observe *A* and *No A*. Furthermore, note that *A* Pareto dominates the Nash equilibrium outcome *SQ* (this is why the game resembles somewhat the Prisoner’s Dilemma). Both *F* and *G* prefer *A* to *SQ*. However, *A* fails to satisfy the conditions for Nash equilibrium, because when *G*’s decision node is reached, it is better off reneging on the promise. *Renega* is in this game a weakly dominant strategy for *G*.

To help the reader grasp the generality of this model – how it extends to pacted transitions as well as settlements in civil war aftermath – I present side by side the two interpretations of the simple model in Table 1.

| Model        | Civil war settlements  | Pacted transitions  |
|--------------|--|---|
| Fighters     | AUC, FARC, ENL   | Outgoing Communists in 1989   |
| Government   | Executive since implementation of JPL  | Dissident opposition, e.g. Solidarity in Poland   |
| A (mnesty)   | Benefits awarded to paramilitaries demobilizing under the JPL  | Refraining from transitional justice  |
| NoA (mnesty) | Failure to deliver benefits under JPL to surrendering paramilitaries   | Transitional Justice  |
| Status quo   | Paramilitaries failing to demobilize (may result in prolonged civil war, associated with losses to both the government and paramilitaries) | Failure to invite dissident opposition to roundtable negotiations (may result in Revolution or regime breakdown which is undesirable to both communists and dissidents) |

Table 1: Interpretation of simple game of credible commitments

In earlier work, I have argued that this model adequately represents the dilemmas confronting actors engaged in pacted transitions in ECE according to Adam Przeworski.<sup>13</sup> Przeworski argues that ECE communists in the late eighties preferred a democratic transition in which they could continue their political careers to a revolution potentially depriving them of any political prospects and, possibly, of life. A democratic transition with transitional justice is a mild equivalent of such a revolution. The simple model above suggests that a transition without transitional justice is not feasible because the former opposition has incentives to default on any promise, depriving the former autocrats of political positions via transitional justice. However, we cannot use this model to explain the actions of the oppositionists in Poland and Hungary. Contrary to the model’s predictions, instead of reneging, they kept the promises made to communists. For years during which the opposition was in power, Poland, Hungary and a few other countries in ECE refrained from administering transitional justice.

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<sup>11</sup> For details on this application of the model see Nalepa, “Skeletons”.

<sup>12</sup> The unique subgame perfect (and also Nash) equilibrium strategy profile is (*SQ*; *Renega*). The strategy *Renega* for Player *G* is weakly dominant.

<sup>13</sup> See Nalepa, “Skeletons”; Przeworski, “Games of Transition” and *Democracy and the Market*.

Applied to the context of civil war settlements the simple model suggests that promises of amnesty given to fighters to induce their disarming will not be kept by the government and thus, fighters should refrain from entering such settlements. The structure of the game and payoffs are common knowledge. Thus, all players have perfect and complete information and know the payoffs of all other players, and, consequently, the fighters should anticipate the government's defection. Since the delivery of amnesty is expected to take place *after* the surrender of arms, how can the government ensure the fighters that it will keep its promise? Jon Elster describes this dilemma as the "delivery problem".<sup>14</sup> I present one possible solution to the credible commitment problem in the following section.

#### 4. Skeletons in the closet

The "Kidnapper's Dilemma" version of the commitment problem comes from the, now classic, *Strategy of Conflict* by Thomas Schelling. Imagine there is a kidnapper who abducts a victim and demands ransom in exchange for releasing her. However, once the ransom is paid out, the kidnapper is better off doing away with the victim. After all, she may provide the police with information identifying him.<sup>15</sup> The victim cannot credibly commit to not revealing her abductor's identity to the police. The kidnapper's dilemma shares the same structure with the simple game presented above. The strategy of releasing the victim is weakly dominated by disposing of her. How can the abducted victim save her life? How can she make her promise to the kidnapper credible? A possible solution to this dilemma runs as follows: let's allow the victim to commit some heinous crime and supply her abductor with evidence of this crime. If she were to reveal the identity of the kidnapper, he would uncover the evidence against her. Since the disutility from being held responsible for such an act outweighs the victim's utility from punishing the kidnapper, she refrains from revealing his identity and the optimal solution is ensured. The victim "leaves a skeleton in the kidnapper's closet" and the abductor will reveal it, if he himself is revealed by the victim. This secret information makes the victim's commitment not to reveal any information to the police credible.<sup>16</sup>

In pactured transitions, such as the ones that took place in ECE, the embarrassing "skeletons" are files of former dissidents who were secret police informers. A note of explanation is in place here: Why are there informers among dissidents? This is related to the long tenure of communist authoritarian regimes in ECE, which lasted nearly half a century. Especially after the death of Stalinist dictators throughout the region, the communist regimes ECE rarely engaged in costly violence against the organized resistance. They preferred to maintain secret enforcement apparatuses capable of monitoring the expansion of dissident activity by infiltrating opposition organizations with a network of undercover agents. The agents would be regular citizens who would report forbidden or illegal activity of their co-workers, neighbours, and sometimes even family members and friends. While sympathizers of the communist regime were eager to become informers, the secret police valued most highly the informers from within the opposition itself. The identity of such informers had to be kept secret, especially from their fellow dissidents.

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<sup>14</sup> Jon Elster. *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004, pp. 190-1.

<sup>15</sup> Below, I call the victim "she" and the kidnapper "he".

<sup>16</sup> The plot of "The Albino Alligator" thriller runs along this scenario. After killing one of the co-abductees in custody of the kidnappers, the surviving victim tells the police who rescued her that the only surviving kidnapper was a victim as well (<http://www.imdb.com/title/tt0115495/>).

Secret police files allowing for the identification of these agents remained secret when the opposition entered the transition negotiations with the outgoing autocrats. The easiest, but also most costly, way to assess the opposition's level of infiltration would have been to adopt lustration laws, that is, a law uncovering links of politicians to the former secret police. If infiltration levels were low, the opposition could gain from lustration, since the procedure would mainly target successors of the communist regime. In the opposite case, adopting lustration could hurt the opposition. Although the opposition was uncertain about the extent of its infiltration, the communists had considerably more information about it. After all, the secret police had worked for the *ancien régime*. The communists could exploit this informational advantage by blocking the transition, if they feared that the low levels of informers would induce the opposition to break its obligation. However, since the opposition did not know to what extent it would be implicated by a transitional justice procedure, such as lustration, the communists could try to convince the opposition that it was highly infiltrated. One may think of their decision to open the gates to transition as a message signalling the level of infiltration in a game of incomplete information. The signal could be noisy, since the communists had an obvious incentive to bluff. To dissuade them, the opposition could respond with ambiguity whether to adopt or refrain from transitional justice.

The strategic interaction outlined above helps to explain two puzzling phenomena observed in ECE: (1) some countries, such as Poland, Slovakia or Hungary, refrained from transitional justice for many years;<sup>17</sup> (2) in other countries, such as the Czech Republic or East Germany, promises of amnesty were broken very quickly. The short answer to the ECE puzzles is: the dissident opposition refrained from lustration in fear of revealing “the skeletons in its own closet”. Exploiting the opposition's uncertainty, the communists entered roundtable negotiations leading to democratization to signal that levels of infiltration are high.<sup>18</sup> The explanation sheds light onto why transitional justice will sometimes be significantly delayed or avoided altogether.

