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Kai Ambos | Stefan Peters [Eds.]

Transitional Justice in Colombia

The Special Jurisdiction for Peace

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The Special Jurisdiction for Peace

With the collaboration of Susann Aboueldahab

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Preface

The Colombian *Jurisdicción Especial para la Paz* (JEP, Special Jurisdiction for Peace) is the judicial center piece of the national Transitional Justice system (*Sistema Integral de Verdad, Justicia, Reparación y No Repetición*, SIVJRNR; Integral System of Truth, Justice, Reparation and Non-Repetition). At the same time the JEP is also at the center of public controversies about the Colombian peace process and faces a series of legal and political challenges in its daily work. In this sense, the JEP generates a continuous need for consultation, discussion and research. The articles in this volume aim to contribute to a better understanding of the JEP and to identify further research needs. At the same time, we hope to contribute to the still limited research on the Colombian peace process and the JEP in English language.

The volume starts with Gabriel Ignacio Gómez, who analyzes the political conflicts regarding the JEP from a socio-legal perspective. He examines the different interests and perspectives on the JEP from relevant political actors in Colombia and illustrates how these conflicts have been fought out in both the political and legal sphere, as well as what impact they have had on the work of the JEP.

In the next section, Kai Ambos and Susann Aboueldahab address the central claim of the JEP's critics, i.e., that it is an expression of impunity. They reject this claim taking a closer look at impunity in Colombia in general (pre-JEP) and analyzing the JEP's mandate, its essential features and key challenges. In doing so, the authors draw the bigger picture in which the JEP operates and emphasize the need for its critical monitoring. They argue that the JEP will only live up to legitimate expectations if it effectively enforces the sanctions imposed, the provisional benefits granted and, in particular, the conditional treatment of those appearing before the JEP.

Diego Tarapués examines the institutional genesis of the JEP. He highlights the need to analyze the JEP as an outcome of the peace negotiations as well as an integral part of the SIVJRNR. The author argues that, based on the standards of international law, the JEP correctly aims to address the most representative crimes committed during the Colombian internal armed conflict. Given the unique characteristics of the JEP – both at the institutional and jurisdictional level – he claims that it can be considered a *sui generis* transitional justice body.

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Carlos Guillermo Castro analyzes how criminal law mechanisms can help the JEP to fulfill the essential objectives of transitional justice, such as promoting justice, accountability, and reconciliation. His contribution focuses on three mechanisms: the conditionality regime (*régimen de condicionalidad*), special sanctions (*sanciones propias*) and the imposition of ordinary sanctions if the objectives of Transitional Justice are not met. These mechanisms allow former combatants, members of the state armed forces, public officials, and civilians to contribute to the truth process and reparation of the victims.

Kai Ambos und Gustavo Emilio Cote Barco examine the international (criminal) law framework of the JEP, i.e., they concretely identify the applicable (international) law. The main focus of their paper is the *Bloque de Constitucionalidad* and the principle of legality. In particular, the authors raise the question as to whether the application of international criminal law by the JEP leads to the retroactivity of criminal law norms that were not yet in force at the time of the commission of these crimes – thus possibly violating the principle of legality. In answering this question, they set international criminal norms in relation to the Colombian domestic legal order and its obligation to investigate and prosecute grave human rights violations.

Oscar Parra-Vera reflects on the implementation of restorative justice mechanisms during the first years of the JEP. He discusses some restorative aspects of the JEP's cases that show the potential and limitations of restorative scenarios in Colombia's transitional justice system. In this sense, Parra-Vera analyzes the challenges of ensuring victims' participation in judicial macro-cases, the form and timing of participation in the voluntary statements before the Chamber, the restorative dimensions of observation hearings during voluntary statements in macro-case 03, the restorative justice approach in territorial cases, the first three indictments and their restorative reconstruction of harm, and the guidelines on restorative sanctions and reparative works and actions.

Juliette Vargas Trujillo discusses the multiple challenges the JEP faces in ensuring meaningful participation of victims. Based on the discussion of international experiences from the International Criminal Court and transitional justice processes from Colombia, Rwanda and Kosovo, Vargas highlights that channeling collective victim participation through legal representatives bears the risk of rendering participation meaningless. Therefore, she argues that some risks, such as the homogenization of victims, lack of communication between victims and representatives, and failure to grant a minimum level of agency to victims in selecting their representatives and/or group membership must be mitigated.

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Indira Yiceth Murillo Palomino and Laura Ximena Pedraza Camacho write on access to the JEP for exiled Colombian victims. The authors present the JEP's strategies to promote the effective participation of victims outside Colombia and analyze their effects based on an empirical analysis of the macro-cases 01 ("Taking of hostages and other severe deprivations of freedom committed by the FARC EP") and 06 ("Victimization of members of Unión Patriótica"). They discuss the particular challenges that refugees and asylum seekers face in accessing the JEP and present some arguments for the JEP to consider victims of forced cross border displacement.

Jenny Pearce and Juan David Velasco deal with the challenge that the continuing violence in many parts of Colombia poses for the JEP's work. Their article studies the responses that the JEP has created to mitigate the risks of human rights violations being perpetrated against the groups and territories that are most important to the transitional justice process. Pearce and Velasco argue that it is mandatory to give priority to the development and implementation of restorative justice as a way to guarantee non-repetition and promote bottom-up participation of victims and social organizations.

Stefan Peters closes this volume with a contribution that discusses current challenges of the JEP in a context of strong political polarization, continuing operations of illegal armed groups and extreme social inequalities. Peters ends highlighting some avenues for future interdisciplinary research.

Kai Ambos
Göttingen/The Hague

Stefan Peters
Bogotá, May 2022

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List of Abbreviations

ACORE	Colombian Association of Retired Officials
Art.	Article
AUC	Autodefensas Unidas de Colombia
BAPOP	Artillery Battles No.2 La Popa
BISAN	Infantry Battalion No. 15 'General Francisco de Paula Santander'
BRIM15	Mobile Brigade 15
CC	Corte Constitucional (Constitutional Court)
CEV	Truth Commission (Comisión de la Verdad)
CLR	Common Legal Representative
CNMH	Centro Nacional de Memoria Histórica (National Center for Historical Memory)
CP	Civil Parties
CPLCL	Civil Party Lead Co-Lawyers
DAV	Department for Victims' Attention
ECCC	Extraordinary Chambers In The Courts Of Cambodia
ECHR	European Court of Human Rights
ELN	Ejército de Liberación Nacional (National Liberation Army)
ICJ	International Commission of Jurists
FARC(-EP)	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (Revolutionary Armed Forces of Colombia – People's Army)
Final Agreement	Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace
FIV	International Victims Forum
IACHR/ IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFIT	Institute for Integrated Transitions

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IHL	International Humanitarian Law
IHRL	International Human Rights Law
IPU	Investigation and Prosecution Unit
JEP/ SJP	Jurisdicción Especial para la Paz/ Special Jurisdiction for Peace
JPL	JEP Procedural Law
JSL	Investigation and Prosecution Unit
KSC	Kosovo Specialist Chambers
LA	Legislative Act
NRC	Norwegian Refugee Council
OIAP	Observatory for Monitoring the Implementation of the Peace Agreement
OTP	Office of the Prosecutor
PA	Peace Agreement
RPE	Rules of Procedure and Evidence
RUV	Registro Único de Víctimas (Unitary Victim's Registry)
SA	Sección de Apelación (Appeals Chamber of the JEP)
SAAD	Sistema Autónomo de Asesoría y Defensa (Autonomous System of [Legal] Advice and Defence)
SENIT	Interpretative Sentence
SIVJRNR	Sistema Integral de Verdad, Justicia, Reparación y No Repetición (Comprehensive System of Truth, Justice, Reparation and Non-Repetition)
SRVR	Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas (Chamber of Recognition of Truth and Responsibility and Determination of Facts and Conducts)
TJ	Transitional Justice
TOAR/ TOARS	Restorative sanctions and the implementation of restorative and reparative works and actions
TP	Tribunal para la Paz (Peace Tribunal)
UARIV	Unit for Comprehensive Attention and Reparation of Victims
UNHCR	United Nations High Commissioner for Refugees
UP	Unión Patriótica
VLR	Victims Legal Representatives

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Political Conflicts Over the JEP: A Sociolegal Perspective[1]

Gabriel Ignacio Gómez

Abstract

This article describes and analyses political debates related to the creation of the Special Jurisdiction for Peace (JEP) in Colombia. Drawing on a on a critical sociopolitical and sociolegal perspective, it analyses transitional justice as a field in which different social and institutional actors with diverse levels of power and interests struggle to persuade or impose their meanings on justice, victims' rights and peace. In consequence, the analysis about the JEP should comprehend the context, the discursive constructions, and the political disputes that frame it. The article is based on archival research that included academic references, institutional reports, news media information and other documents on the matter. The first part of the article presents an account of the sociopolitical context that made possible designing the JEP. Subsequently, it describes the main political and legal disputes to transform the JEP. The article finally provides an analysis that highlights the contradiction between a selective retributivist approach, mainly sustained by those who have opposed the Peace Agreement, and a holistic perspective, led by those who have supported the advantages of a negotiated peace.

Introduction

The signing of the Peace Agreement (PA) between the Colombian Government and the former Revolutionary Armed Forces of Colombia (FARC) on 26 September 2016 represented a glimmer of hope for a society that had endured the longest and one of the most destructive armed conflicts in the hemisphere. This armed conflict lasted more than fifty years, caused more than two hundred thousand deaths and more than eight million

1 This chapter is an updated version of one published in Spanish in *Vniversitas* 2020: 'Las disputas por la Jurisdicción Especial para la Paz (JEP): una reflexión crítica sobre su sentido político y jurídico'.

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displaced people (Centro de Memoria Histórica, 2013). However, the optimism expressed by the international community contrasted with the political tensions within Colombian society. This contradiction is the tip of the iceberg in this complex case in the Latin American context. It is not a transition from dictatorship to liberal democracy as was the case in countries such as Argentina, Chile, Uruguay or Brazil, nor is it a single transition from war to peace, as in El Salvador or Guatemala in the nineties (Skaar, García-Godos & Collins, 2016). It is rather a case of using transitional justice mechanisms in a still active political conflict (ICRC, 2019) with partial transitions from war to peace, characterized by the participation of different armed actors that have demobilized in different moments.

This is a challenging experience of transition from war to peace for different reasons such as the length of the armed conflict, the participation of diverse armed actors (left-wing guerrillas, right wing paramilitary forces and state armed forces), and the existence of illegal economies that have fuelled outstanding amounts of resources for armed actors that compete with state institutions in controlling territories. All these factors have taken place in one of the most unequal societies in the hemisphere and where the state institutions have failed to exert their functions in vast parts of the Colombian territory (Revello & García-Villegas, 2018).

The PA between the Colombian Government and the FARC was very significant and promising for diverse international and national social actors because it represented the possibility of transforming the history of political violence in Colombia. Nevertheless, very influential right-wing political sectors in the country[2] opposed the path of a negotiated peace based on the argument that the FARC were terrorists who needed to be militarily defeated by the State power. In consequence, for those political sectors, the PA was portrayed as concessions to terrorists, and transitional justice institutions, such as the Special Jurisdiction for Peace (JEP by its Spanish acronym), were thought of as mechanisms of impunity.[3] In this context, Colombian society has undergone intense political and legal debates over the legitimacy and legality of these mechanisms during more than four years.

2 These sectors were integrated by right wing parties, such as the Democratic Centre, led by the former president Alvaro Uribe, and the Conservative Party; interest groups, such as Fedegan, an association of landowners devoted to livestock farming, and banana growers; big mass media owners, such as RCN; associations of retired armed forces members, such as ACORE; and religious groups, such as conservative Catholics and Evangelists.

3 See also Ambos & Aboueldahab's contribution to this volume.

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This chapter describes and analyses those political and legal debates regarding JEP through a critical sociolegal perspective. Drawing on Pierre Bourdieu's theoretical point of view, I sustain that transitional justice is a field in which diverse political, institutional and social actors with different levels of power and experiences struggle to defend their approaches to understanding the political conflict, how to reach justice, and how to protect the victims' rights (Bourdieu & Wacquant, 1992). In this regard, transitional justice, its mechanisms, and practices do not reflect a social consensus but rather a space of social conflict. From this approach relations between politics and law differ from both legalist and structuralist views. While legalist approaches conceive social reality as a product of the legal domain, structuralist theories portray law as an outcome of economic or political forces. From a constructivist view, law is both an expression of a social dynamic as well as the possibility of creating a new social reality (Bourdieu, 1986).

Regarding the field of transitional justice, Ruti Teitel (2000) suggests a similar perspective when she makes a distinction between realist and idealist approaches. For realists, power relations frame and define the contents of legality, while for idealists, from liberal theoretical perspectives, law should be a rational constraint that frames the scope of politics. According to Teitel, both perspectives fail to explain the complexity of relations between law and politics in times of political change. Realists fail to give an account of ethical and legal dimensions, while idealists neglect to consider the relevance of understanding political and social contexts as well as the constraints of power relations in the legal process. Teitel draws on a legal constructivist approach based on which law is the outcome of a political and social context as well as a mechanism and a language capable of enhancing social transformations.

Based on this constructivist theoretical framework, I highlight the relationships between the political debates and the institutional framing of transitional justice mechanisms in Colombia. In this sense, the project of transitional justice institutions in the PA represented a relevant ending point in the political negotiations since approximately one year was required to agree on their design (Martínez, 2018; Freeman & Orozco, 2020). Such institutions were comprised of a Unit for the Search of Missing Persons, a Truth Commission, the Special Jurisdiction for Peace (JEP) as well as reparation mechanisms. The negotiators also agreed that these mechanisms should follow the principle of the centrality of the victims, which meant they should pursue the protection of victim's rights (Colombia, 2016).

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After the partial agreement on section five of the PA, diverse debates related to mechanisms of transitional justice emerged in Colombian society, mainly with regards to JEP. These debates, which had started in 2016, increased when the PA was signed, and gained momentum by the time of the referendum in October that same year. By 2017, in the phase of implementation of the PA, the debates moved from the electoral battles of the referendum to the sessions of the Colombian Congress. In 2018, before the presidential elections, the debate about impunity played a significant part of the campaign that led to the election of Ivan Duque, the right-wing candidate who had opposed the PA. Later in 2019 and 2020, the government of Ivan Duque and his party deployed different political actions to undermine the legitimacy of JEP and to transform it.

These political debates, which persist today, have had strong impact on the legal and institutional realm. In this regard, the design, implementation and operation of JEP have been affected by the tension between two main discursive constructions: on the one hand, a holistic perspective that was the basis of the mechanisms designed by the PA and that supports the relevance of a negotiated peace, even in spite of its possible imperfections; and on the other, the political opposition to the PA that considers this negotiation was not legitimate and that transitional justice mechanisms enhance impunity in favour of former FARC leaders.

To spell out these political debates and its consequences, this chapter initially provides a context to better understand the different interests and perspectives at stake. It also provides an account of the way these debates took place in the political and legal arena. Finally, the article analyses these tensions based on three main ideas: political and legal meaning of JEP, conception of justice at stake and challenges for the future. These political battles over JEP have had, and will have, consequences on the functioning of JEP and the protection of victims' rights. The description and the analysis of this article is based on a research project that drew on document analysis of newspapers, official documents, reports about political debates and legal norms, such as Congress laws and Constitutional Court decisions.

1. JEP: The Outcome of a Political Negotiation

As mentioned above, the Colombian experience is a case of partial transitions in which mechanisms of transitional justice were introduced after political agreements with armed and social actors. A first moment is related to the demobilization of right-wing paramilitary forces between 2003 and

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2006 during the presidential terms of Alvaro Uribe Vélez (2002–2006 and 2006–2010). To enhance this demobilization, the Government of Alvaro Uribe and Congress promoted a legal framework (Law 975 from 2005) that granted special treatment to paramilitary commanders based on a reduction of punishment without the condition of disclosing the truth about their crimes (Comisión Colombiana de Juristas, 2008). A second moment, between 2007 and 2011, consisted of the political and legal mobilization of human rights organizations to demand a legal framework for victims' rights. Up to that moment the existing legal framework was focused on the demobilization of perpetrators, but for victims and social organizations there was no public policy to protect their rights. These mobilizations created the political environment that led to the enactment of the Victims and Land Restitution Law (Gómez, 2014; Uprimny & Saffon, 2009).

A third moment, which is the focus of this chapter, is related to the peace negotiations between the Colombian government and the left-wing FARC guerrilla after 2012. This process is highly relevant to the extent that it attempted to overcome a longstanding armed conflict that had persisted since the foundation of the FARC in 1964. The PA included a component related to the Integral System of Truth, Justice, Reparation and Non-Repetition (Colombia, Gobierno Nacional & FARC-EP, 2016). Even after the demobilization of the right-wing paramilitary groups (2003–2006) and the largest left-wing guerrilla group in the country (2012–2016), the political armed conflict is still active because of the existence of other armed actors, such as the guerrilla group National Liberation Army (ELN) and a set of powerful armed groups associated with drug trafficking (ICRC, 2019).

In addition to that context, the peace process with the FARC took place in a politically contested scenario that confronted those sectors that distrust the guerrilla groups, and those social sectors that consider the only way to solve the armed conflict is by means of a negotiated peace. It is necessary to consider that during the past three decades the FARC had reached a very low level of legitimacy and credibility within Colombian society. The expansion of their military capacity during the nineties, the increasing actions against civilian populations and the failure of the peace negotiations during the government of Andrés Pastrana (1998–2002) had created a negative social reaction against this group (Pecaut, 2001). This collective feeling led to the election of Alvaro Uribe, who ran for presidency under a platform based on a project of security and the recovery of the state's sovereignty. Uribe's government (2002–2006 and 2006–2010) was characterized by introducing policies on the war on terror and framing the guerrilla groups as terrorists who had to be defeated (Medellín, 2010).

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Juan Manuel Santos, who was Uribe's former Minister of Defence, was elected in 2010 under the same political platform of security and war on terrorism. However, Santos (2010–2014 and 2014–2018) adopted more practical policies, such as restarting bilateral relations with Venezuela and the initiation of a peace process with the FARC. Uribe and his followers began a fierce opposition against the Santos government and the Peace Process. In this context, the peace negotiations (2012–2016) and the PA of 2016 took place in a highly contested political scenario that blocked political consensus on the PA within Colombian society.

The fifth chapter of the PA, related to victims' rights, was the outcome of an intense and complex political negotiation between those parties who, recognizing the existence of an armed conflict, had different perspectives on how to achieve peace and justice. The Santos government, which sustained a maximalist perspective, insisted on the need to respect international standards on human rights and the creation of tribunals capable of imposing prison to those responsible for gross human rights violations and war crimes (El Tiempo, 2018). The FARC initially portrayed themselves as rebels who exerted the right to resistance and who deserved general amnesties and leaned toward restorative justice sanctions rather than prison punishment (Semana, 2015). Finally, after one year of hard negotiations and the participation of a group of experts nominated by both the Colombian government and the FARC, the parties agreed on creating a mechanism that combines principles of both restorative and retributive justice (Martínez, 2018). According to this agreement, those who had perpetrated war crimes or gross violations of human rights should recognize their actions, make significant contributions to disclose the truth and repair the harm done to the victims. Based on recognition and contribution, perpetrators would receive sanctions consisting of restorative justice principles, otherwise they would be processed and punished with prison sentences up to twenty years (Colombia, Gobierno Nacional & FARC-EP, 2016; Gómez, 2017; Martínez, 2018).

2. *The Referendum: Exacerbation of Political Passions*

The achieved consensus among negotiators in Havana contrasted with the emerging polarization in Colombian society. According to the President of the Colombian Truth Commission Francisco de Roux (2018), the four-year long process and dialogue in Havana helped negotiators transform their initial views of each other. In addition to the impact of this social interaction, the victims' participation in the discussions on transitional jus-

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tice mechanisms highly contributed to the transformation of the FARC's attitudes towards the victims. However, according to de Roux, this subjective transformation process was not visible in the political arena. Conversely, because of insufficient government educational efforts to show the advances and advantages of the PA and the right-wing mediatic strategy to undermine the legitimacy of the peace process, public opinion about the peace process in Colombia was divided.

By September 2016 when the PA was signed, despite the acknowledgement that it might include controversial issues, the whole agreement was considered a significant move toward reaching peace in the country for the Colombian government, the centre and left-wing political parties, civil society organizations as well as the international community at large. Nevertheless, the opponents of the process, which included mainly right-wing parties and some social sectors who distrusted the real commitment of the FARC, supported their opposition with the following discursive postulates: First, in Colombia there is no armed conflict but a terrorist threat, in consequence, terrorists should be defeated and a political negotiation with the FARC represents a surrender of the state's sovereignty. Second, the transitional justice mechanisms created in the PA, mainly JEP, are mechanism of impunity to the extent they do not impose prison sentences on the FARC leaders. Third, the possibility that former FARC commanders might be part of the Colombian Congress without being processed and sanctioned is unacceptable.

In fact, the opponents of the peace process were highly concerned with JEP and the conception of justice it represented. One illustrative example of the formation of a discourse against JEP was framed by the opinion of former president Alvaro Uribe, according to which the PA:

> ignores that there has been a narco-terrorist action against democracy in Colombia, different from other parts of Latin America where armed civilian insurgencies confronted dictatorships, which earned this the name of a conflict. Our armed forces have not been in favour of dictatorships, on the contrary, they are characterized by their respect for democracy. (quoted in El Colombiano, 2016)

After the signing of the first version of the PA in September 2016,[4] the political debate got more heated, just before the referendum that took place on 2 October. The political discussion was characterized by the

4 The first version of the Peace Agreement was signed on September 30, 2016 in Cartagena before a large group representing the international community.

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polarization and the exaltation of strong passions on both sides, those who supported the peace process and those who opposed it. On the one hand, the Santos government and promoters of the peace process attempted to legitimate the process by means of educational campaigns trying to explain the contents of the negotiations as well as delivering messages of hope. On the other hand, the right-wing leaders deployed mediatic strategies that enhanced negative feelings based on social indignation. For instance, there were messages in social networks that repeatedly affirmed the PA was a 'pact of impunity', and it would 'turn the country into the FARC' (Botero, 2017). The most visible sign of the exaltation of political passions and social polarization was the outcome of the referendum. The NO campaign (50,23%) defeated the YES (49,76%) campaign by a very small difference. A few days later, the opposition's campaign manager admitted that the winning strategy was based on making people angry to vote (La República, 2016).

Days after the referendum, the Santos government met to negotiate with the leaders of the NO campaign, who demanded 68 changes in the PA. Despite this adverse result, the social movement for peace, as well as the government, tried to reframe the new circumstances as the opportunity to consolidate a better PA. Multiple social organizations and students called for mobilizations nationwide demanding a 'Peace Agreement Now!' (Fundación Ideas para la Paz, 2016). After the meetings between the leaders of the NO campaign and the Santos government, the negotiators met again in Havana to reform the initial PA.

Regarding JEP, a great number of changes were introduced in order to make clear some of the aspects that concerned the leaders of the NO campaign, such as those related to possible tensions with ordinary jurisdiction, the period of functioning of JEP, the scope of truth disclosure, the legal framework, the treatment of state agents, the scope of political crimes, the accountability for higher commanders, the application of *tutela* writ against JEP decisions, and the composition of JEP, among others.[5] However, for the government and FARC negotiators, there were two red lines impossible to cross: the imposition of prison punishment for commanders of the FARC and restrictions of political representation in Congress (El Tiempo, 2017). Once the new PA was reached, the Santos government and the FARC commanders signed it at the Colon Theatre in Bogotá on 24 November 2016. In this opportunity, the government avoided a

5 The main changes were introduced in section 5.1.2 of the PA. See also Gobierno Nacional (2016).

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new referendum and requested the National Congress to approve the new version of the PA. This finally happened on 30 November 2016.

3. *Political Disputes in the Implementation in Congress (2017–2018)*

In 2017, the National Congress had to enact the legal framework to implement the PA. This crucial step consisted of constitutional and legal reforms to apply the negotiations in the Colombian legal system. A first Constitutional Amendment was introduced to simplify the procedure to reform the Constitution and pass new bills for those topics related to the PA (Congreso de la República, 2016). This mechanism, called fast-track, was introduced to guarantee implementation, and avoid the experiences of other countries where peace agreements were not implemented because of delays in Congress. However, the political debates took longer and the initial term of six months to enact the legal framework of the peace process had to be extended for another period of six months (El País, 2017).

Even if the Santos Government had the support of the majoritarian coalition integrated by centre and left parties that were in favour of the PA,[6] the political environment was not favourable to a speedy enactment of the bills. According to the Observatory for Monitoring the Implementation of the Peace Agreement (OIAP), only ten out of twenty-four bills presented by the government to implement the PA were enacted by the National Congress (OIAP, 2018, p. 5). In fact, during the period 2017–2018, a new scenario of political debate over JEP took place in Congress. First, the right-wing parties that had led the NO campaign in the referendum crafted a narrative according to which they had been misled by the Santos government after the referendum. For the right-wing leaders, the NO campaign had won and therefore the PA should have been substantially altered, even if it meant breaking up the peace negotiations with the FARC. Second, the political environment previous to the presidential elections of 2018 eroded the support of some of the parties that were part of the majoritarian coalition.

These contradictions affected the implementation process since March 2017 when Congress started discussing the Constitutional Amendment that introduced the transitional justice mechanisms in the Constitution.

6 The political parties that were part of the majoritarian coalition named National Unity, were: Partido de la U, Partido Liberal, Partido Verde, Cambio Radical y Polo Democrático.

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By the second semester of 2017, the political debates increased when members of JEP were appointed, and the National Congress started debating the JEP Statutory Law Bill. In 2018, political debates over JEP gained momentum when Congress debated the Procedural Law Bill for JEP.

4. *Main Aspects of the Political Debate*

The right-wing parties' purpose of transforming JEP led to reforms in the following aspects: restrictions to the nominations of members of JEP; the possibility of investigating and summoning entrepreneurs that financed armed groups; differentiated treatment for state agents; and the possibility of assessing evidence related to extradition claims.

4.1. *Composition and Restrictions to the Nomination of JEP Members*

According to the PA and the Constitutional Amendment 01 from 2017, a Selection Committee comprised of international experts on human rights would be in charge of determining the members of the transitional justice institutions, that is to say, the Truth Commission, the Unit for the Search of Missing Persons, and the Special Jurisdiction for Peace (JEP). The selection was based on public hearings and a scrutiny of the experience and trajectory of the aspirants (Congreso de la República, 2017). From the moment the Selection Committee began its work, it was attacked by the opponents of the peace process based on the idea that they were biased and left-wing supporters. The Democratic Centre, a right-wing party led by Alvaro Uribe, had already objected to the participation of international experts on human rights on the Selection Committee (El Espectador, 2017). In addition to this party, Radical Change, a political party that was initially part of the majoritarian coalition that supported the PA, published a press release in September 2017 saying that 'the majority of the recently appointed magistrates have a clear political bias that, from the start, generates no guarantees for civil society…' (Cambio Radical, 2017).

By the time Congress was discussing the JEP Statutory Law Bill, Radical Change proposed new restrictions to the members of JEP. According to the initiative, those persons who legally represented victims on human rights cases against the Colombian state could not be eligible to be part of JEP. In response to this reform, human rights organizations questioned this initiative and vindicated the trajectory of the selected members of JEP,

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as well as the dignity of human rights defenders (El Espectador, 2017). The Interamerican Commission on Human Rights also sustained that 'in case this restriction would be approved by Congress, this reform might constitute an obstacle for protection of human and victims' rights in the functioning of JEP' (Comisión IDH, 2017). Despite these reactions and the advice of international human rights organizations, the restrictions were included in the JEP Statutory Law Bill (Colombia, Ministerio de Justicia, 2017).

4.2. Accountability of Private Entrepreneurs

Another aspect that highly worried right-wing parties (Democratic Centre and Radical Change) was the possibility that private entrepreneurs would be summoned by JEP. According to the PA, JEP ought to prosecute former members of armed groups as well as private entrepreneurs that financed them for perpetrating war crimes, crimes against humanity and gross human rights violations. Participation of private sectors in the armed conflict was not a novelty, as has been demonstrated by judicial investigations, reports, and academic studies (Sánchez et al., 2018). However, the Democratic Centre led a strong opposition against JEP in Congress arguing that it was a 'mechanism of impunity' made to fit 'the FARC's desire for revenge' against entrepreneurs and state agents (Centro Democrático, 2017). While Radical Change sustained that it had the duty 'to protect all productive sectors, particularly the citizens that have invested in rural Colombia, who were victims of the conflict, and who might be victimized again by a tribunal that does not provide sufficient legal warrants' (Cambio Radical, 2017). Due to the political pressure, the National Congress introduced a reform in the JEP Statutory Law Bill establishing that private entrepreneurs could not be summoned by JEP. They could take part in the process only based on voluntary participation. This discussion was revived in 2018 while Congress debated the JEP Procedural Law Bill. In this case, the Democratic Centre proposed a change in the structure of JEP introducing a special group of judges in charge of trying state military force members (Colombia, Senado, 2018).

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4.3. Competence to Assess Evidence Regarding Extradition Claims

In April 2018, Jesús Santrich, a former FARC negotiator, was captured by the Prosecutor's Office based on an extradition claim made by a United States Court (El Tiempo, 2018b). This event brought about another political debate. On the one hand, opponents of JEP considered that this capture confirmed that Santrich continued his criminal activities such as drug trafficking, and therefore, the Supreme Court should authorize his extradition to the USA immediately (RCN Radio, 2018). On the other hand, former FARC members affirmed it was a conspiracy against the peace process and there was no legal certainty for demobilized commanders (El Espectador, 2018b). Those who supported the peace process and the autonomy of JEP, as well as the judiciary, asserted the need to clarify the facts based on which the US court required Santrich's extradition. Finally, JEP decided to request evidence and assess it before authorizing his extradition. (El Espectador, 2018c). In 2020, the newspaper El Espectador (2020) revealed that this capture was part of a trap led by the Drug Enforcement Agency (DEA) of the United States and the Colombian Attorney General's Office.

By the moment of enactment of the JEP Procedure Law Bill in 2018, these political debates affected the discussion of the legal framework. The Democratic Centre proposed another restriction to JEP which consisted of forbidding the assessment of evidence in cases of extradition claims (Semana, 2018). At the same time, those who were suspicious about the political use of extradition and its negative effect on the peace process made it clear that the Colombian State did not have a legal obligation to extradite anyone. It was rather an autonomous decision based on the previous approval of the courts and the assessment of the existing evidence (Uprimny, 2018).

5. Debates in the Constitutional Court

By 2018 and 2019, the political battles and discussions moved from a polarized political arena to the legal field, a space that required more rational scrutiny and legal argumentation. According to the Constitutional Amendment of 2016 (A.L. 01, 2016), the Constitutional Court had to revise the reforms that carried out the PA, as well as the JEP Statutory Law Bill. After the enactment of the JEP Procedural Law (Ley 1922, 2018), a group of human rights NGOs (Dejusticia, 2018) filed a constitutional action against this law before the Constitutional Court. All these cases

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opened the path to declare unconstitutional some of the reforms introduced by the National Congress. In this section, I spell out the main political and legal discussions.

5.1. Restrictions to Appointments of JEP Members

One of the reforms introduced by two right-wing parties (Democratic Centre and Radical Change) consisted of barring those lawyers who had represented victims of human rights violations against the Colombian State during the previous five years from being appointed JEP judges. In response to this restriction, national and international human rights NGOs presented amicus curiae briefs before the Constitutional Court arguing the unconstitutionality of those provisions. Human rights NGOs claims mainly relied on two arguments: First, the provisions that restricted the appointment of former human rights defenders violated international treaties to which the Colombian State was bound, such as the International Pact of Civil and Political Rights, the American Convention on Human Rights, as well as the international principles on judiciary independence. Secondly, the restriction contradicted the Constitutional Amendment that incorporated the Mechanisms of Transitional Justice in the Constitution (A.L. 01, 2017). Finally, the Constitutional Court overthrew those provisions in Sentence C-080 from 2018 (Corte Constitucional de Colombia, 2018).

5.2. Private Entrepreneurs and State Agents

As already mentioned, according to right-wing parties, JEP was supposedly designed as an instrument of vengeance against the productive sector that had been victimized by kidnappings perpetrated by the FARC (Colombia, 2020). This perspective inspired different provisions for the JEP Statutory Law Bill, such as those related to the institution's jurisdiction. In the final version of the Bill, the private entrepreneurs who had supported or financed armed actors could not be summoned by JEP. They could only voluntarily attend JEP in the time frame of three months from the enactment of the JEP Statutory Law (*Verdad Abierta*, 2017). In response, human rights NGOs presented amicus curiae briefs before the Constitutional Court arguing that these provisions disregarded international standards in the struggle against impunity. The Constitutional Court, however, in a very controversial decision, upheld the provision (Corte Constitucional de

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Colombia, 2018). In consequence, those private entrepreneurs who took part in the armed conflict, such as those who financed armed groups, as well as state agents (former functionaries) could not be summoned by JEP. They could only take part in JEP processes voluntarily. Nevertheless, those entrepreneurs can be summoned before ordinary justice.

5.3. Differentiated Treatment for Members of the Armed Forces

Another debate was related to the legal treatment of members of the armed forces. Under the Colombian legal framework, public officials, because of their condition, cannot commit political crimes such as rebellion. To avoid the paradox of granting amnesties to members of the FARC and prosecuting members of the armed forces, negotiators agreed to grant them differentiated legal treatment before JEP. However, the opponents of the PA, such as the Democratic Centre, insisted that armed force members were subjected to unfair treatment (El Colombiano, 2016). A similar argument was sustained by the Colombian Association of Retired Officials (ACORE) in the public hearings before the Constitutional Court (Corte Constitucional de Colombia, 2018).

Regarding this differentiated legal treatment, the Constitutional Court sustained:

> The differentiated legal treatment prevents transitional justice from becoming an instrument of political retaliation. On the contrary, it promotes the comprehensive closure of the armed conflict and fosters reconciliation based on strengthening the Rule of Law in relation to those who are accountable, but also based on granting special treatment and legal certainty for all (Corte Constitucional de Colombia, 2018).

Despite the support of the Constitutional Court for mechanisms of differentiated legal treatment for armed force members, the Democratic Centre insisted that the legal framework introduced in the Constitution (AL 01 2017) and the JEP Statutory Law Bill were not sufficient. In consequence, this party proposed a provision to the Bill delaying the trials of those armed force members until a special legal framework was enacted for them. This provision was challenged by human rights NGOs and overthrown by the Constitutional Court (Corte Constitucional de Colombia, C-112, 2019).

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5.4. Prohibition to Assess Evidence in Cases of Extradition Claims

Finally, the Democratic Centre also tried to change the JEP Procedural Law Bill in 2018, by introducing a new provision forbidding JEP to assess evidence in cases of extradition claims. The Colombian Commission of Jurists and Dejusticia, two prestigious human rights NGOs, filed a lawsuit challenging this provision before the Constitutional Court. Multiple human rights NGOs also participated in the controversy writing amicus curiae intervention briefs before the Court. Finally, the Court declared that restriction unconstitutional because it violated constitutional principles such as due process and judicial autonomy (Corte Constitucional de Colombia, 2019).

6. The Political Counterattack: Presidential Veto against the JEP Statutory Law Bill

On 10 March 2019, the new President Ivan Duque announced his government would veto part of the Statutory Law Bill and introduce different reforms to JEP. In his speech, he affirmed these objections could unify Colombian society and overcome the political division among friends and enemies of the PA (Colombia, Presidencia de la República, 2019). Nonetheless, social organizations, the political opposition to the new right-wing government, human rights defenders and scholars expressed their concern regarding this veto. In response to the presidential speech, the political opposition argued that the veto's motivation contradicted the Constitutional Court decision concerning the JEP Statutory Law Bill (La Silla Vacía, 2019).

This fact opened a new chapter in the political dispute regarding the JEP reforms and the transformation of its legal and institutional design. During the first semester of 2019, this political debate once again raised tensions in Colombian society and submitted the Constitutional Court and JEP to a new adverse political environment (El Tiempo, 2019). By May, the Colombian Congress rejected the presidential veto against the JEP Statutory Law Bill. It became evident these political pressures not only came from the Colombian Government, but also from the United States embassy and the Colombian Attorney General's Office. For instance, the US embassy cancelled visas to some Congress Members and Justices of the Constitutional Court (Semana, 2019). On 15 May, however, JEP granted a former FARC negotiator the guarantee of no extradition based on the insufficient evidence contained in the extradition claim.

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In response to this decision, Humberto Martínez, by then the Attorney General who apparently knew about the entrapment against the FARC negotiators (El Espectador, 2020), resigned allegedly because of his disagreement with the Court's decision. In addition to the Attorney General's move, the Democratic Centre strengthened its political attacks against JEP (El Tiempo, 2019b). Despite this political pressure on 29 May, the courts made two significant decisions. First, the Supreme Court ordered the freedom of Jesus Santrich, who had by then been captured again (Semana, 2019). Second, considering the Congressional rejection of the presidential veto, the Constitutional Court ordered the government to sign the JEP Statutory Law Bill (El Espectador, 2019). These decisions ended, at least partially, the disputes to define the JEP's legal framework.

Nevertheless, the political attacks on the PA and JEP undermined the trust in the process and the state institutions for some FARC former negotiators. On July 2019, Jesús Santrich abandoned the peace process and one month later, he and Iván Marquez, another former FARC negotiator, released a video announcing their return to insurgency (Caracol, 2019).

7. JEP: Challenges to Peace Building

This section attempts a brief sociolegal analysis of the relations between law and politics regarding three main ideas: social and political meaning of JEP, conceptions of justice and challenges for the future.

7.1 Political and Social Meaning of JEP

JEP is the expression of a political negotiation supported by social organizations and democratic sectors of society. However, the PA did not consolidate a consensus in Colombian society. Contrarily, its political and social meaning has been disputed and its legitimacy has been questioned by right wing parties. For the supporters of the PA, the political meaning of JEP is related to the context in which the peace negotiations took place, that is a political negotiation after a longstanding armed conflict without winners and losers. On the other hand, the most salient sector opposed to the PA, persisted in denying the existence of a political armed conflict and sustained the Colombian case was one of terrorist violence. According to this perspective, the construction of the 'other as a terrorist' demanded a different political and legal treatment. Instead of relying on a

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political negotiation, it was necessary to defeat the enemy either by means of military or legal tools. However, this political contradiction between supporters and critics of the PA generated diverse undesirable outcomes for Colombian society. First, the political dispute reinforced an existing division inside the Colombian population and eroded the reliance on the peace process. Second, the centrality of the political debate reduced the visibility of victims and undermined the possibility of promoting more transformative political processes and public policies.

7.2. Discursive Visions of Justice

This political contradiction spans the tension between two main discursive trends. On the one hand, a form of retributive justice that is selective in its targets and promotes an instrumental conception of law that serves the struggle against political enemies and negotiations with political allies; and on the other hand, a holistic perspective that envisions the reconstruction of the social fabric by means of restorative justice mechanisms. Nonetheless, this contradiction has different manifestations in the political and legal fields. Within the political field, political opponents to the PA and JEP have deployed mediatic and political tactics in order to delegitimize JEP, delay the implementation of the PA and undermine trust, not only on transitional justice mechanisms, but also on the courts and rule of law principles. In the legal field, the political discourse of opposition to JEP manipulates the arguments of maximalist retributive justice to claim more severe legal measures against former FARC leaders. It is worth mentioning that the Constitutional Court constrained those political forces and recognized the relevance of transitional justice mechanisms in order to pursue victims' rights protection and to achieve sustainable peace. Even so, some decisions were problematic, such as JEP's restriction to summon private entrepreneurs since it affects the possibility of achieving truth disclosure about participation of private sectors in financing armed groups.

Despite political opposition to JEP, there is an institutional basis leading relevant processes to bring disclosure of truth as well as contributing to reconciliation in Colombian society. According to the PA and the new constitutional and legal framework, JEP is a special jurisdiction created with a legal time framework in order to contribute to the transformation of the Colombian political armed conflict and to protect victims' rights. JEP was not designed to reproduce the legal rationality of ordinary courts, but rather to develop a holistic approach based on restorative justice for those committed to truth disclosure, recognition of their crimes and con-

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tribution to reparation, and retributive justice, in the cases where the indicted are not willing to submit to those conditions.

Inversely, opponents of the PA and JEP envision a mechanism based on retributive justice capable of submitting the ex-FARC commanders, and providing generous treatment for state agents and private entrepreneurs, otherwise they believe this institution should not exist. Political debates during the implementation process show their interest in changing the original design of JEP by restricting human rights defenders from being appointed members, restricting the possibility of summoning private entrepreneurs and armed force members, and impeding the assessment of evidence in US extradition claims. The political opposition to JEP attempted to erode its legitimacy and transform its institutional framework.

7.3. Challenges for the Future

Fortunately, these obstacles did not prevent JEP from fulfilling its functions. JEP has built its institutional capacity amid political attacks. Meanwhile it must respond to the expectations of more than ten million victims, the Colombian society, and the international community. These challenges entailed the design of procedures to receive reports from victims' organizations, to guarantee their participation in the hearings, to define the macro cases and to articulate its activities with the Truth Commission and the Unit for the Search of Missing Persons. By December 2020, JEP had received more than 300 reports from victims' organizations, more than 12,000 people among demobilized FARC combatants, security force members and civilians, and it has initiated seven macro-cases that address sensitive crimes, such as kidnaping and extrajudicial executions. FARC former commanders as well as some members of the security forces have already started disclosing the truth about their crimes. This is a major achievement considering that ordinary justice had not been capable of resolving those crimes during decades of political conflict (JEP, 2020). Relying on the support of civil society and the international community, JEP is moving forward beyond the resistance of its political opposition, disclosing the hidden truth that has remained in the dark for decades, facilitating encounters among victims and perpetrators, creating a different practice of justice and narratives that erode the remaining polarization, and healing the deep wounds that have persisted after the long-standing political conflict in Colombian society.

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Conclusions

This chapter has shown the political debates related to the design and implementation of JEP. These debates took place in a complex scenario characterized by a long standing armed political conflict and an experience of partial transition from war to peace. In this political scenario, Colombian society faces the challenge of reaching sustainable peace and building a project of rule of law. This endeavour is even more critical considering the difficulty of healing historical wounds and traumas that come from the past and persist in our consciousness through the construction of 'the other' by means of the language of hate and fear. Law and legal forms have been used as instruments of institutional and symbolic violence to defeat an enemy in the name of justice. But if we are more cautious, they might open doors to transform narratives and practices of hate and help us understand ourselves as a complex society.

Drawing on Bourdieu's perspective of social fields, this chapter also suggest that transitional justice is a field of dispute among diverse actors, discourses, and interests. In this case, JEP's design has been subjected to intense political and legal debates between two main discursive perspectives: on the one hand, those who supported the possibility of a negotiated transition and an institutional design based on a holistic approach that emphasizes principles of restorative justice; and on the other hand, those who have promoted a project of selective retributivism based on hard punishment against former FARC commanders, and soft treatment for state agents and private entrepreneurs. Notwithstanding, the fact that Colombian society had to endure this political contradiction during more than three years postponed the possibility of addressing debates on how to actually construct a future society.

Finally, drawing also on Bourdieu and Teitel's viewpoints, the fact that the institutional design of JEP emerged during a political battle and against strong opposition does not mean it is dependent on political forces. The language of law and the new institutional practices along with its symbols, argumentative narrative, and practices, can create new realities able to construct new paths of institutional and social action. This challenge relies on strengthening the possibilities of the dialogic procedure and restorative practices in JEP cases. In this perspective, participation of victims, disclosure of truth and transformation of perpetrators are critical in the process of dignifying the memory of the victims and starting to build practices of reconciliation in Colombia society.

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The Special Jurisdiction for Peace and Impunity: Myths, Misperceptions and Realities

Kai Ambos & Susann Aboueldahab[*]

Abstract

The Special Jurisdiction for Peace, the key legal mechanism in the Colombian transitional justice project, has become the subject of heated debate among its firm supporters and its vehement opponents without leaving much room for more nuanced assessments. This article wants to close this gap by addressing the main misunderstandings regarding the JEP, especially those concerning its role and potential to eradicate the many decades of impunity in Colombia. It aims to provide a framework for a debate that, on the one hand, leads to recognition of the JEP's progress and potential and, on the other, acknowledges and demonstrates its most pressing challenges.

Introduction

The Colombian Special Jurisdiction for Peace (in Spanish Jurisdicción Especial para la Paz, hereinafter JEP), the legal mechanism of a larger transitional justice (hereinafter TJ) project, has become the centre of a heated debate that is situated in a complex political entanglement between its opponents and supporters. This article addresses the main misunderstandings in the discussions concerning the JEP, especially regarding its role and potential to eradicate the high level of impunity that has existed for decades in Colombia. The objective is to provide a framework for a debate that recognizes the progress achieved by the JEP while at the same time acknowledging and pointing to its most pressing challenges.

We observe that the JEP's institutional framework meets very high (international) standards (especially concerning due process obligations

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and the duty to ensure accountability for serious human rights violations) and that hence the JEP cannot be dismissed as an impunity mechanism as often done by its most fervent opponents. At the same time, however, we identify urgent challenges that the JEP faces as a starting point for a constructive critical discussion. We argue that constantly perpetuated myths and misperceptions (such as erroneous assessments about the JEP's mandate, scope and its underlying notion of justice) are detrimental to a truly critical analysis of its work, and, instead, fuel the (mistaken) perception that the JEP is one of the causes of impunity in Colombia. The article sustains that what is needed instead is a critical and constructive monitoring of the JEP's work, as well as its underlying notion of justice. The article points out key aspects concerning the JEP's often overlooked mandate, the context in which it operates and its role in the broader struggle against impunity. It closes with recommendations on how to promote a truly critical and meaningful approach towards the JEP.

1. *What does impunity mean?*

From their very beginning, the peace negotiations in Colombia were followed by strong criticism that such a process would end up granting impunity (Suárez 2019). These objections especially focused on the chapters of the drafted Peace Agreement regarding justice for the victims of the conflict and, thus, on the creation of the JEP itself (Sedacca 2019: 324–6). In particular, criticism was expressed that this jurisdiction would disproportionately benefit members of the Revolutionary Armed Forces of Colombia (in Spanish Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, hereinafter FARC-EP), converting this TJ mechanism into a "FARC tribunal" (León 2016).[1] After the signing of the first Peace Agreement, these voices not only persisted, but also increased during and

1 This claim was refuted by the JEP's first "indictment" handed down in the context of macro case 001, charging eight former members of the FARC-EP with hostage taking and severe deprivations of liberty, cf. JEP, SRVR (2021): Ruling No. 19. See also Bermúdez Liévano (2021). So far, the JEP has opened seven macro cases (which concern whole crime situations) that either have a thematic or a territorial focus, namely abduction (case no. 001), extrajudicial killings (case no. 003), the persecution of members of the political party Unión Patriótica (case no. 006), the recruitment of minors (case no. 007) as well as crimes committed in the departments Nariño (case no. 002) and Norte del Cauca (case no. 005), and in the subregion Urabá (case no. 004). For detailed information, see https://www.jep.gov.co/especiales1/macrocasos/index.html <10.08.2021>.

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after the plebiscite, resulting in the rejection of the original Peace Agreement by a narrow majority. As a consequence, the Agreement was adopted with modifications and, although the JEP was approved, it was done only after introducing substantial adjustments (Ambos and Aboueldahab 2018: 119ff.).

In light of the above-mentioned criticism, the key question is whether the Final Peace Agreement has created a special jurisdiction that allows, facilitates, generates, or even increases impunity concerning the crimes committed in the context of the armed conflict and whether the JEP is nothing more than a mere simulation of justice. But what does impunity actually mean in this context?

The eradication of impunity for serious human rights violations is a central objective of contemporary international law. It is predicated on the assumption that States have an obligation to investigate, adjudicate and punish serious human rights violations – such as extrajudicial executions, torture, enforced disappearance, genocide, war crimes, and crimes against humanity.[2] Although this State obligation exists independently of victims' rights, clarifying the responsibility of alleged perpetrators acquires an important restorative character. Therefore, this State obligation is sometimes described as the materialization of the victims' "right to justice".[3] In sum then, all States have an obligation to ensure the effective prosecution of

2 This obligation has its roots in international law on the diplomatic protection that preceded international law on human rights, see for example Max Huber's famous dictum in the case of Spain and Morocco before the Permanent Court of International Justice, cf Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc. E/CN.4/Sub.2/8 (1993), paras 126–7. There are currently several international instruments that establish the State's duty to prosecute and punish, cf for example American Convention on Human Rights. Regarding the JEP, see art 28 of Law 1957 from 2019, Statutory Law on the Administration of Justice in the JEP (henceforth Statutory Law).

3 Revised final report by Special Rapporteur on the question of impunity of the perpetrators of (civil and political) human rights violations, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997), Annex II, Section II. See also Resolution 57/228 (2002) United Nations General Assembly, UN Doc. A/RES/57/228 (2002), which highlights that "the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State".

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those responsible for serious human rights violations and, consequently, to fight impunity (Ambos 2018b).[4]

While the existence and necessity of this State duty seem to be evident, doubts arise as to its scope: for example, should the justice provided by the State consist of classic criminal proceedings, i.e., in the form of an inquisitorial, adversarial or mixed trial? Or do TJ mechanisms suffice that go beyond traditional criminal justice and focus specifically on the interests of the victims? The answers to these questions will depend to a large extent on the underlying concept of justice, as impunity always reflects a lack of justice (be it in its traditional form or in a broader sense). In other words, the exact contours of impunity will depend on the concept of justice employed. Therefore, and for the purposes of this paper, the critical question is: what kind of justice is the JEP's foundational basis?

2. *On what concept of justice is the JEP based?*

The JEP was created as one of the five components of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (in Spanish Sistema Integral de Verdad, Justicia, Reparación y No Repetición, hereinafter SIVJRNR) aiming to "administer justice and investigate, clarify, prosecute and punish serious human rights violations and serious infringements of international humanitarian law" (Final Peace Agreement: 112, pt. 5.1.b.). In other words, the JEP is part of a broader TJ project. Although one of the main pillars of TJ is the criminal accountability of the perpetrators, criminal prosecution is not its sole objective. Rather, TJ "comprises the full range of processes and mechanisms associated with a society's attempts to overcome the problems arising from a legacy of large-scale abuses to hold perpetrators to account, serve justice and achieve reconciliation".[5] In other words, TJ constitutes a holistic approach directed towards truth-seeking, investigation and prosecution of individuals, as well as reparation. To this end, various (judicial or extrajudicial) instruments and mechanisms are combined, primarily aimed at reaching long-lasting resolutions and

4 See also, for example, the Security Council's resolutions on the topic of Haiti: UN Doc. S/RES/1529 (2004), para 7, and the situation in Republic of Côte d'Ivoire, UN Doc. S/RES/1479 (2003), para 8. See also UN General Assembly Resolutions UN Doc. A/RES/57/228 (2002) and UN Doc. A/RES/57/190 (2003).

5 United Nations, Security Council, Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', UN Doc. S/2004/616 (2004), para 8.

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promoting a transformation that facilitates true coexistence among the population.[6] Thus, TJ always concentrates part of its efforts towards the future of a deeply wounded society that requires a transformative process in order to move forward. In this sense, the JEP has been designed, on the one hand, to investigate and reveal the most serious crimes committed in the context of the Colombian armed conflict and to bring to justice individuals that participated (directly or indirectly) in these acts, and, on the other hand, to satisfy the rights of the victims to justice, truth, reparation, and non-repetition.[7]

Consequently, the JEP has to be analyzed in the broader context of the SIVJRNR, that is, as a TJ mechanism embedded in a conglomerate of institutions, laws and concepts that interact under a holistic idea aimed at achieving long-lasting peace and justice. Accordingly, it must be recognized first that the JEP is based on the idea of *restorative justice*, that is to say, on a concept of (prospective) justice whose central focus is to put an end to the conflict, responding to the needs of the victims, and holding the perpetrators accountable to repair the harm caused.[8] Such a concept of justice is opposed to that of *retributive justice*, where, in turn, the justification and meaning of the punishment are linked to the act committed in the past and to the idea that the perpetrators receive what they deserve – rather than to an eventual future (positive) impact that this might have (Duff 2011: 3; see also Ambos 2003: 191). Unlike the mainly retributive objectives usually assigned to (traditional) criminal justice, in a TJ context the aims are collective and not only individual (Teitel 2000: 67). Accordingly, conceptualizations of justice and punishment may change when facing large-scale and severe violations of human rights.

While there is a general consensus that the perpetrators of heinous crimes should be held accountable one way or another, the question of how this is to be done is more complex and controversial. Clearly, it is difficult to achieve what is taken for granted in everyday scenarios: criminal prosecutions that – in the event of a conviction – result in prison sentences. In a TJ context, however, this would even be insufficient, since

6 ibid.

7 CC, Judgment C-674, para 5.1.2.3.

8 cf art 4 Statutory Law. We refer here to the concept of restorative justice as used in the TJ discourse, see Uprimny Yepes and Saffon (2005); Urban Walker (2006), 384ff. For information on the general idea of restorative justice beyond the context of TJ, see Zehr (1990), 95. It is worth mentioning that art 4 of Statutory Law combines the concepts of restorative and prospective justice, by explaining the term 'restorative justice' within art 4, titled 'Prospective Justice'.

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the real challenge here is to turn criminal liability into a factor that contributes to overcome the conflict; that is to say, to ensure that punishment is accompanied by the recognition of the crimes, guarantees of reparation and non-repetition, and a meaningful participation of the victims.

The prevailing response to address this problem inherent to TJ contexts is a "flexible approach" (Ambos 2018b: 215).[9] This means that the notion of justice is extended beyond the classical meaning of criminal justice, thus allowing the application of a more sophisticated approach to justice suitable for complex situations, such as massive violations of human rights or crimes perpetrated on a large scale. Importantly, this extension does not change the State's obligation to investigate and prosecute serious crimes committed during an armed conflict.[10] The Constitutional Court of Colombia (hereinafter CC) has clearly stated, with respect to the duty to investigate, prosecute and punish serious human rights violations, that:

> […] in contexts in which the aim is to put an end to the massive violation of human rights, such as in periods of transition within the context of an internal armed conflict, this duty [to investigate, prosecute and punish] can be flexible, when, in return, an effective gain is pursued in terms of achieving peace, truth, reparation for the victims, and guarantees of non-repetition, and when the *irreducible minimum* of this duty is preserved in terms of investigation, prosecution and punishment of those most responsible for the most serious and representative crimes.[11]

The design of the JEP is built on this thin line between the prosecution of crimes and the purposes of TJ. It is a mixed mechanism that incorporates retributive elements, but also – and mainly – restorative components. This dual nature is reflected in several details. One example of this is the design of alternative (non-adversarial) procedures established to promote truth-telling (so-called dialogic processes) (Cote Barco 2020: 11). Another example are the particular mechanisms to encourage collaboration with the JEP (such as alternative sanctions or amnesties, which will be

9 Regarding Colombia see CC, Judgment C-674, para 5.2.4.2.2.

10 See for example Inter-American Court of Human Rights (henceforth IACHR), *Caso Las Palmeras vs. Colombia*, para 65. IACHR, *Caso de las Comunidades Afrodescendientes Desplazadas de la cuenca del Río Cacarica (Operación Génesis) vs. Colombia*, paras 439 ("duty to investigate and […] to judge and punish"), 440 ("the State must […] remove all obstacles, de facto and de jure, that could maintain impunity").

11 CC, Judgment C-674, para 5.2.4.2.2. (emphasis added).

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addressed below). Consequently, the JEP tries to reconcile the interests of a TJ process (revealing the truth, guaranteeing the centrality of the victims in the administration of justice, and contributing to the construction of a lasting peace) and, at the same time, aspires to guarantee that those most responsible for serious crimes will be held accountable – even through traditional means of criminal law.[12] It is precisely this combination of approaches (both restorative and retributive justice) that makes the JEP a unique TJ mechanism and, indeed, a model to be followed by other transitional processes, at least in terms of its normative design (JEP 2019e).

Consequently, the JEP must be evaluated based on whether it achieves a balance between i) the duty to investigate and prosecute the perpetrators of serious crimes and ii) the way it exercises this duty vis-à-vis the needs, goals, and aspirations of a TJ process (especially with respect to the discussion of whether the JEP can or cannot be equated with impunity).

3. *The JEP's sanctions regime*

An issue that illustrates well how the JEP deals with this balancing act is its sanctions regime, one of the most controversial issues concerning the JEP. In line with its nature and goals described above, the JEP's legal framework provides incentives to ensure that the victims' rights are respected to the maximum extent possible. In other words, those who confess, tell the truth, and participate in activities aimed at reparation and non-repetition will be given lighter sentences. Based on this idea, the JEP provides for three types of sanctions: special, alternative and regular sanctions.[13]

The nature of the sanction to be imposed depends on an assessment relative to the seriousness of the crime, the degree of the recognition of truth and accountability, and the type and intensity of the restriction of liberty.[14] The sooner those persons appearing before the JEP confess the truth, the lighter their sanction will be. Examples of the reparative and restorative functions in the context of special sanctions are activities related to demining, the development of infrastructure (e.g. building schools,

12 See pt 5.1.2 of the Final Agreement, 123–7.

13 See no 60 in pt 5.1.2.I. of the Final Agreement, 142–3; Transitory Article 11 Legislative Act 01 from 2017 (henceforth LA 1/17); art 64 of Law 1922 from 2018, adopting the rules of procedure of the JEP (henceforth RPE); arts 125–143 Statutory Law.

14 See no 60 in pt 5.1.2.I. of the Final Agreement, 142–3; art 64 RPE; art 125 Statutory Law. See also CC, Judgment C-674, para 5.3.2.4.2.

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roads, or housing), or assistance in environmental projects (ICJ 2019: 89, ICJ 2020: 2; detailed Castro Cuenca 2022: 112).[15] The compliance with these duties is ensured through restrictions of freedom such as, for example, place of residence, movement control, or other monitoring and supervision mechanisms (as needed).[16]

Table 1: The JEP's sanctions regime

	Special Sanctions	**Alternative Sanctions**	**Regular Sanctions**
Recognition of truth and account-ability	at the earliest stage	before the first instance ruling (late recognition)	none
Nature of the sanction	restriction of freedom of movement or residence (not in a prison) *and* participation in restorative/reparative programs	deprivation of liberty (prison, jail, military or police units)	deprivation of liberty (prison or jail)
Duration of the sanction	5–8 years (for grave crimes) 2–5 years (if the participation was not essential)	5–8 years (for grave crimes) 2–5 years (if the participation was not essential)	15–20 years

Prepared by the authors.

The model of sanctions imposed by the JEP permits the deprivation of liberty in the case of alternative or regular sanctions. In any case, these sanctions of a retributive nature continue to be (rather) measures of last resort, applicable as long as the main objectives of restorative justice have

15 cf art 141 Statutory Law.
16 cf no 60 in pt 5.1.2.I. of the Final Agreement, 142–3.

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not been achieved or have been insufficiently met.[17] The gradations of this sanctions regime clearly shows that the main goal is not a retributive prison sentence, but the consolidation of peace and the satisfaction of the rights of the victims with the "greatest possible restorative and reparative function for the damage caused, always in proportion to the degree of recognition of truth and accountability".[18]

The JEP will hand down its sanctions in relation to the sentencing objectives – that is, deterrence, retribution, rehabilitation and restoration – on a "case by case" basis (CC 2017: para 23, 23). Hence, the special sanctions regime is designed to motivate perpetrators to contribute to the TJ system (responding to the rights of the victims and complying with reparation as well as guarantees of non-repetition). In addition, the JEP will determine the sanctions with "the genuine intention that the convicted person will be brought to justice" (CC 2017: para 23, 23). In doing so, the JEP ensures that those responsible of the most serious crimes will be held accountable – hereby preserving an "*irreducible minimum*" of the duty to investigate, adjudicate and sanction – and thus avoiding impunity.

4. Exemption from criminal responsibility

4.1. Amnesties and Pardons

Another topic that has sparked discontent in Colombia is the treatment of amnesties and pardons. As with the sanctions, amnesties have been strongly criticized based on allegations that the JEP, by granting amnesties, would be an impunity tribunal. One of the key challenges within the framework of TJ processes is how to confront the dilemma between justice and peace. A peace agreement in the context of an ongoing armed conflict is almost impossible to achieve without allowing for concessions in terms of justice. In that sense, there is an eminent political content to peace negotiations that require all parties to be willing to make and accept compromises. In various peace negotiations (at a global level and in Colombia), amnesties have proven to be a successful tool to achieve this

17 Nevertheless, in those cases the duty to contribute to the clarification of truth, the reparation of the victims and the guarantee of non-repetition is maintained, cf paragraph of transitory art 18 of LA 1/17.

18 See no 60 in pt 5.1.2.I. of the Final Agreement, 142; transitory art 13 of LA 1/17 and CC, Judgment C-674, para 5.3.2.4.2.

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willingness to compromise, since, by preventing the prosecution of certain conducts, they create a relevant incentive to continue the negotiations (Tarapués Sandino 2022: 65–66).[19] While the higher objective of achieving peace justifies these reasons of practical feasibility, the State's obligations to investigate and prosecute grave human rights violations must not be forgotten.

In light of these conflicting perspectives, international law has developed a two-tiered approach that distinguishes between absolute and conditional amnesties (Ambos 2021: 123ff.). (Inadmissible) *absolute amnesties* prohibit any investigation and impede victims and their families from identifying the perpetrators, knowing the truth, or receiving reparation. Thus, they obstruct access to justice (Ambos 2018a: 121).[20] While that kind of *carte blanche* has been banned in international law, *conditional amnesties* are permitted. The latter do not automatically exempt from punishment. Instead, these amnesties condition the benefit on certain acts, such as, for example, acknowledgment of responsibility, full disclosure of the crimes committed, and remorse on the part of the recipients (Ambos 2009: 71).[21] Additionally, international law does not allow conditional amnesties for serious crimes, such as war crimes or crimes against humanity (Ambos 2018a: 127–8).[22] In other words, international law opts for a conciliatory approach that promotes an expeditious and peaceful resolution (by permitting amnesties) and, at the same time, recognizes the State's obligation to protect the rights of the victims (by prohibiting amnesties

19 See CC, Judgment C-674, para 5.3.2.4.2., which states that "the flexibility in punitive standards constitutes a condition for the viability of negotiations with illegal armed groups, since they would not be willing to consider disarmament if it would bring a severe and strict application of criminal law". Regarding negotiations with the ELN, see also Redacción Paz, *El Tiempo* (2019).

20 A classic example of an absolute amnesty in the Latin American context is Chilean Decree 2191 from 1978, which gave amnesty to "perpetrators, accomplices or accessories" extending it to all crimes committed between 11 September 1973—the day of the coup d'état of General Augusto Pinochet—and 10 March 1978, without making any distinction between the seriousness of the common crimes committed.

21 The most famous example of such an amnesty is the case of South Africa. According to the Truth and Reconciliation Act from 19 July 1995, an amnesty can be granted by a specific Amnesty Committee under the condition that (among other things) the applicant reveals all the facts committed and these can be considered political crimes, see Ambos (2018a), 125–6.

22 The IACHR declared that international crimes (such as crimes against humanity, war crimes or genocide) "are crimes for which amnesties cannot be granted", IACHR, *Caso Almonacid Arellano y otros vs. Chile*, para 114.

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for severe crimes and restricting the concession of amnesties to less serious crimes and only under certain conditions) (Ambos 2021: 123).

The JEP's normative framework carefully considers these nuances: it avoids absolute amnesties and instead ensures that the recipients of amnesties or pardons assume responsibility and fulfil specific conditions. In addition, the JEP's framework guarantees that those most responsible of serious crimes (such as crimes against humanity and war crimes) will under no circumstances benefit from amnesties or pardons.[23] Consequently, the JEP can only grant amnesties for certain crimes (for example, political crimes such as rebellion, sedition, or so-called connected crimes such as deaths in combat) and subject the exemption from liability to specific conditions. Thus, the legal framework of the JEP applies a complex system for granting amnesties going beyond the minimum standards of international law.[24] In addition, the fact that the JEP's amnesty regime is neither general (as it excludes specific crimes from the granting of amnesties) nor unconditional (as it establishes mandatory conditions) favors the legitimacy and legality of the Colombian model in terms of amnesties.

4.2. Waiver of criminal prosecution

Another fundamental aspect related to allegations of impunity is the waiver of criminal prosecution. As with amnesties or pardons, this legal figure constitutes a particular criminal proceeding that extinguishes liability and criminal sanctions.[25] Likewise, it does not apply to serious crimes (such as war crimes or extrajudicial executions), limiting its scope of application to certain crimes (ICJ 2019: 103).[26] Additionally, the waiver of criminal prosecution does not exempt recipients from the duty of contributing to the SIVJRNR measures.[27] Hence, the figure of waiver of criminal prosecution is similar to the amnesties regime. However, it differs in that the waiver of

23 Paragraph of Art 23 of Law 1820 from 2016, Amnesty Law (henceforth Amnesty Law). For a detailed analysis see Ambos and Cote (2019).

24 The JEP's normative framework does not only prohibit the granting of amnesties for international crimes, but also for other crimes, such as taking hostages, enforced disappearance and sexual violence (which may amount to international crimes, but do not necessarily qualify as such), cf paragraph of art 23 Amnesty Law.

25 cf art 44ff. Statutory Law; arts 44ff. Amnesty Law.

26 cf art 45 Statutory Law; art 46 Amnesty Law.

27 cf art 49 Statutory Law; art 50 Amnesty Law; no 50f. in pt 5.1.2.III. of the Final Agreement, 137.

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criminal prosecution was designed principally for the State's agents while amnesties were created to benefit FARC-EP ex-combatants (ICJ 2019: 98ff.; ICJ 2021: 2).[28] Accordingly, the JEP's normative framework allows those perpetrators who cannot access the recourse of amnesties or pardons the same opportunity to benefit from a special treatment—provided that they tell the truth and contribute to the reparation of the victims (ICJ 2019: 99; IFIT 2018: 223).

The idea behind the strategy of offering waivers of criminal prosecution is, in some cases, that it permits to concentrate efforts in the investigation and prosecution of the most responsible perpetrators and of the most serious crimes. The JEP's objective is not to try all individuals that have committed crimes in the context of the armed conflict. The pragmatical reason for this is that the JEP would not have the capacity to deal with all the cases that occurred during the armed conflict.[29] Previous attempts to combat impunity have shown that a strategy directed at prosecuting all individual crimes has little chance of success and could lead to "*de facto impunity*".[30] Furthermore, understanding the criminal structures and patterns as a source and cause of the conflict is indispensable to unravel the complexity of the armed conflict.[31] The JEP's design is a result of the lessons learned from past mistakes. It focuses its investigative efforts on specific suspects or criminal organizations based on its prioritization and selection criteria (JEP, Chamber of Recognition of Truth and Responsibility and Determination of Facts and Conducts [hereinafter SRVR] 2018b; see ICJ 2019: 6). That is why crimes against humanity and war crimes, among others, are excluded from the waiver of criminal prosecution. Accordingly, the JEP only deals with those most responsible for committing the most serious crimes in order to uncover the major criminal patterns.[32]

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28 cf art 44 Amnesty Law.

29 CC, Judgment C-674, para 5.2.4.2.5.

30 ibid, para 4.3.2.4.2.

31 ibid.

32 CC, Judgment C-080 from 2018: "*(…) selection as a principle constitutes a general and abstract mandate that applies to the Special Jurisdiction of Peace, whose objective is to allow such a jurisdiction, given the massiveness of the events that have taken place in the context of the armed conflict, to centre its efforts in the criminal investigation of the most responsible perpetrators of all the crimes which have the connotation of crimes against humanity, genocide, or war crimes committed systematically, as required by transitory article 66. On the other, the selection criteria qualify as policy guidelines through which the JEP must fulfil such a mandate*" (emphasis added).

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5. The JEP's conditionality regime

As mentioned above, in order to obtain benefits (that is, favorable special penal treatment such as special sanctions, alternative sanctions, pardons, amnesties or waiver of criminal prosecution) the recipients must effectively contribute to the whole truth, to the satisfaction of the victims' rights, to reparation and guarantees of non-repetition.[33] Failure to comply with these conditions leads to the loss of benefits.[34] The conditionality regime is marked by the principles of progressiveness, proportionality, and comprehensiveness which require stricter conditions for more serious crimes and greater benefits.[35] There is a correlation between the seriousness of the conduct and the severity of the conditionality regime: the more serious and representative the crimes are, the more demanding the conditionality regime is for the beneficiaries (see Tarapués 2019: 44, 46).[36]

A central challenge to this justice model that highly relies on conditionality is that regime's effective enforcement. The normative framework of the JEP comprehensively defines the criteria used to assess breaches to the system of conditions and determines their effects.[37] If the JEP is unable to guarantee compliance with the conditions imposed on individuals in exchange for favorable penal treatment, this model would lack foundation and lose legitimacy. In that case, restrictions in terms of justice would gain nothing in return with regards to truth, reparation of victims and non-repetition. In other words, there would be no substantial gain concerning the objectives pursued with the TJ instruments.[38] In order to avoid this, the JEP can resort to a special proceeding in cases of non-compliance (Castro Cuenca 2022: 101–102).[39]

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33 See transitory art 5 (sub-s 8) and transitory art 11 of art 1 LA 1/17; CC, Judgment C-674, para 5.3.2.4.2.

34 See transitory art 5 (sub-s 8) of art 1 LA 1/17 according to which the special treatment is lost when false information has been maliciously provided, and when "any of the conditions of the System have been breached". See also Representative of the UN High Commissioner for Human Rights in Colombia (2017).

35 Similarly, "[t]he degree of voluntary contribution of each individual or collective to the truth will be in relation to the treatment received in the JEP", cf art 20 sub-s 5 of Statutory Law.

36 JEP, Tribunal for Peace (2019), Judgment TP-SA-SENIT 01, para 233; CC (2018), Judgment C-080, pt 4.1.5.3.

37 Art 67 RPE; transitory art 12 of art 1 LA 1/17.

38 See CC, Judgment C-674, para 5.3.2.4.2.

39 Art 67 RPE.

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So far, the JEP has shown that it strives to respond to non-compliance with the conditions imposed under the conditionality regime, especially in cases where the applicant:

- does not present the monitoring report within the period granted by the JEP or does not assist programmed testimonies without proof of justification (e.g., Hernán Velásquez alias 'El Paisa'[40] and Seuxis Solarte alias 'Jesús Santrich'[41]),
- does not show sufficient commitment to contribute to the truth and to satisfy the victims' rights (e.g., General Mario Montoya (JEP, SRVR 2020)[42]), or
- publicly expresses dissociation from and regret about his previous collaboration with the JEP and forms a new armed group (e.g., Luciano Arango alias 'Iván Márquez'[43]).

As a consequence of such non-compliance, the JEP can deny beneficial treatment (such as conditional release), activate the ordinary (adversarial) criminal procedure or even initiate a process of exclusion from the jurisdiction (for example, in the cases of 'Santrich' and 'Márquez', for having joined the FARC dissidents)[44]. While the JEP needs to respond to such cases of non-compliance with the conditionality regime in line with due process and an otherwise legally sound procedure,[45] this must be done with determination to avoid creating a legal vacuum that leads to impunity and involves the loss of trust from the part of the victims and the society in general.

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40 JEP, SRVR (2019): Ruling 061.

41 JEP, SRVR (2019): Ruling 178. See also JEP (2019c).

42 JEP, SRVR (2020). Although the victims have demanded repeatedly the exclusion of General Montoya from the JEP for his failure to comply, it is not yet clear whether the General's attitude can be considered a serious failure to comply at this moment of voluntary testimonies. The JEP's SRVR denied the victims' request on the expulsion of General Montoya on 16 December 2020, based on procedural arguments that did not yet allow the Chamber to take a decision on the matter, see *Semana* (2020a). It will only be able to do so after the process of contrasting the entire body of evidence has been finalized, cf *infobae* (2021).

43 JEP, SRVR (2019): Ruling 076. See also JEP (2019a); JEP (2019f).

44 JEP, Tribunal for Peace (2019): Ruling TP-SA-289 (excludes Seuxis Paucias Hernández 'Santrich') and Ruling TP-SA-288 (excluding Hernán Darío Velásquez 'El Paisa'). See also JEP (2019b); Castro Cuenca (2022): 105.

45 art 21 of Statutory Law. It should be noted that an expulsion from the JEP must be based on exceptional circumstances, such as abandoning the peace process or taking up the arms again, as set out by the CC in its judgment C-080 of 2018.

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6. International Criminal Court: The International Monitoring Mechanism

The International Criminal Court (ICC) was created to ensure that "the most serious crimes of concern to the international community as a whole" are not left unpunished.[46] As Colombia is a State Party,[47] the ICC monitors the treatment of crimes within its competence[48] that were committed in the context of the Colombian armed conflict, above all regarding possible omissions that could lead to impunity.[49] In this sense, the Office of the Prosecutor (hereinafter OTP) of the ICC periodically examines if Colombia is fulfilling its obligation to deal with these crimes genuinely (see ICC, OTP 2012; see also ICC, OTP 2013–2020; and ICC, OTP 2021: para. 16).

Although the OTP has reiterated on several occasions that it supports the Colombian TJ process and especially the JEP, it has also highlighted the importance of developing effective and rigorous measures to implement and monitor the sanctions imposed (ICC, OTP 2019: 133; ICC, OTP 2020; ICC, OTP 2018: para 165; see also ICC OTP 2021: para. 42). Regarding the constitutional reform project presented by the Democratic Centre party ("Centro Democratico"), former Deputy Prosecutor James Stewart warned the Colombian Government to "Let the SJP [JEP] judges to do their job" in order to ensure "peace with justice" (International Center for Transitional Justice – ICTJ 2018; see also ICC OTP 2021: para. 16). Likewise, the OTP has expressed concerns as to whether the JEP will be able to hold commanders accountable since the respective provision that the JEP's judges will apply contains an ambiguous concept of command responsibility.[50] With regard to the latter, the JEP has provided some clarification in its recent "indictment" in the context of macro case 003, charging several

46 Rome Statute, Preamble.

47 Colombia deposited its ratification instrument on the 5 August 2002, thus the Statute entered into force on the 1 November 2002 (art 126(2) of the Rome Statute). For the internal context, see Colombian Law 742/2002 adopting the Rome Statute.

48 See arts 5–8*bis* of the Rome Statute (genocide, crimes against humanity, war crimes, crime of aggression).

49 The Colombian situation is under preliminary examination since June 2004, see ICC, 'Situations and Cases under Preliminary Examinations Colombia'.

50 cf art 24 LA 1/17. See ICC, OTP (2018), 'Report', para 165. Although the ICC OTP did not express its concerns regarding this matter in its last 'Reports on the preliminary examination of the situation in Colombia' in 2019 and 2020, the question of what definition the JEP will apply continues to be a constant concern, cf. Ambos and Aboueldahab (2021); see also ICC, OTP (2021), para. 16.

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army officials with extrajudicial killings (so-called "false positives") and interpreting the figure of command responsibility in line with international standards, in particular Art. 28 ICC Statute, thus ensuring the prosecution of commanders also with regard to the Armed Forces.[51] Notwithstanding this recent positive development, if the JEP (and Colombia in general) is not capable of prosecuting the most serious crimes committed in the context of the armed conflict, the preliminary examination regarding the Colombian situation might be turned into a formal investigation to ensure that there is no impunity (Eskauriatza 2020: 199; Ambos and Aboueldahab 2019).[52]

7. *General Assessment*

7.1. *General remarks*

Since World War II, the establishment of international criminal tribunals has tended to create overly high and, at times, inaccurate expectations among the affected populations (Milanovic 2020: 261ff; Damaška 2007: 341ff.). The JEP faces the same problem with regard to victims, former members of the FARC-EP, members of the armed forces and citizens in general. The sensation of disappointment or, even worse, a simulated justice, can only be countered by a strategy determined to repeatedly clarify and explain the mandate and the limitations of the JEP to create more realistic expectations (ICJ 2019: 83). Hence, both the Colombian State and the JEP (along with the SIVJRNR) have the responsibility to implement a strategy of expectation management. In addition to false ideas concerning amnesties, pardons and the JEP's sanctions as well as conditionality regime, expectations should be also countered with regard to the length of the proceedings.

The JEP's mode of operation is complex and hence it will take longer to deliver judgments. This is inherent in the nature of the JEP, as it deals with several large-scale cases whose scope and magnitude are reflected in the figures: after three years of operation, the JEP has conducted 138 hearings and adopted 44.853 court decisions (JEP 2021); almost 13.000 individuals have submitted to the JEP (9806 former FARC combatants, 3007 members of the Armed Forces and 141 State Agents (JEP 2021; see

51 JEP, SRVR (2021): Ruling 125, section E.2.3., especially paras. 699–701.
52 cf art 17, para 1(b) of the Rome Statute.

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also ICC, OTP 2020: para. 111)) and more than 260 thousand victims have been accredited (JEP 2020a). This does not represent minor work. Another factor that slowed down the functioning of the JEP was the delay in adopting the necessary provisions for its operation: Although the JEP started to function in March 2018, the Rules of Procedure (Law 1922) were approved only in July 2018 and the Statutory Law (Law 1957) was not issued until June 2019. Hence, the mere fact that it takes the JEP longer than expected is not *per se* a sign of impunity. Rather, it shows the extensive and complex workload that the JEP has to deal with and the political difficulties it encountered during its founding process (*Semana* 2020; Ambos and Abouel-dahab 2019).

7.2. *The JEP does not aggravate the situation of impunity in Colombia*

Another claim that is often made is that the general situation of impunity in Colombia has worsened with the JEP. This assertion overlooks two important aspects: First, there was already a high level of impunity concerning the crimes committed in the context of the armed conflict due to the alleged "lack of guarantees of impartiality within traditional State bodies".[53] Hence, the JEP deals with cases that have gone unpunished because the traditional justice system has not been able to resolve them. It thus contributes to close the already existing impunity gaps (see, for example, JEP 2020b). Second, the ordinary justice system continues to have an essential role in ensuring accountability. Those cases that do not fall within the competence of the JEP based on the prerequisites contemplated in Legislative Act 01 of 2017 will remain with the ordinary justice system. Indeed, the Attorney General (Fiscalía General de la Nación) can continue investigating and prosecuting cases for up to three months before issuing conclusions in each large-scale case.[54] Moreover, third-party civilians, in line with a CC judgement,[55] only have a right but not obligation to submit

53 CC, Judgment C-674, para 5.3.1.1.

54 See also art 79(j) Statutory Law.

55 CC, Judgment C-674, arguing at para. 5.5.2.2. that third parties' voluntary submission to the JEP does not violate their right to a natural judge since this submission "results precisely from their willingness to submit themselves to a jurisdictional authority that is distinct from the ordinary authorities of the State and that offers them sufficient guarantees", adding at para. 5.5.2.3. (last subparagraph) that the JEP's "framework […] offers symmetrical and equivalent guarantees" that do not diminish "procedural and substantive guarantees".

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themselves to the JEP. Since the JEP deals exclusively and provisionally with acts committed in the context of the armed conflict, it does not seek – and would not be able to – substitute the ordinary justice system.[56]

7.3. The JEP is not an isolated institution

It should also be noted that the JEP is not an isolated mechanism, but is interconnected with other institutions: First, it is part of the SIJVRNR that consists of the Commission for the Clarification of Truth, the Special Unit for the Search of Missing Persons and the other bodies that compose the system (see ICJ 2019: 6). Furthermore, both the Colombian Congress and the President approved the JEP's statutory laws, and the CC has made several clarifications regarding its competence and limitations. In other words, the JEP is not solely responsible for achieving the objectives of TJ, nor is the SIJVRNR; but rather it is the joint responsibility of the State and the Colombian society as a whole (*Semana* 2020). Additionally, the proceedings of the JEP can be reviewed by the CC under the mechanism of *tutelas*[57] which have been applied since the CC's Judgment C-674 in 2017.[58] Therefore, the JEP will only be able to meet expectations if all Colombian institutions (including those created with the Victims and Land Restitution Law) work together and in a coordinated manner. To this end, State authorities (and especially the government) have first and foremost the obligation to support the TJ process. In fact, the current government is obliged to comply with the regulations of the Final Agreement (even though it was an agreement made by the previous government)

56 See pt 5.1.b. of the Final Agreement, 112.

57 A *tutela* is a constitutional injunction that aims to protect fundamental constitutional rights when they are violated or threatened by the action or omission of any public authority; it is a mechanism incorporated in art 86 of the Colombian Constitution.

58 See also CC, Judgment C-080 from 2018: "The selection of *tutelas* for review is a power exercised by the court in consistent exercise of its duties to protect the integrity and supremacy of the Political Constitution. In pursuit of this objective, it has the sole exclusive and excluding competency to exercise control of the actions of *tutela* by reviewing the ones that are pronounced in the constitutional jurisdiction to which all the judges of the Republic belong and of which this corporation is the closing body, following the principle of "unity of constitutional jurisdiction". This control takes on greater importance in the framework of the SIVJRNV, since the only mechanism provided for the control of the orders issued by the JEP was the action of *tutela*".

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since it entails an obligation of the Colombian State as an international legal subject, regardless of whether it is politically convenient for the government of the day.[59] Hence, some of the positions assumed by the present government regarding the JEP do not seem adequate.[60] Instead it is to be expected that the government recognizes its obligation to promote the implementation of the Final Agreement and abstains from obstructing the JEP's work in the future. It is equally important that the Office of the Attorney General and the other national bodies fully cooperate with the JEP (JEP 2019a; ICC, OTP 2020; see also ICJ 2019: 7–9).

7.4. The need for critical monitoring

Beyond expectation management and the need to establish joint efforts among all institutions involved, the JEP needs close monitoring. While allegations of impunity about the JEP's normative framework are often based on overly high expectations or misperceptions, the institution does indeed face a number of challenges in terms of fulfilling its mandate. This implementation process undoubtedly requires critical accompaniment. At this point, it cannot be predicted with certainty whether the JEP will be able to guarantee the necessary enforcement and monitoring of the sanctions imposed, the provisional benefits granted, and the conditionality regime. These and other future developments, which, at worst, could eventually impede the fulfilment of the JEP's mandate, require the support as well as critical and constructive monitoring of civil society, State institutions, academia, and the international community.

59 cf Legislative Act 02 from 2017 which constitutionally safeguarded the Final Agreement and turned it into a criterion of legal interpretation.

60 For example, with regard to the objections the government made to the JEP's Statutory Law and which caused immense penal uncertainty at that moment, see Secretary-General's Special Representative Warns against Reopening Colombia's Final Peace Agreement in Climate of Uncertainty, UN Doc. SC/13778 (2019); also Ambos and Aboueldahab (2019).

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The Special Jurisdiction for Peace and Sui Generis Transitional Justice

Diego Fernando Tarapués Sandino

Abstract: This article argues that both the Tribunal for Peace and the Chambers of Justice of the Special Jurisdiction for Peace (SJP) can be considered *sui generis* jurisdictional institutions. They have been established taking into account the rich experience of international criminal justice institutions and Colombia's own experiences in transitional justice (TJ). The principles of preference and exclusive jurisdiction that govern the SJP entail its focus on cases associated with the armed conflict, which previously fell into the mandate of different judicial bodies. This article aims to discuss the SJP's institutional nature as an institution in charge of adjudicating crimes committed during the Colombian armed conflict, highlighting several features that makes it distinct from other domestic criminal justice institutions.

Introduction

The Special Jurisdiction for Peace (SJP or Jurisdicción Especial para la Paz, JEP) is part of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR); it is the justice element within this holistic transitional justice (TJ) system. Its primary function is to enforce the victims' right to justice and to fulfil the State's duty of investigating and prosecuting serious human rights violations, however, it pursues a restorative rather than a retributive approach (Ambos & Abouelddahab, 2020, p. 5). Although the JEP is part of the Colombian legal and political system, the nature and objectives of this institution arguably go beyond the mandate of the ordinary justice system. The JEP thus complements the international fight against impunity in situations of macro-criminality, but differs in its core features from other domestic criminal justice institutions.

In fact, the creation of the JEP as a result of a political agreement and with a temporary mandate after the relevant events occurred is atypi-

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cal in Colombian institutional history. The most similar institution are the Chambers of Justice and Peace by Law 975 of 2005 (Ambos, 2010); however, these Chambers were created within the domestic system, concretely within local courts, and thus were part of the ordinary justice system. Moreover, these Chambers' prosecutors were part of a special unit within the Attorney General's Office (Ambos, 2010, p. 38–39). In other words, the Justice and Peace model did not create a special jurisdiction with its own organs, nor did it have administrative or financial autonomy, nor was it designed as a result of a negotiation between the respective actors.

Yet, the JEP is partly based on national experiences and has been designed according to both the Colombian Justice and Peace Law and the so-called Legal Framework for Peace, a specific constitutional framework created in 2012 by Legislative Act (LA) 01. At the same time, the JEP was inspired by foreign experiences (Tarapués, 2017). As a result, the JEP is an *ex post facto* and *ad hoc* tribunal set up to investigate certain crimes committed before its establishment. The following analysis looks at the main features of the JEP's Tribunal for Peace (Tribunal para la Paz) and Chambers of Justice (Salas de Justicia) in order to understand their peculiar institutional structure.

1. *The Institutional Nature of the Special Jurisdiction for Peace*

The initial model agreed upon in Havana envisaged an institutional design of the JEP (both of the Tribunal for Peace and the Chambers of Justice) in line with contemporary trends in international law, namely the establishment of hybrid criminal tribunals with a mixed composition of judges (Ambos, 2021a, pp. 62 ff.). However, the rejection of the original Agreement in the plebiscite on 2 October 2016 led to a renegotiation with the opponents of the peace process, which resulted, *inter alia*, in the exclusion of foreign judges. The original model, including foreign judges, placed the JEP in the same category as the Iraqi Higher Criminal Court and the International Crimes Tribunal in Bangladesh. None of these tribunals is based on a bilateral agreement with the UN or any regional organization, unlike the Special Tribunal for Lebanon, the Extraordinary Chambers in the Court of Cambodia, the Special Court for Sierra Leone or the Kosovo Specialist Chambers.

Ultimately, foreign jurists have been accepted as so-called *amici curiae*, who were selected by the same (international) selection committee as the JEP's (national) judges. There is also a certain internationalization by way

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of other factors. Thus, for example, the JEP is bound by international standards (LA 01, 2017, Provisional Art. 22; Constitutional Court, judgment C-080, 2018) and defence lawyers can, in theory, be from any country ("freedom to choose an attorney accredited to practice law in any country"[1], LA 01, 2017, subsection 1 of Provisional Art. 12). Last but not least, the JEP is largely funded by foreign donations being part of the Post-Conflict Multi-Donor Fund (2017) and the Colombia in Peace Fund (2017–2018). All these particularities must be taken into account.

1.1 The negotiated nature of the JEP

First, it should be recalled that the JEP was created by virtue of a political agreement signed between the former Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) and the Colombian government. This agreement put an end to the armed conflict between the Armed Forces of the Colombian State and the insurgent group (Pastrana, 2019). It is crucial not to overlook this aspect, which, on the contrary, should be the starting point for the JEP's general understanding. As the JEP was created only after the political transition to peace was agreed upon, it can be seen as a clear expression of the *lex pacificatoria* (Bell, 2008).

In comparative terms, this process of political transition can be classified as a process of "accountability" regarding its content and as typical of "democratically legitimated transitions" with regard to its procedure (Uprimny, 2006, p. 21 and 32 ff.). In other words, the process did not impose a punitive model of judicialization, nor an amnesic model that rendered the victims invisible (Uprimny, 2006, p. 24 ff.). Instead, the model focused on the creation of a comprehensive system centred on the rights of the victims. In addition, the parties placed particular emphasis on the provisions of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL), in accordance with the provisions of the "Declaration of Principles" from 7 June 2014 (Goebertus, 2021).

Within this comprehensive system, the most responsible perpetrators cannot waive criminal prosecution for the most representative crimes committed and those who appear before the JEP must fully comply with a con-

1 The original version in Spanish reads: "libertad de escoger abogado acreditado para ejercer en cualquier país". Translation here and in the following by Enago.

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ditionality regime designed to ensure their contribution to the judicial and extrajudicial mechanisms that make up the SIVJRNR (Tarapués, 2020). The purpose of this is to ensure compliance with the obligations undertaken and to guarantee the realization of the victims' right to truth, justice, reparation, and non-repetition (LA 01, 2017, Provisional Art. 5; Law 1820, 2016, Art. 14, 33, and 50; Law 1922, 2018, Art. 67 and 69; Law 1957, 2019, Art. 20).

Indeed, the creation of the JEP is a political product resulting from the negotiation of the "Partial Agreement on the Victims of the Conflict" of 15 December 2015. This was the most challenging item on the agenda (Sánchez, 2019, p. 15–16); its negotiation took longer than the other parts of the peace agreement. It was necessary to create a special commission, composed of three delegates for each negotiating party, to technically and consensually structure what could not be achieved at the negotiating table (Santos, 2021; Jaramillo, 2021).

Pursuant to this agreement members of the FARC-EP committed to appear in court. However, for them to lay down their arms and be held accountable, the FARC-EP politically demanded the creation of a justice system different from the ordinary one that would guarantee them preferential treatment in conformity with the principle of the 'natural judge' (juez natural)[2]. Moreover, they demanded conditions that would provide legal certainty to what was agreed in the Final Peace Agreement. Therefore, not only was the JEP created to deal predominantly with the crimes committed during the armed conflict. In addition, a guarantee of non-extradition was established as a judicial mechanism to ensure legal certainty and the principle of the 'natural judge' in the event of any request from foreign authorities (LA 01 of 2017, Provisional Art. 19; Tribunal for Peace, Judgment SRT-AE 030 of 2019).

As for members of the public forces involved in actions in the context of the armed conflict, it was decided that their legal situation can and should be resolved within this judicial framework. State agents who were not members of the armed forces, as well as any civilian third parties whose actions were related to the armed conflict, may be subject to the JEP, but on a voluntary basis. Hence, Colombia's Constitutional Court has established that the JEP represents "the natural judge of former combatants", because

2 The principle of the natural judge is a guarantee in civil law systems according to which each person must be tried before a competent judge or tribunal (not *ex post facto*) following all the appropriate formalities in each trial in accordance with the relevant laws previously established.

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of the obligation to appear in court imposed on both parties involved in the war (Constitutional Court, Judgment C-674 of 2017).

Nevertheless, from the perspective of act-based criminal law, it is possible to qualify the JEP not so much as the natural judge of the ex-combatants, but rather as the judge of the actions conducted within the Colombian armed conflict. The voluntary appearance in court of third parties and state agents who were not combatants is only possible if it pertains to any conduct directly or indirectly related to the armed conflict (Tribunal for Peace, Order TP-SA 020 of 2018).

1.2. The preferential nature of the JEP to hear the crimes committed during the conflict

To support the judicial work entrusted to the JEP, the principle of preference was established as a jurisdictional premise to absorb and concentrate the adjudication of cases linked to the internal armed conflict. These cases were previously dealt with diffusely by different authorities. According to the principle of preference, the JEP administers justice temporarily and autonomously, adjudicating cases "with preference over all other courts and, exclusively, in all cases involving acts committed prior to 1 December 2016, caused by, due to, or directly or indirectly related to the armed conflict by those participating in it, particularly regarding acts deemed as serious violations of International Humanitarian Law or serious Human Rights violations"[3] (LA 01 of 2017, Provisional Art. 5).

The principle of preference is essential to activate the jurisdiction of the JEP, as is the principle of complementarity for the International Criminal Court (ICC), the subsidiarity principle for the Inter-American Court of Human Rights (Corte Interamericana de Derechos Humanos, IACHR), or the principle of universal jurisdiction for a third state that intends to investigate and prosecute international crimes that occurred in another state. In none of these judicial scenarios, including the JEP, it is possible for ordinary authorities to directly hear a case without first meeting the

3 The original version in Spanish reads: "de manera preferente sobre todas las demás jurisdicciones y de forma exclusiva de las conductas cometidas con anterioridad al 10 de diciembre de 2016, por causa, con ocasión o en relación directa o indirecta con el conflicto armado, por quienes participaron en el mismo, en especial respecto a conductas consideradas graves infracciones al Derecho Internacional Humanitario o graves violaciones de los Derechos Humanos".

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preliminary procedural requirements of each of these principles to activate jurisdiction.

This constitutional principle is the core of the JEP's jurisdictional scope because it is a specialized jurisdiction that operates in the domestic institutional sphere, taking up tasks from the traditional courts. Without this principle, there would be no clear and precise understanding as to what the JEP has to investigate, adjudicate, and resolve, because this principle enables *ad hoc* and *ex post* hearings of cases by the bodies of this jurisdiction.

Establishing such a principle in order to justify the hearing of cases leads to a strict delimitation of the concurrent jurisdictional factors that trigger the preference of this jurisdiction. Therefore, the provision setting forth this principle also includes the criteria defining the *Kompetenz-Kompetenz* of the JEP's judicial bodies.