Before I present a formalization of the intuitions outlined above, let me sketch the interpretation of the game for civil war settlements, such as Colombia's. The government can credibly commit to delivering amnesty to the surrendering fighters if the government has “skeletons in the closet” that the fighters could release in the event that the government reneged on the promise of amnesty. In this interpretation, Colombian paramilitaries would hold the government hostage for as long as it takes for the amnesty promise to be delivered. The “skeletons” could take the form of infiltration of governmental elites with members of the paramilitary. Any information embarrassing the reputation of the government elites that the paramilitaries are at liberty to release could play the role of “skeletons”. I now turn to presenting a signalling model that formalizes these intuitions.

## 5. Skeletons in the Closet

In the Skeletons in the Closet (SC) model, I use a signalling game to formalize the intuition that the fighters can exploit, as an insurance of amnesty, the government's uncertainty about

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<sup>17</sup> Although transitional justice in the form of lustration laws was eventually adopted, it was not implemented until the late nineties, or in the case of Slovakia, even as late as 2003. Furthermore, in these cases of delayed transitional justice, the opposition negotiating the transition kept its promises – lustration laws were adopted by their successors, or in some cases, the post-communists themselves; see Nalepa, “Skeletons in the Closet”.

<sup>18</sup> However, because the communists' signal was “noisy”, the opposition responded with caution and was somewhat ambiguous about refraining from or engaging in transitional justice.

its infiltration levels and that the government can learn the extent of infiltration from the fighters' actions.

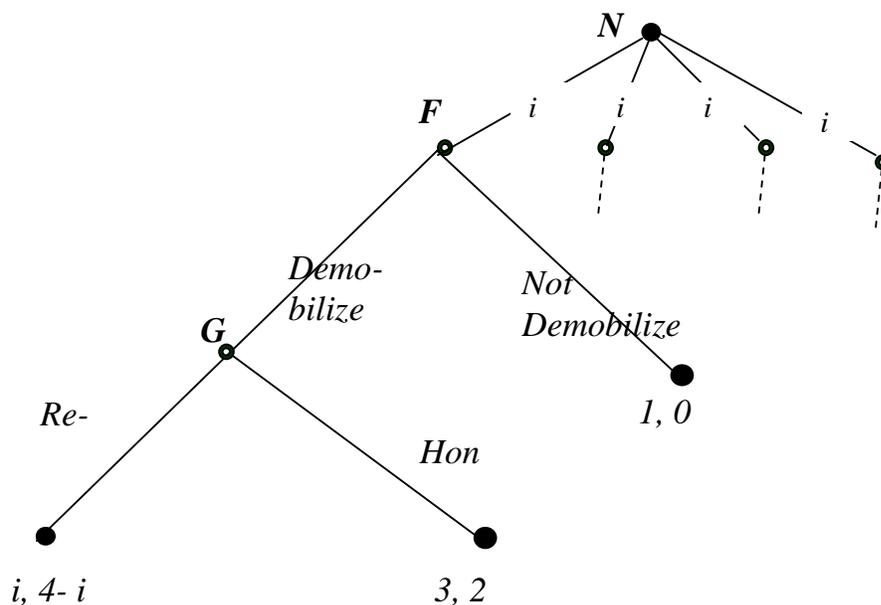
In its canonical form, a signalling model has two players: a *Sender* and a *Receiver*. The *Sender* has private information (about his "type"), unknown to the *Receiver*, which affects the payoffs of both players. Through his choice of message the *Sender* can pass on to the *Receiver* some originally unknown information. In response, the *Receiver* chooses an action. The credibility of the *Sender*'s signal depends on how closely his preferences are aligned with those of the *Receiver*. Equilibria in signaling games (usually Perfect Bayesian Equilibria) have two parts: the strategy profile and the beliefs of the *Receiver* about the type of *Sender*'s private information. In one important class of equilibria – separating equilibria – *Sender* conditions its actions on the type of private information it has. In this process, some information is revealed by the *Sender*, and the *Receiver* gets to update his *a priori* beliefs to a *posteriori* status, and meaningfully conditions his actions on this information. In the other important class of equilibria – known as pooling equilibria – different types of senders choose the same action. Such messages convey no information to the *Receiver*, whose *a posteriori* beliefs remain unchanged. In such equilibria, receivers always act in the same way.

The following SC game is a discrete version of the original Transitional Justice with Secret Information (TSI) game discussed in previous work of mine.<sup>19</sup> The fighters (*F*) are the *Sender*, while the *Receiver* is the government (*G*). The private information is the level of infiltration of the government,  $i \in \{0,1,2,3\}$ , where  $i=3$  represents the highest level of infiltration while  $i=0$  represents the lowest level. The government prefers less infiltration to more while the preferences of the fighters are the exact opposite. The fighters have private information about the exact value of  $i$  but the government does not know it — it believes that each level of infiltration is equally likely. This assumption is supported by the fact that those maintaining contact with the paramilitaries are anxious that this information does not reach the top echelons of power.<sup>20</sup> The game is represented in figure 2 below.

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<sup>19</sup> Nalepa, "Skeletons in the Closet". The discrete version of the game is more tractable than the original version were infiltration is continuous over a one-dimensional space.

<sup>20</sup> Although commentators of the Colombian case may express some doubt as to whether those who had contacts with paramilitaries were able to hide it from the leaders in top echelons of power, the fact that most contacts took place in relatively remote areas suggests that concealing infiltration was at least possible. It is worth noting, however, that relaxing this assumption and assuming that the government knows  $i=3$  would lead to an equilibrium in which the promise of amnesty is honoured. I thank Pablo Kalmanovitz (personal communication) for pointing this out to me.



| Players                        | Actions   | Incomplete information  | Payoffs at terminal nodes |
|--------------------------------|---|---|---------------------------|
| Fighters (F)<br>Government (G) | $A_F = \{\text{Demobilize, not Demobilize}\}$ is F's action set<br>$A_G = \{\text{Renega, Honor}\}$ is G's action set | $i \in \{0,1,2,3\}$ is F's private information about the level of infiltration represented by move of Nature in stage 1 | (Fighters, Government)    |

Figure 2: The Skeletons in the Closet game

In stage 1, Nature determines the level of infiltration  $i$ . There are four possible levels, 0, 1, 2 and 3. The fighters observe the exact level of  $i$  and, in stage 2, choose which message to send. The two types of messages are: enter the settlement with the government (*Surrender*) or hold on to arms longer (*Status Quo*). If the fighters refuse to settle with the government, the game ends and the fighters and the government receive their reversion payoffs,  $N_F$  and  $N_G$ , respectively. In stage 3, after observing the fighters' action, the government updates its beliefs regarding its infiltration level and chooses one of two actions. It can renege on the promise of amnesty. In such a case, the game ends with the payoffs of  $i$  for the fighters and  $4-i$  for the government.<sup>21</sup> The government can also honour the agreement, in which case the payoffs are of  $t_F$  and  $t_G$ , for the fighters and the government, respectively. I assume the following relations between the parameters defining payoffs:

$$0 < N_F < t_F \leq 3 \text{ and } 0 < N_G < t_G$$

Note that  $i$  can take any of the four values described above. However, if the game ends with the opposition reneging, payoffs depend on the value of  $i$ , just as they depend on the values of the parameters. The justification of the relations between parameters is as follows. As was explained before, if amnesty is broken, the more compromised the government is by links to the fighters, the better off the fighters are (their payoff in such a case is  $i$ ). In this situation,

<sup>21</sup> This implicitly assumes vNM utility functions, i.e., players who are risk-neutral.

if the amnesty agreement is broken, the fighters have incentives to reveal compromising information about the government. This may involve naming army generals and politicians who bankrolled paramilitary operations and even “worked hand in hand with [paramilitary] fighters to help carry them out”.<sup>22</sup> Why would the fighters choose this course of action? A possible justification is that after the fighters have surrendered their arms, they can no longer revert to violence. They are forced to seek political influence within the public arena, perhaps by organizing political parties or supporting existing ones, competing for legislative and executive seats with the existing government. Exposing the corruption of existing governmental elites makes it easier for the fighters to place representatives of their own in positions of responsibility. The fighters already have a reputation of perpetrators of human rights. By sharing the responsibility for these crimes with some government officials they can only gain. The costs of revealing embarrassing information are fully absorbed by government elites and they can expect to suffer the consequences of such revelation. These costs could be expressed in electoral currency (as lost legislative representation) or – in areas with unreliable democratic procedures – as losses in clientelistic relations.<sup>23</sup> Hence  $F$ 's payoff is increasing in  $i$ . When infiltration is extremely high, i.e.,  $i$  close to 3 revealing the government's infiltration might even be better for the fighters than an amnesty (thus  $t_F \leq 3$ ).

On the other hand, for the government side, revealed infiltration translates into reputational losses and thus their payoff from reneging on the promise of amnesty (which implies the revealing of “skeletons”) is decreasing in  $i$ . The government prefers reneging when its level of infiltration is low (i.e., when  $t_G \leq 4-i$ ). In this case, the fighters bear the greater burden of responsibility for human rights abuse and the government stands a better chance at surviving in power and reaping the benefit of bringing human rights violators to justice. However, for higher levels of infiltration (i.e.,  $i$  close 3) the government will prefer to keep its promise of amnesty to reneging. This is the case because circulating information about corrupt governmental elites shames members of the governmental elites and reduces their chances of reelection. The worst outcome for the government, however, is if the fighters were to refuse giving up arms altogether ( $N_G \leq t_G$ ). Two informal propositions that characterize certain properties of the game follow.<sup>24</sup> Both propositions refer to what happens in a Perfect Bayesian Equilibrium. Proposition 1 summarizes the main result of the model.

*Proposition 1: No separating Perfect Bayesian Equilibria in pure strategies exist.*

This proposition says that whenever the fighters surrender, the government will sometimes renege and sometimes honour the promise. The risk of defection is something the fighters are always aware of and despite that, they surrender. Most importantly for us, both outcomes in which agreements are kept and in which they are broken are consistent with the model's predictions. Contrary to the predictions from the simple model presented in section 3, demobilization as well the efforts of the government to deliver their side of the bargain are not irrational. Proposition 2 provides an example of a separating equilibrium in which fighters condition their action on the observed level of infiltration  $i$ .

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<sup>22</sup> For an example of top paramilitary commanders revealing that governmental elites were involved in the killing of civilians and cocaine trafficking, see “Paramilitary Ties to Elite in Colombia Are Detailed”, WashingtonPost.com, 22 May 2007.

<sup>23</sup> Pablo Kalmanovitz (personal communication) points out that the Colombian electoral system, particularly in the regions with higher paramilitary infiltration, may be highly corruptible. Thus, contrary to the ECE, payoffs should rely less on electoral incentives and more on reputational effects.

<sup>24</sup> Proofs can be found in Nalepa, “Skeletons”.

*Proposition 2:* Let  $q$  represent the probability of reneging by  $G$ ,  $(1-q)$  represent  $G$ 's probability of honoring and  $i^*$  represent the threshold infiltration, so that if  $i \geq i^*$   $F$  demobilizes and if  $i < i^*$   $F$  does not demobilize. The following profile and set of beliefs form a Perfect Bayesian Equilibrium:

$$(q=1/4, i^*=1)$$

$$Pr(i=0/Neg)=0, Pr(i \neq 0/Neg)=1/3$$

In this equilibrium, the fighters will demobilize whenever the level of infiltration is higher than very low ( $i > 0$ ). After observing demobilization, the government can update its beliefs about the level of infiltration. It knows that it is at least 1. The government's beliefs about the level of infiltration change from complete ignorance to confidence that with one third probability it is moderately low (1), average (2) or high (3) In making their actions consistent with those beliefs, the government will play a mixed strategy, in which it honours the terms of the settlement with probability and reneges on the amnesty promise with probability.

From our point of view, the separating equilibria are more interesting because in these equilibria the government is able to learn about infiltration levels from the fighters' action. The process of learning is referred to as "updating *a priori* beliefs to *a posteriori* beliefs". Over the course of it, fighters base their decision of whether or not to surrender arms on the level of infiltration that they observe, and the government uses the fighters' decision to initiate negotiations to update its beliefs about the level of infiltration.

In the more general TSI model, comparative statics<sup>25</sup> on the parameter  $q$  reveal that a marginal increase in the fighters' utility from amnesty ( $t_F$ ) will make the government more likely to renege, while marginal increases in the government's utility from amnesty ( $t_G$ ) or the fighters' utility from not surrendering, ( $N_F$ ) will make the government less likely to renege.  $F$ 's willingness to surrender increases with  $G$ 's level of infiltration. Furthermore, the more  $F$  has to gain from a transition with amnesty relative to the status quo of no surrender, the more likely is  $G$  to renege on promises of amnesty. The government will be more likely to abide by its promises, the more it values transition with amnesty and the better equipped the fighters are to hold out without surrendering.

## 6. Illustrations from Poland and Hungary

Before discussing the implications of this model for Colombia, I provide illustrative examples from Poland and Hungary. As remarked above, the original version of the SC game – the Transitions with Secret Information game – was originally developed for explaining delayed transitional justice in East Central Europe. The embarrassing "skeletons" represent evidence of dissident members' collaboration with the communist secret police prior to the transition. While the extent of this infiltration is known to communists who are deciding whether or not to negotiate with the dissident opposition the terms of the democratic transition, the dissidents are ignorant about the extent of their infiltration. Breaking promises of amnesty in ECE amounts to implementing lustration laws, that is, laws exposing links of politicians running for office to the communist secret police.<sup>26</sup> As Table 1 did for the simple model in section 3,

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<sup>25</sup> See Nalepa, "Skeletons", mathematical appendix to chapter 4.