As stated in Provisional Art. 5 of the LA 01 of 2017, the preference and exclusive jurisdiction of the JEP to hear cases is only possible if three conditions are met: (i) in terms of *ratione personae*, the act must have been conducted by actors who participated in the armed conflict, according to the defined universe of combatants and civilians subject to and accepted by the SIVJRNR (LA 01 of 2017, subsection 1 of Provisional Art. 5; Law 1957 of 2019, Art. 63 and 64; (ii) in terms of *ratione temporis*, the acts must have been committed during the armed conflict, with the entry into force of the Final Peace Agreement as a reference point, until 1 December 2016 – the only exception to this rule are the crimes related to the process of laying down arms (LA 01 of 2017, paragraph 1 of Provisional Art. 5; Law 1957 of 2019, Art. 65) – and (iii) in terms of *ratione materiae*, the acts must have been caused by, generated by or related directly or indirectly to the armed conflict, with special attention to acts considered to be serious violations or breaches of IHRL and IHL (LA 01, 2017, Provisional Art. 5, paragraph 1, and Provisional Art. 23; Law 1957, 2019, Art. 62).

In this sense, the armed conflict constitutes the cross-cutting element that is present in the temporal, material, and personal factors set forth by the principle of preference when determining the jurisdiction of the JEP. Its ubiquity can be explained by the essential purpose of the SIVJRNR, which is to build components that allow to clarify and overcome the events of the Colombian armed conflict; thus, the JEP is the judicial element that must deal with the criminal nature of the acts linked with the conflict.

The assessment of the relationship with the armed conflict can occur procedurally at different stages, not only when activating jurisdiction but also when granting minor and major benefits. Therefore, the Tribunal for

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Peace has defined that especially the material relationship with the armed conflict must be evaluated to varying degrees of intensity, depending on the stage of the proceedings and the evidence (Tribunal for Peace, orders TP-SA 020, 048, 068 and 070 of 2018). The JEP exercises the exclusive and preferential jurisdiction the Constitution has granted it, in order to overcome, clarify, and determine responsibilities for the events that occurred in the context of the armed conflict.

This preferential jurisdiction is coupled with the JEP's prevailing jurisdiction over the cases it admits. In this regard, the Constitution states: "It shall prevail over criminal, disciplinary, or administrative proceedings for acts committed due to, because of, or in direct or indirect relation with the armed conflict, by having exclusive jurisdiction over such acts"[4] (LA 01 of 2017, Provisional Art. 6, paragraph 1). These areas of prevalence are reproduced in Art. 36 of the Statutory Law of the JEP, which includes fiscal proceedings.

Moreover, Provisional Art. 27 of the LA 01 of 2017 proposes an ultra-active clause related to the prevalent application of the Final Peace Agreement in the event that subsequent regulations are issued which "cause the (combatants or non-combatants who have committed acts directly or indirectly related to the conflict) to be excluded from the jurisdiction of the Special Jurisdiction for Peace, or which result in the non-application of such jurisdiction". In relation to these parties, "the Special Tribunal for Peace shall exercise its preferential jurisdiction in matters within its jurisdiction in accordance with this Legislative Act", regardless of what may be otherwise provided by legal norms in the future. This clause has been strongly supported by constitutional case law (Constitutional Court, Judgment C-674 of 2017).

In conclusion, first, the preferential and exclusive nature of the JEP entails a new judicial approach to hear all cases involving conduct related to the armed conflict under the three conditions established in the Final Peace Agreement (personal, temporal, and material). Second, the JEP's prevalent nature, both in operational and temporal terms, shows an institutional structure that is atypical compared to other Colombian judicial bodies.

4 The original version in Spanish reads: "prevalecerá sobre las actuaciones penales, disciplinarias o administrativas por conductas cometidas con ocasión, por causa o en relación directa o indirecta con el conflicto armado, al absorber la competencia exclusiva sobre dichas conductas".

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1.3 The role of foreign jurists in the JEP

The initial design of the JEP was characterized by a mixed composition like the hybrid courts established for other countries such as Kosovo (thereto Ambos, 2021a, pp. 66 ff.). As a consequence, the original Peace Agreement included the following provision when establishing the composition of the Tribunal for Peace: "Twenty Colombian judges shall be elected and, in addition, four foreign judges who shall act in the Sections if so requested", specifying that "if the number of judges is increased, the number of foreign judges shall be increased proportionally". Furthermore, the participation of foreign judges in the three Chambers of Justice was contemplated because the following was agreed upon: "Regarding the nationality of the judges, there may be up to two foreign judges per Chamber, upon request of the appearing party" (Peace Agreement, 2016, p. 143 ff.).

The "Agreement for the Development of Paragraph 23" of the "Agreement for the Creation of a Special Jurisdiction for Peace" of 15 December 2015 reaffirmed this mixed composition of both the Tribunal for Peace and the Chambers of Justice and set forth the participation of foreign prosecutors as follows: "The Investigation and Prosecution Unit of the Special Jurisdiction for Peace will be composed of a minimum of sixteen (16) prosecutors, of which twelve (12) will be Colombian and four (4) will be foreign".

The inclusion of foreign judges and prosecutors in the JEP was primarily required by the FARC-EP as an additional guarantee of impartiality, to which the government did not object. Consequently, in the course of the negotiations, both parties considered that "the participation of foreign judges ensured the compatibility of the case law with the international standards, especially with regard to a possible ICC intervention" (Ambos & Aboueldahab, 2017, p. 27).

Although the institutional involvement of foreign judges in the Tribunal and in the Chambers of Justice would have resembled the institutional nature of mixed courts, the removal of foreign judges and prosecutors, as well as the institutional readjustment of the JEP based on the second and Final Peace Agreement, did not erase all legal and institutional particularities associated with international law. This is evident, for example, in maintaining the participation of foreign jurists in the JEP as *amicus curiae* (Ambos & Aboueldahab, 2017).

In this regard, Provisional Art. 7 of Legislative Act 01 of 2017 establishes that the Tribunal for Peace "shall have four foreign legal experts who shall intervene" in its proceedings. The relevant Section of the Tribunal "that

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will hear the case shall request the intervention, as *amicus curiae*, of up to two foreign jurists of recognized prestige". This will be performed on an exceptional basis and "at the request of the parties subject to its jurisdiction or on the court's own motion". The rule emphasizes that foreign jurists shall act with the sole purpose of providing concepts or *amicus curiae* on the subject matter of the case under study to obtain elements of judgment or information relevant to the case. The same *amicus* figure is envisaged in the formation of the Chambers of Justice that have "six expert foreign jurists", to fulfil the same purpose and under the same conditions as in the Tribunal for Peace.

The *amicus curiae* are "broadly recognized by international (criminal) courts of law", where the *amicus* participates in proceedings in an independent manner, providing "specialized information on relevant matters in which his [or her] specialized knowledge is required" (Ambos & Aboueldahab, 2018, p. 28–29). The purpose of this is to "facilitate the adoption of trial, information and assessment elements by the judges in the courts, which may be necessary to make any decisions regarding the proceedings" (Ambos & Aboueldahab, 2018, p. 29).

The special features of this figure in the Final Peace Agreement and in the constitutional reform that gave life to the JEP led to the belief that *amici curiae* even fulfilled "a quasi-judicial role" (Ambos & Aboueldahab, 2017). In addition to the peculiarities related to the numerical restriction of *amici*, as well as the requirements and process of selection of foreign jurists by the same Selection Committee that selected the judges, paragraphs 2 and 3 of Provisional Art. 7 of the LA 01 of 2017 indicated that foreign jurists "shall participate in the debates of the Section [or Chamber] in which their intervention is required, under the same conditions as the judges, but without a right to vote".[5]

This constitutional provision empowered foreign jurists to participate in the deliberation and decision-making processes of the Sections of the Tribunal and the Chambers of Justice under the same conditions as the sitting judges, the sole difference being that they did not have the right to vote. However, this competence of the *amici* was deemed unconstitutional because it "invades and obstructs the performance of judicial work" (Constitutional Court, Judgment C-674 of 2017). In terms of this judgment, *amici* are formally included in the constitutional, legal, and internal regulations

5 The original version in Spanish reads: "estos participarán en los debates de la Sección en la que se hubiera requerido su intervención, en las mismas condiciones que los magistrados, pero sin derecho de voto".

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of the JEP (LA 01 of 2017, Provisional Art. 7; Law 1957 of 2019, Art. 98–101 and 108). However, in practice, they do not perform the role envisaged in the Final Peace Agreement. The intervention of the *amici* can occur at the request of the persons submitted to the JEP or *ex officio*, but each Chamber of the JEP or Section of the Tribunal for Peace decides autonomously on its necessity. The Internal Regulations of the JEP state that their selection must be made through the use of technological tools established by each Chamber or Section (Internal Regulations of the JEP, Agreement ASP 01 of 2020, Art. 35). Finally, it should be noted that the Chamber for Amnesty or Pardon has requested an *amicus curiae* opinion in only two cases to date (Díaz, 2020, p. 211).

1.4 The selection process of senior officials in the JEP

The composition of the JEP's judicial bodies differs significantly from that of the ordinary courts due to the selection process not only of its judges and *amici* but also of the Director of the Investigation and Indictment Unit and the Head of the Executive Secretariat. The process for the creation of the JEP and the entire SIVJRNR was designed by a mixed Selection Committee that included national and foreign members by means of Decree 587 of 2017, following the guidelines of paragraph 1 of Provisional Art. 7 of the LA 01 of 2017 for the selection of the senior officials of the JEP, the members of the Truth Commission and the director of the Unit for the Search of Disappeared Persons.

This Selection Committee played a temporary, autonomous, and independent role and was composed of three foreign and two Colombian members[6], which meant a significant representation of the international community in the process of the JEP's formation. It is worth noting that Art. 2 of the aforementioned Decree established that the members of this Committee would be appointed by: (i) the Criminal Division of the Colombian Supreme Court of Justice, (ii) the Secretary General of the United Nations, (iii) the Permanent Commission of the State University System, (iv) the President of the European Court of Human Rights (ECHR), and (v) the delegation of the International Center for Transitional Justice (ICTJ) in Colombia.

6 The members of the Selection Committee were Claudia Vaca González (Colombia), José Francisco Acuña (Colombia), Diego García-Sayán (Perú), Juan Méndez (Argentina) and Álvaro Gil Robles (España).

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The Selection Committee opted to deviate from the traditional selection process of co-option, which is used to elect the judges of the Supreme Court of Justice and the Council of State, as well as from the special procedure to elect judges of the Constitutional Court by the Senate. It performed its duty in a highly transparent fashion based on an open call and through the use of inclusive technological means of consultation and participation; the process could be followed on the internet. Moreover, this selection process was subject to the condition that each selection had to be made by a "majority consisting of 4/5 of the members participating in the vote" to promote consensus (Decree 587 of 2017, Art. 6).

1.5 The comprehensive and autonomous structure of the JEP

Beyond the creation of a court or specialized chambers, the agreement in Havana established an entire autonomous jurisdiction, *ad hoc* and *ex post facto*, designed to resolve the criminal legal situation of former combatants and to investigate and adjudicate serious international crimes. In accordance with LA 01 of 2017, the JEP has its own legal system with administrative, budgetary, and technical autonomy and all of its bodies administer justice jointly, temporarily, and autonomously.

Furthermore, the JEP is guided by constitutional objectives aimed at (i) upholding the right of the victims to justice; (ii) providing truth to the Colombian society; (iii) contributing to the achievement of a stable and lasting peace; and (iv) adopting decisions that provide full legal certainty to those who participated directly or indirectly in the internal armed conflict (LA 01 of 2017, Provisional Art. 5).

In judicial terms, the JEP has been assigned three operational tasks based on its accusatory, jurisdictional, and monitoring function (Tribunal for Peace, judgment TP-SA-SENIT 01 of 2019). In accordance with constitutional jurisprudence, each of these duties have a time limit. In this regard, the Constitutional Court notes that Provisional Art. 15 establishes the following: "the term for the accusatory duty is 10 years from the effective start of the operations of all the chambers and sections of the JEP; the jurisdictional duty has a term of an additional five years, which can be extended by law, at the request of the judges" (Constitutional Court, Judgment C-674 of 2017). The JEP's Statutory Law on the Administration of Justice provides for the same terms, stipulating that "the completion of the duties and missions of the JEP, in any of its chambers or sections, may not exceed 20 years" (Law 1957 of 2019, Art. 34).

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In this sense, the JEP cannot be compared to higher courts, such as, at the national level, the Constitutional Court, the Council of State, or the Supreme Court of Justice or, at the international level, the IACHR, or the ECHR. The JEP is somewhat broader and more structured than a single (judicial) body, it constitutes an entire jurisdiction that encompasses a group of bodies, in which the Tribunal for Peace acts as the high court (LA 01 of 2017, Provisional Art. 7, paragraph 2; Law 1957 of 2019, Art. 90). This has been expressly stated in constitutional case law, emphasizing that "the JEP is not a single judicial body, but a jurisdiction with different institutions, whose closing court is the Tribunal for Peace, and which has special characteristics assigned by Legislative Act 01 of 2017" (Constitutional Court, Judgment C-080 of 2018).

Thus, the JEP's judicial bodies are led by the Tribunal for Peace, which, in addition to being the high court of the jurisdiction, is the only one in charge to try serious human rights violations (LA 01 of 2017, Provisional Art. 7, paragraphs 1 and 2; Law 1957 of 2019, Art. 91). The Tribunal for Peace has four sections. Two of these sections are of first instance and the cases heard vary depending on whether the appearing parties plead guilty or not[7], which, in turn, defines the type of trial to be conducted through dialogical or adversarial proceedings, respectively (Law 1957 of 2019, Art. 92–93).

There is also a Review Section (Sección de Revisión), which has been assigned a special set of functions, such as that of resolving conflicts of competence within the JEP or resolving requests for guarantees of non-extradition. However, its main focus is on judicial proceedings for the review of judgments and the substitution of the SIVJRNR sanctions in cases involving convictions of criminal acts not eligible for amnesty or waiver of criminal prosecution (Law 1957 of 2019, Art. 97). There is also an Appeals Section (Sección de Apelación) serving as the second instance of the Chambers of Justice and Sections of the Tribunal for Peace (Rojas, 2021). In addition, this Section has been legally designated as the interpretative closing court of the JEP (Law 1957 of 2019, Art. 25 and 96). Finally, the Tribunal for Peace is entrusted with implementing and enforcing the judicial decisions made by the JEP through the Stability and Effectiveness Section (Sec-

7 In Spanish "Sección de Primera Instancia para Casos de Reconocimiento de Verdad y de Responsabilidad de los Hechos y Conductas" and "Sección de Primera Instancia para Ausencia de Reconocimiento de Verdad y de Responsabilidad de los Hechos y Conductas".

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ción de Estabilidad y Eficacia) to be constituted (Law 1957 of 2019, paragraph of Art. 91).

In addition to the Tribunal for Peace, the JEP's judiciary is composed of three other independent judicial bodies: The Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conduct, the Chamber for Amnesty or Pardon and the Chamber for the Definition of Legal Situations[8] (Law 1957 of 2019, Art. 79, 81 and 84). These three Chambers of Justice were created to assist in the resolution of the legal situation of defendants, but no trial functions were assigned to them (LA 01 of 2017, paragraphs 1 and 3 of Provisional Art. 7). Therefore, the Chambers of Justice do not pass judgments, but define legal situations by means of judicial resolutions.

The JEP also has an Investigation and Indictment Unit (Unidad de Investigación y Acusación), which is responsible to investigate and prosecute cases in which there is no acknowledgment of responsibility. This Unit encompasses a team of prosecutors and investigators led by a director who acts as the general prosecutor of the JEP and who has autonomy to designate a prosecutor and the investigators for each case (LA 01 of 2017, paragraphs 1 and 5 of Provisional Art. 7).

Moreover, the Permanent Executive Board has an Executive Secretariat (Secretaría Ejecutiva) that is also a constituent institution of the JEP (Law 1957 of 2019, Art. 72). The Secretariat is responsible for the administration, management, and execution of the JEP's resources. It is composed of a group of administrative officials who, in addition to handling the administration of the JEP, coordinate the public defence system and enable communication with victims (LA 01 2017, Provisional Art. 7, paragraphs 1 and 9).

Despite the various autonomous institutions that form part of the JEP, the jurisdiction is represented externally by a single person, who is its president (LA 01 of 2017, paragraph 1 of Provisional Art. 7). Hence, the judge who assumes the temporary two-year presidency of the JEP represents not just the Tribunal for Peace, but the entire set of institutions that the JEP encompasses. In order to adequately represent all of these institutions, the JEP has a Governing Body that takes the primary administrative decisions for the entire jurisdiction. It is composed of representatives of each of the institutions mentioned above (Law 1957 of 2019, Art. 110).

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8 In Spanish "Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas", "Sala de Amnistía o Indulto" and "Sala de Definición de Situaciones Jurídicas".

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In addition to these institutions of constitutional origin, the Statutory Law on the Administration of Justice of the JEP establishes the creation of the Coordination Committee of the SIVJRNR (Comité de Coordinación del SIVJRNR), which is regulated in the Internal Regulations of the JEP (Law 1957 of 2019, Art. 155; Internal Regulations of the JEP, Agreement 01 of 2020). Moreover, in the framework of the administrative, budgetary, and technical autonomy conferred to it by the Constitution, the JEP has designed a set of departments and collegiate bodies created by regulations. These are the Information Analysis Group and its Direction Committee (GRAI), the Judicial Secretariat (Secretaría Judicial), the Rapporteurship (Relatoría), as well as the Territorial and Environmental (Comisión Territorial y Ambiental), Ethnic (Comisión Étnica), Gender (Comisión de Género), Participation and Transitional Justice Policy Implementation Commissions (Comisión de Política Transicional) (Internal Regulations of the JEP, Agreement 01 of 2020, Art. 73, 79, 84 and 104 ff.).

1.6 The institutional status of the JEP, separate from the ordinary judiciary

The JEP has been designed as an autonomous jurisdiction separate from the traditional judiciary. Contrary to the model envisaged in the Justice and Peace Law, the JEP is not part of the judiciary, namely, a component of the constitutional architecture that brings together the different jurisdictions that exist in Colombia: The ordinary, the contentious-administrative, the constitutional, and the special jurisdiction for indigenous communities. The only exception to date has been the military criminal jurisdiction, which is associated with the executive branch.

In fact, the JEP is embedded in the political system of the Colombian State as part of a temporary institutional structure within the SIVJRNR. This system is alien to any existing public power and has been incorporated by means of a transitional title in the Constitution. In this respect, the JEP's judicial bodies differ from other domestic courts due to their unique institutional nature, their objectives and the strong autonomy and independence granted to them by the constitutional system.

For the above reasons, constitutional case law has specified that the LA 01 of 2017 "not only altered *ex post* the regular scheme of distribution of jurisdictional powers, but also, in doing so, transferred its powers to a court created *ex post* and *ad hoc*, separate from the judiciary, and structured on the basis of goals and principles different from those that gave rise to

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the Judicial Branch in the Constitution"[9] (Constitutional Court, Judgment C-674 of 2017).

1.7 The atypical manner in which the JEP carries out its jurisdictional work

In addition to these institutional characteristics of the JEP, a relevant aspect should be added in relation to its judicial practice. Regarding the hearing of cases under its jurisdiction, the processing of the cases in not initiated under the procedural tradition, after having received the *notitia criminis* through a complaint, lawsuit, or special request, as in the ordinary criminal justice system (Law 600 of 2000, Art. 26 ff.; Law 906 of 2004, Art. 66 ff.). This has been indicated by constitutional case law stressing that the JEP "does not receive nor process individual complaints" (Constitutional Court, Judgment SU-139 of 2019).

In fact, cases aimed at establishing criminal liability begin through a sophisticated and complex process, which involves the interaction of several institutions of the JEP such as the Chamber for the Recognition of Truth, Accountability, and the Determination of Facts and Conduct, the Investigation and Indictment Unit, and the Tribunal for Peace. The way the JEP carries out its jurisdictional work aimed at prosecution is based on the judicial activity performed by the Recognition Chamber, which plays a very similar role to that of the Pre-Trial Chamber of the ICC.

This Chamber has the duty to decide whether the alleged conduct falls under its jurisdiction. It receives and compiles reports from certain state entities and from victims and human rights organizations; it receives statements of truth and acknowledgement, and then decides whether to issue its findings. The cases in which these documents are issued are then prosecuted through the dialogical principle that governs the processes of the First Instance Section with Recognition of the Tribunal for Peace (Cote, 2020). Alternatively, this Chamber may refer conduct to the Investigation and Prosecution Unit so that it may bring criminal proceedings and file the respective charges in an adversarial proceeding before the Trial Section of the Court, when there was no recognition of truth (LA 01, 2017, Provisional Art. 15; Law 1922, 2018, Art. 27–27d; Law 1957, 2019, Art. 78–80).

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9 The original version in Spanish reads: "no solo alteró ex post el esquema regular de distribución de competencias jurisdiccionales, sino que además, al hacerlo, traslado sus competencias a un organismo creado ex post y ad hoc¸ separado del poder judicial, y estructurado a partir de objetivos y principios diferentes de los que dieron lugar a la Rama Judicial en la Constitución".

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1.8 Applicable international law

Finally, it should be pointed out that the normative sources to be relied on by the JEP are not only based on domestic law but also on international law, namely on the rules and principles of IHRL, IHL and ICL, especially the Rome Statute (Ambos & Cote, 2021). These rules seek to protect and effectively implement human rights entailing individual criminal responsibility (Ambos, 2014, p. 100–102). This contributes to better ensure the rights of the parties to the proceedings and of the victims because of a broad recourse to international law – part of the "bloque de constitucionalidad"[10] – on the basis of the more favorable provision (principle of favorability) (Ambos & Cote, 2021). Along these lines, the Constitution establishes that judges have the power to resort to international law: "When issuing judgments or adopting resolutions, the JEP shall make a legal classification of the system with respect to the actions in the case heard. Such classification shall be based on the Colombian Criminal Code and/or on IHRL, IHL or ICL, always with the mandatory application of the principle of favorability"[11] (LA 01 of 2017, paragraph 7 of Provisional Art. 5).

This provision is contained in Art. 23 of Law 1957 of 2019, which refers to the law applicable by the Tribunal for Peace, the Chambers of Justice and the Investigation and Indictment Unit. This statutory provision refers to what is set forth in the constitutional text, which adds in the second paragraph that the qualification "may be different from the one previously made by the judicial, disciplinary, or administrative authorities for these actions, since international law is understood to be applicable as the legal framework of reference". This has been endorsed by constitutional case law (Constitutional Court, Judgment C-080 of 2018).

In addition to the role that international law plays in the substantive law applicable to the JEP, its procedural rules indicate in their referral

10 In this regard, Art. 93 of the Colombian Constitution states about this "bloque" that "International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency prevail in the internal legal order. The rights and duties mentioned in this charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia".

11 The original version in Spanish reads: "La JEP al adoptar sus resoluciones o sentencias hará una calificación jurídica propia del Sistema respecto a las conductas objeto del mismo, calificación que se basará en el Código Penal Colombiano y/o en las normas de Derecho Internacional en materia de Derechos Humanos (DIDH), Derecho Internacional Humanitario (DIH) o Derecho Penal Internacional (DPI), siempre con aplicación obligatoria del principio de favorabilidad".

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clause that in all proceedings pending before the JEP concerning victims of gender-based violence, especially sexual violence, it is necessary to proceed "in accordance with the provisions of the bloque de constitucionalidad" as well as "the Rules of Procedure and Evidence of the Rome Statute" (Law 1922 of 2018, Art. 72). Thus, Law 1922 of 2018 provides for the possibility of referring to Rules of Procedure and Evidence that are an instrument for the application of the Rome Statute of the ICC to be applied in proceedings pending before the JEP.

However, the direct and autonomous application of international law for legal qualification may be problematic when it comes to proceedings aimed at determining criminal responsibility, because its direct use — without any adaptation or alignment with Colombian criminal law — could affect the principle of legality. This has been stated by case law and legal scholars, for example, regarding the retroactivity of the figure of command responsibility (Constitutional Court, Judgment C-674 of 2017; Cote, 2019).

Conclusions

The Tribunal for Peace and the Chambers of Justice of the JEP are judicial bodies modeled after domestic and international institutions that seek to prosecute the most serious human rights violations and breaches of IHL committed during the Colombian armed conflict. The JEP constitutes the first criminal justice institution created in Colombia by mutual agreement of the parties to the conflict with the aim of overcoming the decades long non-international armed conflict. From a constitutional perspective the design of the JEP has been innovative and unique given its complex and atypical institutional structure. Thus, for example, the judges of the JEP have been selected by a mixed Committee, including national and foreign members; also, the JEP directly applies international norms.

Given the special features of the negotiations and the strong influence of international law, it is fair to say that for the first time in Colombia international standards have been taken into account in the most comprehensive way possible, not only regarding the criminal prosecution of the most serious and representative crimes and the most responsible perpetra-

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tors, but also regarding the amnesty model which fully complies with international law[12].

Within this comprehensive and holistic TJ system, the feature of conditionality becomes the primary legal aspect of all the judicial and extrajudicial elements of the SIVJRNR, of which the JEP forms part. The JEP's Tribunal for Peace and the Chambers of Justice have to comply with the aim to effectively enforce the victims' rights to truth, justice, reparation, and non-repetition. The JEP administers justice for Colombians but also responds to a supranational duty to prosecute international core crimes. While the crimes to be dealt with were committed in Colombia, they shock and concern humanity as a whole and thus have triggered the (financial) support of various States. Indeed, the Colombian peace process with the JEP as its core judicial component has been discussed and supported in various international settings, including the UN Security Council (International Commission of Jurists, 2019). If the said crimes are not investigated and dealt with by the JEP, they may be brought before international institutions, especially the ICC, or investigated by third States under the principle of universal jurisdiction (Ambos, 2018, p. 97 ff.). In the framework of the international criminal justice system (Ambos, 2018), the JEP can be considered a domestic institution created to enable the territorial State (at the first level) to take a specialized, preferential, and predominant approach to deal with the most serious and representative crimes committed during the conflict. The JEP's special relationship with the ICC has been reaffirmed by the recent Cooperation Agreement between the

12 Cf. Kai Ambos affirming that "the international law framework has emerged along the lines of a bifurcated focus distinguishing between absolute and conditional amnesties. Absolute (blanket) amnesties, which have the primary goal of concealing past crimes by prohibiting any investigation into anybody, are unequivocally prohibited by international law. Unlike these amnesties, conditional amnesties do not automatically exempt from punishment, but make the benefit of an amnesty conditional on certain concessions or acts by the benefitted person. This is why conditional amnesties may (depending on the concrete conditions and circumstances of the particular case) contribute to true reconciliation. Article 6 (5) of Additional Protocol (AP) 11 to the Geneva Conventions (GC) makes explicit reference to amnesties after an armed conflict, demanding that they must remain possible as an appropriate and necessary tool to achieve reconciliation if this does not undermine the State's duty to prosecute under international law. Pursuant to this approach, supported by the overwhelming doctrine, conditional amnesties under certain and exceptional circumstances are allowed under current international law" (Ambos, 2021b, p. 123).

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Court's Office of the Prosecutor and the Colombian government (Ambos, 2021c).

In a nutshell, the JEP seeks to fulfil the work of international and mixed tribunals in order to address the most representative crimes committed during the Colombian armed conflict. The JEP encompasses a set of *sui generis* institutions (Tribunal for Peace, Chambers of Justice, Investigation and Prosecution Unit, etc.), shaped by international experiences, thus displacing the ordinary criminal justice system with regard to conduct associated with the armed conflict and committed before December 1, 2016.

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Combining the Purposes of Criminal Law and Transitional Justice in the Special Jurisdiction for Peace

Carlos Guillermo Castro Cuenca

Abstract

This text analyzes how criminal law mechanisms can help the Special Jurisdiction for Peace (JEP) to fulfill the essential objectives of Transitional Justice (TJ), such as promoting justice, accountability and reconciliation. In particular, this article studies three mechanisms: the conditionality regime (*régimen de condicionalidad*), special sanctions (*sanciones propias*) and the imposition of ordinary sanctions if the objectives of TJ are not met. These mechanisms allow former combatants, members of the state armed forces, public officials, and civilians to contribute to the truth and reparation of the victims.

1. *Introduction*

Transitional Justice (TJ) is composed of a set of special measures of a historical, restorative, criminal, administrative and constitutional nature aimed at achieving a peaceful transition (Teitel, 2000, p. 50; De Greiff, p. 12; Werle, 2018, p. 1). All these mechanisms are essential to fulfil the main purposes of TJ: dealing with the past (Kritz, 1995, pp. 21–30; Mihr, 2017, p. 2; Murphy, 2017, pp. 182–186), ensuring reconciliation (Teitel, 2000, pp. 29–30), and recognizing the rights of victims (De Greiff, 2012, p. 42).

Criminal law plays an important role in contexts where massive abuses or serious human rights violations affecting an entire population must be overcome (Kritz, 1994, p. 21). However, the objective of criminal proceedings in a transitional context goes beyond retribution (Kovras, 2014, p. 4; Murphy, 2017, pp. 21–30). Their aim is to draw a line between the previous and the new era and to condemn the violence of the past, distinguishing between the just and the unjust and delegitimizing the crimes perpetrated (Teitel, 2000, pp. 29–30). In this context, Criminal law is essential in TJ processes because it allows for the recognition and stigmatization

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of wrongdoing, which is a fundamental element in any society undergoing a process of transformation (Teitel, 2000, p. 50).

Therefore, TJ differs from ordinary criminal justice in that it is more restorative in nature (Kovras, 2014, p. 4). Indeed, it is part of a system meant to achieve national reconciliation, guarantee reparation for victims, and reconstruct the events that took place during the time of the conflict (Ferrajoli, 2016, p. 26).

Under this framework, justice is understood in its broadest sense, as contemplated in Article 1 of the Procedural Law of the Colombian Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP) according to which its purposes are closely related to the purposes of criminal punishment: (i) to ensure reconciliation and a stable and lasting peace; (ii) to guarantee the principle of legality; and (iii) to remedy damages caused and provide reparation to victims affected by the armed conflict (JEP Procedural Law, JPL, Article 1).

This text analyzes how criminal law mechanisms included in the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement), namely, the conditionality regime, special sanctions, and the possibility of imposing ordinary sanctions (if the objectives of TJ are not met), can help the JEP to fulfill the essential goals of TJ, such as promoting justice, accountability and reconciliation.

2. *Objectives of TJ under the JEP*

2.1. *Achieving a transition that ensures reconciliation and peacemaking*

The first element of TJ derives from its very name: it is applied to societies undergoing a transitional process. The aim of this transition is to consolidate democracy (Teitel, 2000, pp. 29–30) and overcome massive abuses or serious human rights violations caused by situations that affect the entire population (Mihr, 2017, p. 1).

The transition therefore has to deal with events that transpired during an armed conflict, which gave rise to legal, social, and political aberration, and must be overcome through TJ. Article 1 of the JPL states that one of the objectives of justice is to "guarantee the necessary conditions that will ensure reconciliation and a stable and lasting peace".

When TJ is applied to an armed conflict, its primary goal is to resolve the strong tension that emerges between justice and peace; between the legal imperative of satisfying the rights of victims and the need to cease hostilities (Elster, 2012, p. 88). This requires striking a balance between

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putting an end to hostilities and preventing a re-emergence of violence (negative peace) and consolidating peace through structural reforms and inclusive policies (positive peace) (Lambourne, 2009, p. 34).

Post-conflict justice generally aims to "end the internal war and achieve peace for all combatants, on the basis of a reconciliation among all actors, to guarantee non-repetition" (Ferrajoli, 2016, p. 23). Ordinary justice is insufficient for these purposes because: (i) violence in a context of war cannot be assessed or qualified using ordinary criminal justice criteria that would normally be applicable; and (ii) in order to achieve peace, combatants cannot be treated as criminals, unless they have been involved in war crimes or crimes against humanity. These crimes are the *ratione materiae* limit of TJ. Furthermore, there is another substantive limit which is that, traditionally, only the most responsible individuals are subjected to this justice.

In order to accomplish its objectives, the JEP relies on an important mechanism to ensure that individuals do not commit new crimes: the conditionality system. According to this system, an individual appearing before the JEP must fulfil specific obligations related to truth, justice, reparation, and non-repetition (SLJ, Article 20). If it is proven that said individual has breached these obligations and has been involved in new crimes, he or she may be tried by ordinary courts and lose the benefits of the JEP (Sala de Reconocimiento de Verdad y de Responsabilidad de la JEP, SRVR, AT 061, 2019, Colombia). Moreover, if it is established that the individual has taken up arms once again, he or she may be excluded from the JEP altogether (Court Constitutional, C-080, 2018). In addition, "recurrence" of criminal conduct can lead to exclusion from the JEP and its benefits (Rojas Betancourth, 2021, p. 276).

2.2. Dealing with the past

The second element of TJ is that it focuses on dealing with the past (Fijalkowski, 2017, p. 94; Fornasari, 2013, p. 4; Kritz, 1995, pp. 21–30; Mihr, 2017, p. 2; Murphy, 2017, pp. 182–186). The TJ system recognizes that it is not only important to establish individual responsibility and accountability, but also to issue a judgment on the wrongdoing itself. As such, criminal trials are not only important because they are the materialization of the victims' right to justice, but also because trials in a transitional context draw a line between the old and the new era and condemn the violence of the past, distinguishing between the just and the unjust and delegitimizing the crimes perpetrated. This is a fundamental

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step in consolidating a new democracy and constructing a new legal order (Teitel, 2000, pp. 29–30).

This stigmatization of wrongdoing does not refer to isolated situations, but rather to wide-ranging actions that affect a significant part of the population. In other words, it refers to generalized wrongdoing as described by Malamud-Goti, which has concrete effects on the mind, freedom, and rights of individuals (Malamud-Goti, 2006, pp. 158–159). This, of course, includes individuals that, in many cases, are themselves victims (e.g. of forced recruitment) or who have simply followed and applied the rules of a deeply rooted subculture within society (Cockburn, 2004, p. 31).

Considering this reality, an official narrative must always accompany any transition (Teitel, 2000, p. 69). Uncovering the truth makes it possible to acknowledge victims' suffering and guarantee future coexistence by allowing all parties involved to overcome the events that took place (Buckley-Zistel, 2014, p. 145). This process, known as historical justice, is a mechanism designed to help alleviate the burden of memory of gross human rights violations. In other words, the aim of historical justice is to put an end to the trauma of an enduring cycle that feeds on itself, as violations become wounds of memory that are constantly reopened and unlikely to heal on their own (Messuti, 2008, p. 145).

For Ferrajoli, justice and peace can only achieve a balanced reconciliation if there is a public historical judgment. In order to guarantee non-repetition, it is necessary to build a collective memory of the events that occurred; in this process, the truth must be verified and those responsible must be identified (Ferrajoli, 2016, p. 27–28). In psychosocial terms, having a collective memory helps heal wounds and avoid denial and terror, which in turn will ensure non-repetition (Arias López, 2012, p. 142), although some have also questioned those effects (Rieff, 2016, pp. 87–90).

Regrettably, collective and political wrongdoing has become commonplace in Colombia (Murphy, 2021, p. 256). The Constitutional Court declared in 2004 the existence of an unconstitutional situation with regard to victims of forced displacement and violence; indeed, Colombia itself and several decisions of the Inter-American Court of Human Rights (IACtHR) have recognized massive violations of human rights in this country (e.g. IACtHR, Diecinueve comerciantes vs. Colombia, Masacre de Mapiripán vs. Colombia, Matanza de Pueblo Bello vs. Colombia, Masacre de Ituango vs. Colombia, Masacre de la Rochela vs. Colombia, Valle Jaramillo y otros vs. Colombia, Las Palmeras vs. Colombia).

By judging actions under its jurisdiction as wrong and as underlying sources of the conflict, the justice system could contribute to broader relational change (Murphy, 2021, p. 256). In this context, the JEP is in a

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position to build collective memory as a component of restorative justice, through its investigations governed by Article 11 of the JPL. The objective of these investigations is to obtain a complete truth of the events that occurred:

1. Determine the geographic, economic, social, political and cultural circumstances in which the crimes under the jurisdiction of the JEP took place.
2. Where appropriate, describe the structure and functioning of the criminal organization, its support networks, the characteristics of attacks, and the macro-criminal patterns.
3. Unveil the criminal plan.
4. Connect cases and situations.
5. Identify those responsible.
6. Identify the most serious and representative crimes.
7. Identify the victims and the particular conditions that affected them individually.
8. If applicable, determine the motives underlying the criminal plan and, especially, those involving discrimination based on ethnicity, race, gender, sexual orientation, gender identity, religious convictions, political ideologies, or similar.
9. Establish drug trafficking routes and illicit activities, as well as the assets of the perpetrators and criminal organizations.

Based on the above, the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR, for its acronym in Spanish) does not specifically intend to shed light on isolated events, but rather to obtain the truth through macro-cases, unveiling patterns, following the model indicated in the Legislative Act 01 of 2012 (Legal Framework for Peace)[1] and reiterated in Legislative Act 01 of 2017 and in the Decisions

1 Eckhardt, 2016, 36: "On 31 July 2012 the constitutional amendment "Acto Legislativo 01 de 2012" also known as Marco Jurídico para la Paz (in the following: MJPP) was promulgated, after having been adopted by both chambers of the Colombian parliament. It comprises the two transitional articles 66 and 67, stipulating special conditions for the peace process. The formative term of the law is "transitional justice". The particular provisions of the constitutional norms are defined as instruments of transitional justice, being stipulated in the title and explained in the beginning of the transitional article 66. Pursuant to this first paragraph, instruments of transitional justice are exceptional and aim at facilitating the end of the internal armed conflict and the achievement of a stable and long-lasting peace; guarantees of non-repetition and security for all Colombians

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C-579 of 2013 and C-080 of 2018 of the Constitutional Court. In this system *"investigations should be carried out from a systematic perspective in order to reveal macro criminal structures and a "global truth"* (Eckhardt, 2016, 389).

To achieve this objective, in addition to the mechanisms to aid the criminal investigation, the JEP has important instruments that guarantee full disclosure of the truth by the individuals who appear before it:

(i) A punitive system that depends on the acknowledgement of the truth, under which individuals could be convicted for up to 20 years in prison if they do not acknowledge the crime committed, or could receive non-custodial sanctions if they acknowledge responsibility early in the process.
(ii) Special proceedings upon breach of the conditionality mechanism if the complete truth is not provided, which could entail the loss of benefits such as parole (Constitutional Court, C-080, 2018).
(iii) A special scheme under which individuals who did not play an essential role in the crimes could be prompted to denounce those individuals who were most responsible.

2.3. *Achieving justice*

TJ is first and foremost justice written large. It does not have a purely symbolic or philosophical content; on the contrary, it entails concrete consequences for individuals and must therefore be formally and materially fair. Thus, TJ has been constructed by comparing the consequences of wrongdoing in societies undergoing a transition and not simply based

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shall be granted and the rights of the victims to truth, justice and reparation shall be guaranteed. The constitutional framework determines transitional justice as the superordinate concept for the subsequent sub-constitutional law that shall reflect the results of the peace agreement on this topic. The main aspect of the transitional article 66 is related to criminal justice, as it permits various deviations from ordinary criminal prosecutions and criminal punishment. In particular, it allows extrajudicial sanctions, alternative sentences, cancelation of existing sentences, special modalities for the execution of sentences and the renunciation of prosecution. Furthermore, the article stipulates in paragraph 5 that any special penal treatment will be conditioned to the demobilization and the termination of the armed conflict and to contributions of the perpetrators to the rights of the victims to truth and reparation. Moreover, regulations on the scope of application, the creation of a truth commission, the possibility of extrajudicial processes, conditions on the contributions of the perpetrators and political participation are provided for".

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on theoretical or political analyses. The JEP establishes a system on the expectation that, through their institutions, post-conflict states can address responsibility for grave human rights abuses, achieving three essential goals: accountability for severe violations of human rights, satisfaction of victims' rights, and the potential for reintegration of the ex-combatants (McCoy, J. Subotic, J. & Carlin, R., 2021, pp. 164 – 169).

It is therefore imperative to respect due process (Elster, 2004, p. 3; Kritz, 1995, p. 14; Williams et al., 2002, p. 5) and its essential guarantees (Elster, 2004, p. 88), especially the following: adversarial and public proceedings; the right to choose counsel; the right to appeal; non-retroactivity; respect for statutory limitations; the presumption of innocence; reasonable time limits; and sufficient deliberation. The application of criminal law and, in particular, of sanctions, requires certain minimum requirements of legitimacy and sovereignty. If any of these elements is lacking within a State, either because of the existence of a dictatorship or the absence of institutional control, the determination of accountability could be obstructed (Silva Sánchez, 2018, p. 82).

In this regard, Fornasari rightly points out the main risk that guarantees face in a TJ context: the transformation of criminal law from a *Magna Carta for criminals* to a *Magna Carta for Victims* that turns modern criminal law into a criminal law of revenge, ultimately becoming a criminal law of the victors or of the enemy. Therefore, it is necessary to understand that the basic guarantees of criminal law with regard to accused individuals are non-negotiable (Fornasari, 2013, pp. 202–207).

To ensure these guarantees, the Procedural Law of the JEP establishes various mechanisms that uphold due process and grant legitimacy to the system:

(i) The safeguarding of the *pro homine* principle (JPL, Article 1.d), as well as of the principles of due process (lit.e) and presumption of innocence (lit. f) contemplated in its Article 1.
(ii) Procedures that respect due process and the right to defense in the adversarial process (JPL, Article 35).
(iii) A system of motions for reconsideration (JPL, Article 12), appeals (JPL, Article 13), and complaints (JPL, Article 14).
(iv) An evidentiary system that respects guarantees (JPL, Article 19).

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3. *The purposes of criminal punishment and criminal law in TJ and the JEP*

An important lesson for TJ processes with regard to the purposes of criminal punishment can be drawn from situations of non-international armed conflict. These are particularly valuable in terms of adjusting the special characteristics required to fulfil the societal purposes of criminal punishment.

3.1. *Specific negative deterrence*

The purpose of criminal punishment in the context of specific negative deterrence is to incapacitate offenders, thus keeping them from committing further crimes against the society (Roxin/Greco, 2020, p. 134; Ambos, 2021, p. 119; García Arán & Muñoz Conde, 2007, p. 48; Mir Puig, 2011, p. 84). Specific negative deterrence is therefore directly related to one of the essential objectives of TJ: the guarantee of non-repetition of crimes. Indeed, one of the aims of a transition process is to prevent further crimes against the population. A critical element in this process is to ensure a substantive dismantling of illegal groups and their illicit activities. Otherwise, these groups are likely to continue committing massive crimes against the population or transform into new groups with different names but similar objectives.

Even though the JEP does not rely on imprisonment to fulfill this objective, it does rely on two very important measures: (i) if individuals commit new crimes they will be subject to ordinary jurisdiction (JEP Statutory Law, JSL, Article 62) and, therefore, could immediately lose their liberty and; (ii) if they are involved in an incident that violates the conditionality mechanism, they could lose the benefits granted by the JEP (Constitutional Court, C – 080, 2018).

In TJ contexts, a well-known specific negative deterrence measure is *lustration*, which consists of removing persons involved in serious human rights violations from public office (Elster, 2006, pp. 52–53). Nevertheless, it is important to ensure that this measure is not used for politically motivated exclusions. In the context of the JEP, Legislative Act 01 of 2017 allows for individuals to participate in politics. However, Constitutional Court Decision C – 674 of 2017 provided special considerations for individuals who wish to rejoin public life under the conditionality mechanism: (i) individuals who do not contribute to the achievement of the objectives of the JEP will not be qualified to hold public office; (ii) individuals may lose the right to hold public office if they fail to comply with

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the criteria of the conditionality mechanism; (iii) individuals who have been sentenced under ordinary jurisdiction will not be qualified to hold public office; (iv) in principle and pursuant to the paragraph of transitory article 20, a sentence handed down under ordinary jurisdiction may be suspended, which means that the qualification to hold public office and to exercise other political participation rights extends to individuals who have been sanctioned under ordinary jurisdiction. However, this suspension of the sentence and of the right to participate in politics is also conditioned to the progressive compliance in good faith with the obligations of the system; (v) should members of the FARC wish to register as political candidates, the High Commissioner for Peace must certify their affiliation with the FARC and the Executive Secretary of the JEP must certify their commitment to submit to the system; and (vi) it is the responsibility of the JEP to verify compliance with the conditionality mechanism.

3.2. Rehabilitation

One of the most important purposes of criminal punishment is to reintegrate wrongdoers into society (Roxin/Greco, 2020, p. 136; Mir Puig, 2011, 2011, p. 84). This purpose, also known as rehabilitation, is especially difficult in societies in which crime has more incentives than obstacles. Furthermore, the decision to commit a specific crime depends not only on the needs of the individual, but also on the situational context and the information available about that context.

Rehabilitation cannot be seen as a simple treatment; it must include occupational re-education so that, after serving their sentence, wrongdoers can be integrated into support networks that help them find work and housing, which in itself is quite difficult, as well as provide other types of support (Elster, 2006, p. 51). In this context: *"Violence therapy has to learn from disease therapy: include prevention build cultural and structural peace- and include rehabilitation–, meaning build cultural and structural peace again."* (Galtung, 2004, p. 80).

An individual will compare the expected benefits from a criminal conduct with those from a non-criminal conduct. If committing a crime yields greater benefits than not committing it, the individual will decide in favor of committing the crime. This implies that being caught is considered an acceptable risk compared to the potential benefit (Cornish & Clarke, 1986, p. 20). Given that criminality during an armed conflict is organized and inexpensive, it becomes very profitable, which in turn leads to high levels of recidivism. Similarly, prison often becomes nothing more than a college

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of crime where individuals enhance their criminal skills. For that reason, in terms of avoiding recidivism, a TJ system is more conducive to accessing jobs and economic opportunities than the prison system.

Rehabilitation must therefore ensure sustainable peacebuilding, *"preserving 'negative peace' (absence of physical violence) and building 'positive peace' (presence of social justice), as well as alleviation, if not elimination, of the underlying causes of conflict"* (Lambourne, 2009, p. 34).

In order to prevent recidivism and the continuation of a cycle of criminality (negative peace), the JEP has tied rehabilitation to alternative sentences, and demands commitment by wrongdoers who wish to benefit from them: "To be eligible for an alternative sentence, recipients shall be required to commit to their rehabilitation through work, training or study during the time they remain in custody and, where appropriate, to promote activities aimed at non-repetition" (JSL, Article 142). Meanwhile, the State must provide a social, cultural, and economic environment for building *'positive peace'* through the implementation of the other mechanisms of the Final Agreement.

3.3. General negative deterrence

In TJ, deterrence plays a role in the form of trials and convictions, which seek to prevent armed conflicts and new crimes from being committed. In the words of Justice Robert Jackson during the Nuremberg trials, it is necessary "to make war less attractive to those who have governments and the destinies of peoples in their power" (cit. p. Elster, 2006, p. 49). However, the application of general negative deterrence in TJ faces several problems: (i) the precedent of severe punishment in one country is unlikely to be automatically applied in a completely different country; (ii) given that situations of turmoil or volatility arise in TJ contexts, government officials might not be readily willing to apply said precedents; (iii) the deterrent effect in these cases is greatly diminished by the inordinate temporary benefits obtained by individuals who abuse power, such as dictators; and (iv) individuals behind the massive commission of crimes often see themselves as part of a crusade against a certain social situation, which influences their motivation and reasoning (Elster, 2006, p. 50).