<sup>26</sup> This exposure results in undermining the reputation of politicians running for office; lustration laws may additionally ban verified collaborators from running for office or issue such a ban if the politician has lied about his or her collaboration;

the table below Figure 3 presents the interpretation of the SC model for pacted transitions and civil war settlements.

The most important empirical implication from solving the above model is that all outcomes of the Skeletons in the Closet game may become PBE outcomes for different parameter values. Another main result is that no separating Perfect Bayesian Equilibria in which the opposition (or government) uses pure strategies exist. The SC game is a parameterized family of games with four parameters defining payoffs, i.e., when we assume specific values for these parameters, we define a specific game. Interestingly, only three of these parameters matter for the equilibrium. In addition, for every specific set of parameters and every equilibrium, equilibrium outcomes depend on the level of infiltration. Thus, the parameters that determine which equilibrium outcome is possible are:

- a. How infiltrated is the opposition with secret collaborators?
- b. How attractive is for the opposition transition without lustration?
- c. How attractive is for the communists to hold out without initiating negotiations?

Note that the value of  $i$  does not affect the Perfect Bayesian Equilibrium strategy profile because its distribution is fixed. Thus,  $i$  is not an internal parameter of the game, but a parameter that characterizes the decision node of the autocrats, and subsequently the decision node of the opposition;  $i$  does have an impact on what is the equilibrium outcome, even though it does not have an impact on the equilibrium strategy profile. To summarize: although equilibrium strategies depend on only three parameters,  $N_F$ ,  $t_F$  and  $t_G$ , the equilibrium outcomes depend on the four parameters  $N_F$ ,  $t_F$ ,  $t_G$ , and  $i$ .

Between January and July 2004, I interviewed 51 elite members in Poland and 26 in Hungary. The respondents came from all political camps and included the current President of Hungary Laszlo Solyom, the former Polish Premier Jan Olszewski as well as numerous ministers and MP's. In the research summarized below, I used data from these open interviews both to approximate parameters of the SC model and to provide empirical support for some of the critical assumptions of the model, such as the claim that the opposition's preferences over lustration were closely linked to its beliefs over infiltration.<sup>27</sup>

## 6.1. Poland

A former Polish samizdat publisher, asked to assess the size of the secret informer network in Poland, exclaimed: "The opposition in Poland was so numerous that it must have had more secret police agents in its ranks than there were oppositionists in the remaining countries of the communist bloc all taken together!"

How could the opposition become so numerous? Timothy Garton Ash's statement "In Poland the transition lasted ten years, in Hungary ten months, in Czechoslovakia ten days" provides a concise answer. Solidarity, the first independent trade union in the Soviet bloc, was legalized in 1980 after signing the first accords with the communist government in Gdansk. Many believed that Poland was about to become the first state in the bloc to be independent of the Soviet Union.<sup>28</sup> At the height of its popularity, the trade union had 9.5 million members,

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see Nalepa, "To Punish the Guilty and Protect the Innocent: Comparing Truth Revelation Procedures", *Journal of Theoretical Politics* 20:2 (2008).

<sup>27</sup> A more systematic comprehensive analysis of data collected in ECE is presented in Nalepa, "Skeletons".

<sup>28</sup> Membership in the communist Polish United Workers Party at its peak barely reached 3 million.

nearly four times more than the communist party organization (*Polish United Workers' Party, PZPR*).<sup>29</sup> Furthermore, over the sixteen months during which Solidarity was a legal trade union, other civic associations proliferated, including a few more million of members in independent professional unions, the Farmers' Solidarity, student unions and even independent unions of the police and armed forces.

This outburst of civil society came to a dramatic finale with the enactment of Martial Law on 13 December 1981 by General Wojciech Jaruzelski. Jaruzelski appointed the "Military Council of National Salvation" (*Wojskowa Rada Ocalenia Narodowego*) as an interim executive body. The Polish communist state managed to carry out the military crackdown on Solidarity without any aid from the Warsaw pact or Soviet armies. The introduction and implementation of martial law was a fully internally administered operation. The total number of those arrested for political offenses reached 4,790 by the July, 1983 amnesty. One of the interviewed academics in Poland gave the following interpretation of Martial law:

In 1981 Urban [the communist government's press secretary] wrote to Kania [the prime minister of the communist government] that Solidarity was becoming a force impossible to contain or control and he said that he believed that introducing martial law was necessary to destroy its network. He also planned a scenario according to which tens of thousands of Solidarity members would be temporarily arrested and confronted with the secret police, which would conduct preparatory activities for recruiting them as agents. The sole purpose of the operation would be to figure out who among them would agree to collaborate and who would not. Persons who acted tough so that it was obvious they would not collaborate were left alone and no sanctions were ever taken against them.

The quote suggests how after arresting more than ten thousand opposition members, Solidarity could have been infested with hundreds of informers. How common was this knowledge about the level of infiltration among dissidents? The President of one of the leading libertarian NGO's in Poland volunteered the following answer:

Those who participated in the Roundtable negotiations knew what was in the files. For instance, Adam Michnik, along with two historians, established the, so called, 'Historical Commission,' which for a couple of months in 1990 surveyed the archives of the secret police. After that, Michnik became a staunch resister of opening the files in any form or of carrying out lustration, but he never said what he found in those files.

Adam Michnik was a prominent dissident who after the transition became editor in chief of *Gazeta Wyborcza*, the first Polish daily that was not controlled by the communist government. An attorney and former dissident, who had defended two of his colleagues in lustration court cases concurred with the opinion of PN8 saying "Kozłowski [the liberal Interior Minister] and the Solidarity left knew well what is in the files". One archivist went as far as to say that,

The secret police organized the Roundtable negotiations. The communists promised not to come back to power in return for lack of transitional justice. The files

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<sup>29</sup> PZPR's membership declined between 1979 and 1982 from 3.091.000 to 2.327.000, mainly as a result of voluntary departure in reaction to Martial Law policies. Paradoxically, one can speculate that the departure of these members ensured the party's survival; see Jadwiga Staniszkis and Jan Tomasz Gross, *Poland's Self-Limiting Revolution*, Princeton, N.J.: Princeton University Press, 1984.

of secret agents who had been Solidarity members were the guarantor of the promise. The contract was of the sort “we have something on you and you’ve got something on us.

Indeed, shortly after the “Historical Commission” had surveyed the contents of the former secret police archives, Michnik became a staunch opponent of lustration. His newspaper started advocating the restraint against transitional justice in favour of “forward looking reconciliation”. Former prominent dissidents would complain that although *Wyborcza* promised to be a forum of debate about the desirable extent of lustration, it refused to publish articles calling for lustration.

How did government actors respond to the signals communicated by dissidents who were allowed to consult the files? For an answer to this question we have to move back a few months to the beginning of the Roundtable negotiations.

The Polish Roundtable negotiations were held from 9 February to 6 April 1989, between the representatives of the underground Solidarity, the representatives of communist-controlled trade unions OPZZ, and the communist government. The most important outcome of the negotiations, which initiated an entire wave of peaceful transitions bringing to power the former dissidents of ECE, was the communists’ concession to semi-free elections. As a result of Solidarity’s overwhelming victory, the first non-communist cabinet, headed by Tadeusz Mazowiecki, was appointed in 1989.<sup>30</sup>

When it became apparent that due to a perverse mistake in institutional design, a government led by a PZPR prime minister could not be formed, some of the former communists became concerned about whether promises of amnesty would be kept.<sup>31</sup> Much to their surprise, the first post-Solidarity government “pulled its transitional justice punches”.<sup>32</sup> Both the military and the foreign service, another stronghold of secret police recruitment, remained intact after the transition. Although some screening and employment cuts took place, most of the army and security *nomenklatura* remained in office. Only security service operatives in the embassies and the Interior Ministry itself, who were particularly active in tracking down Solidarity representatives abroad, were fired. In 1992, a proposal to conduct a verification of

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<sup>30</sup> The elections were “semi-free” in the sense that only the 35% quota was open for free contestation to non-PUWP members, whereas PUWP and its satellite organizations were guaranteed the remaining 65% of the seats. MPs who were elected in the 1989 from the Solidarity mandate were united in the Civic Parliamentarians Circle (OKP), which later broke up into multiple post-solidarity parties, some more liberal, like Democratic Union (UD) or the Liberal-Democratic Congress (KLD) and some of them more conservative, like Center Alliance (PC) or National-Christian Alliance, ZChN. For more details about the fragmentation of the Polish party system and electoral law reform, see Kenneth Benoit and Jacqueline Hayden, “Institutional Change and Persistence. Origins and Evolution of Poland’s Electoral System 1989-2001”, *Journal of Politics* 66, 2 (2004), and Marek Kaminski and Monika Nalepa, “Learning to Manipulate Electoral Rules” in *Handbook of Electoral System Choice*, Colomer (ed.), Palgrave-Macmillan, 2004.

<sup>31</sup> The “mistake” was as follows. At the Roundtable, the communists wanted to secure 65% of the seats in the lower house for their own candidates and, in addition, hoped to win some of the 35% seats open for free contestation to non-party-members. However, part of the 65% was to be filled by candidates on the, so called, “national list” containing 33 names of famous communist candidates. A candidate from this list in order to “win” a seat in the legislature needed the support (expressed by not having his name crossed out) of at least 50% of the voters. Only two communists from the national list received the required support. To make things worse for the communists, the “Solidarity” candidates won the entire 35% quota open for free contestation. With 33 seats unfilled in the legislature, the communist coalition would hold only 62.2% seats instead of the planned 65%. While the leaders of Solidarity quickly agreed to have the electoral law amended so that the unfilled seats would be allotted to communist candidates. However, given that “Solidarity” won 99 out of 100 seats in the Senate, the majority of 65% would be able to select its own cabinet but would be unable to make any decision without the “Solidarity’s” consent. The crisis of legitimacy that emerged in the aftermath of the elections was irreversible. For details see Marek Kaminski, “How Communism Could Have Been Saved: Formal Analysis of Electoral Bargaining in Poland in 1989”, *Public Choice* 98: 83-109 (1999).

<sup>32</sup> Elster, *Closing the Books*.

communist army officers was put forward by Senator Zbigniew Romaszewski, who argued that army purges would serve as “a form of fending off enemy infiltration from outside, as the army is the single most sensitive point of each country”. But members of the former opposition, especially the RT negotiators who were at that time cabinet members, advised against considering the proposal. President Lech Walesa, Solidarity’s leader, admitted publicly that he was “in favor of a reasonable exchange of senior staff in the army, as a much better idea than screening”. This policy was supported by ex-dissident members of the cabinet: at a meeting of the Sejm’s National Defense committee, Deputy Defense Minister Bronislaw Komorowski opposed the plan to vet army officers, claiming that:

[t]he ministry has no evidence of the purported disloyalty of army commanders and it sees no cause for suspicion. Implementing the Senate proposal would deprive the army of about 7,000 officers. From the point of view of the army and state defense, both the Senate’s bill and all the other proposals in the matter must be considered harmful, because they are bound to decimate the commanding staff. (Polish News Bulletin 1992)

When a lustration resolution was submitted in May 1992 by a group of 105 MPs, it was passed in the absence of members of the Democratic Union (UD), the party of premier Mazowiecki. UD members were the first to bring down the implementation of the resolution along with the cabinet who had attempted to implement it.

In 1992, when six proposals of lustration were submitted to the Sejm, the UD was the only party besides the post-communist SLD that did not sponsor any proposal. It also moved to reject the four harshest proposals and have the remaining two sent back for committee work. During those debates, as well as in 1993 when a special committee on lustration was created in the parliament, the UD vigorously opposed purges, arguing that most of the evidence was destroyed and the remaining files could have been fabricated.<sup>33</sup> Mazowiecki not only failed to apply collective responsibility to members of the military and police, but even went as far as to offer promotions to the existing personnel. The generals’ promotions were regarded as “spectacular” not only in terms of the number of officers to be promoted, but with regard to particular candidates. Seven generals were promoted to a higher rank, and twenty-two colonels (plus one from the Ministry of Internal Affairs) were promoted to generals (Lamentowicz interview, Rzeczpospolita). This allowed some military officers to become so confident that they denied their role in supporting the past regime, as expressed by one of the officers awarded promotion:

Our consciences and hands are clean. We have always served the country, and we remained faithful to our oath. Today, I can find no justification which would allow certain politicians to apply the principle of collective responsibility, to put us in an ambiguous situation, and to undermine our credibility. I look at the Defense Ministry’s leadership that I am a part of from the professional point of view. One needs to spend many years in the service in order to become a general. During this period, an officer’s competence, his ability to supervise very large teams and, first of all, his allegiance to Poland are subject to numerous trials. I have full confidence in the people whom I promote. I have met many of them during their training. I believe that it is unfair to attach double-meaning labels to many of them. At

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<sup>33</sup> See Nalepa, “Punish the Guilty” and Kaminski and Nalepa, “Judging Transitional Justice” for a discussion of the merits of this argument.

the same time, one could attach such labels to the majority of adult Poles, including the ardent supporters of decommunization. On the other hand, it would be a tragedy to destabilize the army, considering the complex international situation. I believe that, reason will win over a dogmatic approach to the screening issue. (General Tadeusz Wilecki, chief of the General Staff of the Polish Army, in interview with Zbigniew Lentowicz for Rzeczpospolita, 1990)

A lustration law that matched the extent of secret police infiltration was not implemented until 2007.