Deterrence is crucial in a TJ process because the rigor of the mechanisms and the effective sanctioning of the individuals responsible will determine whether or not the criminal conduct is repeated by other armed groups or if the original perpetrators of the crimes become repeat offend-

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ers. However, sanctions can take the form of alternative sentences designed to have a positive impact on society as a whole.

3.4. Positive general prevention (positive Generalprävention)

Finally, positive deterrence is aimed at restoring society's trust in the legal system by consolidating the rule of law, strengthening democracy, and dismantling criminal organizations (Roxin / Greco, 2020, p. 141; Ambos, 2013, p. 71). The existence of armed conflict in a society has three profoundly harmful effects that must be corrected if crime is to be reduced:

- Endemic violence within a population turns the use of force into a means of achieving power (Mcclelland, 1989, p. 289) and superiority over others (Adler, 1958, p. 58). This use of force inevitably materializes in aggressive acts as a mechanism to dominate others (Cooper et al., 2002, p. 208; Hogg et al., 2010, p. 350), which in turn radically changes social values, ultimately creating subcultures and countercultures dominated by aggression (Martín Baró, 2003, p. 80). This pattern of aggression is learned and assimilated during childhood only to develop later as a form of domination (Cooper et al., 2002, pp. 208–209) over the most vulnerable groups (Worchel, 2001, p. 661), resulting in acts that violate human rights and human dignity, and feeding the cycle of criminality, which eventually becomes routine (Dexter, 2018, p. 219). Indeed, endemic violence mutates the criminal issue from a subsistence criminality to a power-hungry mafia or terrorist criminality, taking over the economy, becoming an illegal recruiter of petty criminals, and exploiting ignorance, misery, and fanaticism (Ferrajoli, 2007, p. 353).
- The involvement of organized crime. According to Article 1.1 of Additional Protocol II to the Geneva Conventions (AP II), for a non-international armed conflict to exist there must be "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a State's] territory as to enable them to carry out sustained and concerted military operations". The Rome Statute of the International Criminal Court (ICC) states that armed conflicts take place "when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" (ICC, Rome Statute, Article 8.2). In other words, there must be an organized policy with central command, a hierarchical structure, and the capacity to conduct military operations (Ambos, 2014, p. 125). Armed conflicts therefore require the participation of organized groups

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which have to meet certain criteria, turning them into organized actors being part of organized crime. Organized crime is understood as the set of activities carried out by the members of a highly organized and disciplined group dedicated to supplying illegal goods and services (Finkenauer, 2010, p. 26), generating structures within society that affect people's behavior.

- A culture of illegality in the affected areas. Although territorial control is not necessarily considered an element of armed conflict for the purposes of applying International Criminal Law (Ambos, 2014, p. 128), it is a requirement under Article 1.1 AP II and it is also a frequent element in the major conflicts that have occurred worldwide. Territorial control creates countercultures dominated by armed groups, which seep into social groups thereby reproducing the pattern through social learning for decades. In such contexts, the social paradigm rewards imitative behavior—which is why children develop a generalized habit of reproducing the responses of successive patterns—and subsequently the learned patterns of behavior spread into situations different from those in which they were learned (Bandura & Walters, 1990, pp. 18–21; Felson & Cohen, 1979, p. 589). In the war context this situation becomes massive, illegality becomes an almost routine activity and violence a serious disease in the society (Galtung, 2004). Similarly, crime becomes so deeply rooted in society as a result of the armed conflict that it is very difficult to eradicate, which is exacerbated by the fact that it is further cultivated in prisons by the criminal system itself.

In view of these challenges, positive general prevention is one of the most complex purposes to accomplish when attempting to legitimize TJ, as it relies on whether the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition achieves its core objectives.

3.5. Retribution

Society channels retributive emotions such as anger, contempt, indignation, and hatred through criminal laws (Elster, 2006, p. 37). In TJ, however, there are complexities that make these arguments less straightforward, such as the difficulties in determining the severity of crimes and having punishments commensurate with these crimes (pp. 47–48). Moreover, retribution tends to be seen as an impenetrable obstacle for broad-ranging trials of human rights violations related to internal armed conflicts, because crimes particularly during internal armed conflicts characteristical-

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ly involve a large number of perpetrators. Given political realities and practical difficulties, carrying out wide-ranging trials leads to widespread impunity: everyone must be punished, so therefore no one is (Nino, 2006, p. 258).

Despite its complexities, retribution is undoubtedly a necessary component in TJ processes; not necessarily from a perspective of punishment, but rather because it is by seeking retribution that the unjust nature of a conduct is determined, and wrongdoing is recognized and stigmatized. Indeed, all of these processes are essential for any society undergoing a transformation (Elster, 2006, p. 50).

The international law argument on the duty to punish is based on several conventional and customary norms, which, however, are not defined as enforceable rights that any State is bound by. In fact, even the duty to punish is discretionary in democratic States, and said conventional and customary norms are considered satisfied after alternatives have been granted. This was recognized by the Inter-American Court of Human Rights when it stated in the Velásquez Rodríguez case that the State's obligations could be fulfilled through remedies, investigations, and reparations. Conversely, when the Court rendered an opinion on the amnesty laws of Argentina and Uruguay, it considered that these States breached numerous obligations of the American Convention on Human Rights, including the right of victims to seek justice (Teitel, 2000, p. 55). However, this duty should not be confused with any specific right of the victim to have the offender punished, as this would distort the protective function and the public nature of criminal law. Nevertheless, it does allow the victim to voice the injustice suffered and it offers a guarantee of non-repetition, thereby restoring the victim's trust in the system and in society. Furthermore, it keeps the victim from becoming de-socialized or alienated from society (Gil, 2016, p. 31).

Turning to the practical difficulties involved in attempting wide-ranging retribution, it is clear that issuing a universal judgement would lead to extended impunity. In response to this predicament, special mechanisms must be put in place to make prosecutions more effective and to avoid completely arbitrary and discretionary punishments.

At this point, it is worth remembering that the effects sought by the system of the JEP are not purely restorative; they also have concrete retributive elements that may lead to a restriction of rights, depending on the case:

- In the case of special sanctions (*sanciones propias*), the Final Agreement itself recognizes that the system must provide for the restriction of

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rights and freedoms. This is further determined in JSL, which states that sanctions "shall include effective restrictions of freedoms and rights necessary for their execution, such as freedom of residence and movement, and shall also guarantee non-repetition" (JSL, Article 127).
- The very performance of actions in favor of communities implies carrying out specific tasks that demand time and commitment from the individuals subject to the JEP who must adhere to specific timetables and conditions (JSL, Article 127).
- With respect to alternative sanctions (*sanciones alternativas*), JSL states that "their function will be essentially a retributive deprivation of liberty for five (5) to eight (8) years" (JSL, Article 128).
- Lastly, ordinary sanctions (*sanciones ordinarias*) can result in an effective deprivation of liberty for 15 to 20 years (JSL, Article 130).

4. *Articulation between the objectives of TJ and the purposes of criminal punishment*

Beyond a purely semantic content, combining the objectives of TJ with the purposes of criminal law has particular effects on the entire system, which must find a way to make them compatible. Among these effects, the following stand out: (i) the conditionality mechanism as an instrument for specific deterrence, (ii) the imposition of special sanctions and (iii) ordinary sanctions if the objectives of TJ are not met.

4.1. *The conditionality mechanism as an instrument of specific deterrence*

There are multiple instruments aimed at achieving a transition that will ensure reconciliation and the establishment of a stable and lasting peace. It is therefore essential to have the necessary mechanisms that will guarantee specific negative deterrence by keeping individuals included in the system from committing crimes again and at the same time guarantee specific positive deterrence through their rehabilitation. In this regard, it becomes particularly important to establish a conditionality mechanism to ensure that individuals adhering to the JEP fulfill their obligations and, in particular, refrain from taking up arms again.

In this sense, subsection 5 of transitory article 1 of Legislative Act 01 of 2017 stipulates that the mechanisms of the system "will be interconnected through conditionality links and incentives [for individuals] to access and

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maintain any special justice treatment, always based on the acknowledgement of truth and accountability." Furthermore, subsection 8 of transitory article 5 of Legislative Act 01 of 2017 links the special justice treatment to compliance with obligations to render a complete and truthful account of events, provide reparation to victims, and guarantee non-repetition. Moreover, it states that individuals who fraudulently provide false information or fail to comply with any of the conditions of the system will lose access to said special treatment.

The Constitutional Court has indicated that under the conditionality mechanism of the SIVJRNR, "special criminal treatment is subject to the duties of providing a complete and truthful account of events, making reparation to the victims, and guaranteeing non-repetition" (Constitutional Court, C-674, 2017) and therefore "any benefit depends on the individual's acknowledgement of the full, detailed and exhaustive truth, and on satisfying the victims' rights to reparation and non-repetition" (Constitutional Court, C-674, 2017).

The scope of these obligations was specifically established in Article 20 of JSL, as follows: (i) the obligation to provide a complete and truthful account of the facts, which involves providing information, when known, on crimes within the jurisdiction of the JEP and on illegally acquired assets, including the identity of those who have lent their name to acquire, hold, administer and possess them; (ii) the obligation to guarantee non-repetition, which implies abstaining from committing new intentional crimes for which the minimum prison sentence is equal to or greater than 4 years, as specified in the list of legally protected rights (Constitutional Court, C-180, 2014); and (iii) contributing to the reparation of victims and, in particular, to uncovering the truth with regard to the procedures and protocols for completing an inventory of all types of goods and assets. Additionally, in the case of demobilized FARC-EP combatants, compliance with the following obligations must also be ensured: "(a) the laying down of arms, (b) the obligation to actively contribute to guaranteeing the success of the process of reincorporation into civilian life in a comprehensive manner, and (c) the surrender of minors."

In any case, the consequences for violating the conditionality mechanism must be proportional to the seriousness of the breach (Constitutional Court, C – 080, 2018). These can range from a loss of benefits such as conditional release, as initially happened in the case of Hernán Darío Velásquez (JEP, SRVR, AT 061, 2019), to expulsion from the JEP, as was the case of Iván Márquez Marín, José Manuel Sierra and Henry Castellanos (JEP, SRVR, AT 216, 2019). They were taken out of the JEP for the creation of a new armed group in 2019 called *"Nueva Marquetalia"*.

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In particular, expulsion from the JEP can only occur under exceptional circumstances, namely:

> "when the basic condition of non-repetition is breached, abandoning the peace process to take up arms again, when false information is provided fraudulently, or when the other conditions of the system are breached, as decided by the JEP in accordance with the principles of proportionality and gradualness, even in cases related to other actors responsible for acts within the jurisdiction of the JEP." (Constitutional Court, C – 080, 2018).

Both the Constitutional Court (C-674, 2017) and the Appeals Chamber of the JEP (*Sección de Apelación, SA*) consider that the commitment of non-repetition, which consists of abstaining from again taking up arms against the State or from joining organized armed groups, constitutes

> "an essential requirement for access to the JEP and for obtaining and maintaining the benefits, special treatment, rights, and guarantees provided for in the transitional system. Furthermore, these are requirements to remain under this system, and must be fulfilled continuously by all former members of the FARC-EP" (JEP, SA, TP-SA 288, 2019).

In this regard, the Appeals Chamber has been clear in pointing out that "the armed and deliberate desertion from the peace process is equivalent to a self-exclusion from the transitional jurisdiction due to its voluntary, public and unequivocal nature" (JEP, SA, TP-SA 288, 2019).

This system would not be complete, however, without a procedural tool with which to determine whether breaches to the system have been committed. This tool is contemplated in the first subsection of Article 67 of the JPL which created the special proceeding for non-compliance: "The Chambers and Divisions shall monitor compliance with the Conditionality Regime and with the sanctions they have imposed through their resolutions or sentences."

The purpose of this special proceeding is to fully guarantee the rights of the victims as well as the legal security of all individuals subject to the JEP. Under this proceeding, evidence on the alleged breach is collected and presented and individuals can fully exercise their right to intervene in litigation. This special proceeding may be initiated *ex officio* by the Judges of the Chambers and Divisions of the JEP or at the request of the victim, of his or her representative, of the Public Prosecutor's Office, the General Prosecutor's Office, or the JEP's Investigation and Prosecution Unit (UIA), as provided for in the second subsection of Article 67 of JPL.

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This system illustrates an interesting combination of the specific deterrence function of criminal punishment with the guarantee of non-repetition inherent in a TJ system that safeguards due process, through a special proceeding in which the right to participate must be respected.

4.2. Special sanctions as a mechanism to achieve the preventive purposes of criminal law

Prevention of future crimes is one of the most important objectives of Criminal Law (Roxin, Greco, 2021, p. 151). This must include mechanisms of specific negative deterrence – preventing individuals from committing further crimes against society – as well as rehabilitation that must have a component of labor re-education (Elster, 2006, p. 51). Special sanctions achieve both purposes, because they allow the application of effective restrictions on freedoms and rights – such as freedom of residence and movement – as well as participation in collective reparation programs for the victims.

The Final Agreement created a new system of penalties called special sanctions, which can be applied to individuals who fully disclose the truth and acknowledge responsibility, as verified by the Acknowledgement Section of the JEP's Peace Tribunal. These special sanctions are of a restorative nature and may entail from 5 to 8 years of effective restriction of liberty, albeit without imprisonment. Furthermore, special sanctions include work and activities aimed at repairing victims (JSL, Article 126).

The essential purpose of the sanctions imposed under the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition must be the satisfaction of the rights of the victims and the consolidation of peace. Consequently, retribution and reparation for the damages caused must take precedence, taking into account the degree of acknowledgement of truth and responsibility. Point 60 of the Final Agreement states that such sanctions shall include effective restrictions of freedoms and rights, necessary for their implementation, such as freedom of residence and movement, and shall also guarantee non-repetition. Article 13 of Legislative Act 01 of 2017 reiterates the purpose of criminal punishment and refers to the content of the aforementioned agreement, describing and classifying sanctions:

> "Sanctions imposed by the JEP will have the essential purpose of satisfying the rights of victims and consolidating peace. They shall favor restoration and reparation of damages caused, always taking into ac-

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count the degree of acknowledgement of truth and accountability. The sanctions may be special, alternative, or ordinary and in all cases shall be imposed under the terms set out in numbers 60, 61, and 62 and in the list of sanctions in sub-section 5.1.2 of the Final Agreement."

These sanctions are applicable with respect to those persons who acknowledge the full, detailed and complete truth before the JEP. Sanctions especially related to participation in collective reparation programs are the following (JSL, Article 141):

- In rural areas, participation in or execution of: (i) effective reparation programs for displaced persons; (ii) programs for environmental protection of natural reserves; (iii) programs to construct and repair infrastructure in rural areas: schools, roads, health centers, housing, community centers, municipality infrastructure, etc.; (iv) rural development programs; (v) waste disposal programs in areas in need; (vi) programs to improve the supply of electricity and communications networks in agricultural areas; (vii) programs for the substitution of illicit crops; (viii) environmental recovery programs in areas affected by illicit crops; (ix) programs for the construction and improvement of road infrastructure necessary for the commercialization of agricultural products from illicit crop substitution areas.
- In urban areas, participation in or execution of: (i) programs to construct and repair infrastructure in urban areas: schools, public roads, health centers, housing, community centers, municipal infrastructure, etc.; (ii) urban development programs; and (iii) programs for access to drinking water and construction of sanitation networks and systems.
- Additionally, sanctions also include tasks to clear and eradicate explosive remnants of armed conflict and anti-personnel mines from areas within the national territory that have been affected by these devices: (i) participation in or execution of programs for the clearance and eradication of explosive remnants of war and unexploded ordnance; and (ii) participation in or execution of programs for the clearance and eradication of anti-personnel mines and improvised explosive devices.

With respect to the severity of sanctions, the JSL states that the following criteria must be considered: (i) the degree of truth told and its promptness, (ii) the gravity of wrongdoing, (iii) the level of participation and responsibility and the circumstances of greater or lesser punishability, and (iv) the commitments in terms of reparation to the victims and guarantees of non-repetition.

In order to develop the restorative component of the special sanctions, the JEP created so-called Works, Occupations, and Activities with Repar-

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ative and Restorative Content (Trabajos, Obras y Actividades con Contenido Reparador-Restaurador, or "TOAR" for its acronym in Spanish) that must be verified by the Acknowledgement Section of the JEP's Peace Tribunal. TOAR must fulfill the following requirements: (i) guarantee the participation of victims; (ii) address the effects caused; (ii) respect the rights of victims; (iii) contribute to the reconstruction of social ties; and (iv) be conducive to rehabilitation (Guidelines on Special Sanctions and Works, Occupations, and Activities with Reparative and Restorative Content). This new concept can help the JEP achieve the objective of rehabilitation by building trust between victims and perpetrators.

4.3. The imposition of ordinary sanctions if the objectives of TJ are not met

The JEP also includes the alternative of a normal adversarial trial for persons who refuse to acknowledge their criminal responsibility (individually or collectively) or when the acknowledgment is false or incomplete (Ambos, 2021, p. 89). In these cases, ordinary sanctions may be imposed to favor the retributive purpose of criminal punishment and uphold the victims right to truth.

This system incentivizes the recognition of responsibility and truth by those involved in any conduct against human rights through the imposition of less severe sanctions than those typical of the Colombian legal system (Ambos, 2021, p. 89, Gallón Giraldo G., & Ospina, J., 2021, p. 110). It is also a mechanism to connect the restorative purposes of the SIVJRNR and the obligations of the conditionality system. In these events, the imposition of sanctions follows a tiered process:

- If an individual never acknowledges truth and responsibility, sanctions of 15 to 20 years of deprivation of liberty will be imposed, which may involve confinement (JSL, Article 143).
- If an individual makes a belated admission of truth and responsibility, sanctions of 5 to 8 years of deprivation of liberty will be imposed, which may involve confinement (JSL, Article 130).
- If an individual does not acknowledge truth and responsibility but did not play a decisive role, he or she may be sentenced to between 2 and 5 years of deprivation of liberty, which may include imprisonment (JSL, Article 130).

In these cases, the JEP establishes an adversarial and public proceeding that applies the rules of ordinary criminal proceedings (JPL, Articles 39 – 41) and must respect due process and the right to defense (JPL, Article

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35). This structure seeks to guarantee *"the security and legal stability to the processes of reintegration of former combatants and to protect the victims' right to participation, to the truth of what occurred during the conflict, and the application of restorative justice focused on the elimination of the conflict's structural causes"* (Gallón Giraldo G., & Ospina, J., 2021, p. 111).

The JEP includes among its special sanctions a plea bargain option for those who collaborate with the Justice system. This situation disproves the argument from its critics regarding the alleged impunity granted by the JEP, considering that ordinary criminal law accepts confessions and whistleblowing as valid grounds for penalty reduction, house arrest, parole and probation. It also proves that the criminal law component of the JEP is not accessory but essential in the operation of the whole system.

In fact, the most significant difference between transitional law and ordinary criminal law is that the conditionality mechanism is not applied as an effect of the judicial decision, but as an initial condition to enter the JEP. In this context some purposes of criminal law are conditions to remain in the system, and are tied to the essential objectives of TJ:

- Specific negative deterrence is deeply connected with reconciliation, peacemaking, and guaranteeing non-repetition for the victims.
- Rehabilitation under the JEP's system must be achieved through contributions to the truth and reparation of victims, helping them to deal with the past.
- General negative deterrence is also connected with guaranteeing non-repetition for the victims by preventing armed conflicts and new crimes from being committed.

Finally, even if retribution is not an essential part of the system, it is applied in the JEP through its sanctions system:

- In ordinary sanctions as an effective deprivation of liberty for 15 to 20 years (JSL, Article 130),
- In alternative sanctions as a retributive deprivation of liberty for 5 to 8 years (JSL, Article 128), and
- In special sanctions as effective restrictions of freedoms and rights (such as freedom of residence and movement) that guarantee non-repetition (JSL, Article 127).

5. *Conclusions*

The purposes of criminal punishment are deeply related to the TJ objectives of the JEP, namely, realizing a transition that ensures reconciliation

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and peacemaking, dealing with the past, achieving justice and ensuring reconciliation. These objectives are tied to the purpose of deterrence, while dealing with the past inevitably includes a retributive component that begins with the prosecution of wrongdoing itself.

However, in order for the system to be effective in achieving these objectives, mechanisms must be in place that directly link the fulfillment of the goals of TJ with specific criminal consequences. In this respect, at least three concrete mechanisms have been put in place:

- The conditionality mechanism, which is directly tied to the obligations of the system and, among these, in particular to non-repetition. This, in turn, is related to negative deterrence. In specific cases, the JEP has had to apply the criteria of this mechanism to exclude individuals from the system who have taken up arms again.
- Special sanctions not only seek to ensure reconciliation through restoration but are also directly connected to specific positive deterrence through work with communities.
- The possibility of imposing ordinary or alternative sanctions that may involve imprisonment if truth and responsibility are not acknowledged renders the victim's right to truth of great importance. Undoubtedly, there is a direct relationship between satisfying the victims' right to truth and facing a more retributive purpose of criminal punishment if an individual chooses not to cooperate in the process. From a legal point of view, the existence of ordinary sanctions shows that the JEP includes plea bargains in its criminal law system, which can be applied under special sanctions for those who collaborate with the Justice system, and it also proves that the criminal law component is not accessory but essential in the operation of the system as a whole.

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International (Criminal) Law as Applicable Law in the Special Jurisdiction for Peace: Bloque de Constitucionalidad and the Principle of Legality

Kai Ambos & Gustavo Emilio Cote Barco

Abstract

This chapter explains how international (criminal) law enters the Colombian domestic legal order by way of the so-called '*bloque de constitucionalidad*'. It then explains the principle of legality (in its international sense) and enquires as to how far this principle limits the *bloque* and thus the international (criminal) law applicable to the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP).

Introduction

The 2016 signing of a Peace Agreement between the Colombian government and the FARC ("Fuerzas Armadas Revolucionarias de Colombia") guerrilla made it possible, for the first time, for domestic judicial processes in Colombia to apply international norms to cases involving grave human rights violations (HRV).[1] The creation of the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP), designed as a judicial mechanism for transitional justice (TJ), permits the application of different normative frameworks to the legal characterisation of conduct, i.e. for the purposes of defining which criminal offences are applicable to the events under investigation. Colombia's Constitution was modified to pave the way for the JEP, via the introduction of various new articles.[2] The modifications make explicit reference to, first, the Colombian penal code (*Código Penal*), and, second, the body of international law made up by international human

1 See final Peace Agreement text, paras. 4 and 19 (pp. 144 and 147).

2 Colombia allows for its political Constitution to be modified by Congress, by the use of what are known as 'legislative acts' (*actos legislativos*). In order to create the JEP, Congress passed Legislative Act 01, dated 4 April 2017, incorporating certain transitory articles into the text of the Constitution.

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rights law (IHRL), international humanitarian law (IHL), and international criminal law (ICL), as the substantive law that is to be applied by the JEP. The wording, confusingly, uses the conjunction "and/or".[3] This concurrence of different normative frameworks generates a range of questions which affect legal certainty,[4] and thus involve the principle of legality.

According to the principle of legality usually referred to by the expression *nullum crimen sine lege*, no person may be convicted of a criminal offence except on the basis of a law that existed before the events that constitute the alleged offence took place. This principle therefore prohibits the retroactive application of criminal law norms, i.e., their application to past events. The decision to allow the use of ICL, as well as domestic criminal law, to judge international crimes committed *during* the period of the armed conflict with the FARC-EP guerrilla, was taken *at the end* of that conflict. We must therefore ask ourselves whether this is in line with the principle of legality, particularly if we bear in mind that the reference to international law entails the possible application of unwritten norms.

The question addressed by this chapter is, accordingly, whether the use of ICL to try international crimes committed during the armed conflict leads to the retroactive application of criminal law norms that were not valid in Colombia at the time of commission of such crimes. It is important to point out at the outset that we are dealing here with the principle of legality with regard to the *crimes*, and not with regard to possible sentences, the criminal process, or the adjudicator (judge). A discussion of these latter three aspects is meaningless, at least for the purposes of this

3 According to paragraph 6 of Transitory Article 5, Legislative Act 01 (2017): "On adopting its resolutions or sentences, the JEP will make its own legal classification […] regarding the conduct at issue. This classification will be made on the basis of the Colombian Criminal Code and/or the norms of international law as they pertain to Human Rights, International Humanitarian Law, or International Criminal Law. The principle of the most favourable law must always be applied" ("*La JEP al adoptar sus resoluciones o sentencias hará una calificación jurídica propia del Sistema respecto a las conductas objeto del mismo, calificación que se basará en el Código Penal colombiano y/o en las normas de Derecho Internacional en materia de Derechos Humanos (DIDH), Derecho Internacional Humanitario (DIH) o Derecho Penal Internacional (DPI), siempre con aplicación obligatoria del principio de favorabilidad*."). Here and throughout, unless otherwise stated, translations into English from Spanish-language texts are the authors' own.

4 The final text of the Peace Agreement (supra n. 1, p. 128) refers to legal certainty as "an essential element in the transition to peace" ("*elemento esencial de la transición a la paz*"). For specific reference to the JEP and the concession of benefits such as amnesty, see ibid. pp. 143 (para. 2), 146 (para. 15), 147 (para. 18), and 148 (paras 26 and 29).

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paper, given that we are dealing with an ad hoc TJ mechanism[5] which imposes specially-designed sanctions and is in essence retroactive, having been created as a result of political negotiation with one particular armed group.

The central contention of the brief explanations that follow is that judging international crimes committed during the Colombian armed conflict on the basis of ICL does not violate the principle of legality. This is for two reasons. First, the international norms that form the basis for prosecution of this type of crime already formed part of the Colombian legal order, in particular owing to what is known as the 'bloc of constitutionality' (*bloque de constitucionalidad).* Second, the international definition of the principle of legality – which has been particularly developed in international human rights law – permits the domestic criminal prosecution of international crimes on the basis of existing international law at the moment of their commission. Accordingly, existing international law must be taken into consideration by the judges of the JEP.

The remainder of this chapter is divided into three sections. The first discusses the incorporation of the Rome Statute of the International Criminal Court (ICC) into the Colombian legal order, and the relationship of the Statute to the *bloque de constitucionalidad.* As we will see, the importance of the Rome Statute for the Colombian legal order mainly has to do with the failure of the Colombian legislator to codify the core crimes contained in Art. 5–8*bis* of the Statute. Thus, a direct application of the Rome Statute would close this gap. The second section offers a general discussion of the international standard of the principle of legality, with particular reference to the national prosecution of international crimes. The third and final section of the chapter offers a brief summary of its principal argument.

I. The Rome Statute, the Colombian Legal Order and the Bloque de Constitucionalidad

In order to establish whether or not the application of ICL by the JEP violates the principle of legality, it is useful to first consider the relationship between ICL and the Colombian domestic legal order, with particular reference to the constitutional framework. As Art. 93 of the Colombian Con-

5 On the *ad-hoc* nature of the JEP and the guarantee of the 'natural judge' see Constitutional Court Sentence C-674, 14 November 2017, section 5.5.2.

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stitution makes express reference to the Rome Statute,[6] it is useful to enquire whether the Rome Statute forms part of the *bloque de constitucionalidad.* To this end, it is important to note that the dominant understanding in Colombia is that the Constitution is not made up solely of its written articles. Rather, it is generally accepted that certain other norms, particularly international ones, enjoy constitutional rank by express referral (*reenvio*) of the Constitution.

Article 93 of the Colombian Constitution integrates international human rights norms into the domestic legal order. According to its first paragraph, "those international treaties and conventions ratified by Congress which recognise human rights and which prohibit the limitation of such rights during states of exception, prevail *(prevalecen)* in the internal [legal] order".[7] The second paragraph states, in a similar vein: "those rights and duties that are enshrined in [the Constitution] shall be interpreted according to the international human rights treaties that Colombia has ratified".[8] For the Colombian Constitutional Court (CC), the *bloque de constitucionalidad* is, then, made up of all those norms that act "as parameters to carry out control of constitutionality of legislation".[9] In other words, the *bloque* is not only "what the Constitution enunciates, but also includes, *inter alia*, the international treaties to which Art. 93 makes reference".[10] As part of the process of Colombia's ratification of the Rome Statute, two new paragraphs were moreover added to this same article.

Determining whether the Rome Statute belongs to the *bloque de constitucionalidad* -which would afford the Statute constitutional rank in Colombia – allows us to identify the status that the Colombian internal legal order affords to ICL. In order to correctly understand the reference to the Rome Statute in Art. 93 of the Constitution, we must consider the various stages in the process of Colombia's adoption of the Statute. First of all, in

6 See Uprimny, *El bloque*.

7 "[l]os tratados y convenios internacionales ratificados por el Congreso [colombiano], que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno". Colombian Constitution, Art. 93, para.1.

8 "[l]os derechos y deberes consagrados en [la Constitución Política de Colombia] se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia" Colombian Constitution, Art. 93, para.2.

9 "como parámetro para llevar a cabo el control de constitucionalidad de la legislación". Constitutional Court Sentence C-191, 6 May 1998, para. 5.

10 "[no solo por] /el articulado de la Constitución sino, entre otros, por los tratados internacionales de que trata el artículo 93". Constitutional Court Sentence C-191, op. cit.

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2001, two new paragraphs – paras. 3 and 4[11] – were added to the existing text of Art. 93 of the Constitution.[12] This was done in order to pre-empt possible constitutional objections to the Rome Statute, as it contains certain provisions that might conflict with the domestic legal order (such as life imprisonment).[13] Congress subsequently (in 2002) introduced Law 742, approving the Rome Statute as a necessary prelude to its ratification.[14] The Constitutional Court examined the constitutionality of Law 742 in Sentence C-578, 2002, making reference for the first time to Art. 93 of the Constitution, including its two new paragraphs.

The modification to Art. 93 of the Constitution as initially proposed would have integrated the Rome Statute into the Constitution.[15] Changes

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11 Art. 93, para. 3 of the Constitution reads: "the Colombian State may recognise the jurisdiction of the International Criminal Court in the terms contemplated by the Rome Statute, adopted on 17 July 1998 by a [Conference of Plenipotentiaries] of the United Nations, and may, in consequence, ratify said treaty in accordance with the procedures set down in this Constitution": ("*[e]l Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución*"). Paragraph 4 of the same Article reads: "Where the Rome Statute treats substantive matters in a manner that differs from guarantees contained in the Constitution, [this treatment] will be admitted and will have effect exclusively in respect of the issues that [the Statute] regulates": ("*La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él*").

12 This reform to Article 93 of the Constitution was carried out by Congress via Legislative Act (AL) 02, 27 December 2001.

13 See Art. 77(1) of the Rome Statute.

14 Constitution of Colombia, Art. 224.

15 The initial proposed modification of Art. 93 of the Constitution to facilitate the adoption of the Rome Statute consisted of the incorporation of a new paragraph, which would have read: "incorporate to this Constitution, the Rome Statute of the International Criminal Court" ("*[i]ncorpórese a la Constitución el Estatuto de Roma de la Corte Penal Internacional*"): see Legislative Draft Bill (Proyecto de Acto Legislativo) no. 14, 2001 (Senate), published in Gaceta del Congreso, AÑO X – № 77, 20 March 2001, p. 1, and Constitutional Court sentence C-578, 30 July 2002, p. 44–55). The proposal was motivated above all by pragmatism. The desire was to avoid having to initiate ordinary legislation, the process of which would open the door to detailed debate of the content of the Rome Statute. It was anticipated that such an eventuality (which did, in the end, come about) might cause problems for approval of the Statute. In any case, it was specified that the proposed incorporation of the Statute into the Constitution would be "for the purposes of [the Statute's] own functions" ("*para efecto de sus propias funciones*"). The

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were however introduced to the text of the proposed Constitutional reform during the legislative process. The final version as approved simply authorised the Colombian State to accept the competence of the International Criminal Court (ICC) – i.e. to ratify the Rome Statute.[16] Accordingly, paragraph 3 of Article 93 of the Constitution, added to the Article by this constitutional reform, simply reads: "the Colombian State *may recognise ('puede reconocer')* the jurisdiction of the International Criminal Court […] and in consequence [may] *ratify* this treaty" (emphasis added). Paragraph 4 only indicates that the form in which certain issues are treated in the domestic legal order is not changed merely by virtue of the fact that the Rome Statute treats them differently. Neither paragraph speaks to the legal status of the Rome Statute in domestic law. The Constitutional Court accordingly ruled, in 2002, that the purpose of modifying Article 93 of the Constitution had not been to directly incorporate the Rome Statute into the Constitution, nor to render ratification of the Statute obligatory.[17] Instead, the Court concluded, the modification had simply served to authorise the ratification.[18] Thus, if the Rome Statute does form part of the *bloque de constitucionalidad*, this is not as a direct result of the introduction of paras. 3 and 4 to Article 93 of the Constitution.[19]

A case might be made that the Rome Statute forms part of the *bloque de constitucionalidad* as a direct consequence of para. 1 of Art. 93 of the Constitution. This position is however difficult to sustain if we consider the wording of the paragraph, and other rulings by the Constitutional Court. Para. 1 refers to: "those international treaties and conventions ratified by Congress which *recognise* human rights and which *prohibit* the limitation of such rights during states of exception" (emphasis added). One obvious example of a treaty of the kind referred to is the American Convention on

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impact on the domestic legal order was not spelled out. See report (*Informe de ponencia*) for the first debate of Draft Legislative Act (Proyecto de Acto Legislativo) No. 14, 2001 (Senate), available in Spanish from Gaceta del Congreso, AÑO X – Nº 114, 9 April 2001, pp. 5–6, 10.

16 See texts of Draft Legislative Acts (Proyectos de Acto Legislativo) No. 14, 2001 (Senate); and No. 227, 2001 (Lower Chamber (*Cámara*)), in: Gaceta del Congreso AÑO X – Nº 293.

17 Constitutional Court Sentence C-578, 2002, *supra* n. 15.

18 Constitutional Court Sentence C-578, 2002, *supra* n. 15, p. 45 ("given that the final purpose of the legislative act was not to directly incorporate the treaty into the Constitution nor to make its ratification imperative"), ("*ya que el propósito final del acto legislativo no fue incorporar directamente el tratado a la Constitución ni hacer imperativa su ratificación*").

19 See Sentencia C-578, 2002, *supra* n. 15, pp. 215–217.

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Human Rights (ACHR). Articles 3 to 25 of the ACHR recognise a range of individual rights, while Article 27(2) prohibits the suspension of certain of them during states of emergency.[20] Despite the strong relationship that exists between human rights law and ICL, the Rome Statute neither recognises rights nor prohibits their suspension. Given that the Statute is dedicated to the definition of rules of individual criminal responsibility, the creation of an international tribunal to implement them, and the delimitation of its competences, etc., it cannot be considered an international treaty that (explicitly) recognises human rights. This is true even though its existence owes much to the international community's desire to strengthen respect for such rights.[21]

The Constitutional Court has on occasion, albeit with a certain ambiguity, seemed to suggest that the Rome Statute does in effect form part of the *bloque de constitucionalidad.*[22] More usually, however, it has adopted a nuanced approach, preferring to analyse each norm of the Statute separately. In line with this approach, only some of the dispositions of the Statute can be considered part of the *bloque,* based on their content rather than the nature of the Statute *per se.* In other words, these specific norms must be directly and materially connected to IHRL and IHL. Working along these lines, the Court has suggested that the Rome Statute constitutes "probably the principal international instrument for the *protection* of human rights

20 On Article 27 (2) of the ACHR see Rodríguez, "*Artículo 27…*", pp. 838 ff.

21 See Sentence C-578, 2002, *supra* n. 15, p. 115 ("the definitions of crimes of humanity contained in the Statute protect the effectiveness of the right to life; the prohibition of torture and of disappearance; equality, and the prohibition of slavery"), ("*las definiciones sobre crímenes de lesa humanidad que trae el Estatuto protegen la efectividad del derecho a la vida, la prohibición de torturas y desapariciones, la igualdad y la prohibición de la esclavitud*"), p. 120 ("the definitions of war crimes protect the effectiveness of the right to life (Art. 11), physical integrity rights; respect for the prohibition of disappearances and torture (art. 12), and prohibition of slavery (Art. 17)", ("*las definiciones sobre crímenes de guerra protegen la efectividad del derecho a la vida (artículo 11), a la integridad física; el respeto a la prohibición de desapariciones y torturas (artículo 12), y a la prohibición de la esclavitud (artículo 17)*"). On the ideals that inspired the creation of the Rome Statute and the values that it seeks to protect (paras. 1 and 3 of its Preamble), see Triffterer, Bergsmo and Ambos, "*Preamble*", p. 1, notas marginales (nm.) 7, 9 and ff.

22 See for example reference to Art. 6 of the Rome Statute in Sentence C-291 of 25 April 2007, p. 44, in which the Court explains its previous discussion, in Sentence C-148, 22 February 2005, of the term "grave" as it appears in Art. 101 of the Penal Code.

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and International Humanitarian Law".[23] Whether or not one agrees with this assertion, the Court itself goes on to say that this "does not imply that all the norms of the Rome Statute form, *per se*, part of the *bloque de constitucionalidad*".[24] Thus, we can conclude that the Rome Statute is an instrument for the protection of such rights that pre-exist in international law, without however amounting to an instrument of recognition of rights within the meaning of Article 93 para. 1 of the Constitution. Therefore, for the Constitutional Court, the only Rome Statute norms that form part of the *bloque de constitucionalidad* are those which "are *directly related* to the protection of human rights and international humanitarian law" (emphasis added).[25] This must be determined on a case-by-case basis.[26]

Article 6 of the Rome Statute, which defines the crime of genocide, is a good example of a norm that does, in the view of the Constitutional Court, form part of the *bloque de constitucionalidad.* The Court explained that the norm belongs to the *bloque* not because it is contained in the Rome Statute but principally because it "incorporates the entire content of the Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter, Genocide Convention).[27] It was on the basis of these same criteria that the Court affirmed that Arts. 6, 7, 8, 19(3), 20, 65(4), 68, 75 and 82(4) of the Rome Statute formed part of the *bloque de constitucionalidad* (without saying which articles do not belong to the *bloque*).[28] In this decision the Court reiterates that for a Rome Statute

23 See Constitutional Court Sentence C-370, 18 May 2006, p. 240 ("*constituye probablemente el mayor instrumento internacional de protección a los derechos humanos y al Derecho Internacional Humanitario*", emphasis added).

24 See Constitutional Court Sentence C-488, 24 July 2009, p. 24. The Court has also affirmed that the Rome Statute as a whole cannot *a priori* be considered to constitute *ius cogens*: Constitutional Court Sentence C-240, 1 April 2009, p. 48.

25 See Sentence C-488, 2009, *supra* n. 24, p. 24 ("…*que guardan una relación directa con la protección de los derechos humanos y del derecho internacional humanitario*" [emphasis added]).

26 Ibid.

27 Ibid. ("*recoge integralmente el contenido de la Convención para Prevenir y Sancionar el Genocidio*"). This formulation by the Constitutional Court lends itself to confusion, since in fact the Rome Statute only incorporates the crime of genocide as codified in the Genocide Convention, without incorporating the entire Convention.

28 See Constitutional Court, Sentence C-290, 18 April 2012, pp. 35–36: "in particular, the following dispositions have been applied as parameters for exercising control of constitutionality: the Preamble (C-928, 2005); Art. 6, with reference to the crime of genocide (C- 488, 2009); Art. 7, with reference to crimes against humanity (C-1076, 2002); Art. 8, which typifies war crimes (C-291, 2007, C-172, 2004 and

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norm to be considered part of the *bloque*, the norm in question must "be oriented toward the effective protection of the dispositions that make up international human rights law and international humanitarian law",[29] dispositions which include definitions of international crimes.

Whether or not the Rome Statute norms mentioned by the Constitutional Court in Sentence C-290 belong to the *bloque de constitucionalidad* accordingly depends on their human rights-protective function and the Colombian state's obligation to criminally prosecute grave violations of human rights. As the Court has previously stated these norms equip "the system of human rights protection with an additional tool in the struggle against impunity";[30] guarantee that rights not susceptible to suspension even during states of exception prevail and are effectively enjoyed;[31] and, in general, restate various of the obligations taken on by the Colombian State by subscribing to treaties such as the ACHR, the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions, and their Additional Protocols.[32] All of these instruments form part of the *bloque de constitucionalidad* under the direct effect of para. 1 of Article 93 of the Constitution.[33]

C- 240, 2009); Art. 20, with reference to the relativisation of the principle of *res judicata* (C-004, 2003 and C-871, 2003). Likewise, articles 19.3, 65.4, 68, 75 and 82.4, concerning the rights of victims (C-936, 2010). In consequence, the Court has preferred to determine on a case by case basis which articles of the Rome Statute form part of the *bloque de constitucionalidad*, and with what effects" ("*de manera puntual, han sido tomados como parámetros para ejercer el control de constitucionalidad las siguientes disposiciones: el Preámbulo (C-928 de 2005); el artículo 6, referido al crimen de genocidio (C- 488 de 2009); artículo 7, relacionado con los crímenes de lesa humanidad (C-1076 de 2002); artículo 8, mediante el cual se tipifican los crímenes de guerra (C-291 de 2007, C-172 de 2004 y C- 240 de 2009); el artículo 20, referido a la relativización del principio de la cosa juzgada (C-004 de 2003 y C-871 de 2003), al igual que los artículos 19.3, 65.4, 68, 75 y 82.4, concernientes a los derechos de las víctimas (C-936 de 2010). En consecuencia, la Corte ha preferido determinar, caso por caso, qué artículos del Estatuto de Roma, y para qué efectos, hacen parte del bloque de constitucionalidad*").

29 See Constitutional Court, Sentence C-290, 18 April 2012, p. 34 ("…*se oriente a la protección efectiva de las disposiciones que conforman el derecho internacional de los derechos humanos y el derecho internacional humanitario*").

30 See Sentence C-578, 2002, *supra* n. 15, p. 114 ("…*una herramienta adicional para la lucha contra la impunidad*").

31 Ibid.

32 Ibid.

33 See, for example, Constitutional Court Sentence C-582, 11 August 1999, p. 9.

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II. The Principle of Legality and the Application of International Law to the Domestic Prosecution of International Crimes

We have already seen that the norms implementing the Peace Agreement contemplate the possible application of international norms for the legal characterisation of conduct to be tried before the JEP. In this regard it should first be noted that, as explained in the preceding section, these implementing norms do not alter the status that the Colombian domestic legal order affords to norms such as the Rome Statute. At any rate, ICL has different, and less formal, sources than domestic criminal law. Thus, arguably, the application of ICL at the national level may conflict with the principle of legality, since it would entail the application of unwritten norms of criminal law. The problem becomes more acute if we bear in mind that custom and general principles of law both constitute sources of ICL,[34] but not of Colombian criminal law, whose main source is the Penal Code. This is grounded in the fundamental principle of *lex scripta*, and the need for a legal (parliamentary) basis to law. In other words, from the perspective of ordinary Colombian criminal law, not only can criminal law not be applied retroactively (*nullum crimen sine lege praevia*), but the respective norms must also be written, and have been issued by the country's parliamentary legislature.[35]

Nonetheless, as we will see below, the principle of legality does not have the same consequences normally attributed to it, when it is applied at the domestic level to the prosecution of international crimes. It is also important to acknowledge that the application of ICL, while not "ordinary" or "traditional", is not, either, completely new to the Colombian legal tradition either. In addition the JEP is in any case bound, in general terms, to respect the principle of legality.

34 On custom and general principles of law as a source of international law see Thirlway, *The Sources*, pp. 53 ff. and 93 ff.; on sources in ICL see Ambos, *Treatise ICL, Volume I*, pp. 124 ff.; on sources in the framework of the Rome Statute see Cryer, "*Royalism…*", pp. 390–405.

35 See Constitutional Court Sentence C-091, 15 February 2017, p. 54 and Sentence C-297, 8 June 2016, pp. 19 ff; and see Velásquez, *Fundamentos*, 2020, p. 75 ss.

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1. *The Principle of International Legality in the Domestic Prosecution of International Crimes*

The principle of legality is contemplated by various international human rights treaties, including the ICCPR, the ACHR, and the European Convention on Human Rights (ECHR), being singled out moreover as one of the guarantees that may not be suspended even during states of exception.[36] As the Constitutional Court has rightly affirmed, each of these instruments recognises that criminal responsibility may be attributed on the basis of international norms, whether contained in treaties, or pursuant to customary international law or general principles of law.[37] Thus, the principle of legality as understood in international law is clearly not limited to the notion of codified (written) law within the meaning of the *lex scripta* principle.[38] What matters, as the European Court of Human Rights (ECtHR) has made clear, is that the respective criminal law norm was *accessible*, and thus the possibility of punishment was *foreseeable*, at the time of commission of the offence.[39] This standard also applies when international norms or definitions are applied in the framework of a domestic prosecution. Let us take a closer look at ECtHR case law on this point[40].

The ECtHR has accepted the retroactive application of national norms (i.e. their application to acts committed before the existence of the relevant provision in criminal law) for the purposes of judging grave human rights violations or grave infractions of IHL which amounted to international crimes at the time of commission. This can be seen, for example, in the two cases of *Kolk and Kislyiy v. Estonia*, and *Kononov v. Latvia*. In the former, the applicants had been convicted in 2003, by a first instance domestic court, of participating in the deportation of Estonian families during the 1948 Soviet occupation. They were convicted despite the fact that Estonian criminal law did not specifically recognise the category of crimes against humanity until 1994.[41] Nonetheless, the ECtHR decided that the conviction did not breach the principle of legality, because the deportation of civilians was considered a crime against humanity in Art. 6(c) of the Nuremberg Statute (Charter of the Nuremberg International Military Tribunal). This position was subsequently re-stated by the United Nations

36 See Art. 4 (2) ICCPR; Art. 27 (2) ACHR, and Art. 15 (2) ECHR.
37 Sentence C-080, 15 August 2018, p. 31.
38 Cote, *Rückwirkung*, p. 333.
39 Ibid., pp. 322, 333, 379.
40 Ferdinandusse, *Direct Application*, pp. 267–268.
41 Ibid.