## 6.2. Hungary

The Hungarian RT negotiations took place between June and September 1989 and essentially comprised two independent RTs: the opposition table (*Elenzekei Kerekasztal*), EKA, at which the opposition forces agreed on a common stance against the regime and the National Roundtable Talks which brought together three teams.<sup>34</sup>

The opposition team was created upon the invitation of the Independent Lawyers Forum and comprised eight opposition groups, among them the Hungarian Democratic Forum, MDF, the Alliance of Young Democrats (Fidesz) and the Alliance of Free Democrats (SzDSz), as well as a group of historic descendents of the parties present in the semi-democratic period of 1945-7, such as the Smallholders (FKgP), the Social Democratic Party and the Christian Democrats (KDNP). The opposition Roundtable was to a large extent a reaction of the various groups to the communists' attempts at conducting separate negotiations with each of the dissident groups, a strategy that obviously would have weakened the opposition's bargaining power. To increase unity among members of the opposition, EKA adopted unanimity as the rule for decision making. This voting rule was the only condition under which SzDSz agreed that EKA negotiate with the MSzMP, fearing that otherwise, the opponent would exploit their weaker position. The Alliance of Young Democrats (Fidesz) similarly agreed to talk with the MSzMP only as part of a united opposition.

The communist team consisted of lawyers from the Ministry of Justice, all of whom were members of the Hungarian Socialist Workers' Party (MSzMP). Additionally, a so-called "third side" was made up of organizations affiliated with the MSzMP, but technically not part of it. The existence of an official forum of debate among the numerous opposition groups did not mean that the communist leaders all represented a unified position. In contrast to communist party in Poland, the MSzMP was more pluralist and involved numerous reformist circles. The most influential one was led by Imre Pozgay, famous for his close affiliation with the MDF. It is plausible that the reform communists, such as Pozgay, who were in close contact with the opposition groups, inflated and exploited the divisions within the ruling camp to extract concessions from the opposition. They would present the communist hardliners as willing to call off RT negotiations if the reformists failed to gain some benefits for the outgoing regime, such as a presidential appointment or election date early enough to avoid flat defeat. The KDNP and MDF either believed the communist reformers or simply acted as their advocates on the floor of EKA. They supported the idea of direct presidential elections preceding the general parliamentary elections that would ensure that Pozgay got the presidential position. In response to MDF's and KDNP's proposal, the more radical opposition groups, such as Fi-

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<sup>34</sup> Andras Bozoki. *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy. Analysis and Documents*, CEU Press, Budapest, 2002.

desz and SzDSz, undertook steps to ensure EKA's tough stance to extract concessions from the communists.

Most interviewees indicated that young parties, such as Fidesz, were less infiltrated than the historical parties, such as the Smallholders and KDNP. The MDF was registered as an association as early as 1987, after having declared itself to be a neutral group. Its members had decent careers in Kadar's communist state. These factors made the MDF party particularly suspect of links to the secret police. Ivan Szabo, a former MDF MP, has been quoted as saying that the reason MDF blocked the SzDSz's lustration proposals between 1990 and 1994 was that lustration would make the government lose its majority support in parliament, so extensive was its infiltration. It was rumoured that the MDF was the most infiltrated party. On the other hand, the communist party was long believed to have escaped infiltration, since its members felt obligated to provide communist authorities with the information they required even without signing an official contract of any sort.

In the aftermath of the roundtable negotiations, when the first non-communist cabinet was being formed in Hungary, out-going communist Prime Minister, Miklos Nemeth, handed to the new Prime Minister, Jozsef Antall of MDF, a list of former secret police collaborators from opposition parties. A majority of my elite respondents suggested that, according to Nemeth's list, Antall's MDF was the most infiltrated party among the opposition parties. They found it hardly surprising that the first lustration proposal was scrapped by combined votes of members of the ruling coalition, MDF, the Smallholders (FKgP) and the Christian Democrats (KDNP).<sup>35</sup> A very popular rumour in Hungary was that Prime Minister Antall used files on his coalition partners, Istvan Csurka and Peter Torgyan, to secure their support for his policies. Media sources report also that Antall selectively released dossiers damaging ex-communists' reputation prior to the 1994 elections to prevent the Hungarian Socialist Party (MSzP) from winning.

Early in 1994, it became apparent that MSzP would win elections anyway. At that time, the MDF, along with its coalition partners, who a few years earlier had opposed any TJ legislation, passed a very harsh lustration law. It covered not only politicians, but also reached the media, as well as legal and academic circles – a total of 12,000 people. To ensure that the law would affect the post-communists, the definition of a lustrable offence also included receiving summarized periodic reports from the secret political police. Thus, anyone who had held a cabinet post in one of the pre-transition communist governments would be prevented from holding office. MDF was hoping that a lustration law would lessen the communist success in the upcoming elections. Also, since Antall was about to lose exclusive access to the secret files stored in the Interior Ministry, he preferred that the post-communist leader who was to replace him in the post of prime minister would not have that same access, but rather that the contents of the files be overseen by a screening agency, independent of the government. The harshness of the law, however, backfired when the Constitutional Court ruled it illegal in December 1994. The decision came after the MSzP had won an absolute majority in parliament. As a result, Hungary waited until 2001 for a workable lustration law.

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<sup>35</sup> The proposal itself was submitted by two opposition MPs from SzDSz, Gabor Demszky and Peter Hack. Work on the bill was prompted by a scandalous revelation, which later came to be known as the "Danubegate affair". A former secret police officer, Mayor Vegvari, contacted the SzDSz headquarters in January 1990, only three months prior to the scheduled first democratic elections, with information that the secret police was still infiltrating the roundtable opposition (EKA). After the elections, every deputy was under suspicion for ties with the III/3. The purpose of the Demszky-Hack law was to put an end to rumours being spread in the newly elected parliament about ties of former opposition MPs to the secret police collaborator network. Lustration would end these rumours by appointing a public body to verify them

In an important sense, the phenomenon of delayed lustrations serves as a very direct application of the SC model. It is plausible that the dissident opposition was unaware of who among its members collaborated with the secret police, because revealing this information to fellow dissidents was embarrassing. It is plausible that the communists had much better information about infiltration levels, since the secret police had worked for them. It is also plausible that exposing collaborators among parties that originated in former dissident groups is more damaging to these groups than exposing collaboration of the former communists. After all, they would have been supporting their preferred political system. In a sense, one would almost expect communists to serve as secret informers. It is rather the usefulness of communist collaborators that is problematic. If the secret police wanted to contain anti-communist dissidence, infiltrating dissident groups with informers was a much more advisable route. Finally, it is very difficult to pass lustration selectively, so that its effects extend only to some parties, but not others. Once the law is passed, it applies to all parties although it is more damaging to those who have more collaborators amongst their ranks. Infiltration is not distributed equally across post-transition parties and neither is information about this infiltration. Scenarios in which former dissident parties would benefit from lustration, since they have fewer collaborators than the communists, but in which the dissidents do not know this to be the case are possible. Outgoing communists carried an informational advantage that shielded them from transitional justice for many of the post-transition years. How portable is the TSI model beyond ECE? Can it help us understand how governments can make promises of amnesty credible to paramilitary fighters in the aftermath of civil war?

## 7. Implications for Colombia

The key insight from the SC model is that the potential infiltration of elites who deliver promises of amnesty makes these promises credible and provides fighters with incentives to surrender arms. For promises of amnesty to be credible, according to the SC model, the following conditions must be met:

- a. The governments should be suspecting that members of their elites have incriminating links, but should be uncertain as to where precisely these links are.
- b. The fighters should be in a position to reveal this information if the government were to renege on its promise of amnesty.

Alternatively to (a), the government could have a suspicion of who is infiltrated, but find it impossible to simply purge these members from governmental elites and be free of infiltration. The key is that lack of information about infiltration on the delivering side (the government) is equivalent to having that information but not being able to act upon it.<sup>36</sup>

The meaning of (b) is that the fighters must have access to information about the government's infiltration and should have an incentive to disclose it. If embarrassing the government with exposing its links to human rights violations would further compromise the fighters, they lack incentives for revealing the secret. However if, as a result of revealing these secrets to the public, the fighters would shed part of the responsibility for human rights violations and, by weakening the political position of governmental officials, they would increase

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<sup>36</sup> It is possible that instead of purging, the government wants to protect those who have been severely implicated because it fears being associated with infiltrations if they were to be made public. If infiltration is extensive, extensive purges could be impossible. Revealing infiltration to the public could significantly disrupt the work of a government (Pablo Kalmanovitz, personal communication).

the popular support of their politicians, they have the necessary incentives to make amnesty promises credible.

These observations are particularly important in the light of recent events in Colombia. Similarly to the South African TRC, the JPL has provoked criticism for its leniency towards perpetrators from international human rights organizations, local NGOs and even the office of the UNCHR. There are also problematic aspects associated with monitoring what constitutes a full disclosure of assets and the truth. Specifically, demobilizing fighters were expected to hand-over of all ill-gotten assets, including land, to the National Reparation Fund and to disclose their involvement in crimes as well as knowledge of paramilitary structures and financing sources. However, it is not clear how well equipped the National Prosecutorial Office is to confirm that no truth or assets have been withheld by a surrendering paramilitary.<sup>37</sup>

In other words, paramilitaries may be demobilizing and avoiding harsh sentencing without providing their side of the bargain. Although, this is disconcerting from the point of view of justice, an optimistic observer would note that perhaps because of lenient treatment, the paramilitary forces have been demobilizing in impressively large numbers (more than 31,600 AUC members by October 2006, according to an International Crisis Group Policy Briefing of October of 2006). The numbers are so impressive that it is not clear if the government will be able to provide them with benefits promised to induce their demobilization. Among the benefits are a stipend and professional training, all of which are part of the re-immersion into society process.

If the fighters anticipate difficulties with keeping the terms of amnesty, the SC model predicts that they would start revealing information that is embarrassing to governmental elites. Indeed, the summer of 2007, unveiled serious revelations disclosed by Salvatore Mancuso, a top paramilitary commander. Mancuso had been testifying under the terms of the JPL since the fall of 2006. In May 2007 he revealed that over and above 17,000 armed fighters, the paramilitary controlled a network of more than 10,000 collaborators among the civilian population, linking some of these to the ruling elites. Mancuso helped the JPL prosecution draw a map of massacres committed by AUC forces.<sup>38</sup> However, his testimony has also implicated two ministers from President Uribe's cabinet (Washington Post, 22 May 2007). Following Mancuso, another paramilitary leader, Ivan Laverde Zapata (one of Mancuso's men in the province of Norte de Santander) revealed 380 murders and promised to deliver on 2,000 more. In his testimony, Zapata also gave information on government officials who had been cooperating with the paramilitaries.<sup>39</sup>

Eventually, the police seized a computer that belonged to one of the paramilitary chiefs, which led to another breakout of revelations. By June 2007 charges against 14 current members and seven former members of Congress, the head of the secret police as well as many mayors and governors had been issued. In light of the SC model, the recent events help under-

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<sup>37</sup> *El Tiempo* reported that one of the former paramilitary commanders, José Gregorio Mangones, former leader of the "William Rivas" AUC front (known as "Carlos Tijeras") when testifying under the JPL denied having enough assets to compensate victims. He claimed that his only possession was an SUV. This testimony is hard to reconcile with the fact that for his service under the AUC, he had been receiving a very high monthly salary (*El Tiempo*, 22 August 2007).

<sup>38</sup> The map is available at: <http://www.eltiempo.com/media/produccion/crimenesMancuso/index.html>.

<sup>39</sup> The following month however, another paramilitary leader (Fernando Sanchez a.k.a. "El Tumaco") who had offered key information to a Justice and Peace prosecutor was assassinated just as he was going to tell of his block's activity and of collaboration with government officials (according Eduardo Cifuentes, another JPL applicant; see *El Tiempo*, 11 September 2007). This may have led to more caution in naming collaborators.

stand why paramilitaries were disarming so eagerly. Their infiltration of governmental elites provided them with sufficient insurance that the terms of amnesty would be met.

An important caveat to note here is that although the implementation of the JPL was not what the paramilitaries had anticipated, this was not necessarily due to ill will on the side of the Uribe government. In May 2006, the Constitutional Court ruling put stringent conditions on the paramilitaries surrendering arms under the JPL, or stringent enough to make unlikely an agreement had they been proposed at the beginning.<sup>40</sup> Furthermore, in July 2007, the Constitutional Court ruled unconstitutional the part of the JPL which automatically qualified any crime preceded with an order as a political crime. The Court justified its decision by arguing that in allowing such crimes to fall under the JPL, the law was promoting confusion between common crimes and political crimes (*El Tiempo*, 26 July 2007). In response to the Court's decision, Uribe's government issued a statement severely criticizing the ruling, which led to a deepening of the conflict between the two branches of government. Ostensibly, the rulings had put the Colombian executive in the difficult position of appearing to have reneged on promises given to the AUC during negotiations.

Even without the Constitutional Court throwing logs under Uribe's feet, there was little room for relaxing the tight conditions of the agreement. For instance, Vicente Castaño, a prominent paramilitary leader, left the negotiation table after he sensed that the terms were getting tougher. As the Court ruling made full disclosure of truth mandatory for taking advantage of the JPL benefits, many paramilitaries reversed their decisions to disarm, disarmed only partially, or joined newly forming military groups. These actions were reinforced by further criticism against the leniency of the JPL from foreign human rights activists, the EU and to some extent the US. Thus, the decision of some of the paramilitary leaders to start revealing linkages between the paramilitary human rights violations and the government could be motivated by these external factors.

It is important to note here that the revelation of infiltration is part of an equilibrium strategy for the demobilized paramilitary. There are, however, also other important insurance mechanisms in play, which deserve some discussion here, because of their compatibility with the events that took place in Colombia since the JPL went into force. I discuss them in the final section. Before I do that, however, I would like to address what may seem to be a critical problem with SC's application to Colombia, namely, that contrary to the model's assumptions, those who had contacts with paramilitaries may have been unable to hide this embarrassing information from the top echelons of the executive. The fact that most contacts took place in relatively remote settings may have made secrecy somewhat easier. Note however, that even if in Colombia the prevailing levels of uncertainty regarding infiltration were different than in ECE, it is true that the Colombian government knew that the levels of infiltration were fairly high (for instance, that  $i=3$ ). The equilibrium of a game thus modified would have the Government's action of "Honor". This prediction fits squarely with the Uribe administration's efforts to revert the JPL to the original version agreed to with AUC in 2003.