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General Assembly in Resolution 95 (I) of 1946, adopting what are commonly known as the Nuremberg Principles.[42] The facts in *Kononov* are largely similar. Here, the ECtHR was to adjudicate a case involving a national conviction imposed in the year 2004 for war crimes.[43] The crimes dated from 1944, whereas Latvian domestic law had incorporated war crimes only in 1993.[44] The ECtHR once again held that there had been no violation of Article 7 of the ECHR, since the execution of civilians had constituted a war crime at least since the Fourth Hague Convention, of 1907 (Regulations Concerning the Laws and Customs of War on Land).[45] The criteria of accessibility and foreseeability have been reiterated by the ECtHR in other decisions relating to the national prosecution of international crimes,[46] and have contributed to defining the contours of the principle of legality within the framework of ICL.[47]

However, the subsequent national criminal law provision, when applied retroactively, must not contain elements additional to those that defined the international crime at the time of its commission. Moreover, the international definition of the respective crime must be interpreted in the same fashion as at the time of its commission. This was confirmed by the ECtHR's Grand Chamber in *Vasiliauskas v. Lithuania*, where the matter at hand was a conviction for genocide issued in 2004 by the Lithuanian courts regarding the 1953 killing of two nationalist partisans.[48] The Grand Chamber determined, by a slim majority of 9 to 8 votes, that the principle of legality had been violated because the national definition of genocide, adopted in 1998, added political groups to the list of protected groups, whereas 1948 Genocide Convention definition does not include political groups.[49] The Chamber also challenged the Lithuanian tribunal's qualitative interpretation of the "in whole or in part" element of genocide, to the effect that the intention to destroy a distinct or prominent part of the group under attack was considered sufficient to meet the high subjective (special intent) threshold. This was rejected by the Chamber's majority

42 Ibid., p. 9.
43 ECtHR, *Kononov v. Latvia*, para. 38.
44 Ibid., para. 12 ff and 30 ff., 47.
45 Ibid., para. 205 ff.
46 See, for example, ECtHR, *Vladimir Penart v. Estonia*; ECtHR, *Korbely v. Hungary*; ECtHR, *Ould Dah v. France*; ECtHR, *Šimšić v. Bosnia and Herzegovina*.
47 See ICTY, *Prosecutor v. Hadzihasanovic et al.*, Interlocutory Appeal, para. 15; ICTY, *Prosecutor v. Hadzihasanovic et al.*, Decision on Joint Challenge, para. 62; ICTY, *Prosecutor v. Milutinovic et al.*, para. 39; ICTY, *Prosecutor v. Vasiljevic*, paras. 193 ff.
48 ECtHR, *Vasiliauskas v. Lithuania*, para. 15 ff.
49 Ibid., para. 165 ff.

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on the grounds that the domestic interpretation had been developed only from the 1990s onward, whereas the subjective element had previously been interpreted quantitatively, as requiring the intent to destroy a substantial part of the respective group.[50]

These decisions by the ECtHR allow us to sum up the scope of the principle of legality in the national prosecution of international crimes by way of five propositions:

(i) IHRL does not allow the renunciation, in such cases, of the principle of legality;
(ii) yet, the principle of legality as applied to international crimes acquires particular and distinctive characteristics when compared to the prevailing notion of legality in Colombian domestic law;
(iii) one of these characteristics is, precisely, the possibility that national criminal norms may be applied retroactively;
(iv) for this to occur, the content of these norms must coincide with the scope and definition of the respective offences recognized under international law at the time of commission;
(v) in such cases, the question of whether the principle of legality has been violated or not will depend on an analysis of criminal law provisions, pursuant to international law at the time of commission, (including international treaty law, custom, and general principles of law).[51]

The adoption of this conception of legality within the framework of the Colombian TJ system would not be in contradiction with obligations arising from the ACHR. The Inter-American Court of Human Rights (IACtHR) has not explicitly supported the retroactive application of national norms on the basis of international law. However, Article 9 of the ACHR, which deals with the principle of legality, refers only to "applicable law" as the respective standard, i.e., using a term which covers both national and international law.[52] In fact, the Inter-American Commission

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50 Ibid., para. 176–177; see Ambos, "*The Crime of Genocide…*", p. 175 ff.; in Spanish in InDret 3/2016.

51 In a subsequent decision, in a case whose facts were in essence identical to those of *Vasiliauskas*, the ECtHR nonetheless decided that there had been no violation of Art. 7, finding that the Lithuanian courts had provided convincing reasoning for the conviction and that this was sufficient to satisfy the criterion of foreseeability; see ECtHR, *Drėlingas v. Lithuania*, para. 97–111; for a critique see Ambos/Rackow, "*Rspr…*", in: NStZ (2020), p. 401.

52 This can be derived from the preparatory work toward the ACHR itself: on this point see Cote, *Rückwirkung*, p. 328 ff. On Art. 9 ACHR and the prosecution of international crimes, see also Antkowiak/Uribe, "*Artículo 9…*", pp. 337–338.

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on Human Rights (IACHR) has drawn attention to States' obligation to take such measures and/or undertake such reforms as may be necessary to enable them to investigate and adjudicate international crimes.[53] Along these same lines, the IACtHR has maintained that States have a duty to adopt such measures as may be necessary to avoid impunity for massive human rights violations, which implies activating their criminal jurisdictions to apply both national and international law.[54] In *La Cantuta v. Perú*, and in *Almonacid-Arellano et. al. v. Chile*, the Court went so far as to hold that States could not adduce the prohibition on retroactivity as an excuse for non-compliance with these obligations.[55]

2. *Application of the International Principle of Legality in Colombian Law*

Given Colombian case law to date, it is fair to say that there is some precedent for the application of the international conception of legality explained above. Thus, the JEP is not moving in completely uncharted waters. Indeed, the Supreme Court recognised that conduct can be characterised in accordance with international law where grave human rights violations are concerned. Thus, for example, the Court made reference to the "flexibilisation of the principle of legality", as it is known in IHRL, in the context of the Justice and Peace Law (another, pre-JEP, judicial transitional justice mechanism).[56] On this basis, the Court held that it was possible to apply penal provisions from IHL, introduced in the year 2000, to conduct prior to this date.[57] The Court reasoned, inter alia, that the

53 See IACHR Resolution 1/03, 24 October 2003: "[S]tates must respect and ensure the human rights of all persons under their jurisdiction. They are therefore obligated to investigate and punish any violation of these rights, especially when such violations also constitute crimes against international law."

54 See IACtHR, *La Cantuta v. Peru*, para. 160; IACtHR, *Goiburú et al. v. Paraguay*, para. 131.

55 La Cantuta v. Perú, *supra* n. 54, para. 226; IACtHR, *Almonacid-Arellano et al v. Chile*, para. 151.

56 The Justice and Peace Law is a previous TJ mechanism, adopted in 2005 (Law 975). This mechanism aimed to demobilise paramilitary groups (*Autodefensas Unidas de Colombia* – AUC) and allow prosecution of their grave crimes.

57 See, for example, Corte Suprema de Justicia (CSJ) Radicado: 44462, p. 32 ff.; also CSJ, Radicado: 33039, p. 25 ff.

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four Geneva Conventions, and their Additional Protocols I and II, were incorporated into domestic law in 1960.[58]

It should be noted that certain pronouncements by the Colombian Supreme Court might seem to suggest that the aforementioned "flexibilisation of the principle of legality" requires only that the conduct should be prohibited in some international instrument.[59] However, this approach does not correspond to the actual development of the principle of legality in international law. The "flexibilisation of the principle of legality" does not operate in the face of any and every human rights violation, no matter how grave. It is reserved for international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression, as the Supreme Court has itself made clear on several occasions.[60] In other words, it is not sufficient that the conduct appears in some international instrument such as a declaration or resolution. Nor is it sufficient for it to have been defined in an international treaty, or for there to be a clear international prohibition forbidding the carrying out of such conduct, or obliging States to criminally prosecute it on the basis of treaty law. Rather, individual criminal responsibility based on international law presupposes that the conduct is not only prohibited, but criminal, under international law.[61]

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58 CSJ, *supra* n. 57, Radicado: 44462, p. 39 (the four Conventions of 1949 were approved by Law no. 5 of 1960. Additional Protocol I was implemented by Law 11, of 1992 and Additional Protocol II by Law 171, of 1994).

59 CSJ, *supra* n. 57, Radicado: 44462, p. 32 ("both this postulate [the principle of legality] and that of the non-retroactivity of criminal law, are to be considered satisfied if the act or omission is prohibited under international treaty or customary law at the moment of its commission.") ("*tanto este postulado [el principio de legalidad] como el de irretroactividad de la ley penal, se encuentran satisfechos con la prohibición de la acción o de la omisión en tratados internacionales o en el derecho consuetudinario al momento de su comisión*").

60 Ibid., p. 42; CSJ, Radicado: 38957, p. 83; CSJ, *supra* n. 57, Radicado: 33039, p. 34 ("We must be emphatic in pointing out that said flexibility in regard to the principle of legality applies exclusively to the four categories of what are commonly referred to as international crimes, that is, crimes of genocide, aggression, crimes against humanity and crimes against international humanitarian law"; ("*Hay que ser enfáticos en señalar que dicha flexibilidad al principio de legalidad es atendible exclusivamente a las cuatro categorías de los llamados delitos internacionales, vale decir a los crímenes de genocidio, agresión, de lesa humanidad y contra el derecho internacional humanitario*").

61 See Cote, *Rückwirkung*, p. 378 ff.; and along these lines, CSJ, Radicado: 33118, ("it would be possible to apply the content of an International Treaty recognised by Colombia in respect of any crime there *prohibited* and *sanctioned*, even in the absence of a pre-existing domestic law to that effect, without contravening the principle of legality." [emphasis added] ("*sería posible aplicar el contenido de un Tratado*

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The enforced disappearance of persons represents a useful example in this regard. While it is true that this conduct may amount to a crime against humanity, this requires, in line with modern ICL (e.g. Article 7 of the ICC Statute), that it must have been committed as "part of a widespread and systematic attack on the civilian population".[62] Only if this so-called context element is fulfilled, does an enforced disappearance amount to an international crime. In other words, while a single case of enforced disappearance would constitute a grave human rights violation, it would not as such be elevated to the category of an international crime. Accordingly, ICL could not serve as a basis for its domestic prosecution. For this reason, it is problematic to affirm that enforced disappearance *per se* – without reference to discussion of the particular structure of crimes against humanity – constituted, by the mid-1980s, an example of an international crime. Notwithstanding, the Supreme Court advocated this very position in a judgment of 16 December 2015, offering as its justification three resolutions: Resolution 33/173, 1978, of the UN General Assembly, and resolutions 666 (1983) and 742 (1984) of the General Assembly of the Organisation of American States (OAS).[63] This is not convincing. In the first place, only the latter two resolutions affirm that enforced disappearance "constitutes a crime against humanity", (without, moreover, offering an explanation). Secondly, it is doubtful that just two resolutions – i.e., soft law from a regional organisation – can be considered a sufficient basis for a position which has, after all, no other basis in general international law. Nor can such resolutions define, with binding force, the legal nature of particular conduct.[64] Once again: the international concept of the principle of legality that emerges from international human rights law requires *detailed and careful analysis of the sources of international public law,* in order to establish whether particular conduct constituted an international crime, and can therefore be treated as such in Colombian domestic law.

Internacional reconocido por Colombia respecto de algún delito allí prohibido y sancionado, aún sin existir ley interna previa en dicho sentido, sin atentar contra el principio de legalidad").

62 In this regard see Ambos, *Treatise ICL, Vol. II: The Crimes and Sentencing*, p. 50 ff.; Ambos, Article 7, in Ambos, *Commentary*, mn. 15 ff., 200 ff.; see also Ambos, *Informe Jurídico*.

63 See CSJ, Radicado: 38957, p. 86 ff.

64 On the criminalisation of conduct in international law, and the identification of international customary law in this area, see Cote, *Rückwirkung*, p. 378 ff. On the elements that make up international customary law (state practice and *opinio iuris*), and various aspects of proving these elements, see Arajärvi, *The Changing Nature*, p. 16 ff.

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3. The Obligation to Observe the Principle of Legality in the JEP

The fact that the JEP can apply international norms does not give it, as a judicial TJ mechanism, the right to violate the principle of legality or to consider itself exempt from the need to respect this principle. In fact, the JEP is bound by Art. 29 of the Colombian Constitution, which specifically provides for the principle of legality.[65] This is also acknowledged by the special norms that were adopted to create the JEP, such as Art. 10 of its Statutory Law, and Art. 1 of its Procedural Law.[66] However, it is also true that, in light of the complexity of the JEP's normative frameworks, the *scope* of the principle of legality cannot be the same as it is in the context of ordinary justice.[67]

Thus, the Constitutional Court has recognised that the application of ICL in the JEP does not contradict the Constitution, and that this has implications for a correct understanding of the principle of legality. According to the Court, although "the JEP's duty to administer justice in all cases is subject to the principle of legality",[68] the JEP must also take into account the fundamental parameters of the Constitution, and international law insofar as it is binding for Colombia.[69] These two points of reference constitute, in the Court's view, "a kind of mediator, to resolve the tension between the rule of law, or prevailing legality, [on the one hand], and the new normative expressions proper to transition [on the other]".[70]

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65 See Art. 29 of the Colombian Constitution ("No-one will be judged except on the basis of laws that predate the act of which they are accused").("*Nadie podrá ser juzgado sino conforme a leyes preexistentes al acto que se le imputa*").

66 Respectively, 'Ley Estatutaria de la JEP', (LE-JEP) and 'Ley de Procedimiento' de la JEP, (LP-JEP). Art. 10 of the LE-JEP reads "the JEP will carry out its functions while guaranteeing the application of the principle of legality 29 of the Political Constitution", ("*[l]a JEP cumplirá sus funciones garantizando la aplicación del principio de legalidad consagrado en el artículo 29 de la Constitución Política*"). See also Art. 1 (a) of Law 1922, of 2018 (LP-JEP): "the decisions that will bring procedures before the JEP to an end, as well as complying with the principle of legality […]" ("*las decisiones que pongan término a los procedimientos ante la JEP, además de cumplir con el principio de legalidad*").

67 On the tension between two notions of legality within the JEP see Cote, "*El carácter abierto…*", p. 73–113.

68 Constitutional Court, Sentence C-080 of 2018, *supra* n. 37, p. 319 ☯"el deber de la JEP de administrar justicia en todos los casos está regido por el principio de legalidad"☸.

69 Constitutional Court, Sentence C-112, 13 March 2019, p. 83.

70 Ibid. ["*una especie de mediadores para resolver la tensión entre el Estado de Derecho o la legalidad vigente y la nueva expresión normativa de la transición*"].

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Although the JEP, as an "extremely complex integration of multiple instruments, of different natures",[71] must consider a range of types of sources, the principle of legality must be complied with. The principle however, needs to be understood from a broader perspective,[72] at least when compared with the traditional, strict, notion of legality that prevails in the domestic legal order of Colombia (and other civil law jurisdictions). In other words, when the JEP classifies certain conduct and subsumes it under the definition of a particular criminal offence, it must do so on the basis of a norm that is valid in Colombia and existed before the acts in question took place.[73] This norm need not, however, be drawn necessarily or exclusively from the Colombian Penal Code.[74] What is required is only that the conduct was clearly prohibited before it was carried out, *irrespective of the source*, and was moreover criminal under international law. Accordingly, where the Penal Code is not operating as the point of reference, the JEP must carefully examine the relevant sources of international law in order to determine, in the words of the Constitutional Court, "the date from which an international crime that cannot be amnestied or pardoned, and in respect of which criminal prosecution may not be renounced exists".[75] The JEP's judicial practice is thus not only based on the domestic constitutional and other norms that regulate it, but also on the international definition of the principle of legality.

III. Conclusion

Judging international crimes committed during the Colombian armed conflict in accordance with ICL does not necessarily entail the retroactive application of criminal law norms that were not in force in Colombia at the time of commission. Rather, the international norms on which such prosecutions can be founded – for example Arts. 6, 7 and 8 of the Rome Statute (defining genocide, war crimes, and crimes against humanity) – already form part of the Colombian domestic legal order, in particular

71 Constitutional Court, Sentence C-674, 14 November 2017, p. 330 ("[U]*na muy compleja integración de múltiples instrumentos de distinta naturaleza*").
72 Constitutional Court, Sentence C-080 of 2018, *supra* n. 37, p. 319.
73 Ibid., p. 313.
74 Ibid., p. 311.
75 Constitutional Court, Sentence C-007, 1 March 2018, p. 172, ("*la fecha desde la cual existía un crimen internacional no susceptible de amnistía, indulto [o] renuncia a la persecución penal*".)

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pursuant to the '*bloque de constitucionalidad*'. Although the Rome Statute is not part of the *bloque* in its entirety, the definitions of international crimes that it contains do form part of the *bloque* insofar as they are directly related to norms of IHRL or IHL, which in Colombia enjoy constitutional rank. In any event, the concrete legal status of each crime will be determined by the analysis of the individual acts that gave rise to, for example, war crimes or crimes against humanity. Even when the respective conduct took place before the adoption of the Rome Statute, customary ICL norms will be applicable, in line with the *bloque*.

Further, it must be borne in mind that the international definition of the principle of legality, particularly developed in IHRL, allows for the domestic criminal prosecution of international crimes on the basis of international law valid at the time of commission. Accordingly, from the perspective of IHRL, the retroactive application of national norms is admissible as long as their content coincides with pre-existing international law. These assertions are bolstered by the jurisprudence of the Colombian Constitutional Court and must therefore be observed by the JEP, in line with the legality principle.

The international conceptualisation of the principle of legality that has developed from IHRL therefore demands *detailed* analysis of the sources of international law. This is to be done in order to establish whether particular conduct constituted an international crime at the time of commission, and consequently whether it can be treated as an international crime in Colombian domestic law. In so doing, the JEP, and thereby the Colombian State, comply with the minimum standards established by the principle of legality and with its international responsibilities with regard to the obligation to investigate and prosecute grave human rights violations.

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The Special Jurisdiction for Peace and Restorative Justice: First Steps

Oscar Parra-Vera

Abstract

Considering the different challenges that restorative justice entails in the context of transitional justice (TJ), the purpose of this article is to reflect on some of the main advances in the implementation of restorative justice mechanisms during the first years of the Special Jurisdiction for Peace (SJP). The main objective is to concentrate on some restorative aspects of the SJP's cases that demonstrate the potential and limitations of restorative scenarios in Colombia's TJ system. In this sense, this paper analyzes the challenges related to victims' participation in judicial macro-cases conducted by the Chamber of Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts (1.), the form and timing of participation in the voluntary statements before the Chamber (2.), the restorative dimensions of observation hearings during voluntary statements in macro-case 03 (3.), the restorative justice approach in territorial cases (4.), the first three indictments and their restorative reconstruction of harm (5.) and the "Guidelines on Restorative Sanctions and Reparative Works and Actions" (6.).

Introduction

Notwithstanding more profound theoretical considerations, restorative justice can be defined as an attempt at conflict resolution through comprehensive justice with a community-based reparative process that involves the community, the perpetrator and the victim. This approach to conflict resolution differs from the traditional (retributive) one and usually takes place through dialogue, actions and instances, which aim to restore the relations affected by the respective conflict (Cunneen/ Hoyle, 2010).

The incorporation of restorative justice practices in the prosecution and sanctioning of the most serious international crimes committed during the Colombian armed conflict was one of the most innovative matters

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included in the negotiation of the Final Peace Agreement.[1] In order to achieve the disarmament of the former Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) and to build a stable peace, the Final Agreement opted for restorative sanctions for the gravest atrocities of the armed conflict. In this respect, those that contribute to detailed and exhaustive truth-telling, recognize their responsibility, and comply with victim reparation and non-recurrence will be sanctioned with restorative justice mechanisms, i.e., an alternative non-prison-based sanction that aims for social and political reintegration. The design and definition of these sanctions involves the participation of the most affected victims and communities, entailing a broad concept of sanctions compared to criminal law sanctions (punishment) within the ordinary criminal justice system.

Considering the above, it is not surprising that the Colombian case has become itself a reference for contemporary studies on the relation between criminology, transitional justice (TJ) and restorative justice (Moffett et al., 2019). More than two decades of discussions surrounding TJ in Colombia, including lessons learnt from the previous so-called "Justice and Peace Process"[2], allowed for the establishment of the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP or SJP). From these previous experiences, it was clear from the outset that the SJP would have to overcome serious challenges to implement its ambitious restorative justice aims. These obstacles have been related to, for instance, the interaction between perpetrators and victims, often in the absence of psychosocial assistance, as well as the reparation of mass atrocities (Bueno, Parmentier/Weitekamp, 2016). It is important to mention in this context that restorative justice will not only be included in the sanctions imposed by the SJP. Rather, it generally aims to guide the different judicial procedures before the different Chambers of the SJP.

Considering the different challenges of restorative justice entailed in the TJ context, the purpose of this article is to reflect on some of the main advances in the implementation of restorative justice mechanisms during the first years of the SJP. I will primarily focus on some elements

1 "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace", 24 November 2016. For a comprehensive assessment of the agreement, see McCoy, Subotic and Carlin (2021).

2 This TJ process, which is based on Law 975 of 2005 (known as the "Justice and Peace Law") forms part of the normative framework for the demobilization process of paramilitary groups. It started in 2002 and continues to be implemented to date.

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that adequately show the potential and limitations of restorative justice elements implemented by the SJP. In this sense, this paper attempts to analyze the main advances and challenges related to victims' participation in judicial macro-cases conducted by the Chamber of Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts (hereinafter, "Chamber of Acknowledgment" or SRVR[3]). Subsequently, it provides an analysis of the challenges regarding the participation of victims in the voluntary statements made by suspects before the Chamber and the progress made in the respective hearings. Finally, more specific restorative justice approaches in the macro-cases are discussed, focusing on progress in recognizing new subjects as victims, such as territories, and selecting them as cases before the SJP.

1. *Challenges related to the participation of victims in proceedings before the Chamber of Acknowledgment*

In principle, the Chamber of Acknowledgment is tasked with: i) gathering reports from institutions and civil society, ii) using these reports to prioritize cases, iii) legally recognizing as victims those who meet all the respective legal requirements, iv) summoning the perpetrators to provide voluntary statements regarding the reports presented, v) receiving the victims' perspectives on the voluntary statements, vi) considering the above, determining the patterns and policies associated with international crimes and attributing responsibility to the 'most responsible' perpetrators, vii) organizing public hearings between victims and perpetrators, the latter of which acknowledge responsibility for political violence, and viii) submitting decisions to the Tribunal for Peace with proposals of restorative sanctions. The Chamber also has the duty to (ix) propose the cases of non-acknowledgment of responsibility for an adversarial process, which can result in sanctions of up to 20 years under ordinary prison conditions.

In the first four years of operation, the Chamber of Acknowledgment has prioritized seven macro-cases that analyze thousands of atrocities related to patterns of violence committed during the Colombian armed conflict. This has included cases on kidnappings (Case 01, approximately 21396 crimes, 2600 recognized victims, 9000 former FARC members under investigation); recruitment of children (Case 07, approximately 18677

3 SRVR stands for the Spanish name: *Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas.*

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crimes); extrajudicial executions (Case 03, approximately 6402 crimes, 2500 military officials processed, almost 1000 recognized victims and over 1000 judicial processes under the ordinary justice system); and the victimization of the political party *Unión Patriótica* [Patriotic Union] (Case 06). The Chamber has also prioritized three cases that focus on territorial conflict dynamics in specific areas, recognizing over 200,000 victims (Case 02 – Tumaco, Ricaurte, Barbacoas; Case 04 – Urabá; and Case 05 – Northern Cauca and South of Valle del Cauca).

For the SRVR, the debates surrounding participation in these macro-cases address different scenarios and actors, such as the organizations that legally represent victims; the attorneys that defend the perpetrators; the inclusion of the perspective and voice of the victims; the communities involved and victimized; the public officials and judges participating; the instances of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition; and the participation of society in general. From the above, four questions arise: Who participates? How do they participate? When do they participate? And, finally, what is the purpose of their participation?

A specific challenge arose concerning the participation of victims in the macro-cases selected: Is it possible to design victim participation in a similar way to that in ordinary judicial proceedings, conceived primarily for individual cases? What differences could be established in this regard? Should victim participation be identical in all the macro-cases, or could differences be justified based on the principle of non-comparability? All these questions are related to what the literature has termed the "urge to blame", that is, the possible differences and hierarchies existing between groups of victims, the debate on the authenticity of their voice and the way it is presented, amongst other issues (McEvoy/ McConnachie, 2013).

So far, the SRVR has supported the participation of victims by drafting guidelines for report submission on conflict-related facts, as well as selection and prioritization criteria, and throughout the hearings in which various victims' organizations were heard. Once the macro-cases had been opened, the Chamber started recognizing victims as a party in the judicial process, granting them access to the macro-case files and allowing the submission of questions or requirements to be resolved during the voluntary statements, or subsequent procedural phases. The recognized victims can also participate in the voluntary statements and present observations on them, either in writing or during hearings scheduled for that purpose. When someone is recognized as a victim, they can provide observations, not just on their individual case, but also on the macro-case more generally. This is fundamental since the investigation conducted by the SJP

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is based on the determination of macro-criminal patterns rather than individual cases. This approach to macro-criminal investigations led to the grouping of several cases with various similarities. Therefore, the scope of victims' participation is not strictly linked to a singular crime, but to a pattern of macro-victimization. In this sense, victims can provide observations on the determinations of facts and criminal conducts made by the Chamber and participate by proposing sanctions, as well as restorative and reparative activities.

Considering the challenges associated with the judicial management of macro-cases, it is important to mention some of the specificities of the victim recognition process. For example, as of May 2021, the SRVR had recognized over 1000 victims in Case 03 on *Killings and Forced Disappearances presented as Combat Casualties by State Agents*. Around 15 human rights organizations have taken part in Case 03, in various meetings organized by the SRVR. Moreover, inter-jurisdictional dialogues have been carried out when dealing with the accreditation of indigenous peoples. Several coordination meetings have been held with traditional authorities to assess the differentiated impact of violence against these communities.

1.1. When should encounters between victims and perpetrators occur?

An important debate arose in the first year of voluntary statements concerning victim participation. In the first 10 months of voluntary statements, victim participation during this stage was not planned. However, an appeal filed by victims' organizations marked a shift in the Chamber's view regarding victim participation in hearings involving perpetrators' statements. Below I will refer to an opinion I expressed in relation to this issue (JEP, 2019a). I agree in principle with the Chamber's decision, as it defends the way in which victim participation contributes to better restorative outcomes. However, it seemed important to specify in greater detail some of the challenges that make such participation more complex during the preliminary stage of voluntary statements. These challenges are best understood within the framework of restorative justice in a TJ process.

The Chamber identifies two types of risks regarding victim participation: i) on the one hand, given the direct engagement with perpetrators, victims may be affected by the perpetrators' statements on the events and on the victims' relatives, and ii) on the other hand, interventions on the part of victims' lawyers during voluntary statements may transform the scenario into an adversarial one. Eventually, this could eclipse the dialogical-restorative objectives of the process. Therefore, "the voluntary

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statement is not the ideal scenario to carry out the first 'victim-perpetrator encounter' and, on the contrary, it is a useful space to measure and evaluate the restorative disposition of the perpetrators" (JEP, 2019b, p. 2).

Another important challenge concerns the risks involved in applying the monological approach of ordinary justice to the SJP scenario. In the ordinary criminal justice system, parties focus exclusively on litigation (both victims and perpetrators) and may not find a space for dialogue with one another (Cunneen/ Hoyle, 2010). In light of these issues, opening up interactions between perpetrators and victims at a very preliminary stage could misguide the restorative dialogue promoted by the SJP. The objective is to understand why a person engaged in egregious forms of political violence in order to comprehend the general context of violence. We always ask the perpetrators when their first involvement in this kind of political violence took place to understand the individual paths leading to specific crimes and to gain a general understanding of the criminal conduct. In this regard, the Chamber also analyzed the risks associated with victim-perpetrator encounters in the absence of psychosocial intervention, as well as several problems that arose in the 'Justice and Peace' proceedings in terms of re-victimization. To solve these challenges, the Chamber considered the principle of 'Do No Harm' (Bolivar/ Vásquez, 2017) by postponing the victim-perpetrator dialogue until later procedural stages.

The 'Do No Harm' approach emphasizes how certain interventions, despite being well-intended, can "exacerbate conflicts, generate dependencies, nullify people's capacities" (Bolivar/ Vásquez, 2017, p. 20), amongst other possible harms. In this approach, context plays a crucial role. It is argued that the intervention (although intended to be neutral) is determined, to a large extent, by the conditions in which it occurs – such as social meanings, personal histories, previous experiences in the ordinary justice system, and perceptions of harm.

From this perspective, a careful reading of the respective context is necessary to mitigate the risks of revictimization and of causing new harm. This highlights the importance of the measures adopted by the SJP to address these challenges. These include considering the consistency between the principles and the implementation of restorative justice practices; the analysis of stakeholders and parties involved; their responses to the measures adopted by the SJP; the contents of these measures; the interdisciplinarity of professionals chosen (such as those with experience in psychosocial interventions); and the recognition of the differential impacts of the process. The objective is to prevent the exacerbation of pre-existing conflicts or to avoid negative impact on local communities.

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1.2. Avoiding revictimization: restorative encounters require adequate preparation

To understand the dialogical design of the voluntary statements before the SJP, it is crucial to consider the ways in which judicial processes had been previously developed in the ordinary justice system. It is alleged that intimidation, threats, manipulation, delays, amongst other strategies, tampered existing trust between parties in the ordinary justice system. In other cases, it is alleged that the development of the ordinary judicial process was manipulated or biased. Likewise, many victims argue they had never been listened to in the ordinary criminal justice system and that only now, through the submission of reports to the SJP or observations on voluntary statements, they are beginning to have a voice in these processes.

In this sense, specific efforts are required to work with the legal representation of perpetrators, who are encouraged to understand these transitional procedures differently from the way trials operate in the ordinary justice system. We must consider the centrality of victims' rights, as well as the importance of acknowledging the harms caused to individuals, families, and communities. Furthermore, we must adhere to the strict requirement of a complete and unambiguous recognition of truth (JEP, 2019a). In addition, restorative justice requires a constant dialogue with the community in tandem to voluntary statements. In this way, the Chamber can eventually coordinate its work with victims, perpetrators, and communities. It is crucial to harmonize these restorative processes with different forums of community participation, considering the specific harms caused to communities. These restorative processes are said to involve three actors: the victims, the aggressors, and the community (Rosenblatt 2015). At this stage, the community cannot be seen as "the audience" to which the actions carried out by the tribunal are presented, nor can it adopt a passive attitude; on the contrary, a restorative dialogue requires the intervention of the community in different forms, scenarios, and stages (Rosenblatt, 2015). Although the restorative process advocates for constant dialogue, this does not imply that this approach avoids conflict between victims and perpetrators. Disagreements are likely to arise during the process, even more so if one considers the gravity of the crimes prosecuted by the SJP. Therefore, restorative justice also has the objective of adopting measures to address these tensions, particularly through strategies in which victims and perpetrators can find forums for interaction and dialogue.

In light of this context and the adversarial approach adopted by the ordinary justice system which can intensify the lack of trust between victims and perpetrators, the dialogical perspective implemented by the

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SJP must rebuild lost trust through several steps and focus on the restorative dimensions of these new processes. This is possible if victims and perpetrators are guaranteed separate spaces in which they can interact and become involved in this new judicial scenario. The measures established by the Chamber aim to address the above-mentioned challenges whilst considering the tensions inherent to this type of process (JEP, 2019a). These measures place an emphasis on preparing the parties to channel their own restorative agendas and give special value to their autonomy and freedom. The process of victim intervention also learned from the previous "Justice and Peace" experience with paramilitaries, particularly regarding the importance of psychological and legal support given before, during, and after judicial interventions and taking into account victims' expectations. Thus, the SRVR respects the way victims choose to participate, with a particular consideration of their experiences in the ordinary criminal justice system.

From a restorative perspective, not allowing the direct participation of victims in voluntary statements can be justified due to the difficulties involved in ensuring that dialogue between the parties, their advocates, and the community is preceded by conditions required by restorative justice. On the other hand, in the public hearings of acknowledgment of responsibility, there will be appropriate spaces for encounters and dialogue between victims and perpetrators. The first hearings will have taken place by the first semester of 2022. It is therefore beneficial to prevent the perpetrator from having face-to-face interaction with the victim which could undermine his or her engagement with a new justice system, such as the SJP, and his or her commitment to truth-seeking. This also explains why victims should not have to deal with a perpetrator who may not be sufficiently interested in contributing to the construction of truth and, instead, may disregard what has been established by the ordinary judicial system, thus leading to a scenario of re-victimization. Voluntary statements could also become a filter that would allow us to distinguish between perpetrators who are genuinely committed to truth-telling obligations and those who are not. In this way, victims could instead focus on interacting with perpetrators with a clear restorative intention.

There is also a risk involved in analyzing each stage of the process separately, rather than adopting an interconnected approach. Achieving the goals of truth-seeking and reconciliation requires a set of scenarios in which victims and perpetrators advance, step by step, towards a deeper interaction. From a restorative justice point of view, it is a mistake to consider each stage without considering what will occur in subsequent ones. The starting point is the autonomy of the parties and the opportu-

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nity to listen and to be listened to, throughout the process. From this perspective, the Chamber must attempt to eliminate or, at least, reduce asymmetrical power relations between victims and perpetrators which may persist from the moment in which the crimes occurred until their prosecution. It is therefore necessary to establish differential ways of participating, considering the procedure at each stage.

With this in mind, it makes sense that direct dialogue between victims and perpetrators should begin gradually, with an initial minimum level of interaction, and proceed towards a later stage of deeper dialogue. This becomes particularly important considering the narratives adopted by perpetrators with regards to truth-telling. In previous experiences, such as the "Justice and Peace" process, there were debates between those who, on the one hand, considered it necessary to disqualify any denial of facts and responsibility and those who, on the other hand, defended the right of perpetrators to make unrestricted declarations, even if that involved discourses that were not only revictimizing, but that justified violence. It is important for the SJP to work around the narratives and discourses explaining the atrocities committed by perpetrators. The voluntary statements serve as a preliminary stage to listen, in the sincerest way, to the first version of the perpetrators' narrative. Then, after some initial restorative activities, the judge can arrange a meeting with the victims.

Handling the narratives of perpetrators and victims is essential in the dialogic processes of restorative justice, which must be dynamic and relational. In these processes, each of the parties involved can modify their own narrative in response to that of others. The restorative dialogue does not pursue an unequivocal truth that silences other narratives; instead, it seeks the harmonization of a dialectic process involving a synthesis of conflicting narratives (Cunneen/ Hoyle, 2010). Restorative justice focuses "on the consequences of the crime for the victim" and on the possibility of finding "significative ways to hold the aggressor responsible" (Rosenblatt, 2014, p. 15). Therefore, a dialectical construction of various narratives that are structured around a gradual approach to dialogue between victim and perpetrator is crucial.

For now, adequate measures are required to prevent early victim participation from negatively affecting the later stages of the proceedings before the Chamber, where it will be necessary to ensure the centrality of victims' voices, either through hearings or through other mechanisms enabling observations on voluntary statements. Such mechanisms will seek a balance between the technical, legal, and procedural observations presented by victims' organizations, the contributions made by victims based on

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their experiences, and the community. This is fundamental for restorative processes.

2. *Debates on the form and timing of participation in voluntary statements: tensions and hope*

In macro-case 03, justice rapporteurs Catalina Díaz, Alejandro Ramelli and this author have promoted the recognition of more than 1000 victims and more than 15 human rights organizations within three years (until June 2021). The participation of victims and institutions has involved the submission of over 35 reports on facts related to the macro-case, covering almost 6402 possible cases of extrajudicial executions. Victims have also participated in many of the 400 voluntary statements heard by the Chamber, either during the statements or later, by presenting observations on the statements (sometimes at hearings). Progress is also expected to be made regarding victims' participation in the hearings of acknowledgment of responsibility and in the proposals of alternative sanctions presented to the SJP's Tribunal for Peace.

In the aforementioned procedural stages, it has become evident that in many cases, the families of the victims have been forced to become "judicial investigators" of the crimes. Upon receiving their reports and observations, the Chamber has appreciated the efforts made by families to discover what happened to their loved ones. Their perspective and their voice have been reflected in the reports presented before the Chamber. Through almost 400 voluntary statements, macro-case 03 has surpassed the level of truth reached in the ordinary justice system, particularly through the identification of different patterns of criminality and the determination of facts and individuals that had never been investigated before. Although the justice rapporteurs have heard voluntary accounts that referred to individual cases that had already been investigated in the ordinary criminal justice system, these individuals have also mentioned issues that had never been analyzed before. Investigations in the context of macro-case 03 have also involved clustering and analyzing many cases that had previously been studied individually so that connections and patterns between them could be identified. This strategy has allowed the Chamber to successfully reconstruct past events. Victims have evaluated perpetrators' commitment to the truth and have identified gaps that remain, matters that are still pending and silences that cannot be accepted in this process, because they diminish their right to the truth and the perpetrators' commitment to the full establishment of the truth.

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As mentioned before, interventions by legal representatives in voluntary statements were of particular importance in macro-case 03. In a press release, the SJP outlined highlights of the first voluntary statement made with the participation of victims, especially that of an Army Sergeant, who had been linked to various cases of extrajudicial executions. After hearing an initial account of what happened, the victim had the opportunity to submit questions through his attorney. When leaving the proceedings, the victim mentioned that it had been a privilege to be there:

> "I know there were many cases like my brother's and the fact that his case is being clarified gives me great pride. I am pleased to see that the story is being told in a different way, because they had dishonored his name. Even though it is hard, I am glad the truth is surfacing; I have been looking for it all my life" (JEP, 2019c, para. 5).

Similarly, the victim's attorney said:

> "We asked [the perpetrator] how he would repair the harms caused and he said he was willing to undertake restorative activities, as long as they did not pose a risk to his life. At the end of the proceedings, through his attorney, he asked us to let him know if other family members thought he could repair them in some way. That is how we are moving forward, using dialogue to explore different reparative possibilities".

In these proceedings, the SJP has sought to establish a balance between the victims' rights to the truth and achieving reparation for the harms suffered, and the due process guarantee for the perpetrator. Moreover, psychosocial support for the victim was provided before and during the proceedings to avoid any revictimization.

Despite these advances, it is important to note that the participation of victims in the voluntary statements has been marked by various difficult moments. Some victims have asked to speak directly to the perpetrators and have expressed their desire to communicate their anger or indignation. The task of the justices presiding over these judicial proceedings has been to explain prior to, and at times during, the proceedings why their voice is expected to be heard at a later stage in the process. Although denying victims' participation during these statements may be questioned, it is important to reiterate that any interaction between victim and perpetrator must be planned, properly organized and must allow sufficient time for individuals to process difficult feelings regarding the atrocities committed.

Moreover, the narratives detailed in voluntary statements cannot be assessed in isolation. Emphasis has been placed on the relationship be-

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tween testimonies, and it is possible that some accounts are incomplete statements that must be cross-referenced with other statements. In any case, each victim is free to decide the approach with which they manage observations. However, the role of the SJP has been to instruct victims on the observation mechanism, in order to promote their participation. With the documentation and the information received in the case, the Chamber must assemble the complex puzzle of past events, whilst establishing corresponding accountability for the crimes committed.

In light of these challenges, victims and the organizations representing them have received psychosocial support. In some cases, this support has involved group work on victims' feelings and emotions in response to voluntary statements. On occasion, the victims have discussed the limits to judicial truth, the limitations of judicial processes, and the fact that some perpetrators do not tell the truth they were expecting. At other times, victims delved into facts they wanted to know and, as a group, go into specific details. Thus, what is finally presented as an observation is sometimes rather detailed and focused.

Regarding the voice of the perpetrators during voluntary statements, it is worth pointing out that some of them rely on the ways in which the ordinary justice system has dealt with these issues. This is shown, for instance, by the tendency to say or answer only what they are asked, limiting themselves to solely the facts. Some have even alluded to the "scripts" they had to follow in the ordinary justice system, in the context of the cover-up strategies that are currently under investigation. Consequently, victims have complained about re-victimization occurring during certain statements. In other voluntary statements, a debate has arisen about how perpetrators perceive the harm suffered by victims and compare it to the pain they themselves have suffered. Some victims have also considered this comparison to be re-victimizing.

Other perpetrators, in turn, have found in these statements an opportunity to provide an account of the heartbreaking implications that their involvement in these atrocities had for them. For those of us who have presided over these statements, a central question has been to inquire when the perpetrator first had any type of information or contact regarding these atrocities. We have investigated what was happening in their military and personal life at the time, to try to understand why the events occurred. Acts of political violence also transformed their lives, and we have noticed that in many cases, they had never been asked about it. In several cases, they have asked themselves these questions and the testimony provided sometimes allows the victims to see them in a different light as part of a larger context in which the violence committed is not the sole

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focus. This provides a starting point for possible dialogue between victims and perpetrators.

3. *Restorative dimensions of observation hearings on voluntary statements in macro-case 03*

One of the challenges the SJP has faced is to creatively advance some of the restorative dimensions of these procedures. An example is the observation hearings on voluntary statements. In this regard, Law 1922 establishes when observations on the aforementioned statements can be submitted. However, the modality of these observations was not specified, and therefore, the judges who were rapporteurs in Case 03 provided an interpretation. This allowed observations to be carried out both orally and in writing. For the oral component, observation hearings were designed which aim to grant victims' voice an important space in the public sphere, including their version of the facts and the harms that were suffered. This is particularly important to ensure that victims' voices are first expressed in the public arena prior to the recognition hearing, in which perpetrators' voices will then play a significant role. In other words, the hearings are intended to give victims the very first public moment of the proceedings. This is consistent with a progressive, step-by-step approach to restorative justice in these macro-cases. In fact, the actors initiate their process separately (with perpetrators appearing before the SJP in the confidential and non-disclosed voluntary statements, and the victims presenting their reports and observations) until a later moment when they meet in the acknowledgment scenario. A crucial symbolic act is carried out during the observation hearings: the first public intervention is that of the victims and their reaction to the statements of the alleged perpetrators. This represents a change in the power relations that had existed in the past, giving a space to victims that they had never had before; a new opportunity to express themselves and to be heard.

At the same time, observation hearings have played an important role in the materialization of the territorial approach to Case 03. This case identified that extrajudicial executions had occurred in all departments of the country. However, when analyzing data on the multiple variables included in the reports, a concentration of alleged crimes in six departments of the country was observed. Therefore, the macro-case's first phase of analysis and voluntary statements focused on the military units with the largest number of individual cases. Moreover, the persons appearing before the SJP were those present in those specific departments. The victims' observa-

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tions on the voluntary statements have brought to light specific dynamics of the armed conflict in their respective territories.

Through victims' observations, both in writing and during hearings, we have been able to observe different types of requests for the truth: the truth about facts beyond those discussed, the truth about other parties involved in these crimes, and the truth about those most responsible. These demands have also drawn our attention to the need for moral truth: the mothers of the victims and other relatives want to know if the perpetrators are still capable of compassion and humanity. In this respect, the victims hope that society will support them in their claims, so that they do not feel alone in their demands to know the truth about what happened to their loved ones. They expect compassion and humanity from the whole country as their pain has been stigmatized and devalued – not only by those directly responsible for the alleged crimes, but also by those who denounced them and somehow justified what happened to them.

3.1. The hearing with the Madres de Soacha

During the first observation hearing held on October 17, 2019, relatives of the victims of Soacha (Cundinamarca), who were illegitimately presented as having been killed in combat, made their observations on 31 voluntary statements given by the perpetrators responsible for at least 69 deaths in Catatumbo (Norte de Santander) between 2007 and 2008, including the extrajudicial executions of 15 young persons in Ocaña (Norte de Santander), who had been recruited in Soacha (JEP, 2019d). Justice rapporteurs stressed that the victims pointed out the gaps that remain, their unresolved questions about the truth, and the silence that cannot be tolerated in this process, since "they diminish the value of the right to truth and the perpetrators' commitment to full and detailed clarification, which the victims, and all of us, have trusted in" (JEP, 2019d).

3.2. The hearings with the Wiwa People and Kankuamo People

On November 14, 2019, in a private hearing, the indigenous Wiwa people submitted their observations on the voluntary statements provided. During the proceedings held in La Guajira, relatives of the victims and indigenous authorities submitted their observations on the accounts given by the alleged perpetrators. They had been involved in the death of a

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14-year-old girl, and two other members of the Wiwa community, who had barely come of age when they were illegitimately presented as combat casualties by members of Artillery Battalion No. 2 La Popa, located in the city of Valledupar. The proceedings were carried out behind closed doors, as requested by the authorities of the Wiwa community and the relatives of those who were illegitimately presented as combat casualties. Following a harmonization exercise, as is customary for the Wiwa people, the victims and the Human Rights Commissioner for Indigenous Peoples intervened, referring to what was said by the alleged perpetrators. They recalled the pain caused to them and their community by the deaths of the three young victims and stressed the need for non-repetition of these crimes.

On January 21, 2020, in Atánquez, Valledupar, a hearing was held to submit observations regarding alleged crimes related to the executions of individuals belonging to the Kankuamo community. Alleged crimes attributed to members of the Artillery Battalion La Popa between 2002 and 2005 were analyzed. It is worth mentioning that this form of victim participation was held in a municipality where many of these serious crimes occurred.

The proceedings were a continuation of the intercultural and interjurisdictional dialogue with the indigenous authorities of the Kankuamo and Wiwa communities which began in 2018. The first courses of action were established then to promote and facilitate the participation of these communities. This was followed by a second interjurisdictional dialogue with victims and indigenous authorities of the Kankuamo community in 2019. Subsequently, the Chamber carried out discussions to reach a consensus with the Kankuamo authorities and their legal representatives, to establish a methodology for the analysis of voluntary statements, as well as for the submission of observations. Psycho-legal counseling was provided by the SJP for families during a review of the content of the voluntary statements presented. Psychosocial counseling helped ensure that victims' observations on the statements were presented in a way that mitigates the harm that may be caused from hearing detailed descriptions of the date, means, and place of the alleged crimes.

During the day prior to the proceedings, different units of the SJP worked separately with each family. They tried to encourage the families to develop their own reflections and reactions to what, so far, those involved in the alleged crimes against them have contributed to the truth. This facilitated the formulation of observations, since the families had first-hand experience with the alleged crimes. In this sense, having their voices heard during the judicial process allows for contrasting comparisons of contributions to truth and acknowledgment. The victims' observations

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were formed based on answers to a number of questions, which included four issues: i) what the victims already knew about the alleged crimes, ii) what was new and could be considered by victims to be contributions to the truth, iii) the aspects with which they disagreed, either because they occurred differently from their perspective or because they are contrary to the truth, and iv) what still needs to be acknowledged; that is, remaining gaps for the victims and for the Kankuamo people which require greater detail and elaboration.

The proceedings began with a harmonization exercise in accordance with the customs and traditions of the Kankuamo community, which was conducted by the Kankuamo authorities (the Governing Council) and this author. Relatives of the victims, the Governing Council of the Kankuamo People, the Coordinator of the General Council of Elders, and the Coordinator of the Commission for Women, Family and Generation of the Kankuamo People intervened during the proceedings. These interventions aimed to reveal the number of ways in which the alleged crimes have impacted the Kankuamo community and the Kankuamo women. The proceedings continued with an intervention from the Colombian Psychosocial Collective (COPSICO), to present the findings of a psychosocial assessment of the victims that had been previously presented as part of a report to the Chamber. Likewise, the victims' legal representatives were heard, as well as the Office of the Inspector General of Colombia.