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<sup>40</sup> The court ruled that "reparation to victims not be limited to ill-gotten assets held by ex-paramilitaries, that all members of a paramilitary unit be held responsible for crimes committed by members of that block, that prison terms under the JPL be no less than 5 years (with time served in detention centers not counting towards the sentence and that all JPL benefits be forfeited if the ex-paramilitary under consideration fails to confess the whole truth" (International Crisis Group, October 2006).

## 8. Alternative explanations<sup>41</sup>

As the example of Vicente Castaño above suggests, not all paramilitary leaders participated in the negotiations with the government to the very end.<sup>42</sup> Other AUC members negotiated, partially disarmed, but still preserved links with illegal armed organizations; some to this day maintain loyal lieutenants ready to follow orders. This is a quite important feature that sets Colombia and ECE apart. In Poland and Hungary, dissident groups who did not participate in the roundtable negotiations, did accept, at least in 1989, the outcome of the RT, which was gradual democratization.<sup>43</sup> This cannot be said for Colombia. First, the two remaining major groups of armed illegal combatants – the FARC and ENL – did not participate in the negotiations.<sup>44</sup> Second, the AUC did not surrender single-handedly, but rather declared willingness to initiate a process of gradual demobilization.

The implication for the SC model is that the fighters preserved an exit option for themselves. At any given time, they are in a position to threaten or to actually use violence, should the government fail to keep its side of the bargain. International NGOs suspect that a large number of weapons were not surrendered after the negotiations. This is supported by the OAS verifying mission's finding that a little over 18,000 weapons were surrendered by December 2006, on average one per two demobilizing combatants! Since the demobilization was an ongoing process, paramilitaries from certain groups could observe its credibility and implementation over time and update their beliefs about how likely the JPL was to be implemented as expected. While the incentives of big drug money and other criminal activities remained more or less stable, prospects of a lenient JPL became grimmer. Hence the paramilitaries' decision against demobilization. The creation of new military units can be reflective of these decisions, especially since after the demobilizations the AUC lost its original structure.

Some recent actions of the Uribe administration could weaken this alternative explanation, however. Two top paramilitary chiefs ("Don Berna" and "Macaco") who had been present at the negotiations have been scheduled for extradition to the US, after it was confirmed that they kept their criminal activities ongoing from jail (*El Tiempo*, 26 July 2007). In August, one of the paramilitaries who had accompanied Castaño in his escape from prison (pseudonym "HH") was also put on the list of inmates awaiting extradition.<sup>45</sup> This may send a strong signal to other paramilitaries' chiefs. Even though the paramilitary commanders may have thought they could continue their operations from jail, the executive has been trying to use the threat of extradition to ensure that they keep their side of the bargain.

Unfortunately, it is also reasonable to expect further violence, both between the new armed groups and the military (as the new groups' relationship with the military may not be

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<sup>41</sup> This section relies heavily on research and comments from Pablo Kalmanovitz.

<sup>42</sup> Castaño participated but pulled off when Uribe ordered that paramilitary commanders be put in temporary seclusion. However, Pablo Kalmanovitz notes in the introduction to this volume that paramilitaries were well represented at the negotiation table, perhaps even more than they should have been, as the representation included even regular drug traffickers.

<sup>43</sup> Even in Hungary, where FiDeSz and SzDSz propagated a referendum to decide upon the mode of electing the President, they did so to prevent the communist representative from winning this office, not to sabotage the outcome of the roundtable talks altogether. The referendum was an attempt to get more out of the roundtable deal than had been initially agreed to; see Bozoki, *Roundtable Talks of 1989*.

<sup>44</sup> Efforts to negotiate the demobilization process of the ELN and FARC have been made, but are still in very early stages, although international organizations, such as the OEA (Organization for American States) are optimistic (OEA/Ser.G 2007).

<sup>45</sup> It has also recently been rumoured that Vicente Castaño has been murdered for his obstruction of the negotiations process – another fact weakening the strength of this alternative explanation (Pablo Kalmanovitz, personal communication).

as collaborative or symbiotic as it was in the past) and towards other illegally armed groups (over control of drug-trafficking routes surrendered by demobilizing AUC units). Moreover, it can be expected that the competition for power within the ranks of emerging or reappearing paramilitary groups will be fierce, as lower echelons of the paramilitary begin competing for leadership after their leaders have surrendered arms. There is increasing alarm in the National Reintegration Program about demobilized low-level troops who are being recruited into new criminal/semi-paramilitary organizations. While the nature and power of these groups is not yet clear, it is possible they will gradually take over the control AUC had. Due to lack of information about their organization and chain of command they may present an even stronger threat to peace in Colombia.<sup>46</sup>

The decision of Salvatore Mancuso to disclose links between paramilitaries and the government could also be interpreted as an effort to comply with the Constitutional Court's restrictions on the applicability of JPL benefits. Since the Court ordered that a paramilitary's failure to disclose the full truth is sufficient grounds to lose the JPL benefits, Mancuso could have been using the ruling as an excuse to punish or caution the government; or even more simply, as a way to cover his back. Since the Constitutional Court failed to elucidate fully the grounds for losing the benefits,<sup>47</sup> Mancuso and others who decided to confess may have been using the opportunity created in the law.<sup>48</sup> However, according to JPL, a former combatant must "describe the circumstances of time, manner, and place in which they have participated in the criminal acts committed on occasion of their membership". There is no obligation to disclose sources of political support or finance. Truth-elucidation requirements are narrow. As the recent events seem to show, infiltrated elites were hoping to reap the benefits of a lenient law, to a no lesser degree than the paramilitary leaders.

Finally, after the incentive structure for demobilizing was altered in the process of implementing it, one could interpret the disclosure of infiltration as an example of, literally, a prisoners' dilemma situation. Some AUC members' refraining to demobilize has created distrust and enmity among paramilitary leaders. What one might expect in this situation is a race to the bottom, in which all parties who had participated in human rights violations (both on the paramilitary and on the government side) would be engaging in mutual defections.<sup>49</sup>

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<sup>46</sup> It should be noted however that the OEA mission has been collecting information about these groups (OEA/Ser.G. 2007).

<sup>47</sup> Kalmanovitz in Section 2.2. of the introduction to this volume mention that there are some gaps in the ruling. But it is clear that if a significant omission in a confession is found *ex post*, all benefits are lost.

<sup>48</sup> In the original version of the law, a discovery that disclosure was less than full would result in a revaluation of the particular case, but not in necessarily in a loss of benefits.

<sup>49</sup> This interpretation, however, is not consistent with the fact that the government has allowed demobilized paramilitaries to communicate and coordinate in jail; for instance, they are allowed to use cell phones in jail. Para-commanders may communicate and coordinate, and may have external allies, but they have a very hard time trusting each other. It is mafia dynamics. One should note that the AUC is an umbrella organization, not very tightly put together, and disputes among chiefs have not been rare. A key source of instability is secret negotiations with the DEA: there is a constant underlying risk of defection and direct plea bargaining with the US authorities; each commander knows too much about everybody else.