During the final part of the hearing, as justice rapporteur, this author presented some important precedents, such as the provisional measures maintained for several years by the Inter-American Court of Human Rights in relation to alleged crimes of extreme gravity and urgency associated with the victimization suffered by the Kankuamo community. In addition, it was stressed that the SJP was created as a result of the Kankuamo people's demand for justice for the grave crimes committed, as well as the many struggles experienced by various victims throughout the country. The SJP is therefore committed to placing victims at the center of its cases.

Several victims shared stories of the pain, profound harm and trauma that the executions had inflicted upon their families (many of which were left broken or had to flee the territory) and on the Kankuamo people. The presence of the victims and traditional authorities in the proceedings and the vehemence with which they demanded that the truth be known about those most responsible for the events, serve as an important reference point to contrast with what was said by individuals during voluntary statements. Additionally, the victims stressed the importance of ensuring non-recurrence of the crimes. The victims' observations reveal that they

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were the ones who had to endure extremely painful conflict-related experiences.

It was also stressed during the hearings that one of the purposes of restorative justice is to shed light on events that left a deep mark on communities, taking into consideration accusations and suspicions of conflict-related illegal activities perpetrated against community members. One of the most important aspects of full and comprehensive truth is the recognition of victims and their pain, which implies acknowledging the effects on the Kankuamo people as collective rights holders. Therefore, the hearing was an opportunity to employ the voice of victims as a constituent element of the truth and thereby dismantle the impotence and rage caused by previous silencing. In addition, the Chamber made note of the allegations regarding the recurrent harms inflicted upon the cultural integrity of the Kankuamo people, and the denial of this cultural identity as part of the vulnerability and stigmatization to which they were subjected. During subsequent proceedings, dialogic activities conducive to healing, the vindication of victims' dignity, and the promotion of restorative spaces must be continued so that those who have a genuine willingness to contribute to a comprehensive and complete truth can engage in restorative actions and potential restorative sanctions.

4. The restorative justice approach in territorial cases

Territorial cases do not focus on a single criminal conduct or actor, but rather investigate serious crimes committed in a certain territory by both FARC, members of security forces and third parties (i.e., persons who were not part of armed groups but who contributed "directly or indirectly" to conflict-related crimes). In the territories the SJP prioritized as macro-cases, a high percentage of the population belongs to ethnic minority groups.

The restorative justice approach involves, amongst other aspects, the creation of spaces for dialogue that allow for acknowledgment and restoration throughout the judicial process. For example, several judicial proceedings have been carried out incorporating the principle of legal pluralism. This has led to the implementation of features such as the adoption of an ethnic and cultural approach to notification processes within these communities. This approach includes opportunities for SJP judges and indigenous authorities to meet and to announce decisions, in the context of horizontal dialogue and interjurisdictional coordination with the special indigenous jurisdiction. These dialogues are usually held in the presence of the community concerned.

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In Cases 02 and 05 the Chamber of Acknowledgment established that two territories of the indigenous Awa and Nasa communities, Katsa Su and Cxhab Wala Kile, could be recognized as victims of the armed conflict. In this regard, the Chamber noted that:

> "The acknowledgment that a territory can be a victim is essential for understanding the process of victim identification […] the internal armed conflict in Colombia affected the territory in its geographical, cultural, cosmogonic, social, organizational, environmental, and productive dimensions, amongst others, therefore […] a unique element in the process of identifying indigenous victims is recognizing the territory as a victim" (JEP, 2019e).

Both territories were therefore considered to be a living organism and "inseparable from the people who inhabit it". The restorative scope of these decisions, the decisive role of the territorial approach and the cosmovision of ethnic peoples will be further examined in subsequent procedural stages. This particular worldview will be key to accurately identifying the specific harms suffered by Colombia's ethnic communities in the context of the war.

5. *The first three indictments in 2021 and their restorative reconstruction of the harm*

In 2021, the SJP issued its first three indictments in macro-case 01 and macro-case 03. Macro-case 01 on *Hostage-taking and other Severe Deprivations of Liberty by the FARC-EP* has promoted the implementation of restorative justice in two ways in particular: i) the acknowledgment of victims as "experts" based on the analysis of the harm inflicted, and ii) the acknowledgment of the harm caused by those persons appearing before the SJP during the voluntary statements (Lemaitre/ Rondón 2020).

Regarding the victim-centered approach and victim participation, Case 01 has focused on the need to recognize the harm caused based on the voices, expectations, and experiences of the victims involved. In this sense, extensive work has been undertaken regarding the "characterization of the harm" through the creation of spaces for victims where they have the opportunity to construct a narrative of their experience.

On the other hand, Case 01 adopts a specific methodological strategy regarding voluntary statements of those appearing before the SJP. This aims to ensure that the accounts given do not only constitute verifiable information about the alleged crimes, but also that the acknowledgment

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of the crimes reflects the full scope of the harm inflicted upon victims. Accordingly, the implementation of this methodology aims to produce information that has not been revealed before, neither in ordinary justice processes nor in other non-judicial scenarios. This information relates to the methods or practices used in the context of kidnapping, the explicit acceptance of the victims' accounts, as well as a description of the alleged perpetrators' reactions to these accounts.

On January 26, 2021, the Chamber of Acknowledgement issued order No. 19 of 2021 (JEP, 2021a). In said decision, the Chamber determined the facts and conducts that might be attributed to members of the FARC-EP Secretariat in the context of Case 01. The Chamber decided that there is sufficient evidence to determine that the FARC-EP carried out large-scale deprivations of liberty, and identified the following practices and patterns: i) deprivation of liberty of civilians with a view to financing their activities, by means of demanding monetary payment for their release, ii) deprivation of liberty of civilians and members of the security forces in order to exchange them for imprisoned guerrilla members, iii) deprivation of liberty of civilians as a means to achieve social and territorial control, and iv) conducts carried out during the deprivations of liberty which violated human dignity and caused serious harm to victims and their family members. This order played a special role in naming the atrocity. While the ordinary justice system focused on the criminal prosecution of kidnapping, the SJP as a TJ-mechanism gave visibility to the victims' voices regarding their suffering and the ways in which mistreatment during captivity destroyed their dignity. All the guerrilla members accused accepted the indictment and expressed their acknowledgment of responsibility.

Moreover, in 2021, the Chamber of Acknowledgement emitted two decisions within the framework of Case 03, in which members of the armed forces were charged with war crimes and crimes against humanity. In these decisions, one of the central issues was the harm caused to the victims based on the different findings obtained by comparing and contrasting evidentiary material. In the sub-case of Norte de Santander, the Chamber determined that parents, companions, and family members in general suffered from serious harm as a result of these crimes. Moral, emotional and material harm was caused, such as intense pain due to the loss of relatives, a decrease in family assets and a negative impact on life plans, amongst others. In the case of the Costa Caribe sub-case it was determined that, of the 127 cases, 12 were members of two ethnic groups: the Wiwa and the Kankuamo communities. Of these, 3 were young Wiwa, including a 13-year-old girl who was pregnant, and nine Kankuamo men (JEP, 2021c).

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In its indictment No. 128 of 2021, the Chamber identified that the Wiwa and Kankuamo indigenous peoples suffered serious, differential and disproportionate harm with a multidimensional nature (JEP, 2021c). This impacted their way of life and way of seeing the world, as well as the inseparable and reciprocal relationship that they have with their territory. Likewise, it was determined that the territory should be recognized as a victim in the sense attributed to it by the indigenous communities; that is, as an interlocutor and a subject of rights entitled to consultation, welfare and reparation measures.

The recognition of the territory as a victim allowed to identify each territory as a unique subject with distinctive features and cultural meaning, as well as the acknowledgement of its intrinsic relationship with the people who inhabit it. This is a big step forward in terms of TJ, as it determines that the territory is a subject susceptible of harm, and therefore requires reparation. It also illustrates post-conflict effects that would otherwise be ignored, such as the deep consequences of the conflict beyond individual harm, as well as those of new economies that infiltrate ancestral territories and disrupt existing economies and collective forms of association (Huneeus/ Rueda 2021). This includes the harm inflicted on the spiritual life of a community when its territory is compromised.

All this should be taken into account when determining the ways in which reparations for the harms caused should be approached, in order to effectively reestablish the relationships between the indigenous community and their territory. The environmental damage caused by human actions should also be considered, as well as the different measures required to repair the territory identified as a victim of the armed conflict.

One of the greatest achievements of the JEP is related to the acknowledgment of responsibility of a General for these events. 22 army officials, that is, the majority of those accused in the indictments, acknowledged their responsibility. General Paulino Coronado expressed these remarks:

> "I present my feelings of forgiveness for the great pain caused by the execrable acts committed […], which led to the deaths of innocent people who were marked as combatants, leaving deep desolation among their loved ones. To them I offer my absolute willingness to contribute to the clarification of the truth, as a means of redress", "My acknowledgement is also a call to leaders and all those who have held positions of command and power in our country to reflect on what they failed to do or allowed to happen by endorsing, probably in good faith and overconfidence, those disastrous actions that are now fully known and accepted by the perpetrators" (JEP, 2021d).

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Another retired major expressed:

> "I take responsibility for having contributed to the armed conflict instead of peace, as my duty as a public servant and a citizen demanded of me. I ask forgiveness to each citizen who was a victim of my actions, whom I recognise as dignified persons and subjects whose rights were violated, and I commit myself to redress them by providing the complete truth known to me about these murders" (JEP, 2021d).

Taking into account these acknowledgments of responsibility, a public hearing is being organized so that the acknowledgment is framed in public restorative encounters with the victims. By the beginning of 2022, the preparatory meetings and the private meetings that precede this public moment have begun.

6. *The "Guidelines on Restorative Sanctions and Reparative Works and Actions" of the Section for the Acknowledgment*

On April 14, 2020, the Section for the Acknowledgment of Truth and Responsibility of the Tribunal for Peace[4] established guiding criteria for the implementation of restorative sanctions and 'restorative and reparative activities and actions' (TOARS).[5] Restorative sanctions were one of the cornerstones of the Final Agreement, based on restorative justice theories, and aimed at imposing sanctions on those who acknowledge their responsibility and contribute to comprehensive truth from the outset. These sanctions are not limited to punishment, but rather contribute to the reconstruction of social ties and the reparation of victims. Thus, restorative sanctions are made up of two components: one restorative, the TOARS, and the other retributive, which consists of restricting the rights and freedoms of those sanctioned. Those who bear the greatest responsibility must serve a sentence ranging from 2 to 8 years depending on their participation in the respective crimes. Considering that these sentences will not be served in prisons, a special monitoring and verification mechanism will be created. The mechanism involves the United Nations Verification Mission and the Colombian government, both of which will monitor compliance with the sanctions. Finally, the Section for the Acknowledgment of Truth and Responsibility of the SJP will verify their judicial enforcement.

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4 Spanish name: *Sección de Reconocimiento de Verdad y de Responsabilidad.*

5 In Spanish, '*Trabajos, Obras y Actividades con contenido Reparador-Restaurador*'.

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As for the TOARS, these are activities articulated within existing public policies created for this purpose. To this end, the SJP has been working with the Mayor's Office of Bogotá and the Governor's Office of Magdalena to design the first public policies. The Statutory Law of the SJP provides some examples but does not go into detail on the scope of possible activities that can be carried out. For example, it mentions the possibility of building tertiary roads, demining, eradicating illicit crops, and reconstructing infrastructure affected by the armed conflict. Persons who appear before the SJP and who choose to complete TOARS before a sanction is imposed may do so. This could then have an impact on reducing their eventual sanction. Effective victim participation must be ensured and the impact on victims as a result of the conflict must be addressed. Furthermore, TOARS should not have any negative effects on victims or communities and must contribute to the restoration of social cohesion and a social transformation that leads to the termination of conflict. TOARS must also seek to reintegrate the perpetrator into society. It is expected that by the second half of 2022, the Tribunal for Peace will impose the first restorative sanctions on individuals. The effective implementation of these sanctions will be crucial to the legitimacy of the SJP.

7. *Final considerations*

Throughout the multiple scenarios described in this paper, the SJP was faced with the fact that many of the victims had not previously had a chance to be heard in open court. These victims expressed their appreciation of this opportunity. The judges, whilst acknowledging the pain caused by remembering the alleged crimes, stressed on several occasions the importance of victims' contribution to creating a narrative of past atrocities.

Given the sheer number of crimes and victims, there is a great risk of creating expectations that the SJP cannot meet. As mentioned previously, although the SJP has accomplished important advances in building restorative justice processes with victims, communities and perpetrators, important challenges remain. Despite efforts, the Chamber of Acknowledgement needs to continue the search for strategies that allow victims to trust the judicial system as well as to fulfill the Colombian State's obligation regarding truth, justice, reparation, and non-recurrence of the committed crimes. At the same time, revictimization must be avoided and due process guarantees respected. Ultimately, the Final Agreement mandates the Chamber to demand detailed and exhaustive truth-telling, recognition

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of responsibility, compliance with victim reparation and non-repetition of the violence.

Likewise, unveiling the various patterns of socio-political violence underlying the macro-cases represents a great challenge. More specifically, progress is needed in terms of determining more precisely the harms that have occurred to individuals, families and communities which is difficult in a scenario that aims for macro-criminal investigations rather than a case-by-case approach. In this framework, victim participation raises many challenges which are being addressed by the Chamber of Acknowledgement as the process unfolds. It is imperative to continue promoting paths towards a comprehensive and complete truth, which is a prerequisite for the adequate recognition of victims, their pain, and the harms they have suffered. The voice of victims serves as a fundamental element for the construction of truth and for vindicating their struggle against impunity and for justice; a struggle on which, in fact, the Peace Agreement is predicated upon.

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The Collectivisation of Victim Participation: The Case of Colombia's Special Jurisdiction for Peace

Juliette Vargas Trujillo

Abstract

The Special Jurisdiction for Peace faces multiple challenges in ensuring meaningful participation for victims. Amongst the most significant is the implementation of suitable mechanisms of collective participation. This chapter considers possible lessons that may be drawn from selected domestic and international experiences. Colombia's "Justice and Peace" processes, the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia and the Kosovo Specialist Chambers are examined in order to identify measures that might be implemented. The chapter warns that channelling collective victim participation through legal representatives runs the risk of rendering participation meaningless, when certain risks are not eliminated or at least mitigated. These include victim homogenisation, lack of communication between victims and representatives, and failure to grant a minimum level of agency to victims in selecting their representatives and/or group membership.

I. Introduction

The Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) is the judicial mechanism created by Colombia's Final Peace Agreement (henceforth Peace Agreement), signed in 2016 between the Colombian government and former guerrilla group FARC-EP (Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo). The Agreement contemplates the creation of a set of transitional justice mechanisms, of which the JEP is one. The JEP's primary responsibility is to hold both former FARC-EP combatants and members of State security forces accountable for crimes committed during the Colombian armed conflict. The JEP is not tied to a punitive approach: its mandate allows it to adopt a restorative justice perspective wherever possible. Moreover, the JEP aims to satisfy victims' rights, *inter alia*, by granting them a central role in the proceedings.

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These aspirations surely mean a milestone for victims' participation. However, the JEP's temporal mandate covers over 60 years of conflict, involving a large number of atrocity crimes with potentially millions of victims.[1] Extensive victim participation therefore poses the dilemma of enabling meaningful participation within the limits of resource availability and tribunal capacity (Van den Wyngaert 2011). Procedural rules and the defendants' due process rights impose further restrictions (Ambos 2016: 170, 178). One attempted answer has been to collectivise victim participation, aiming for a streamlined procedure in which many victims can participate simultaneously.[2] Collectivisation, however, is not a magic bullet and it involves risks and tensions. Collective participation can easily become merely symbolic, contrasting unfavourably with the promise of meaningful participation.

The JEP has yet to define or refine the collective participation mechanisms it will provide at each procedural stage. Participation moreover poses a particularly daunting challenge, since the JEP's legitimacy has largely been conditioned on satisfaction of victims' rights, for which participation is explicitly defined as a *conditio sine qua non* (Acuerdo Final de Paz, Chapter 5 – Declaration of Principles). Recognising this challenge, the JEP's first Interpretative Sentence, in 2019, ordered the Executive Secretariat (Secretaría Ejecutiva) to "design and operate a system of coordination leading to a coordinated act of collective participation by victims".[3] The verdict also ordered the development of a manual to provide clear guidelines for victim participation at each stage, and for each Chamber and Section of the JEP. Meanwhile, the Executive Secretariat had already put in practice a collective legal representation system, through the 'Autonomous System of [Legal] Advice and Defence', (Sistema Autónomo de Asesoría y Defensa, SAAD).

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1 Colombia's Official Victims' Registry (Registro Único de Víctimas, RUV) reported over 9 million registered victims as of 19 October 2020. Of this extensive victim universe, however, only those who are victims of crimes perpetrated by the FARC-EP or by State forces can potentially participate in the JEP.

2 Strategies for addressing, in transitional justice settings, the commission of those acts that constitute grave and massive crimes under (international) criminal law, include prioritisation and case selection. This means that not all crimes committed can or will be addressed through criminal prosecution. Nonetheless, prioritisation and selection have proved to be insufficient to allow extensive victim participation while avoiding a corresponding breakdown of justice mechanisms.

3 Sentence by the JEP Tribunal for Peace Appeals Section, SENIT 1, 3 April 2019: 146.

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The manual, published in December 2020 (JEP 2020), has almost 400 pages. It attempts to unify the JEP's legal framework, providing essential guidelines for victim participation at different procedural stages. Nevertheless, it is not binding, and the implementation of some of its recommendations needs clarification (JEP Tribunal for Peace Appeals Section, SENIT 1, 3 April 2019). Thus, for example, the Participation Manual reinforced the idea that victims can directly participate in hearings, especially in restorative scenarios (JEP 2020: 34, 40, 146, 147, 157, 166). Although the first hearings that involve direct encounters between a large number of victims and defendants will take place in 2022 (JEP, Auto CDG 208 2021), it is not clear how these hearings can be carried out in practice, having in mind the difficulties to allow opportunities of direct participation for each participant.

Significant challenges therefore lie ahead, and consideration of other transitional or international criminal justice experiences may shed light on how to deal with victim participation on a large scale. This article accordingly analyses some difficulties and lessons learned from such experiences, to identify challenges that frequently arise in implementing collective participation. Thus, this article considers at the international level the International Criminal Court (ICC), the Extraordinary Chambers In The Courts Of Cambodia (ECCC), and the Kosovo Specialist Chambers (KSC), for they all represent milestones for victim participation in international criminal justice (generally thereto Ambos 2021: 62ff.). At the domestic level, Colombia's "Justice and Peace" processes, the JEP's key domestic transitional justice precedent, is discussed.

The article shows that channelling collective participation through legal representation can become meaningless in the face of certain pitfalls, namely victim homogenisation, lack of communication between victims and representatives, and sub-optimal levels of victim agency and impact. Methodologically, the analysis reviews laws, legal decisions, and secondary sources regarding the ICC, the ECCC, the KSC, and the "Justice and Peace" processes. NGO reports are consulted to identify issues classified as critical by organisations representing victims' interests. Because collective participation is an emerging topic at the JEP, primary data from the JEP itself was limited to jurisprudence, in addition to the author's observations of public hearings.

The first part of this article offers a conceptual characterisation of collective participation in (international) criminal proceedings. This is followed by a brief overview of the ICC, ECCC, KSC and the proceedings under the "Justice and Peace" Law (Law 975 of 2005), focusing on achievements, shortcomings, challenges and lessons learned about collective victim par-

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ticipation. The second part explains the legal framework for victim participation at the JEP, tackling the question of the JEP's exceptional nature in order to demonstrate the extent of the challenges posed by collective victim participation. Finally, the article identifies crucial issues that should be considered for implementing a collective approach to victim participation in the JEP such as avoiding victim homogenisation, lack of communication between victims and representatives, and to grant a minimum level of agency to victims in selecting their representatives and/or group membership.

II. Collective victim participation in criminal proceedings

Victim participation in criminal proceedings has different modalities, especially when transitional or international criminal justice scenarios are involved. According to the four-part typology of victim participation introduced by Edwards (2004: 974–977)[4], 'dispositive participation', where victims have actual control of particular decisions, is rather exceptional in criminal proceedings. He discusses three forms of what he calls 'non-dispositive' participation, when victim input might influence decisions: consultation, information provision, and expression (where victims communicate information or feelings). Taylor (2014) considers "notification" as a form of indirect participation, where notification means keeping victims well informed of developments and critical issues that affect them throughout the process. Edwards however considers that merely "*receiving information*" is not a form of participation, since there is no interaction between the victim and the decision-maker (Edwards 2004: 976, emphasis in original).

A typology offered by Sprenkels (2017)[5] distinguishes direct participation (without mediation or representation), from indirect participation (taking place through a representative). In criminal proceedings, most participation requires the services of a legal representative, because procedures

4 Edwards takes as an example of the dispositive participation of victims the oprions provided by sharia law. In this context, relatives of victims of homicide and other offences can choose between expressing forgiveness towards the offender, claiming compensation, or imposing the death penalty (674–675).

5 The typology of Sprenkels is based on a comparative perspective of different Transitional Justice mechanisms, including judicial and non-judicial mechanisms, but also taking into account the different phases of TJ processes (design, implementation and follow-up).

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often demand technical expertise. Guaranteeing victims' rights to access to justice means providing high-quality legal counsel and representation when required (Donat-Cattin, Art. 68 2022: 2006). Victim participation tends therefore to be indirect (through representatives). Where collective approaches are taken or recommended, this usually means participation through a common legal representative.

Collective approaches to participation typically arise when tribunals address macrocriminality,[6] a common scenario for transitional and international criminal tribunals dealing with widespread or systematic crimes that affect collective actors, communities, or entire populations. Collective participation in theory allows victims to be active (though indirect) stakeholders in proceedings, rather than solely witnesses. Experiences of collective participation nonetheless demonstrate both opportunity and risk. On the one hand, the collective approach makes victim participation more financially and humanly viable.[7] It moreover seems to offer the only avenue for balancing mass participation, with the need for timely justice. On the other hand, collectivisation could lead to a homogenisation of victims' opinions, concerns, and needs, leading to questions about how meaningful it can be (United Nations 2016). While there is no single, clear definition of meaningful participation, it certainly implies recognising the victims and their specific interests. It espouses the idea that victims and their families must be effectively involved, provided with the information they need (United Nations 2012), and have some level of agency and influence (Sehmi 2018).

1. *Collective participation at the International Courts*

The fact that the ICC, the ECCC and the KSC allow for victim participation has been regarded as an essential step towards acknowledging victims,

6 The term "macrocriminality" was originally used by Jäger (1990), who defined it as "*die gravierenden und gefährlichen Großformen kollektiver Gewalt*" ('serious and dangerous forms of collective violence': translation by the author). Macrocriminality denotes a collective action by the State, or by an organised societal structure or power apparatus, resulting in the systematic commission of serious crimes.

7 Thus, for example, former ICC judge Elizabeth Odio Benito acknowledged victim participation to be "an expensive system", exhorting all involved to "make an effort" to organise victims into groups (VRWG Bulletin, 2014–2015). A 2014 report by international human rights NGO the International Federation for Human Rights, FIDH, suggested that collective participation can mean costs of legal representation remain stable irrespective of victim numbers (FIDH, 2014).

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particularly as previous international criminal tribunals, such as the 'Ad Hocs' (The International Criminal Tribunal for the former Yugoslavia, ICTY, and the International Criminal Tribunal for Rwanda, ICTR), did not allow victims to participate except as witnesses. Nevertheless, the ICC, ECCC and the KSC have encountered difficulties defining the extent of their participatory regimes. In the case of the ICC and the ECCC, a streamlining of collective participation over time has led to a reconsideration of how meaningful collective participation can be. In the case of the KSC it is still too early to make an assessment on collective participation, however, its experience could shed some light on the risks of a restricted approach of victim agency, especially if in the future the number of victims increases.

According to Art. 68(3) of the Rome Statute, where the personal interests of victims are affected, their views and concerns may be presented before the ICC provided that the judges consider this to be appropriate, not prejudicial to the rights of the accused, and consistent with a fair and impartial trial. Victims are regarded as participants, with the possibility of intervening at any or all stages of the proceedings, (Donat-Cattin, Art. 68 2022: 2018). They must, however, provide evidence of the specific affected personal interest, while judges retain discretion to decide on a case-by-case basis as to the feasibility and timing of any participation. Therefore, a number of considerations and circumstances condition the victims' intervention. The ECCC's participatory scheme is, by comparison with the Ad hoc Tribunals and even the ICC, broader, because victims can participate as "Civil Parties"(CPs) (ECCC 2015). This grants them the same intervention rights as the prosecution and the defence, from the outset of the proceedings. Once admitted as parties, victims can also exercise these rights throughout the entire process. Nonetheless, the ECCC's Internal Rules have been amended at least nine times, to redefine the scope of victim participation. Moreover, following a 2009 Trial Chamber decision, CPs have a reduced role, when compared to the prosecution, in making submissions about sentencing and in introducing certain lines of questioning. They are also barred from directly questioning the accused (McGonigle 2011).

In addition to the difficulties in defining the scope of victims' procedural rights, the participation of a large number of victims has created new issues in both scenarios, while diminishing the possibilities of individual interventions. Thus, for example, 129 victims were authorised to participate in the ICC Lubanga case.[8] Applications were made individually, and

8 The first conviction at the ICC was against Thomas Lubanga, who was found guilty on 14 March 2012 of the war crimes of enlisting and conscripting children,

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victims could choose their legal representatives (Victims Legal Representatives, VLR). Successful applicants were then organised into two groups, each represented by a legal team composed of external lawyers (ICC 2012). Subsequent cases saw considerable increases in the total number of victims participating,[9] turning the selection of common legal representatives into a vital issue. Under Rule 90 of the ICC's Rules of Procedure and Evidence (ICC 2002), victims are entitled to choose a VLR, but where numbers are high the Court can ask victims to nominate one or more common legal representatives. If they cannot choose by a set deadline, the ICC may decide. Although this outcome was supposed to be exceptional, decision-making has fallen mostly to the ICC Registry, depriving victims of a fair and informed opportunity to choose their VLR (Zhang 2016).

The first case before the ECCC, the Duch Case (Case 001),[10] began, like the early ICC cases, with a manageable number of CPs: 93. The victims were organised into four groups and each group was assigned a team of two layers (one national, one international). Although the teams had similar overarching goals, collaboration between these teams suffered from disagreements over legal strategy and other matters (Jasini 2016). ECCC Case 002 had more than 3560 victims participating as CPs. This significant increase in victim numbers, plus the troubled history of case 001, led to a shift toward predominantly collective mechanisms of participation. The ECCC amended its Internal Rules of Procedure and Evidence (RPE) so that while CPs could select their own legal representatives during the investigative phase, they were to act as one consolidated group once the trial phase began. The Case 002 group would have two Civil Party Lead Co-Lawyers (CPLCL), both selected and paid by the ECCC (ECCC 2015).

Notably, both the ICC and the ECCC have limited the victims' scope of action, at least in the selection of legal representation. Logistical difficul-

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and using them to participate actively in hostilities in the Democratic Republic of the Congo.

9 In the Katanga case, 366 victims participated, represented by their respective legal counsels. In Kenyatta, 725 victims were represented by one legal adviser. In the Ongwen case, 4065 victims participated, divided into two groups. One group consisted of 2564 participating victims, represented by two lawyers. The other group consisted of 1501 victims, represented by one lawyer from the Office of Public Counsel for Victims. In the Bemba case, 5229 victims participated through five lawyers.

10 Kaing Guek Eav, alias 'Duch', is the former director of the Khmer Rouge's S-21 Security Center in Phnom Penh. On 26 July 2010 he became the first person to be convicted before the ECCC, found guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions.

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ties and financial limitations may seem persuasive reasons for omitting consultation or choice, but this streamlining can curtail meaningful and effective victim participation mainly for two reasons. First, because it seems to suggest that victims are incapable of making their own decisions (REDRESS 2015). Second, if opportunities for meaningful participation are ultimately reduced to the actions of VLR or CPLCL, it is arguably more important for victims to be able to exercise a minimum of agency in choosing who will fill these roles – since the client-lawyer relationship is premised upon trust (FIDH/KHRC 2020; Stegmiller 2016).

Another controversy over collective participation arises from a perceived lack of communication and consultation between victims and their VLRs or CPLCLs. The ICC largely depends on local intermediaries – often, community-based NGOs – to coordinate communication with victims, since most victims live thousands of kilometres away from the ICC' seat in The Hague; also, financial constraints may limit the possibilities for local visits (FIDH/KHRC 2020). Despite their essential role, these local intermediaries are unpaid, and are not formally part of victims' legal teams. Direct communication between victims and their VLR is meanwhile limited, and some victims even report not knowing who their lawyer is, or never having communicated with him or her (Smith Cody et al. 2015). The absence of regular communication has undermined trust in the ICC, lowering its credibility among victims (Smith Cody et al. 2015). In the case of the ECCC, even though the majority of the victims live in the same country where the Court has its offices, the CPCL have no direct relationship or communication with victims at all, interacting instead with victims' private legal representatives. This absence of direct communication means that a typical client-lawyer relationship is never established. This should not be taken as a criticism of the capabilities of particular VLRs or CPCLs: there are real structural and practical obstacles to consulting and communicating with hundreds or thousands of victims, in a distant location, under financial and human resource pressures. For example, a five-person legal team in the ICC's Bemba Gombo case was responsible for representing 5229 victims. It is hardly realistic that any team, however capable, could adequately represent such a large number of victims (Sehmi 2018).

Likewise, grouping criteria can also be problematic when many victims are to be represented by the same legal team. Taking the same case (Bemba Gombo) as an example, while the obvious way for the ICC to assign victims to groups was by geographical location, this alternative may have operated to disadvantage victims of sexual violence, who can suffer stigmatisation in their own communities and families. The NGO 'Women's Initiatives for Gender Justice' criticised this decision, arguing that victims of

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sexual violence required a form of participation distinct from that offered to other victims (Inder 2010). Although ICC Rule 90 (ICC 2002) states that the Registry should avoid conflicts of interest when selecting VLR and ensure that the interests of the various victims are represented, it is still unclear to what extent what victims can request assignment of a different group or Common Legal Representative (CLR) in cases of conflict or significant disagreement. At the ECCC, the configuration of legal teams, like the decision to compulsorily assign victims to a consolidated group, was a product of the ECCC's relationship with intermediary organisations and NGOs, rather than responding to victims' common interests (Jarvis 2016).

Finally, the example of the KSC represents an interesting context where from the very legal framework the scope of victims' agency seems precarious.[11] At the KSC, the participation of victims is allowed once the Trial Panel confirms an indictment according to Rule 113 of the KSC RPE (KSC 2020). The participation is focused on notification (to be informed), acknowledgement (recognition of victimhood and sufferings) and the attainment of reparations. Hence, victims enjoy some procedural rights such as to submit observations and evidence supporting reparation claims and to request the Panel *to order the submission of relevant evidence or call witnesses to testify* if necessary for the determination of truth (KSC-BC-2020–05 2021).

The legal framework of the KSC specifies that victims can participate during trial proceedings only as one group, but exceptions can be made, and the Trial Panel can divide victims into more than one group, if necessary, for example for victims of sexual violence (KSC 2015). The KSC Law also specifies that victim groups receive a Victims' Counsel provided by the Registry's Victims Participation Office and their participation could be exercised only through this Counsel. This means that, except in the case of witnesses, the possibility of direct participation of victims before the KSC

11 The consideration of this precariousness of victims' agency is based on two main reasons under Art. 22 of the Law on Specialist Chambers and Specialist Prosecutor's Office: i) victims have no say over the grouping criteria (rather the general rule is that they participate as one single group), ii) victims cannot choose or suggest who their legal representative should be (rather the Registry takes the decision and provide a Victim's counsel). Although Rule 26 (2) of the RPE indicates that victims should be consulted before the Registrar assign Counsel for common representation, it does not specify whether the views and interests of victims are binding or to what extent the registry have to consider them in taking the decision.

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is excluded, that they also do not have the possibility to choose their legal representative or at least be consulted about it, and that the decision on the grouping criteria rests exclusively with the Trial Panel.

The experience of victim participation at the KSC is very recent since only until 2021 the first decisions granting victim participation have been issued. So far, in the Salih Mustafa case, the Chambers have granted participation to nine victims, as they did in the Hashim Thaçi et al case. Despite the low number of participating victims to date, if compared with the ICC or the ECCC,[12] the possibility of collective participation has been already discussed at the KSC. In the first Appeals Decision in Hashim et al. (2021) the Appeals Panel rejected the broader collective criterion of participation of the JEP arguing that "[t]his model cannot simply be transferred to the Specialist Chambers that are governed by different Law and Rules. The broad recognition of participatory rights of victims, including collective entities, by the JEP, is a consequence of this unique constitutional framework and peculiar to this transitional justice process. The Panel stresses in this context that the possibility of ensuring minimum standards for real and meaningful victim participation is related to the implementation of sound participation mechanisms in accordance with the legal framework of the respective tribunal. Otherwise, the extensive participation of victims can easily become a mere symbolic act without real impact on the effective realisation of victims' rights to truth and justice" (para. 26). As will be explained below, the JEP allows entire groups of people to apply and participate in the proceedings as collective subjects. However, the KSC legal framework takes a more restrictive approach and for this reason the Panel could not accept the application. So far, no controversy has emerged over the selection of legal representative or grouping criteria, however, it is uncertain whether the KSC will have to deal with large number of victims in the future and whether therefore the issue of collective participation will be of relevance at all. In any case, it is questionable whether genuine participation is possible if victims do not have a minimum scope of agency taking into account the same arguments discussed for the cases of the ICC and the ECCC.

12 It is important to have in mind that due to the limited material jurisdiction of the KSC, the potential number of victims that could eventually participate before the KSC is reduced if compare with the ICC, the ECCC or the JEP.

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2. Collective participation and Colombia's Justice and Peace processes

One of the most important precedents in Colombia for judicial accountability mechanisms operating in a transitional justice context are the proceedings under the "Justice and Peace Law". This law set up a judicial mechanism which deals with demobilised members of illegal armed groups, primarily, former combatants of the paramilitary group known as Autodefensas Unidas de Colombia (AUC). Proceedings under the "Justice and Peace Law" auspices are unlike JEP proceedings in that the former take place in the ordinary criminal justice system. Prosecutions nonetheless have distinctive features, including possible sentence reduction for serious crimes, if applicants confess, via 'voluntary depositions', to all crimes committed. The primary vehicles for victim participation in these proceedings are the provisions of ordinary domestic criminal law, complemented by the "Reform of Justice and Peace Law" (Law 1592 of 2012). According to both, victims without sufficient financial resources have the right to legal aid. Where multiple victims want to participate in voluntary depositions, they must however act as a group, designating up to two common legal representatives. One prominent criticism of this arrangement has to do with the ratio of victim totals to legal representatives. Colombia's General Ombudsman provides legal representation for most victims with insufficient financial means. In its first few years of operation, the system reveals a notable deficit in the capacity of the assigned lawyers to adequately attend to large numbers of victims (Ambos et al. 2010). According to reports by the "Comité Interinstitucional de Justicia y Paz" – an inter-ministerial state body set up to coordinate the implementation of the Justice and Peace Law – as of 2017 the relevant statistics showed that the average number of victims per legal representative was between 400 and 1000 approximately (see table 1).

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Table 1: Number of victims per legal representative in the context of the proceedings under the "Justice and Peace Law"

Years	2013–2017		
City/Region	**Number of victims**	**Number of legal representatives**	**Average number of victims per legal representative**
Bogotá	17,000	40	425
Antioquia	32,226	33	976
Atlántico	17,500	29	603

Source: Prepared by the author based on the reports of the Comité Interinstitucional de Justicia y Paz.[13]

The high number of victims choosing to participate has become a major issue for the legal aid system, to the detriment of the quality of participation. For example, some victims meet their legal representative for the first time once a "voluntary depositions" hearing begins. At other times, a system of rotation means that legal representatives' assignations are regularly changed. All this impedes fluid communication and a good working relationship between victims and their legal representatives. It also prevents legal representatives from obtaining crucial information from victims prior to hearings, which reduces their ability to adequately represent victims' interests (Ambos et al. 2010; Forer 2011). Bacca Caicedo et al. (2017) have suggested that this is one of the causes of the recent decline in the numbers of victims attending voluntary depositions. Some victims' organisations have also reported feeling instrumentalised, with their participation being used to legitimise the legal framework for paramilitary demobilisation, without full consideration of their rights (MOVICE et al 2009).

III. Victim participation before the JEP

Certain unique features of the JEP shape the mechanisms available for victim participation. The JEP's bifurcated system allows for two types of proceedings: the restorative, where perpetrators tell the truth and acknowl-

13 The majority of the reports are not of public access anymore while some of them were retrieved from: [https://www.siijtmj.gov.co/SIIJYP/Modulos/MatrizInterinstitucional/Externo/Matrices/GetFileRecurso?id=75];[https://www.siijt.gov.co/SIIJYP/Modulos/MatrizInterinstitucional/Externo/Matrices/GetFileRecurso?id=125]; [https://www.siijtmj.gov.co/SIIJYP/Modulos/MatrizInterinstitucional/Externo/Matrices/GetFileRecurso?id=140] <20 January 2022>.

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edge their responsibility; or the adversarial one, where responsibility is not admitted but must be proven in a fair trial (JEP, Procedural Law, arts. 1[a, b]). Both proceedings are to be victim-centred, but at the same time have to respect due process. Also, according to what the JEP's legal framework calls a 'dialogical principle', the construction of truth in JEP proceedings must be deliberative (JEP, Procedural Law, Art. 1 Lit. b). The manual of victim participation specifies that the dialogical principle allows for deliberative communication processes between *i) victims and their organizations and representatives; ii) victims and JEP; and iii) victims and alleged perpetrators* (JEP 2020: 34). Thus, the application of this principle opens up the possibility of direct communication between victims and judges and moreover, the possibility of direct encounters between victims and perpetrators. Although the dialogical principle is considered particularly appropriate for restorative proceedings, the same law stipulates that it is to be preferred over the adversarial logic whenever possible. At the moment, it is noticeable that some victims have been given opportunities to express themselves[14] and even to react to defendants' interventions or proposals in some hearings.[15] Nonetheless, the limits and minimum standards to apply this principle are not yet clear, especially in contrast with the due process guarantees of defendants.[16]

The 'flexibilisation' of elements proper to a punitive approach can be increased where this is considered conducive to the pursuit of truth and reparation.[17] This means that the severity and type of sanctions and other

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14 See, for example, JEP Colombia, "Audiencia del coronel (R) Gabriel Rincón Amado" [https://www.youtube.com/watch?v=yoKhg7c3YGQ&list=PLbtegW3d3L4JAstPux8ji9-h9balFGI6M&index=1] <20 January 2020>.

15 See: JEP Colombia, "Audiencia de régimen de condicionalidad, Mondoñedo I, II, II" [https://www.youtube.com/watch?v=6S-j34I6qYs&list=PLbtegW3d3L4JAstPux8ji9-h9balFGI6M&index=6]; [https://www.youtube.com/watch?v=h_tddODdjso&list=PLbtegW3d3L4JAstPux8ji9-h9balFGI6M&index=5]; [https://www.youtube.com/watch?v=VPiC9yuIdTQ&list=PLbtegW3d3L4JAstPux8ji9-h9balFGI6M&index=4] <20 January 2020>.

16 For a more comprehensive analysis of the dialogical principle see: Cote 2020.

17 This flexibilization refers to i) the possibility to serve prison in military units (for military) or equivalent for JEP applicants who have been 5 or more years serving sentence for serious crimes; ii)) the anticipated and provisional release of prison for JEP applicants whose crime is punished with 5 years or less; iii) the possibility to receive restorative sanctions instead of prison when the perpetrator acknowledges full truth and responsibility; iv) the possibility to substitute the sanction the perpetrator received in the ordinary criminal jurisdiction for the special sanctions of the JEP; v) amnesty and pardon for political crimes and connected crimes; vi) waiver of criminal prosecution for those applicants whose

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punitive measures would not depend on the seriousness of the crime but rather on the commitment of the defendant with the satisfaction of victims' rights. All defendants who decide to be tried by the JEP are required to sign a commitment to contribute to the clarification of truth, comprehensive victim reparation, and guarantees of non-recurrence (Conditionality regime of the JEP, Statutory Law art. 20). The JEP has the power to impose restorative, non-custodial penalties (e.g., community service) where perpetrators fully disclose the truth at an early stage of the proceedings. If perpetrators do not provide the whole truth, or do not do so at a sufficiently early stage, the JEP can impose penalties which may include custodial sanctions, but they will be more lenient than those for the same crimes under ordinary criminal law (JEP, Statutory Law, arts. 125–130).

The JEP is also mandated to adopt a "differential approach" (*enfoque diferencial*) in all of its activities, taking into account factors such as gender, ethnicity, regional identity, age and sexual orientation. These special considerations for victims affect the forms of participation (JEP, Statutory Law, art. 18). Thus, for example, the JEP must prioritize oral forms of communication with indigenous peoples and Afro-Colombian communities and any proceeding in their territories must be coordinated with their ethnic authorities (SIVJRNR 2019; JEP 2021).

From this brief overview it is clear that the JEP oscillates between a restorative and a retributive judicial model. While it is under a duty to respect due process guarantees, it must also give victims a central role. One might therefore expect to find more avenues of participation than those that feature in the ordinary criminal process. Victims participate before the JEP in a capacity known as "special interveners" (*intervinientes especiales*). This does not give them, *stricto sensu,* the status of full parties in line with many civil law jurisdictions but, in practice, the participatory regime at the JEP is broader. Thereby, victims at the JEP have rights, including the right to be fully informed, the right to appeal the decisions of the court's various chambers and sections, and the right to introduce or request evidence. Most importantly, the judges of the JEP must hear and take into account the victims' observations on the accounts provided by the perpetrators as contributions to the truth, as well as the victims' proposals regarding truth and reparation commitments and restorative sanctions (JEP, Procedural

crimes don't fall within selected cases or amnesty. For a detailed explanation see: Ambos/Cote 2019.

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Law, arts. 12, 13).[18] The process of notifying decisions also became an important issue for Indigenous and Afro-Colombian groups, because it entails stages and considerations designed to take into account the culture, ethnicity and language of the community (JEP 2020). Thus, victims may have a range of modes of participation – including being consulted and providing information – as well as an active role in the notification process.

Thus far, the extensive approach for victim application before the JEP has meant that the routes to the special intervener status are uncomplicated and accessible. A broad definition of victimhood is applied (Corte Constitucional, Sentence C-080 de 2018, para. 4.1.11.), while the requirements for being recognised as a special intervener in macro-cases, or in procedures around concessions of amnesty and other benefits to perpetrators, are very simple.[19] Indigenous peoples, Afro-Colombians or Rrom Communities (Romani people) can be recognised as collective subjects. Applying a similar logic, social or political groups defined by reference to a shared culture or territory; common ideals, or by having suffered the same harm, can also be treated as collective subjects in the JEP (JEP, SRVR, Auto 27, 26 February 2019; Auto SRVBIT 079, 12 November 2019; Auto SRVR, 002, 17 January 2020). Granting special intervener status to collective subjects – as distinct from individual ones – contributes to a more expeditious application process, and also fosters large scale participation. According to a JEP report dated 5 March 2021, the seven macro-cases ongoing at the time included more than 320,000 recognised victims.[20] 230 collective subjects, representing indigenous peoples and Afro-Colombian

18 For a comprehensive recent overview of victims‘ rights at the JEP see Galindo/Vargas 2020.

19 The requirements are that victims must: i) manifest their wish to participate, ii) demonstrate, using any form of evidence, their status as victims, and iii) provide a narrative of the events at issue. Indirect victims – such as the surviving spouse, or parents, of an absent or deceased person – only need to show evidence of their relationship to the direct victim. In all situations, victims who already appear on the country's official victim register, the RUV, or have been acknowledged as victims in administrative or other legal proceedings, would not be asked to provide any additional proof (JEP, SRVR, Auto, 6 February 2019; SENIT 1:128).

20 Other official JEP sources show that the collective subjects who have been recognised as having the right to participate in the different macro-cases could, amount to over 574,732 individual victims. It is however difficult to establish the exact number of victims participating through the medium of collective subjects, as there is no accurate record of the population associated with each collective subject. Information provided by the JEP's Executive Secretariat in response to a right of petition submission by Colombiacheck, 19 August 2020.

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communities, accounted for the majority of this total number of victims. Case 01, concerning kidnapping, is the macro-case case with the highest number of individually recognised victims to date: 2476. Cases 04 (Urabá region) and 05 (Region of Cauca and Valle del Cauca), however, involve the majority of the collective subjects, and therefore group even more individual victims (See table 2).

Table 2: JEP Macro-cases and recognised victims

Case	Collective subjects recognised	Approximate number of members of the collective subject	Individual-recognised victims
01: Hostage-taking and other serious deprivations of liberty committed by the FARC-EP			2800
02: Territorial situation of municipalities of Ricaurte, Tumaco and Barbacoas in the department of Nariño	11	105,109	87
03: Deaths illegitimately presented as combat casualties by State agents (Extrajudicial Killings)			1373
04: Territorial situation of the Urabá region	116	39,617	230
05: Territorial situation of north of Cauca and south of Valle del Cauca	137	178,059	92
06: Victimization of members of the political party "Unión Patriótica" (UP)	2	-	185
07: Recruitment of children in the armed conflict			335

Source: Prepared by the author based on the statistical report of the JEP, 31 December 2021.

Victims can participate in one of four ways: self-representation; their own legal representatives; legal representatives provided pro bono by victims' associations or human rights organisations, or common or group representation provided through the JEP. The latter is delivered, specifically, through the SAAD, a division of the JEP's Executive Secretariat (JEP Procedural Law, art. 2). The SAAD provides legal advice and representation to victims unable to afford it. To this end, the SAAD recruits lawyers from some human rights organisations and victims' associations, experienced in supporting victims through legal processes, and ideally versed in differential approaches. This system has proven satisfactory thus far because it

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has facilitated the building of trust between victims and their legal representatives, not least because it often allows for the continuity of advocacy and activism by victim organisations.[21] As of 30 June 2020, the SAAD had provided common (group) legal representation to 3285 individual victims and more than 200 collective subjects (Colombiacheck, Right of petition 2020).

IV. Challenges to collective victim participation mechanisms at the JEP

As in many other justice mechanisms have shown, collective participation is the only way to deal with large scale victim participation. The Colombian Constitutional Court followed that same reasoning, stating that "an essentially individual [approach to] victim participation would lead to a collapse of the [Integrated System] particularly the JEP"[22] (C-080 of 2018, para. 4.1.11). The JEP's Appeals Section has likewise expressed the view that direct individual participation by all victims "could be in tension with the constitutional principles of efficiency, effectiveness, expeditiousness, and procedural economy" (SA-TP SENIT 1 of 2019, para. 109). Consequently, the different Chambers and Sections of the JEP can request victims to organise themselves into collective groups and appoint a common legal representative. If victims do not reach an agreement, the JEP can decide for them (JEP 2020). Intra-group coordination and selection of common representation tends to happen more spontaneously where ethnic groups such as indigenous peoples or Afro-Colombians are involved: such groups generally want to participate as collective subjects.[23] However, not every macro-case has involved the participation of collective subjects to date, and it should not be assumed that it is always possible

21 Since the SAAD may appoint as victims' legal representatives, lawyers drawn from the some of the same NGOs those victims have worked with in the past.

22 The original wording refers to the 'SIVJRNR', or Sistema Integral de Verdad, Justicia, Reparación y No-Repetición (Integrated System for Truth, Justice, Reparation and Non-Repetition). This is the official term for the set of transitional justice mechanisms and institutions agreed under the terms of the 2016 Peace Accord, of which the JEP forms a part.

23 Based on fieldwork of the author with different ethnic collectives already recognised in the JEP's macro-cases, especially in case 05, it is clear that from their cosmovision, history and traditions as indigenous or Afro-Colombian peoples, they identify themselves more as a collective than as individuals. Therefore, it is important for them to participate as a collective according to their religious, social and political internal structures.

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or easy for victims to organise as a group. Nor is it clear to what extent a single common legal representative is capable of competently representing a large number of victims in practice. Even if legal teams could be set up to represent groups of victims, best practice benchmarks are vague. Victim participation has not yet been activated before all chambers and sections of the JEP, nor have all of the foreseen procedural stages and hearings actually taken place to date. Consequently, the complexities of collective participation are likely to increase and more challenges are likely to become visible in the near future.

1. *Exceptions to collective participation*

Collective participation could lead to inadequate representation of some victims' interests, due to homogenizing, obscuring or ignoring their needs or disagreements. Therefore, in some exceptional cases, victims may wish to participate in smaller groups or even individually. The JEP has recognised the need to be prepared for exceptions that allow victims to act individually, as long as requests are substantiated and the decision does not jeopardise other fundamental rights or the overall effectiveness of the system (SENIT 1 2019). While it is not yet clear to what extent such an individual approach could endanger other rights or the interests of justice per se, any imposition of a collective approach that is (perceived to be) arbitrary could be counterproductive. It could discourage victims from participating or render their right to participation empty and meaningless. Consequently, an individual participation needs to be considered and evaluated carefully, and perhaps employed mainly in order to protect the victims' privacy, allow for differential approaches, and encompass differential impacts of harm. Thus, for example, victims of sexual violence, children, and individuals who have suffered exclusion or discrimination may need this exception.

2. *The dialogical principle and collective participation*

According to the JEP's Chamber for the Recognition of Truth and Responsibility (Sala de Reconocimiento de Verdad y Responsabilidad, SRVR), the dialogical principle entails a direct dialogue between victims and defendants. It is designed to promote mutual acknowledgment and partly replace the purely adversarial logic of the ordinary criminal process (JEP,

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SRVR, Auto 080, 2019, para. 64). In line with the JEP's restorative aspirations, this facilitates direct encounters by allowing for a deliberative approach involving all main stakeholders, not exclusively mediated by lawyers and judges. Thus, some hearings have taken place with in-person participation by victims, allowing them to express their views and concerns in a direct and straightforward way. This comes close to the modality of "expression" as formulated by Edwards (2004: 274–277). For example, on 17 October 2019 the SRVR gave the floor to 13 victims in case 03, the "False Positives" case, to comment on the voluntary depositions provided by some defendants. The hearing, lasting for almost seven hours, allowed victims to express their own stories and emotions as well as making observations about the depositions.[24] Nonetheless, it is unrealistic to expect such direct encounters between all defendants and the thousands of victims who would potentially be involved if every one of them had the opportunity to speak up. There is currently no precedent for such a procedure, neither at the JEP nor in any of the other mechanisms considered here. From the perspective of the JEP's restorative approach, the question arises as to how some types of hearing that are contemplated but have not yet been carried out in practice, can or will be conducted. These include hearings for the acknowledgment of truth and responsibility and so-called "restorative hearings" (JEP, Procedural Law, arts. 27 C, 30, 44).

A preliminary answer has already been hinted at in the jurisprudence of the JEP referring to the notion of "supra-agency" (JEP, SENIT 1), according to which victims can designate a representative or subgroup from among the existing members of the group. Holding symbolic commemorative events and extrajudicial encounters, such as those implemented by the Truth Commission of the SIVJRNR,[25] while respecting cultural traditions, could partially compensate the impossibility of allowing individual interventions by each person. Any such act should include and recognise all victims of a particular group, and could be connected to victim support programs in order to fill possible gaps in the collective approach.

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24 JEP Colombia, "Audiencia Pública para escuchar a familiares de los jóvenes de Soacha ejecutados extrajudicialmente" [https://www.youtube.com/watch?v=or-eN1imsfE] <20 January 2020>.

25 See for example: Comisión de la Verdad, "Así fueron las acciones vivas de la Comisión de la Verdad en la región Centroandina" [https://www.youtube.com/watch?v=gj2nXWjMM1Y] <20 January 2020>, "Encuentro por la verdad: reconocimiento a las víctimas de ejcuciones extrajudiciales en Colombia [https://www.youtube.com/watch?v=Jf6unC9qPDM] <20 January 2020].

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Nonetheless, the real test for the full implementation of the dialogical principle will be in 2022 when the first hearings for the acknowledgement of truth and responsibility will take place regarding case 03 in the subcases of Norte de Santander and the Caribbean Coast (JEP, Autos 125 and 128, 2021). The SRVR foresees the participation of 22 defendants and all the recognised victims of the case (more than 1300), especially those related to the subcases who voluntary want to participate. It means that at least hundreds of victims would participate in such encounters. Although the JEP has not yet specified its exact methodology for the interventions during the hearings, it has announced to implement important strategies that are intended as preparatory steps of the restorative processes, namely: i) Organization of outreach activities with the main stakeholders to duly inform and explain the progress of the case and the subsequent phases of the proceedings; ii) Identification of the expectations and victims' assessment of the work of the JEP and the Truth Commission, as well as the implementation of lessons learned; iii) Realisation of private restorative encounters (victims-facilitator, defendants-facilitator, and even victim-defendants and facilitators) to define the content and modality of the hearing(s) of acknowledgement; iv) Preparation for the future restorative component of the sanctions that emanate from the acknowledgement of truth and responsibility (JEP, Auto CDG 208, 2021).

These strategies aim to ease the tensions evolving around the collective participation of victims in the hearings before the JEP. Yet, it remains uncertain whether it will be possible to identify and manage all the expectations on the part of the victims. Moreover, the restorative character of these preparatory steps and the hearings themselves will depend substantially on whether victims will be allowed to express their views and needs and to what extent these are taken into account by the JEP.

V. Conclusions

All criminal justice mechanisms, whether international or transitional, have limitations: they alone cannot satisfy victims' expectations regarding their participation, but must be complemented by other non-judicial mechanisms. Criminal proceedings are not the most appropriate way to give victims a decision-making role, nor can it be taken for granted that the mere participation in such proceedings can restore dignity to victims. Nonetheless, participation can offer an opportunity to acknowledge victims and make them significant stakeholders. Although a collective approach to participation seems to be the only feasible avenue for

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guaranteeing participation to large numbers of victims, it is highly questionable whether and how it can be done in a meaningful way. Many shortcomings observed across different scenarios indicate that there is no ideal mechanism for implementing collective participation while ensuring meaningful participation. This paper tried to present some possibilities for minimising the risks of collective participation, while maintaining some basic standards.

Considering how difficult it can be to achieve victim consensus or convergence around shared interests, needs, views and concerns, a common legal representative becomes a key actor if there is to be meaningful participation. This person must in many ways become the voice of victims during proceedings, keeping them fully informed, consulting them when decisions need to be taken, and even representing a range of interests when there is no agreement among victims. Therefore, it is essential that the common legal representatives selected are best qualified, with a high moral standing, and providing a minimum of agency and recognition to the victims. At the same time, courts must take appropriate measures to ensure that the complexity of the necessary tasks does not come to constitute an impossible burden. These measures must include assigning a reasonable number of victims to the same legal representative, facilitating communication between victims and their representatives, and providing necessary outreach and information.

Naturally, it is a quite different matter to deal with a cohesive group of victims than a disjointed one. Such difficulties can be magnified if victims are geographically dispersed. Therefore, the SAAD needs a stable budget allowing it to provide reliable funding for legal teams. Its communication and consultation strategies must also be specially designed and/or adapted to ensure that victims are kept well informed, and to provide mechanisms by which all victims can express their interests, views, and concerns whenever necessary. The current COVID-19 situation has demonstrated the potential offered by digital platforms and remote connectivity, which have sometimes allowed for more frequent and fluid communication. However, not every victim or group of victims has access to the remote communication tools that are needed. In many cases, in-person meetings may be better, and might also offer greater possibilities for coordination and trust-building.

Given the JEP's aspirations to move beyond a purely adversarial-punitive logic and to ensure that victims feel central to the process and perceive their participation as worthwhile, further steps may be needed in both direct and indirect forms or participation. Consultation and possibilities for expression could, for example, be enhanced in extrajudicial spaces such

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as those related to outreach and psychosocial support. Finally, it is essential to note that the collective approach to victim participation entails possible advantages, alongside the risks already highlighted. Collectivisation may, for example, foster self-organisation and the development of community ties, offering greater possibilities for advocacy when a group is strategically coordinated.

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Access to justice beyond borders: Victims abroad and their participation before the JEP

Indira Yiceth Murillo Palomino & Laura Ximena Pedraza Camacho

Abstract

The Final Agreement signed by the Colombian State and the FARC-EP recognized the magnitude of the Colombians displaced abroad but was not explicit about access to justice for those victims, therefore this task had to be assumed by the Special Jurisdiction for Peace (JEP). This article discusses the strategies implemented by the JEP to promote the effective procedural and extra-procedural participation of victims abroad, explains the challenges faced by refugees and asylum seekers in accessing the justice component of the Comprehensive System for Peace (SIVJRNR), and finally argues why the JEP should recognize as victims of forced displacement those who had to flee the country due to the armed conflict. This article is based on the premise that the JEP must move away from the narrow concept of victim of forced displacement established in Law 1448/2011 and the limited interpretation that some state institutions have given to this concept.

Introduction

After several decades of internal armed conflict in Colombia, the serious consequences for the population have not been limited to the country's borders. They have spread to neighbouring countries such as Ecuador, Venezuela, and Panama, and to other more distant countries such as Canada and Spain, as the victims have had to flee to these countries to safeguard their integrity and that of their families. According to the UNHCR Global Trends data in 2019, there was a total of 189,454[1] Colombian refugees and people in refugee-like situations around the globe; the number of

1 United Nations High Commissioner for Refugees, Global Trends, Forced Displacement in 2019, P.78.

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Colombians displaced across borders in 2010 was 395,600[2]; and in 2020, 39,300[3] new asylum application came from Colombian nationals. Even though it is impossible to know whether all those refugees and people in refugee-like situations were victims of the internal armed conflict, the numbers give a sense of the seriousness of this issue.

The Final Agreement signed in 2016 by the Colombian government and the former guerrilla group FARC-EP acknowledged that exodus of Colombians as a result of the armed conflict. The Agreement entailed the strengthening of the programme for the acknowledgement and redress of victims abroad, as well as the creation of supported and assisted return plans that include refugees and exiles.[4] Although this acknowledgement exists, the Agreement was not explicit about access to truth and justice by victims abroad. Thus, the responsibility for enabling their participation lies on the shoulders of the entities belonging to the Comprehensive System of Truth, Justice, Reparation and Non-repetition (SIVJRNR)[5]; while matters related to access to justice fall under the Special Jurisdiction for Peace (JEP) jurisdiction[6].

This task, characterised by the Agreement's territorial approach and by a biased view regarding Colombians' return from abroad, is preceded by the implementation of measures for comprehensive care, assistance, and redress to be provided to victims abroad, as set forth in the Victim's Law 1448/2011. The Victim's law has taught us many lessons over the last ten years and may work as a benchmark for the JEP. In this regard, a number of lessons can be drawn that will undoubtedly help the JEP to start using effective tools to ensure the participation of these victims. The lessons learned include, for example, the need to i) change the very limited concept of victims of forced displacement used by the Law, in order to encompass those who have had to cross the country's borders; ii) to create and strengthen alliances with other states to promote the implementation of the aforementioned measures; iii) to coordinate with organisations with credibility among victims; and iv) to recognise existing difficulties in relation to Colombians' return to the country.

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2 United Nations High Commissioner for Refugees, Global Trends, Forced Displacement in 2019, P. 20

3 United Nations High Commissioner for Refugees, Global Trends, Forced Displacement in 2019, P.40.

4 On the concepts of exile and exile, see Roniger (2010).

5 Sistema Integral de Verdad, Justicia, Reparación y Garantías de No-Repetición, SIVJRNR

6 Jurisdicción Especial para la Paz, JEP

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Given the possible opening of two "*umbrella cases*" at the JEP —one focusing on crimes committed by former FARC members, and the other, on the relationship between State agents and paramilitary groups, in which forced displacement will be investigated[7]— we must insist on the importance of acknowledging those who have had to leave the country as victims of this crime. The latter, as will be shown later in this article, is common for victims abroad. We must, therefore, clarify that this piece does not examine whether exile is a victimising act itself or whether, on the contrary, it should only be taken into account when determining the differentiated damage caused to victims abroad. Such issues require a broader analysis and exceed the purely legal perspective of this document. Instead, the purpose of this paper is to define, from a legal point of view, why the JEP should not take the position as some State institutions that do not acknowledge people who have had to flee abroad because of the armed conflict as victims of forced displacement.

This article[8] also seeks to identify which strategies the JEP has implemented to promote the effective participation of victims abroad. The empirical focus of this piece is specifically related to cases 01 "Taking of hostages and other severe deprivations of freedom committed by the FARC EP" and 06 "Victimisation of members of Unión Patriótica", as both imply evidence of certain activities of the victims abroad. Moreover, the two macrocases are the only ones so far in which victims abroad have been accredited or have received requests for accreditation, and they clearly reflect the results of the JEP's management regarding the participation of victims abroad. Based on participation experiences, the article discusses the particular challenges that refugees, and asylum seekers could face in accessing the JEP. Finally, it presents some arguments for the JEP to consider victims of forced cross border displacement and why the jurisdiction should keep its distance from the position taken so far by some State institutions regarding the subject.

7 Watch the statement of the president of the JEP, Judge Eduardo Cifuentes Muñoz, at the event Justice for the displaced persons in Colombia: a pending debt, organised by CODHES, Colombia +20, El Espectador, and USAID, broadcasted on August 23, 2021, available at: https://www.youtube.com/watch?v=bTq6PS28caE.

8 This article is based on qualitative data taken from interviews with some victims' organisations abroad, individual victims, JEP officials and interviewers from the *Nodo* of the Truth Commission in Germany. It also replies to the rights of petition sent to the JEP, the UARIV (Unit for Comprehensive Attention and Reparation to Victims), and the Ombudsman's Office.

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Brief profile of the victims of the armed conflict living outside Colombia.

The immediate question that emerges regarding access to justice for victims abroad —which seems to be the most important— is: how to develop mechanisms for victims, regardless of their location, to access justice and truth? However, if the diversity of victims abroad is addressed, there are aspects that go far beyond their location, which must be considered by the JEP when complying with the mandate of centrality of victims in the implementation of the Final Agreement. Thus, before addressing the strategies that the JEP has implemented to encourage victim participation, it is necessary to have an idea of who the victims abroad are, where are they, and what victimising acts (*hechos victimizantes*) they have suffered.

For the purpose of this article, victims abroad are those Colombians who have suffered victimising acts in instances, or because of, or in direct or indirect relation to the armed conflict, who are outside the country in need of international protection as refugees —recognised and unrecognised— and asylum seekers; regardless of whether or not they have been included in the Unitary Victim´s Registry (RUV)[9]. It is worth noting that in relation to the RUV, some organisations working with victims abroad that were interviewed expressed their concern about the under-registration of such victims, which is estimated at between 100,000 and 500,000 individuals.[10]

When using the term *victims abroad*, it is easy to get carried away by the idea of a group that had to leave the country due to its political activism or its oppositional role to the government in power, and that has access to material resources to exercise its rights, both in Colombia and in the host country. Although this image may be accurate for some victims who fled the country at a specific time (CNMH & UARIV, 2015), victims abroad are much more heterogenous. The term includes victims with different traits and individuals as diverse as the Colombian population. Thus, for this analysis, it is important to clarify who exactly these *victims abroad* are.

In September 2020, the UARIV and the Norwegian Council for Refugees presented a characterisation of the victims of the armed conflict abroad.[11] Although said exercise was not intended to be exhaustive, it

9 Registro Único de Víctimas

10 See Colombia in Transition (2020). For a reference on under-registration in border areas, see National Centre for Historic Memory [CNMH] (2014), specifically page 18.

11 This document clarifies that the survey for the characterisation was applied to 2.612 victims of the armed conflict included and not included in the RUV in

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does provide an idea of the socio-demographic characteristics, the reasons they had for leaving the country, the victimising events they suffered, the socioeconomic and migratory situation to which they are subject in the host country, the possibilities of having access to State institutions, their main needs, and their intention to return to Colombia, among others.

Age, sex, and ethnic origin

The victim population abroad, interviewed in order to prepare the aforementioned characterisation, falls within the age range of 29 to 60 years, with 54.5% women and 45.5% men.[12] Sixty seven percent stated that they did not belong to any ethnic group; 26.3% recognised themselves as black, mulatto or Afro-Colombian; 6.5% as indigenous; 0.1% as Rrom; and 0.1%, as Palenquero.

Socioeconomic traits

Regarding educational level, 36.06% —the majority of the surveyed population— finished middle school, 26.57% attended elementary school, and 11.22% has an undergraduate/ university degree. In terms of productive activity, 28% claimed to be self-employed and 23% said they were unemployed. 38% are unemployed or had informal employment. According to the findings of UARIV, 4 out of 10 people have difficulties securing a job and their livelihood in the host country, with sales (12.1%), cleaning and household services (11.9%), and agricultural work (9.4%) being their main sources of income.

Where are the victims abroad located?

Of the 30,000 statements received abroad through Colombian consulates within the framework of Law 148/2011, 26,107 victims have actually been

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the 8 countries with the highest concentration of victims, i.e., Ecuador, Panama, United States, Venezuela, Canada, Spain, Chile, and Costa Rica. For more information on the methodology used, see UARIV and NRC (2020).

12 All figures cited below were taken from UARIV & NRC (2020).

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registered in the RUV.[13] These Colombians, are located in at least 43 countries around the world.

In the aforementioned characterisation, it was found that 94% of victims are located in 10 countries, classified as *bordering, near, and distant*. The first category is made up of Ecuador, Panama, and Venezuela; the second of Chile, Brazil, and Argentina; and the last of Canada, the United States, Costa Rica, and Spain. It was also observed that most victims of the armed conflict and Colombian refugees are located in Ecuador, Venezuela, the United States, Canada, Panama, Chile, and Costa Rica. The Afro population is found mainly in Ecuador, Chile, and Panama, while the indigenous population is mainly based in Panama.

International protection and immigration status

Regarding international protection in the host country, 74.3% —equivalent to 1,942 people surveyed— stated that they had applied for recognition of refugee status or a similar protection figure. Of this percentage, 55% received the protection they had applied for, 13% were rejected, and 32% are waiting. As for their migratory status, it was observed that while 78% of those surveyed had a regular status, that of the remaining 22% was irregular.

With reference to the definition of international protection and immigration status, the percentage of people who obtained the nationality of the host countries was as follows: Canada (88%), the United States (45%), and Spain (36%). While in Chile, the majority obtained a temporary visa or permanent residence, in Panama and Ecuador, they have been protected under refugee status or another protection measure. In Costa Rica, the recognition is divided between refugee status and permanent residence. Finally, Venezuela appears as the country with the lowest definition of the migratory status of the Colombian population considered victims.

13 This figure was reported by the UARIV in a reply dated October 15, 2020 to the right to petition filed with this entity. In the reply, it was also indicated that 309 applications for inclusion in the RUV are currently in progress in 16 different countries.

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Crimes committed against victims abroad

The three most common victimising events perpetrated, during the armed conflict, against victims abroad are forced displacement (83.3%), threats (81.3%), and homicide (21.2%). It was observed that 68% admitted having suffered internal displacement at least once, before leaving the country. Most of the victims fled the country leaving from Bogotá D.C., Cali, Medellín, San Andrés de Tumaco, and Buenaventura. The victims who left the country from Bogotá and Buenaventura came from different parts of the country; those that left from Cali and Tumaco fled from municipalities located in the Pacific and neighbouring departments, and the same was true for those who left from Medellín, as they were from municipalities in Antioquia (UARIV & NRC, 2020).

The heterogeneity of victims abroad, their socioeconomic situation, the migratory status in the host country, and forced displacement as the predominant victimising event, should not be viewed as mere data. On the contrary, these aspects must be considered by the JEP as factors that could weaken or strengthen victims' capacity to participate in the proceedings before that jurisdiction. The data presented invite us to question whether the victims in irregular migratory situations, those located in border areas, those who live in precarious socioeconomic conditions, and the Afro and indigenous population, have the same opportunities available to them as other victims abroad to participate in the proceedings at the JEP.

Participation in cases 01 and 06 of the JEP

Although neither the Final Agreement nor the procedural laws (Law 1922/2018) and the JEP's Statutory Law (Law 1957/2019) contemplate the extraterritorial and differential participation of victims abroad, the JEP has implemented a number of activities intended to promote and simplify their participation. Reference will be made to these extra-procedural and extra-territorial participation scenarios before detailing the procedural participation of victims in the two selected cases. The foregoing, taking into account that the information received by the victims abroad about the SIVJRNR, the competence of the JEP, the prioritisation, and selection of cases and the restorative justice applied by the JEP, are key in supporting their decision on their procedural participation.

It should also be considered that by not contemplating a participation model especially aimed at victims abroad in the regulation, their participation in JEP proceedings is enabled through the same mechanisms created

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for victims in Colombia, i.e., through reporting and accreditation in cases already open, and under the same guiding principles for the participation of all victims with the JEP (JEP, 2020). The specific details that can be highlighted to enable the participation of victims abroad include the preference of online over face-to-face media, on-site proceedings, abroad and procedural actions through tools created under international treaties or international judicial cooperation (e.g., letter rogatory or exhorts etc.) (JEP, 2020). Similarly to the victims in Colombia, victims' organisations abroad are not required to be legally incorporated in Colombia in order to submit reports to the JEP.

Accreditation as special participants (*intervinientes especiales*) is enabled through online channels or correspondence, as, due to their physical absence from the country, these organisations cannot appear personally before the JEP. At the same time, effective participation in the submission of observations to voluntary statements is materialised through alternative channels to physical presence. In terms of their attendance at truth recognition hearings, remote channels are expected to be provided to avoid jeopardising the international protection status that covers the victim population in the recognition process, or the population already recognised as refugees in host countries. In cases where victims want to be physically present at the hearings, their protected status must be maintained, in accordance with the considerations discussed below.

Extra-procedural participation

In coordination with the Truth Commission (CEV), the International Victims Forum (FIV) and the UARIV, the JEP[14] has held open talks and online workshops intended for victims in different countries and at CEV *Nodos*[15]. The latter constitute spaces in which participation mechanisms are disseminated and explained, communication channels with the JEP

14 At this point, the importance of the JEP Executive Secretariat having a group focusing on victims abroad in the DAV (Department for Victims' Attention) should be highlighted, this practice is paramount in terms of promoting the extra-procedural participation of these victims.

15 *Nodos* are volunteer collaborative networks based in five regions i) Europe: Germany, Belgium, France, Italy, the Netherlands, Sweden, Switzerland, Great Britain and Ireland; ii) North America: United States of America and Canada; iii) Central America: Mexico, Costa Rica and Panama; iv) Andean Area: Colombia, Venezuela and Ecuador; and v) South America: Argentina, Brazil and Uruguay.

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are made public, and frequently asked questions about participation are answered. In addition to this, a *Handbook for the participation of victims with the Special Jurisdiction for Peace* was created, Chapter VII of which is dedicated to the participation of victims abroad.

These activities are undoubtedly important and may be suitable for victims who are located in European countries, the United States, and Canada or middle-class victims in Latin America, who may have access to the internet and who may also be part of solid organisations that have gained a space in the discussions on the participation of victims in the implementation of the Final Agreement. However, the online dissemination strategy falls short when dealing with unorganised victims and those in border areas with limited access to the internet and basic services.

For the JEP's outreach strategy to yield positive results, both organised and unorganised victims must be included. In order to approach unorganised victims or those in conditions of social vulnerability, it is necessary to reach border areas and directly learn of their situation and the obstacles they face when it comes to participating in transitional justice proceedings. This includes taking into account the situation of intensified violence in the areas they inhabit, their precarious socioeconomic conditions, their irregular status in the host country, the lack of documents proving their Colombian nationality,[16] and security problems etc. However, implementing such an approach is no easy task. It requires the support of community leaders, victims' and humanitarian organisations, the Church or faith-based organisations, and constant support from the JEP's territorial liaisons in border regions.

The positive impact of victims' organisations abroad on enabling their extra-procedural participation should not be disregarded. Some of these, such as FIV, have taken the initiative to approach the JEP, using their own methodologies and fostering spaces for discussion regarding their effective participation in the proceedings with the JEP.[17] The work of these solid organisations is an example of horizontal cooperation that can contribute to i) fostering the participation of victims that are lagging either

16 These situations have been verified by the authors in their professional practice in the Colombian-Panamanian, Ecuadorian, and Venezuelan borders, in the area of the Panamanian Darién, in Lago Agrio (Ecuador) and in Arauca, respectively.

17 In the online meetings held on July 4 and 18 and August 1, 2020 of the FIV and the JEP, topics such as how the SIVJRNR works, the JEP, participation of victims with the JEP, and submission of reports are addressed, see International Victims Forum (2020a; 2020b; 2020c). These meetings are also available in the archive on the FIV website: https://www.forointernacionalvictimas.com/inicio/.

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due to their socioeconomic situation or migration policies in the host country, and ii) strengthening the training processes for victims abroad who received training in legal matters and served as lawyers in Colombia, who can undoubtedly contribute to understanding how the SIVJRNR works and specially how the JEP works. These actions will favour the acknowledgement process and provide greater dignity for victims abroad.

Procedural participation in the cases 01 and 06[18]

To elaborate on this section, two forms of procedural participation for victims were chosen in cases 01 and 06. These are the submission of reports to the Chamber for the Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts (SRVR) and accreditation of victims as special participants. It should be considered that the two selected thematic cases differ in terms of the victims' profiles. Whereas case 06 involved a collective (the left-wing political party Unión Patriótica -UP-), victims are largely organised, and there are two generations of victims: the UP survivors and their children. The victims of case 01 do not share these characteristics.

Submission of reports to the Chamber for the Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts

Reports from victims and human rights organisations are a valuable tool for JEP judges to learn first-hand about the events that took place during the armed conflict, who was subject to them, the context in which they occurred, and who committed them. However, due to their collective nature, preparing these reports requires a great deal of coordination among victims, the availability of financial resources, psychosocial support, and conditions to guarantee the safety of victims. However, this collaborative work scenario is not the norm for all victims in Colombia or abroad.

By the end of 2021, the JEP's DAV had received five reports from victims' organisations abroad. Case 06 has three written reports submitted by the Office of the Attorney General, Reiniciar Corporation, and the

18 Case 01 of the JEP focuses on the crime of taking of hostages and other severe deprivations of freedom committed by the FARC EP, and case 06 investigates the Victimisation of *Unión Patriótica* members.

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CNMH, which have been supplemented by oral reports provided by some victims abroad, as listed below.

To collect oral reports for case 06 in October 2019, the JEP and the CEV heard UP victims in Geneva Switzerland. The oral reports given in Geneva correspond to 16 victims who are located in European countries. It should be mentioned that the SIVJRNR entities insisted that these reports should be given in UN facilities, and not in those of Colombian embassies or consulates. They did so to avoid contact with the Colombian authorities to be interpreted by the host country as an intention to re-avail the protection of the Colombian State. This would ensure the ongoing protection provided by refugee status of victims interested in participating.[19] This exercise was replicated in Canada and Argentina (victims living in Uruguay were also included in the conference held in this country).

Supplementing the written reports submitted by civil society organisations or State entities with oral reports rendered on-site by victims abroad to create *mixed reports* is an excellent strategy, as it allows the JEP judges to approach the victims. This direct contact also allows victims to draw near to JEP proceedings and to transitional justice, which victims would probably not be able to do by their own means.

In other words, oral reports give a voice to the information contained in institutional reports, and thus the harm suffered by victims can be much better understood. Certainly, they contain key information to analyse aspects related to the following: i) special sanctions (*sanciones propias*); ii) the determination of the conditions of acceptance for the acknowledgment of responsibility; iii) facts and conducts; iv) the *modus operandi*; v) the conditions of time, manner, and place where the events took place; and vi) the criminal apparatus. Certainly, this type of report requires a significant dedication of time and resources from the SRVR and the respective JEP offices, as well as great support from international cooperation and host countries.

The use of the mixed reporting methodology is essential to listen to the stories of victims of forced displacement who are located in border areas, and in general, of the victims whose socioeconomic situation does not allow them to take part in organisational processes, because —even if they wanted to— they must first solve the basic material needs for themselves and their families. The foregoing becomes much more important when it

19 The "International protection and participation in proceedings with the JEP" section of this contribution presents the risks to the refugee status that could arise from such participation.

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is frequently heard that both the submission of reports and the actions in the proceedings at the JEP should be part of victim's redress.

Accreditation as special participants

The accreditation of victims in the cases opened by the JEP is a requirement to ensure victims´ participation in the various procedural stages. Hence, it is important to implement strategies to communicate the possibilities for victims abroad to participate and enable the channels for their accreditation.

In case 01, approximately 14 victims abroad are accredited, 3 of them foreigners. This case was a pioneer in making an online accreditation form available to victims through the JEP website[20] and in using online mechanisms for victims to access the proceedings. At this point it should be clear that the use of online channels is a valuable first step. Still, there are important challenges when it is transferred to other contexts not necessarily applicable to the victims of case 01, in which the predominant factor is the gap in information and access to digital resources. In this respect, the use of online media must be accompanied, firstly, by ensuring internet access, and secondly, by a pedagogy for its use, so it can actually be asserted that these mechanisms are accessible to a diversity of victims. It must also be recognised that in cases where the digital gap is predominant, the presence of the institution on-site is the best way to encourage participation.

Regarding the JEP's work methodology in the accreditation of victims abroad, it should be mentioned that, although there are procedural elements that have been established in the regulatory framework for the JEP's operations, each office has the opportunity to formulate strategies agreed upon with the victims to strengthen these legally established minimum points. In other words, this regulatory framework represents the minimum procedural guarantees granted to victims. Offering them less than these guarantees would go against the principle of legality. However, doing more than what is legally established and arranging how victims will participate and relate to the JEP will largely depend on the offices in charge of hearing the cases and on the approach defined by judges in each case.

As one of the rights of accredited victims is their participation in the design of comprehensive reparation measures, at this stage it is essential to consider the specific needs of victims abroad. Here it must be taken

20 The form is available at http://abogados.jep.gov.co/publico/atencion_victimas.

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into account that the characteristics of the individual and collective damages suffered by victims abroad are different from those of victims who remain in the country. For victims abroad, the fact of leaving the country —in some cases without the possibility of returning— is often a greater violation and leads to no improvement in their socioeconomic situation, as is often thought. Lack of knowledge of the law and of the operation of institutions in the host country, language barriers, irregular migratory status and the invisibility of cross-border displacement are some of the difficulties faced by victims abroad, which victims displaced within the country do not have to deal with. As a result, the mechanisms for determining special sanctions and restorative measures in the case of victims abroad must also have an extraterritorial approach beyond their return. This requires conditions in the territories concerning the materialisation of almost all the items contemplated in the Final Agreement; however, all of these do not fall within the JEP´s jurisdiction.

International protection and participation in proceedings before the JEP

Taking into account the participation of victims in cases 01 and 06, three scenarios have been identified that could —at least from a conceptual point of view— be interpreted by the host country as a tacit manifestation of a refugee or asylum seeker[21] to re-avail themselves of the protection of the Colombian State, and this can jeopardise victims' recognition of refugee status abroad. These scenarios are as follows: i) participation in the preparation of a written report, ii) the implications of participating in oral reports in the host country, and iii) accreditation as special participants in an open case in the JEP and —as a result of such accreditation— the possibility of participating in person in truth recognition hearings.

Below are a number of elements of analysis that can be considered in order to rebut the risk that the host country will enforce a cessation clause of the refugee status to a victim abroad in any of these three scenarios.

First, it must be mentioned that in the 1951 Convention Relating to the Status of Refugees, the lack of national protection is a fundamental aspect of the concept of refugee, i.e., if a person does not have access to the local or national authorities of their country of origin or residence to protect

21 See the definition of refugee in article 1 of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1984 Cartagena Declaration.

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them from persecution, this person is at risk of suffering serious violations of their human rights, forcing them to cross the borders of their country of origin or residence to seek international protection.

In the rationale of categorising the measures of comprehensive attention, assistance and integral reparation, access to justice is framed within the comprehensive reparation measures in the Final Agreement, specifically in terms of satisfaction. The latter encompasses investigation, prosecution and the punishment of the most serious and representative crimes committed during the armed conflict. Therefore, national protection — which refugees did not obtain— should not be confused with the obligation of the State of origin, in this case Colombia through the JEP, to guarantee access to truth, justice and non-repetition of conducts as the rights of victims abroad, including refugees. Thus, the participation of refugees in the proceedings before the JEP should not be interpreted as the disappearance of the causes that made refugees flee.

The handbook on procedures and criteria for determining refugee status (United Nations High Commissioner for Refugees [UNHCR], 2019) requires the analysis of voluntariness, intention, and ultimate effect of the actions carried out by a Colombian victim recognised as a refugee or in process of being recognised. If persons do not act voluntarily, they cannot forfeit the protection provided by the statute. The interest in availing the protection of the State of origin must arise from an autonomous, free, and informed determination. Thus, it is important to promote an interpretation of the action that is based on the guarantee of human rights, as well as on the materialisation of the *pro-personae* principle that should always guide the actions of authorities (Mexico Declaration and Plan of Action, 2004).

Regarding voluntariness, it is common for appearances before the JEP to be the result of the autonomous and free desire to contribute to the reconstruction of the truth and to access reparation measures in matters of justice, which is why it is necessary to insist that when refugee victims participate in the JEP, they are not re-availing themselves of national protection. This willingness to seek channels to participate in a comprehensive reparation process of the events that took place during the armed conflict is different from the interest of victims in Colombia guaranteeing their protection.

In terms of intention, it is important to inquire whether said appearance was, in fact, intended to accept protection by Colombia, or, on the contrary, if participation before the JEP is only accepted as a step to the redress for the damages caused. Furthermore, the existence of well-founded fear produced by the systematic violations of their human rights that occurred

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in Colombia must be assessed, as must whether these violations continue to keep victims under the protection of another state.

Finally, we must consider the analysis of the effects derived from said appearance. Here, it would be necessary to determine whether said participation guarantees the person the protection of the state of origin, mainly in relation to the causes of forced cross-border displacement. Colombia is not a country with sufficient internal security conditions to provide protection to the thousands of victims abroad who eventually intend to return to the country. For this reason, even with voluntariness and intention to re-avail themselves of Colombia's protection, the final effect would probably not be to enjoy access to a protective environment.

The permanent application of interventions carried out with a do-no-harm approach has been established within the framework of the actions proposed in the SIVJRNR (JEP, 2020). Based on this approach, and in relation to the participation of victims abroad, the JEP has defined that interventions must always consider two levels of execution, in order to address the special characteristics of this population. On the one hand, by acknowledging the migratory or international protection status that the person holds abroad to ensure that their participation in the JEP is not considered as the cessation of the danger that led the victim to request recognition as a refugee. This may lead to the denial of recognition or the application of a cessation clause. On the other hand, the importance of not creating false expectations about the scenarios available for their participation in the proceedings with the jurisdiction (JEP, 2020). It is very important for the judicial authority before which the victim appears to indicate that the nature of the victims' participation cannot be assessed as an indication that the risk has ceased. This makes it possible to provide better tools for the study that the authority in charge of recognition must conduct at the request of the victim and provides elements to deny the applicability of a cessation clause.

Cross-border and transnational forced displacement

It is worth remembering that forced displacement is the *involuntary movement* of a person or group of people in their country or abroad, crossing international borders to flee from a danger or threat to their life, personal integrity, freedom, security, or against other human rights (Celis & Aierdi, 2016). The generic term to refer to these people is forcibly displaced persons, and it encompasses both refugees and internally displaced persons.

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Forced displacement has been one of the most recurrent crimes during the internal armed conflict (Constitutional Court, Ruling T-025/2004). The Final Agreement classified it as a non-amnestiable or pardonable crime (Final Agreement, 2016), and the JEP is competent to investigate and punish its occurrence, as long as the crime was committed in instances of, as a result of, or in direct or indirect connection with the armed conflict by former FARC-EP combatants, members of the public forces (mandatorily), state agents other than the public force and civil third parties who go to the JEP (voluntarily) (Legislative Act 01/2017).

As mentioned at the beginning of this document, 83.3% of the people surveyed in the characterisation performed by UARIV and NRC stated that they were victims of forced displacement. From that number, 68% stated that before leaving the country, they were internally displaced. This aspect concerning the escape route accounts for: i) the close relationship between the victimising act and leaving the country to protect physical integrity or life; and ii) the relation between internal displacement and cross-border displacement, as it shows that forced displacement completed its cycle within the country, whereby after not finding safety in it, the victims had to flee abroad.

Forced displacement from a criminal perspective

In international criminal law, deportation and forcible transfer of population as forms of forced displacement are considered crimes against humanity and also war crimes.[22] It should be emphasised that forced displacement can take place within the territory of a state or across the borders of a country. This distinction is evident in the document *Elements of Crimes*, published by the International Criminal Court (2011), since, when referring to deportation and forcible transfer of population as crimes against humanity, it clarifies that one of the elements of these crimes is that in both cases the perpetrator has deported or forcibly transferred one or more persons *to another state or location*. According to this rationale, deportation refers to transnational displacement and forcible transfer of population is more closely related to the displacement to another place within the territory of a country.

22 See Rome Statute of the International Criminal Court, art. 7, par. 1(d); and art. 8, par. 2(vii).

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In the Colombian Criminal Code (Law 599/2000), forced displacement is set out in articles 159 and 180. In the first, some of the parameters of the concept as stated in the Rome Statute are reflected with a perspective of protection that is typical of the international humanitarian law, and the second addresses forced displacement from the viewpoint of the international human rights law (Aponte, 2012). In both types of criminal offenses, the result sought by the person causing the displacement is to force the victim or victims to leave their place of residence, using violence or other coercive acts, regardless of the purposes sought by the perpetrator with such displacement.

A geographical limitation of displacement is not created in the elements of neither of the two articles; i.e., involuntary human movement is not restricted to the national territory, so that abandoning one's home may lead one to another part of the national territory or to cross borders to protect life or personal integrity, as in fact happens in border areas. A disastrous example of this was the massive displacement of Wayuu indigenous natives to Venezuela after the massacre in Bahía Portete, in the municipality of Uribia in Alta Guajira, in 2004 (CNMH, 2015).

Victims of forced displacement in Law 1448/2011

Law 1448/2011[23] only recognises as victims of forced displacement those who remain in the country, creating a subcategory of victims with non-existent territorial limitations in the concept of victim in article 3 of the same law. As a consequence of the application of this limited vision by the UARIV, certain victims of forced displacement have been denied inclusion in the RUV for not meeting the requirement of permanence in the national territory (Constitutional Court, Ruling T-832/2014).

The UARIV's position has not been questioned by the Constitutional Court, because as observed in the aforementioned ruling, the Court did not further analyse forced displacement itself or the particularity of cross-border displacement, but ordered the inclusion of the plaintiff in the RUV, based mainly on the fact that the concept of victim in Law 1448/2011 —as opposed to forced displacement— does not contain a terri-

23 Article 60, paragraph 2 of Law 1448/2011. This provision followed the definition of Law 387/1997. The validity of Law 1448/2011 was recently extended; however, the scope of the term forcibly displaced was not the subject of discussion in the Congress.

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torial restriction. With ruling 494/2016, the Court missed the opportunity to specify the scope of the concept of a victim of forced displacement, so as to include in the category both victims who had to leave their homes — even if they remained in the country— and those who were forced to leave the country. This would have eliminated any shadow of discriminatory treatment in Law 1448/2011 between victims of the armed conflict who remained in the country and those who had to leave it.

In sum, the concept of the victim of forced displacement and the interpretation that has been made of it ignore that i) there are various forms of forced displacement; ii) internally displaced people and refugees often share the causes of forced displacement; iii) the legal framework for the protection of internally displaced persons arises after the international protection of refugees due to the dynamics of armed conflicts; and iv) discriminatory treatment is created between internally displaced persons and refugees (recognised and unrecognised).

The JEP must keep its distance from the concept of a victim of forced displacement as set out in Law 1448/2011 and from the interpretation that the constitutional case law has made on the matter, as in both cases, the realities of forced displacement in Colombia and its consequences abroad are not recognised. This is especially true for Ecuador, Venezuela, and Panama as the bordering countries that have received the highest number of victims from the Colombian armed conflict (UARIV & NRC, 2020).

Continuing with this treatment may have a negative effect on how this issue is addressed in the two umbrella cases in which forced displacement will be investigated, and it will, of course, constitute a challenge for the JEP. This problem has not so far arisen in cases 02 "Prioritisation of the territorial situation of Ricaurte, Tumaco and Barbacoas – Nariño" and 04 "Territorial situation of the Urabá region", which contemplate forced displacement, and therefore, the situation of displacement in border areas must be analysed. Perhaps in these cases there will be no exclusion for the victims of forced displacement in border areas or in neighbouring countries, since as a territorial case, crimes are not analysed in isolation —forced displacement— but rather as part of a myriad of violations that affected territories and their inhabitants. Thus, cross-border displacement will be related to other associated crimes, such as forced disappearance, recruitment, etc. This assessment of displacement associated with other crimes will surely give victims more options to be individually or collectively accredited as special participants for one or another crime.

Maintaining a restrictive position against cross-border and transnational displacement would keep the victims invisible, since: i) it would deny that the events that gave rise to the displacement constitute a crime; ii) their

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status as victims of forced displacement would be denied; iii) the investigation and punishment of those most responsible for the acts constituting forced displacement in its various modalities would not be implemented; and iv) these victims would be denied their right to access justice, truth, and non-repetition guarantees.

Conclusions

Although their heterogeneity and their characteristics are fundamental to decisions regarding the strategies to promote and enable their participation in the proceedings before this jurisdiction, victims of the internal armed conflict abroad are highly diverse. To pave the way for their real access to truth and justice implies i) not considering them a homogeneous group of people, ii) taking the necessary steps to ease their interventions beyond the procedural minimum established by law, and iii) rethink restorative measures for victims abroad with an extraterritorial approach given the victim´s impossibility or unwillingness to return to Colombia.

Virtual dissemination of the participation channels before the JEP has so far been the main resource to approach victims abroad. However, this strategy may not be appropriate in terms of eliminating barriers to the participation of those who have no internet access such as the population settled in border areas. Direct communication channels with victims living in border areas continues to be a challenge as they may not be able to reach out to JEP, due to the lack of sufficient technological, socioeconomic, political, and legal resources, or due to their irregular migratory status in host countries. As a result, *in situ* proceedings outside the JEP headquarter in Bogotá are needed. This certainly requires a great deal of effort and coordination between the JEP and small community organisations, and it needs the Colombian State to create alliances with other states to enable the execution of on-site procedural and extra-procedural actions in host countries without risking the protection of refugees or asylum seekers.

In line with the above, the JEP must implement interventions in coordination with other SIVJRNR institutions and continue the joint work with the CEV, based on the best practices that this entity has implemented, such as the international work through its *Nodos* to enable the participation of victims abroad.

In addition, lessons learned from implementation of Law 1448/2011 regarding the need to broaden the concept of victims of forced displacement to include victims of this crime who had to flee the country should be

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present in the two future umbrella cases in which forced displacement will be investigated.

Besides innovative strategies, the JEP must clearly communicate the importance of the participation of victims abroad to the general public, so that it is understood that the initiatives that are put in place to enable the participation of this population require the allocation of funds and should not be entirely financed by international cooperation.

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Persistent Violences and Transitional Justice: From Security to "Provention" as a Guarantor of No Repetition

Jenny Pearce & Juan David Velasco

Abstract

Colombia is the tenth country in the world in terms of its number of peace negotiations according to the Uppsala University Data Base. Each negotiation has had varied outcomes, some resulting in significant demobilisations, but none have ended the collective use of violence by non-state armed actors nor selective violence by some state actors. Each one has also been followed by what appears to be an 'historic pattern' of assassination of former combatants. Another pattern during and after armed conflicts, has been the systematic assassination of social activists, often accused of supporting an insurgency, or who have been organized to achieve certain reforms, from access to land, to defending indigenous rights and human rights in general. Following the Peace Accord with the FARC-EP in November 2016, these patterns do not appear to have changed. However, one thing is new, the opportunity for a new institutional framework able to confront these ongoing violences which are an obstacle to rights to truth, justice, reparation, and no repetition. This chapter explores how the JEP is contributing to a shift in the focus of the State from one of security as a function of militarisation and punitive populism to one of "*provention*". This neologism created by the Investigation and Prosecution Unit of the JEP, conveys the importance of integrating protection and prevention as part of a comprehensive security system for people that participate in the transitional justice. The chapter discusses the violences that are threatening the lives and livelihoods of the population groups that the JEP is mostly concerned with (victims, the former combatants, and human rights organisations). It shows why "*provention*" can pave the way for a new approach to justice in Colombia, one which embraces restorative justice, contributes to guarantees of non-repetition and promotes the principles of the centrality of victims and their effective participation. In turn, this generates new sensibilities amongst citizens about the significance of transitional justice to sustainable peace.

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Introduction[1]

Colombia is the tenth country in the world in terms of its number of peace negotiations according to the Uppsala University Data Base[2]. Despite these efforts, no government has achieved a definitive end to the internal armed conflict. Although the abandonment of weapons by the longest lasting insurgency in western history -the FARC-, was an important step towards a stable peace, it was not enough. Criminal organizations and insurgent groups continue to generate chronic violence and insecurity in different regions of the country[3].

This chapter reflects on the way these persistent violences continue to overshadow the development of the transitional justice model that was created by the Final Peace Agreement signed between the national government and the FARC in November 2016. The chapter analyses how the Special Jurisdiction for Peace (hereinafter JEP) has adapted itself to high-risk environments and how it is contributing to building the pathway from transitional justice to sustainable peace.

The chapter will focus on studying the responses that this judicial body has created to mitigate the risks of the occurrence of human rights violations against the groups and territories of importance to transitional justice. It proposes the neologism of "provention"[4] in order to build a philosophy that departs from the conventional wisdom that associates security with militarism and "punitive populism[5]" (Wood, 2014). "Provention" prioritizes the following goals: the development and embrace of restorative

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1 This chapter aims to explain the proposal of Provention Strategies in the Transitional Justice System. It does not include a study or an evaluation of the implementation process.

2 Only surpassing Colombia in the number of peace negotiation initiated with one or several rebel forces or paramilitary groups are the following countries: Chad, Sudan, Liberia, Uganda, Ivory Coast, Burundi, Liberia, Congo, and Mozambique.

3 The National Liberation Army (ELN) continues the armed struggle after six decades of revolutionary life, which makes it the oldest guerrilla insurgency in the western hemisphere today, replacing the historical record claimed by the FARC.

4 Provention is the combination of an early warning system with the immediate adoption of protective measures to avoid the risks's materialization to the life, liberty, security and physical integrity of individual and organizations participating in the JEP. In this sense, an analyst's team assesses the probability of serious human rights and International Humanitarian Law violations in certain geographical areas of Colombia and issues an alert for the chief prosecutor of the JEP and the judges to take different risk control decisions.

5 "Punitive populism" refers to the idea that public support for more severe criminal justice policies (specifically incarceration) has become a primary driver of policy

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justice as a way to guarantee non-repetition and promote the participation of victims and social organizations from the grass roots upwards. In other words, it protects citizens in order to prevent more violence.

1. *Persistent violence and their negative impacts on the development of transitional justice in Colombia*

One of the distinctive features of the JEP is that it has sought to acknowledge victims who have community ties or collective identity. For this reason, the judges allowed more than 268 groups, such as indigenous organizations and reservations, community councils, unions, and political movements, to participate until December 2021 as civil parties in the proceedings.

However, from the opening of the JEP doors to the public in March 2018, gross human rights violations have taken place against the very organizations that have been acknowledged as victims by the JEP. This figure is particularly high for the cases of indigenous and Afro Colombian communities located in the Pacific Nariño, northern Cauca as well as in the Urabá Antioqueño and Chocoano.

making, as well as of political election cycles, with the result of increasingly harsh punishments regardless of their ability to reduce crime.

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Table 1. Level of human rights violations against indigenous, afro and peasant groups that were acknowledged as victims by the JEP, 2018–2021[6]

Judicial case opened by the JEP judges	Number of social groups acknowledged as victims	Number of social groups acknowledged as victims that have registered gross human rights violations	Percentage of gross human rights violations
Territorial situation of Ricaurte, Tumaco and Barbacoas in Nariño (case No. 02)	94	26	28%
Territorial situation of the Urabá region (case No. 04)	80	16	16%
Territorial situation in the northern region of Cauca and southern Valle del Cauca (case No. 05)	82	27	33%

Source: Investigation and Prosecution Unit (The Prosecutor of the JEP)

During 2020, every six days a social activist and member of an organization that has submitted reports to the JEP, was killed[7]. The year 2020 is considered a turning point in the history of the conflict in Colombia, since repertoires of violence that were believed to be overcome – such as massacres – returned in alarming numbers. In the words of the Chief Prosecutor, Giovanni Álvarez:

> "*There is a warning sign with the occurrence of massacres in the last nine months. We are approaching the threshold of the year 1998 when the most cruel and degraded stage in the history of the armed conflict in Colombia began. At that time (1998 – 2002) there was an average of one massacre every two days. In 2020, we are approaching this reprehensible statistic. The evidence shows us that after exceeding this threshold of deaths, the chances of returning to a humanitarian crisis are high*" (Giovanni Álvarez, statement 063, September 2020)"[8]

6 Data were checked last on 31st December 2021.

7 One of the existing mechanisms for social organizations to contribute to the clarification of the truth in the JEP is through the preparation and submission of reports containing context data of victims by region and period, and attributions of alleged responsibility in the commission of crimes.

8 Authors' own translation.

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This trend has gotten worse to the point that 2021 had the highest levels of organized violence since the signing of the Final Peace Agreement[9]. Thus, it became the year with the highest number of massacres (93), mass forced displacements (146), clashes between the security forces and illegal armed groups (228), and harassment against the security forces (134). There has also been an increase in cases of forced recruitment of children (89).

Another repertoire of violence that was believed to be overcome and that returned with great force during 2020 and 2021, was the generalized threats to the civilian population through graffiti painted on the walls and the circulation of pamphlets. Thus, in 20% of Colombian municipalities, propaganda messages from an illegal armed organization have been observed in public places, and the dissemination of lists of people and social organizations that are declared to be "military targets" by criminal organizations, have also been verified in parks, commercial establishments and WhatsApp message chains[10].

The frequent murder of social activists and the significant increase in massacres of civilians has generated new dynamics of terror in the population. These are connected to efforts by armed groups to control territories and trafficking corridors. The literature refers to efforts by non-state armed actors to control territories as “rebel governance” or “criminal governance” (Mampilly, 2011; Kasfir, 2015; Arjona, 2016; Arias 2017; Lessing, 2020). While this captures the depth and extent of efforts to ensure that territories serve the interests of these actors and not of the State, the authors prefer to characterize these processes as the construction of “violent social orders” which, in turn, “order violences”. This distinguishes them from understandings of “governance” as non-coerced consent which can be objectively measured as such. The construction of these orders certainly includes aspects which are associated with “governing”. Examples are the

9 JEP (2022). COMUNICADO 013: En 2021 el conflicto armado se reactivó en 12 zonas del país: UIA. Available at: https://www.jep.gov.co/Sala-de-Prensa/Paginas/En-2021-el-conflicto-armado-se-reactiv%C3%B3-en-12-zonas-del-pa%C3%ADs,-dio-a-conocer-la-UIA-de-la-JEP.aspx

10 In the pamphlets issued by the illegal armed groups during 2020, it has been detected that 15% of the social organizations that have submitted reports to the JEP have been declared as "military targets." The Gulf Clan and the FARC dissidents are mainly responsible for the authorship of the pamphlets and threatening graffiti. This information can be seen at the Risk Monitoring System of the Investigation and Prosecution Unit. Available at: https://www.jep.gov.co/uia/Paginas/mecanismo_monitoreo/index.aspx

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norms of behavior that the dissidents of the FARC[11], the Gulf Clan[12] (*Clan del Golfo*) and the National Liberation Army (ELN) have illegally imposed during the health emergency caused by the coronavirus in ten departments of Colombia[13]. However, while they may be underpinned by the de facto rules imposed by armed groups, they are not underpinned by the rule of law, independently administered by legitimately authorized authorities.

Like the victims and the social organizations that participate in the JEP, the former combatants of the FARC also live a worrying security situation. According to calculations by the Investigation and Prosecution Unit, since the signing of the Final Peace Agreement until October 20, 2020, every five days a demobilized person was a victim of homicide[14]. If this "historic pattern" remains[15], it is predicted that by the end of 2024, 1,600 murders

11 The FARC dissidents can be classified into three groups: the "early deserters" such as alias Gentil Duarte and alias Iván Mordisco, who, before the signing of the Peace Agreement, withdrew from the process and publicly reiterated their rebellion against the Colombian State. A second group are the "late deserters" such as alias Iván Márquez, alias Jesús Santrich, alias Romaña and alias el Paisa, who, after having led and signed the Peace Agreement, claimed betrayal and returned to armed struggle. This group called itself "the second Marquetalia." And a third group are the "lumpenized independents", who have contacts with the previous groups, but maintain autonomy to manage the drug trafficking business and illegal mining, since their motivations are exclusively economic. On a characterization of the FARC dissidents: Aguilera (2020) and Fundación Ideas para la Paz (2018).

12 Also known as *Autodefensas Gaitanistas de Colombia* (AGC). They are successor groups to paramilitarism, which have a hybrid command structure (hierarchies with network and outsourcing delegations), imitate the methods of violence of the old AUC (massacres, murder of left-wing social and political leaders) and the guerrillas (armed strikes), and are financed mainly from drug trafficking, illegal mining and smuggling of goods.

13 During the Covid 19 pandemic in Colombia, evidence has emerged that shows how illegal armed groups and organized crime networks have controlled rural populations and urban peripheries in Nariño, Cauca, Vichada, Antioquia, Córdoba, Bolívar, Norte de Santander and Arauca, imposing curfews, establishing opening and closing hours for commercial establishments, punishing people who do not wear masks and murdering people who violate the rules of social distancing. See: Investigation and Prosecution Unit (2020), Defensoría del Pueblo (2020) and Human Rights Watch (2020).

14 In total, there were 220 cases of homicides of former FARC combatants during the period of the signing of the Peace Agreement until October 20, 2020.

15 Historically, after the signing of peace accords in Colombia, demobilized former combatants have faced dangerous situations. For example, out of a total of 2.200 former EPL guerrilla combatants who surrendered arms, 321 were killed (14.6%). Similarly, out of 280 demobilised from the PRT guerrilla, 40 were killed (14.3%).

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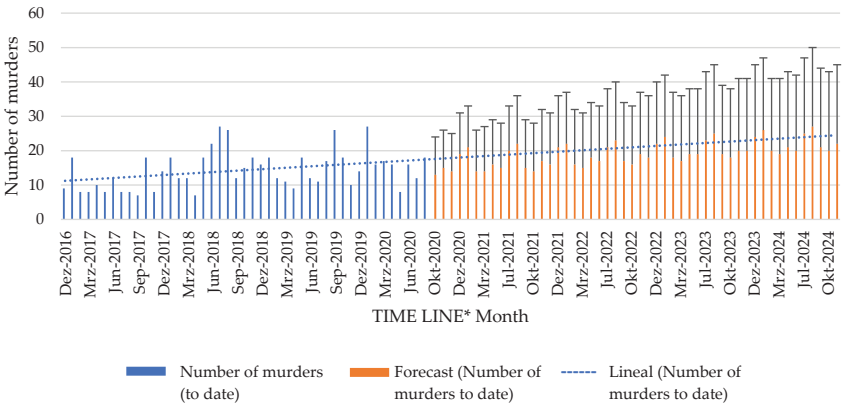
of former combatants would have occurred[16] (see graph 1). These human losses not only erode the trust of the demobilized in the Colombian State, but also symbolize the silencing of the truth, because with each violent death a valuable opportunity to clarify the crimes committed in times of war is lost.

Graph 1. Forecast of violent deaths of former FARC combatants (2021–2024)



Source: Investigation and Prosecution Unit. (2020). Silenciando la verdad: Un diagnóstico de violencia letal que afectan a los excombatientes de las FARC-EP en Colombia (2017–2020).

*Note: This forecast does not represent a probabilistic estimate. It is a forecast based on the analysis of a time series of homicides of former FARC-EP combatants through the "exponential smoothing method[17]", which is why it is specified that its results are projections that depend on the invariance of the environment (everything stays the same)

On the other hand, of 37.761 former members of the paramilitary groups (AUC) who demobilised, 3.589 were killed (11.33%).

16 This means that in seven years after the signing of the peace agreement, 12% of the total demobilized population of the former guerrilla FARC could have lost their lives violently.

17 It is a method that allows to estimate the number of possible cases in the future, based on the analysis of short time series where recent results are given a greater weight over past results. This method allows to identify trends in the behavior of a variable as long as the factors remain the same. (Hyndman, Koehler, Keith, & Ralph, 2008, p. 4–5).

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This ongoing violence in territories where the JEP has prioritized its investigations for international crimes committed prior to December 1st, 2016, raises several challenges concerning the possibility of full compliance with the Constitution and the law[18]. A first challenge is the deterioration of the guarantees for the participation of victims.

On the one hand, the social and territorial control exercised by criminal structures in various regions of the country, keeps communities from being involved in the transitional justice process. There are known cases where social activists have expressed fear of presenting reports, accrediting themselves as victims and/or participating in judicial hearings, due to the risks to their lives[19].

On the other hand, the persistent dynamics of the armed conflict mean that the victims who have been acknowledged, stop going to the hearings of the Tribunal. This is because they have been forcibly displaced many times or are living in environments with high restrictions on physical mobility due to the "de facto confinement" imposed on communities inhabiting areas of influence of criminal structures.

In these events, contact with the JEP is difficult and even impossible, since people in a situation of forced displacement must ensure their material subsistence and therefore have no choice but to renounce their intention to access their rights to truth, justice and reparation. And, failing that, people in "de facto confinement" cannot communicate with the outside world, given the death threats or the risks involved in movement, due to devices and explosive remnants (antipersonnel mines) that have been installed in the perimeters of their homes.

Where all these conditions of insecurity and vulnerability prevail, JEP officials must anticipate the risks potential witnesses face and plan their judicial mission and support activities accordingly. This is important since the JEP's operating model is not centralized[20]. Many of the JEP's plans consist precisely in bringing transitional justice closer to the peripheral communities that have been seriously affected by the armed conflict. Likewise, many of the judicial activities demand permanent contact with the victims who reside in these remote, dispersed, and disconnected places from the country's capitals.

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18 For example, Legislative Act 01 of 2017, Law 1957 of 2019, Law 1922 of 2018 and Law 1820 of 2016.

19 cf El Espectador (July 4, 2020).

20 The majority of victims of the armed conflict live outside the capital Bogotá. Hence, judicial action in the territories is necessary to satisfy rights to justice, truth, and reparation.

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In summary, the deterioration of security conditions in Colombia in recent years has created obstacles for victims and human rights organizations to effectively participate in the JEP. The homicides of social activists, massacres, threats to entire communities, and the return of violent social orders in general, has made the administration of transitional justice difficult in the territory. There is a high geographical correspondence between the sites where the JEP develops its macro cases[21] and the sites of intensification of violent conflicts.

2. *"Provention" as an integrated system to mitigate risk and guarantee the principles of the centrality of victims and their effective participation*

The previous diagnosis is alarming due to the threats and vulnerabilities that severely limit the participation (as *comparacientes* or those who appear in person) of victims, former combatants and social organizations, in the processes which the JEP has set in motion. For this reason, the Investigation and Prosecution Unit of the JEP created a "protection system for rightsholders and guarantors" which is divided into two components: i) the programme of *protection* for victims, witnesses, and other participants; ii) the programme of risk *prevention.* The integration of these two components is what the Investigation and Prosecution Unit calls: "Provention".

The protection programme was created under Article 87(b) of Law 1957 of 2019[22]. This component is responsible for receiving and processing applications of risk assessment for accredited victims, witnesses, and judicial representatives of victims and appellants. In the event that the level of risk is assessed as extraordinary or extreme[23], and that there is a causal link

21 The concept of "macro case" refers to the fact that the JEP investigates a large volume of crimes and the perpetrators responsible in the same judicial file. Till now, the JEP has opened seven "macro cases": Three of them prioritize territorial situations of gross human rights violations and war crimes (Urabá, pacific Nariño, and north of Cauca and south of Cauca Valley); three other cases prioritize types of large-scale crimes (kidnappings committed by the FARC, extrajudicial executions committed by state agents; and forced recruitment of children); and another one prioritizes the genocide of a political party.

22 Article 87 of Law 1957 of 2019: "*Functions of the Investigation and Accusation Unit. To decide, ex officio or at the request of the Chambers or Sections of the JEP, the protection measures applicable to victims, witnesses and other participants*".

23 As a legal rule, the level of risk must be classified as ordinary, extraordinary or extreme. This evaluation follows technical criteria that guarantees the process will be impartial and transparent.

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between the threat and the participation of the person or the population group in the JEP, two types of protection measures can be taken: a) *strong*, characterized by the provision of security schemes such as armored cars and escorts; b) *soft*, characterized by the emergency relocation of the person[24], the delivery of bulletproof vests, cell phones, panic buttons, police visits to where the programme beneficiary resides, among others.

The number of applicants and beneficiaries of the programme have been increasing proportionally to advances in the macro-cases of the JEP. For example, in 2019, the program received one application every two weeks, while in 2020 the programme received 15 applications per week. Similarly, the number of people who received protection measures, increased exponentially compared to 2019 (see Table 2). In summary, up to 31 December 2021 the Investigation and Prosecution Unit of the JEP had processed 1,424 applications for protection submitted by victims, witnesses, judicial representatives of victims and appellants.

Table 2. Number of protection measures assigned by the Investigation and Prosecution Unit of the JEP, 2019–2021

NUMBER OF PROTECTION MEASURES ASSIGNED	
2019	36
2020	173
2021	443

Source: Investigation and Prosecution Unit (Prosecutor of the JEP)

The protection programme has been one of the most significant policies that the JEP has taken to safeguard individuals or social organizations who contribute to uncovering truth from being subjected to reprisals and homicides. However, measures such as providing armored cars and escorts are not always appropriate, due to the fact that these measures are the most expensive and are not financially sustainable in the medium and long term[25]. In fact, these measure in remote areas increase the level of exposure of members of social organizations to armed groups.

24 That is, the immediate change of the person's place of residence to avoid being killed.

25 Protection Programme expenditures increase over time, since the security schemes assigned to the beneficiaries are cumulative. The risk level for a social leader who is a victim or who represents the interests of a community participating in the JEP does not tend to improve over time.

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Furthermore, when the risk is collective and affects entire communities, strong protection measures end up being useless because it is impossible to provide security schemes to each member of an indigenous reservation, community council, political party, etc. In addition, experience shows that in some cases assigning armored vehicles and escorts to certain leaders within an organization causes rivalry or makes other members jealous[26]. On many occasions, social organizations use nonviolent discourses and reject the use of arms, and therefore refuse protection measures based solely on bodyguards and the militarization of territory.

Due to these problems, the Investigation and Prosecution Unit created the risk prevention programme to complement protection measures[27]. The programme aims to issue early warnings when victims—those who appear in the JEP as well as social organizations that contribute to truth—are at risk of suffering human rights violations. Therefore, this programme is based on the following principles:

I. Prevention of human rights violations is a legal obligation of the State, which especially applies to agencies that manage transitional justice
II. Prevention is an essential component for the guarantees of non-repetition
III. Prevention is an indispensable requirement to apply restorative justice as a guiding paradigm of the JEP
IV. Prevention is a guiding criterion for planning the JEP's activities in rural and urban areas, using the principles of "do no harm", precaution, and due diligence
V. Prevention strategies are directed against violences and militarized responses to violence. They transfer, build, and strengthen the capacities of social organizations participating in the JEP and their mechanisms of care, self-protection and timely communication when threats occur.

Thus, prevention is not conceived as an act of good will by public officials from the transitional justice system, but rather as a legal obligation of the Colombian state that emanates from two sources of law. Firstly, international human rights treaties that have been signed and ratified, such as the International Covenant on Civil and Political Rights and the

26 Based on an interview with a leader who belongs to a platform of organizations of women victims of sexual violence and human rights defenders done on October 29, 2020 in Bogota.

27 This program was created in March 2020 through an administrative resolution signed by the Chief Prosecutor of the JEP, Giovanni Álvarez Santoyo.

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American Convention on Human Rights. Secondly, the jurisprudence of the Colombian Constitutional Court.

The United Nations General Assembly has considered "prevention" to be a specific component for guaranteeing non-repetition (Van Boven, 1993). Its relevance lies in the fact that it is not possible to fully compensate a victim of serious human rights violations. Rather, measures should be taken to prevent such violations in the first place (De Greiff, 2015).

The Inter-American human rights system[28] has also defined "prevention" as a core element to guarantee non-repetition, which in turn is part of the right to full reparation according to Article 63 of the American Convention (Rojas, 2009; Engstrom, 2019). For this reason, in 63% of the cases where a conviction was made, the InterAmerican Court ordered states to create new norms, mechanisms, or policies for the prevention of human rights violations (Londoño & Hurtado, 2017).

Regarding the Colombian Constitutional Court, its jurisprudence has established that:

> *"While in some cases the right to non-repetition has been associated with the right to reparation, it deserves special mention in transitional justice contexts. The guarantee of non-repetition is composed of all actions aimed to prevent the re-occurrence of conduct that affected the rights of the victims, which must be appropriate to the nature and magnitude of the offence. <u>The guarantee of non-repetition is directly related to the State's obligation to prevent serious human rights violations</u>, which includes the adoption of legal, political, administrative, and cultural measures that promote the safeguarding of rights[29]" (emphasis added)*[30]

This interpretation is important for three reasons: first, because it no longer considers the guarantees of non-repetition to be subsumed within the right to comprehensive reparation[31]; second, because it explicitly defines the guarantees of non-repetition as a "legal obligation of the Colombian State"; and third, because it makes a causal link between the right to non-repetition and the adoption of measures to prevent gross and massive human rights violations.

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28 The American Convention on Human Rights was approved by the Colombian State in Law 16 of 1972 and ratified on July 31, 1973. As an international human rights treaty, it was incorporated into the domestic constitutional order in Article 93 of the Political Charter of 1991.

29 Constitutional Court, Ruling C-839 of 2013, numeral 3.5.2.4.

30 Author's own translation

31 Which implies they have a sort of "legal life of their own".

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On this last point, the Constitutional Court of Colombia stated unambiguously that there are seven types of prevention mechanisms that form part of the State's obligations to safeguard human rights and guarantee non-repetition:

> *"(i) In particular, the following contents of this obligation have been identified: Recognize rights internally and offer guarantees of equality; (ii) design and implement comprehensive prevention strategies and policies; (iii) implement education and outreach programs aimed at eliminating patterns of violence and rights violations, and to provide information on rights, their protection mechanisms, and the consequences of their violation; (iv) introduce programmes and promote practices that allow for an effective response to reports of human rights violations, as well as to strengthen the institutions whose functions correspond to protecting human rights (v) allocate sufficient resources to support prevention efforts; (vi) adopt measures to eradicate risk factors, including the design and implementation of instruments to facilitate the identification and notification of such risk factors and violations; (vii) To take specific prevention measures in cases where a group of persons is found to be at risk of having their rights violated*[32]*"* (emphasis added)[33]

This position, according to which the guarantees of non-repetition are an autonomous right that is interconnected with the right to reparation, was ruled constitutional by the Court in its review of Act 01 of 2017[34]. What is more, the high court went further in a subsequent decision on the statutory law of the JEP. The judges considered that prevention—understood as an obstacle to the emergence of new violence—could be analyzed as a necessary means for the development of restorative justice[35]:

> *"Restorative justice can be an appropriate complement in transitional situations, both to the design of transitional justice mechanisms as well as for the implementation of transitional justice. In order to achieve objectives of peace*

32 Constitutional Court, Ruling C-839 of 2013, numeral 3.5.2.4

33 Author's own translation

34 Constitutional Court, Sentence C-674 of 2017, Judge: Luis Guillermo Guerrero Pérez.

35 The third paragraph of transitory article 1 of Legislative Act 01 of 2017 establishes: *"The Comprehensive System will achieve justice by placing special emphasis on restorative and reparative measures and not merely retributive sanctions. One of the guiding paradigms of the JEP will be the application of restorative justice that preferably seeks restitution for harm caused and for the reparation of the victims of the conflict, especially to end the situation of social exclusion that has caused their victimization" (emphasis added).*

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> *and reconciliation proposed in transitional justice, it has become evident that it is necessary to reconstruct social fabric and find new types of punishment from those used in ordinary justice… The above, oriented to prevent the emergence of new violence that could endanger the transition process. Restorative justice and transitional justice also complement each other in their understanding of reparations to victims. In the framework of restorative justice, reparation is a central element according to which the aim is to restore the victims' agency as a rightsholder, while at the same time allowing for the rehabilitation of the perpetrator, in such a way as to guarantee the non-repetition of human rights violations and the reconstruction of the social fabric of the community*[36]" (emphasis added)[37]

In summary, prevention is a legal obligation of the Colombian State that applies especially to institutions that administer transitional justice, since (i) it is a fundamental element for constitutional right, such as guaranteeing non-repetition, also (ii) it is necessary for achieving restorative justice. But in addition to such legal grounds, the JEP's prevention program seeks to incorporate the principle of "Do No Harm" which complies with the jurisprudence of the Appeals Section of the Special Peace Tribunal:

> *"The administration of justice must be oriented towards do no harm. This means, at least in part, that the substantial and procedural configuration of the Jurisdiction must serve to prevent even a hint of re-victimisation. Thus, the JEP must do more than abstain, which it can achieve with policies of caution and respect. It must also act by designing and executing judicial mechanisms to protect and guarantee the rights of the victims. During their time at the JEP, these people are at risk of further abuse… So that the Jurisdiction cannot limit itself to being the vehicle for the future dignification of victims under an assumption that this could be frustrated by exogenous factors… Do no harm demands that the Jurisdiction consider the impact its rulings will have. This can be multidimensional. It encompasses the geographical location of the victims and perpetrators, the place where the acts subject to the proceedings were perpetrated, and the place where the judicial proceedings—including reparations—will take place. From a reading of this context, the organs of the JEP will be able to anticipate the impact of their decisions and adapt them so that they are relevant and reasonable*

36 Constitutional Court, Sentence C-080 of 2018, Point 4.1.9, Substantive judge: Antonio José Lizarazo Ocampo.

37 Authors' own translation.

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> *for the particular group to which they are addressed". (Appeals Section, TP-SA-SENIT 1 of 2019, April 3, 2019, Paragraphs 72 and 73)*[38].

Finally, it should be noted that the prevention program prioritizes strategies that are diametrically opposed to the militarization of territory and "punitive populism" (Wood, 2014). In fact, for the Investigation and Prosecution Unit it is important to strengthen the capacities of the organizations that participate in the JEP, through support for human rights observers[39], improvement of internal communications in rural communities[40], and the promotion of self-protection mechanisms such as *guardia indígena*[41] and the *guardia cimarrona*[42]. Consequently, this integrated scheme inspired the invention of the neologism "provention"[43] with the purpose of pointing out the importance of generating security conditions from within civil society and from diverse territories, avoiding solving problems through state repression (see table 3).

38 Authors' own translation.

39 The Investigation and Accusation Unit is part of the Network of Human Rights Observers of Colombia. It supports the process of information management and technical documentation of human rights violations of civil society observers in the territory.

40 By supporting ethnic and racial communities to have means of communication such as radios, booster antennae, internet connection, etc.

41 The Indigenous Guard is an ancestral, autonomous organization that seeks to defend the territory through a system of surveillance and internal communication that rejects the use of firearms.

42 The Cimarrona Guard is a community self-protection initiative that seeks to protect the territory autonomously from threats posed by external interests.

43 "Provention", as previously discussed, is a way of integrating protection and prevention a part of a comprehensive security system for victims and social organizations that participate in the JEP.

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Table 3. Integrated scheme of prevention and protection (named "provention" by the Investigation and Prosecution Unit)

PREVENTION	PROTECTION
International Human Rights Law • International Covenant on Civil and Political Rights adopted by the United Nations General Assembly • American Convention on Human Rights (Art. 63). **Jurisprudence of the Constitutional Court** • Sentence C-839/2013 • Sentence C-674/2017 • Sentence C-080/2018	• Article 87 of Law 1957 of 2019
• Early Warning System in the Transitional Justice • Designs mechanisms to eradicate risk factors (prevention as guarantees of non-repetition)	• Remedy a situation of imminent risk • Acts when a risk arises as a result of participation in the JEP
• Design and implementation of monitoring systems that allow quantitative and qualitative risk assessments (longitudinal survey) • Emission of warning signals about the probable emergences of risk scenarios • Design and implement "risk baselines" to monitor situations that may affect the participation of rightsholders in the JEP. • Precautionary measures to safeguard the lives and integrity of appellants and social leaders (e.g., improving internal community communications, strengthening organizational capacities, supporting collective self-protection mechanisms, etc).	**Strong measures** • Armored Cars • Bodyguards **Soft measures** • Training in human rights and self-protection, first aid courses, delivery of panic buttons • Arrangement of Police visits • Bulletproof vests • Emergency relocation

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3. *The Risk Monitoring System of the Investigation and Prosecution Unit*[44]

In compliance with international standards for the protection of human rights and taking into account the aforementioned case law, the Investigation and Prosecution Unit developed a Monitoring System to identify, in a timely manner, risk factors in regions[45] as well as for populations of interest to the JEP[46], and thus forewarn of situations that may hinder participation and appearance in the processes that the Jurisdiction carries out.

This methodological tool establishes a conceptual approach[47] that allows the systematization of large volumes of information[48], in order for an early detection of threats and vulnerabilities that have the potential to affect the fundamental rights of those who testify and other stakeholders of the JEP, and hence affect the normal advancement of judicial processes as well as the activities that support the entity's mission. In that sense, this instrument is essential for supporting all sorts of processes of the entity's mission, such as administrative actions, judicial investigations, and actions

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44 Available at: https://www.jep.gov.co/uia/Paginas/mecanismo_monitoreo/index.aspx

45 The system for monitoring risk can be analyzed at two levels: the national level, where 100% of Colombian municipalities are covered; and the local level, in which an analysis of context is carried out in the 111 municipalities where the JEP has prioritized its macro-cases and has adopted precautionary measures. Some of these measures include protecting cemeteries where there are signs that the bodies of victims of extrajudicial executions are being concealed.

46 The population groups of interest to the JEP are: 1. the individual and collective victims (307,783 persons who were seriously affected by the armed conflict, and more than 268 ethnic groups, racial groups, peasant groups, unions, and political parties); 2. civil society organizations and State institutions that have submitted reports to the JEP (545); 3. Those who are obligated to participate (3,367 former members of the Armed Forces and 9,757 ex-combatants of the FARC) 4. Judicial representatives of victims and appellants.

47 A mathematical equation can measure this: Risk equals the sum of hazard and vulnerability factors, over institutional capacities. There are 46 variables of analysis that allow for an analysis of the temporal and geographical evolution of the armed conflict, organized crime, social conflicts and the response of the State.

48 The monitoring system captures real-time information from 197 media outlets and 637 Twitter and Facebook accounts of social organizations, state entities and multilateral agencies working on the implementation of the Peace Agreement, which participate in the JEP and which follow the human rights situation in Colombia. It also incorporates 230 Early Alerts of the Ombudsman's Office and the early warnings issued by social organizations on Twitter.

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with a procedural character which the Jurisdiction controls. It follows, therefore, that the Risk Monitoring System contributes to:

- The development of the Index of Risks and Affections (ICAR) that classifies the level of danger in the Colombian municipalities[49]. Through statistical analysis of factors of organized violence, insecurity and the evolution of the Covid 19 pandemic, a scale of 0 – 100 is generated where it would warn of a high or extraordinary risk at a certain threshold[50], a rethinking of JEP actions in a territory is necessary. In this way, ICAR became a guiding criterion and a planning tool to support administrative, logistical, and judicial activities in the territories under the principle of "do no harm" that has been registered in the jurisprudence of the Appeal Section.
- The development of restorative justice by issuing early warnings that indicate the geographical points where security risks for ex combatants are concentrated. In other words, the aim is to prevent injuries and physical threats to demobilized ex-combatants who appear before the JEP during the implementation of the "proper sanctions" and the "*Works and activities with restoration-reparations content (TOAR, for its initials in Spanish*[51]*)*". For example, two main risk patterns of victimization for ex combatants were identified in the report "*Silenciando la Verdad*" by the Investigation and Prosecution Unit (Investigation and Prosecution Unit, 2020). First, there is a higher risk for these ex-combatants who assume leadership roles in cooperatives, productive projects, governmental institutions or occupy a regional position in the *Los Comunes* Party, formed by the former FARC. Second, there is another pattern of risk for the ex-combatants who are between 18 and 32 years old and keep strong roots in the territories that were part of the historical rearguard of the FARC-EP guerrilla during the war. Specifically, in areas like Los Llanos del Yarí and El Caguán, La Macarena, El Duda y El Guayabero, there are high risk of assassination and threats against demobilized combatants, and/or pressures to take up arms again and join the guerrilla dissidents.

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49 The ICAR methodology is developed at the document "Diagnosis of connectivity, safety and public health conditions (COVID-19) Territorial Cases 02, 04 and 05" done by the Executive Secretariat of the JEP in August 2020.

50 The high risk threshold is from 22–24,05 and the extraordinary risk is from 24,05–100.

51 The TOAR can be understood as an early reparation plan that seeks to the reconstruction of the social fabric of the community.

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- Perception analyses—through longitudinal surveys—on the security and risk conditions applied to victims, affected communities, and other groups of interest to the JEP. This offers an input on which to base the possible adoption of precautionary measures according to the level of severity and urgency resulting from such analyses[52].
- The submission of reports about patterns of current human rights violations of acknowledged victims and former combatants, in order to support the possible adoption of protective measures under Articles 22 and 23 of Law 1922 of 2018, and Article 17 of Law 1957 of 2019[53]. This information is also essential in the analysis of guarantees of non-repetition.
- The design and implementation of "risk baselines" to analyze the evolution of security situations in the territories prioritized by the Chamber for the Recognition of Truth and Responsibility[54] and other jurisdictional instances of the JEP.
- The establishment of a permanent linkage with victims' organizations at all procedural stages in the JEP. A pilot plan was implemented within the framework of case 07 on forced recruitment of children. A base line of risk was established in this case and before the start of the stage of "voluntary testimony" by top FARC leaders who were called to account to the JEP. From that moment on, and until the case is resolved (by issuing convictions or acquittal), a "preventive accompaniment" is carried out to warn of different risk situations that could affect the participation of the victims and their legal representatives.

52 For example, the Section on the Absence of Recognition of Truth and Responsibility of the Special Peace Tribunal ordered the Investigation and Prosecution Unit, through SAR AT-0148–2020, to analyse the situation affecting all human rights organisations acting before the JEP, and based on that information, to proceed with the processing of precautionary measures for collective protection.

53 On several occasions, the magistracy has ordered the Investigation and Prosecution Unit to prepare and deliver reports identifying possible patterns in the threats to rightsholders and guarantees in the JEP. See: Order SRVBIT-137 of 14 August 2020; Order SRVNH-04–00–126/20 of 16 September 2020; Order SAR AT-0148–2020 of 21 September 2020; Order SRVAOA-020 of 28 September 2020.

54 On different occasions, the rapporteurs' offices of the macro-cases have ordered the Investigation and Prosecution Unit to establish "risk and security baselines" in the prioritized municipalities. See: Case Order No. 002 of March 26, 2019; Order SRVAOA-008 of June 25, 2020.

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Conclusion

Over four years since the Peace Accord was signed, Colombia remains in 2022 a country facing multiple expressions of violence. Within this context, the JEP has used its mandate to find ways to defend the rights and lives of those victims which it was set up to enable to provide testimony to its Investigation and Prosecution Unit. '*Provention*' is now a comprehensive mechanism aimed at both protecting victims and social organizations who participate in the JEP, but also to prevent them experiencing further victimization. This, it is argued, is a duty of the State, not a choice. The national and international legal justifications have been set out in this chapter.

However, the contribution of the JEP goes even further than this. The pattern of the many previous peace negotiations in Colombia has included the assassination of many former combatants as well as social activists. In the first place, the JEP represents an opportunity for a new institutional framework able to confront this history of violence associated with efforts to make and build peace in Colombia. In the second place, the JEP has begun to show that "*Provention*" has a potential beyond the immediate and urgent need to protect the population groups with whom it directly interacts. It is demonstrating that a form of justice which reduces violence and builds peace in a country that has experienced so many variations of insurgent, state and criminal violences, must begin to explore restorative approaches to justice. These must also enable the participation of victims. This generates new sensibilities amongst citizens about the significance of transitional justice to sustainable peace. This approach to justice underpins, the authors argue, the aim of interrupting the intergenerational cycles of violence in Colombia and de-sanctions violence as a tool for dealing with conflicts, injustices and/or for the purposes of accumulation of economic, social and/or political power.

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The Special Jurisdiction for Peace in Colombia: Transdisciplinary Inquiries

Stefan Peters

Abstract

The article highlights current conflicts regarding the implementation of the peace process and especially its transitional justice component in Colombia. It stresses some important gains of the transitional justice institutions and discusses current challenges regarding dealing with the past in Colombia. The article closes by presenting four discussions that will be important for both future interdisciplinary research and political discussions on transitional justice on an international level.

During the last five to ten years Colombia has been the focus of attention in international peace and conflict studies. Arguably, this changed with the Russian war of aggression against Ukraine. However, especially regarding peacebuilding in the aftermath of internal armed conflicts, the Colombian case continues to be of relevance. A growing number of journal articles as well as ongoing research projects deal with the continuing peace process in Colombia. International politics, human rights activists and civil society groups are also following the peace process closely (Birke Daniels & Kurtenbach 2021; Fabra-Zamora et al. 2021). This can hardly come as a surprise: After all, the signing of the peace agreement between the Colombian government and the FARC-EP guerrilla organization in 2016 was truly historic. A conflict that had lasted for over fifty years was settled; the largest and oldest guerrilla movement in the Western Hemisphere was demobilized and began the difficult process of reincorporating itself into society. The successful peace negotiations in Havana and the signing of the peace agreement in the Colombian coastal city of Cartagena seemed to pave the way to a better and more peaceful future for Colombia and was enthusiastically supported by the international community in particular.

However, there is a striking contrast between the euphoria of both the international community and the peace and conflict research community and the tone of the general public debate in Colombia. At home, the peace process was heavily criticized, particularly by actors from the

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right-wing political spectrum. After a polemic debate about the real and supposed contents of the peace accords, the agreement failed to win a majority in a plebiscite called by then Colombian President Juan Manuel Santos on October 2, 2016. With a low voter turnout (even by Colombian standards) of 37.43%, a razor-thin majority of 50.21% rejected the peace agreement.[1] Various analyses have identified the reasons for the lack of a majority backing the historical peace agreement. These include effective political marketing based on a campaign of fear and fake news by the right-wing opposition, as well as low interest in the peace process among large segments of the mostly urban population that has been less affected by the internal armed conflict (Bello, 2016; Botero, 2017; Esguerra Muelle 2017; González, 2017; Basset, 2018). In addition, during the last years, it became apparent that certain aspects of the agreement reached in the peace negotiations met with rejection within broad segments of the population. This was particularly true of the guaranteed mandates for former FARC combatants in the Colombian parliament in the 2018–2022 and 2022–2026 legislative periods, as well as the design of the transitional justice mechanisms and, in particular, the *Jurisdicción Especial para la Paz* (JEP, Special Jurisdiction for Peace) (see the contributions by Ambos & Aboueldahab and Gómez in this volume). Thus, the way how to deal with the past and especially the design of the Transitional Justice process is at the heart of the political conflict related to the peace agreement.[2]

Dealing with the Past in Colombia

Colombia is notable not only for its long history of political violence, but also for its multiple attempts to deal with its violent past. Jefferson Jaramillo Marín (2011) identifies eleven non-judicial commissions for dealing with the past for the period from 1958 to 2007, none of which meet the requirements of a truth commission "in the strict sense" (Jaramillo Marín 2011: 234). This is complemented by a variety of memory enterprises at a local, regional, and national level as well as countless initiatives in peace education (see. e.g. CNMH 2013; CNMH 2015; Chaux et al. 2021). Still, there is a striking contrast between this variety of academic production

1 For the results of the plebiscite see https://elecciones.registraduria.gov.co/pre_plebis_2016/99PL/DPLZZZZZZZZZZZZZZZZZ_L1.htm

2 Of course, public contestation on how to deal with the past is rather a common trait of transitional societies (see e.g. Lessa 2014; Jelin 2017).

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and grassroot initiatives on the one hand, and a rather poor knowledge about the internal armed conflict and a general lack of successful public policies aiming to mainstream the confrontation with the violent past throughout the Colombian society (Sánchez Meertens 2017).

This is not to disregard important efforts to deal with the past by the Colombian governments (Riaño Alcalá & Uribe 2016). Transitional justice measures were introduced for the first time in Colombia during the process of demobilizing the paramilitary *Autodefensas Unidas de Colombia* (AUC, United Autodefenses of Colombia). Colombia thus joined the international trend of resorting to transitional justice mechanisms to address human rights crimes after brutal dictatorships or civil wars. The "Age of Transitional Justice" (Adler 2018) gained momentum in the early 1980s in the context of increasing efforts to deal with the past of the civil-military dictatorships in the Southern Cone and rapidly became part of the standard peacebuilding toolkit (Buckley-Zistel & Oettler 2011; Lekhra Sriram 2017: 15; Figari Layús 2021).

However, the Colombian transitional justice process in the context of the demobilization of the AUC (*Ley de Justicia y Paz*) is generally not seen as a successful textbook case. Rather it has been criticized early on for example by Uprimny Yepes et al. (2006), pointing out the flaws of a transitional justice process without transition. Criticism was particularly directed at the lack of protection of victims' rights to truth, justice, and reparations (Uprimny Yepes 2006; Cortés Rodas 2007: 73–79; Gómez 2012). This was partly rectified with the passage of the Victims' Law (*Ley de Víctimas y Restitución de Tierras*) in 2011 and the Law 1592 of 2012. The Victims' Law has been hailed by Sikkink et al. (2014: 61) as an "impressive compromise to provide redress to the victims" (see also Sikkink et al. 2021: 119) Nevertheless, a multitude of problems remained including the narrow financial scope with simultaneously high expectations of victims (Rettberg 2015), but also the lack of access to justice for vulnerable groups in particular (Rivera Revelo & Peters 2017).

In the context of the current peace process in Colombia, the transitional justice mechanisms from the *Ley de Justicia y Paz* and the Victims' Law continue to operate. However, they coexist with a new transitional justice system – the *Sistema Integral de Verdad, Justicia, Reparación y No-Repetición* (SIVJRNR; Integral System of Truth, Justice, Reparation and Non-Repetition). The SIVJRNR is composed of three institutions created in the context of the peace agreement: the JEP, the Truth Commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No-Repetición*, CEV) and the Special Unit for the Search of Disappeared Persons (*Unidad de Búsqueda de Personas dadas por Desaparecidas*, UBPD). While the

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JEP is responsible for the legal prosecution, the Truth Commission, as a non-judicial institution, is particularly dedicated to clarifying the patterns of violence in the past.[3] The UBPD has a humanitarian component and focuses on the search for the victims of enforced disappearance and has a temporary mandate of 20 years.

The Colombian transitional justice system is a subject of great interest among scholars and international policymakers. Colombia can even be considered a model student of the transitional justice community. The SIVJRNR integrates lessons learned from past transitional justice processes and recommendations from academic literature on transitional justice. The SIVJRNR aims to deal with the crimes of the past while contributing to social reconciliation and preventing the repetition of past violence.[4] In addition, the SIVJRNR highlights it victim-centeredness and includes differential approaches that aim to take into account the diversity of the Colombian population. Moreover, exiled victims are considered as well in the Colombian transitional justice system (González Villamizar et al. 2020; González Villamizar & Bueno-Hansen 2021; see also the contribution by Murillo Palomino & Pedraza Camacho to this volume).

At the same time, the Colombian transitional justice process faces a variety of challenges. *Firstly*, the context within which institutions of the SIVJRNR operate is shaped by the ongoing presence of illegal violent actors (neo-paramilitary actors, ELN guerrillas, FARC dissidents) and a very precarious security situation in various – mostly remote and historically marginalized – regions of the country (Ríos & Niño 2021). Social activists, human rights' defenders and ex-combatants are especially exposed to the violent actors. This scenario makes the work of the institutions of the SIVJRNR extremely difficult, especially when it comes to ensuring victims' participation (Interview with Luz Marina Monzón, Director of the UBPD, 10–07–2020; see also Rivera Revelo 2022; and the contribution by Pearce & Velasco to this volume).[5] *Secondly*, this is closely linked to the enormous complexity of the internal armed conflict in Colombia and, consequently, of the peace process itself. According to the continuously updated *Registro Único de Víctimas* (RUV), the armed conflict in Colombia has claimed

3 The CEV will present its final report at the end of June 2022.

4 However, although it is generally taken for granted that judicial prosecutions contribute to preventing the repetition of human rights violations, empirical results on this forward-looking pillar of transitional justice are rather weak and there is an important methodological problem in ascertaining whether deterrence worked (Lekha Sriram 2017: 21; Davidovic 2021: 387).

5 Interview with Luz Marina Monzón, Director of the UBPD, 10–07–2020.

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more than 9,230,000 victims as of the end of January 2022.[6] At the same time, a variety of different actors have been operating in the armed conflict. These include security forces, several guerrilla groups, and paramilitary actors, with various illegal armed actors still operating in the country. Moreover, rather than having clear distinctions between victims and perpetrators these lines are often blurred and there are plenty of cases of "complex political victims" (Bouris 2007) that challenge the construction of a victim-perpetrator binary in transitional justice (Weber 2021). Related to the huge number of victims, *thirdly*, is the tension between the expectations of victims and the actual ability of transitional justice institutions to implement victim participation and fulfill expectations regarding material and symbolic reparations and the content of the works and activities with restorative content (*Trabajos, Obras y Actividades con contenido reparador*, TOAR) in the context of very limited material and time resources (Vargas Trujillo et al. 2021; see also the contribution by Vargas Trujillo to this volume). *Fourth*, an extremely multilayered and complex transitional justice system has been established in Colombia, which is hardly understandable for broad segments of the population, including victims and perpetrators, and consequently creates the problem of expectations based on insufficient or incorrect information. So far, these challenges have not been sufficiently met by educational measures to convey the basics of the Colombian transitional justice system (PRIO/UNDP 2021: 60). This is compounded, *fifthly*, by the low level of support the peace process receives from the current government of President Iván Duque (2018-2022). The Duque government's skeptical attitude toward the peace agreement manifests itself particularly in discussions about the JEP and was evident not least in the discussions about the *Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz* (Statutory Law of the Administration of Justice in the Special Jurisdiction for Peace) at the beginning of 2019. The new law was approved by the Constitutional Court only after heated debates and corresponding delays, and was finally signed by the president despite his objections (Matías Camargo 2019). *Finally*, the SIVJRNR was also negatively impacted by the effects of the Corona pandemic and, in particular, by the harsh lockdown measures taken to contain the pandemic in the months from March to around August 2020. In particular, the

6 https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394. The majority of the victims are internally displaced persons. Others are victims of murder, forced disappearances, *falsos positivos*, forced recruitments, gender-based and sexual violence, torture, etc.

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restrictions made it difficult to work with marginalized victims of the conflict living in remote areas of the country or conduct field visits to solve crimes and attend face-to-face events (Figari Layús et al. 2020).

The Role of the JEP in the Task of Dealing with the Past

Within the process of coming to terms with the past in general and the SIVJRNR in particular, the JEP plays a very prominent role. The focus on the JEP even raises concerns regarding a hegemonic position of the JEP within in SIVJRNR.[7] This results, on the one hand, from the fact that the JEP issues legal judgments with direct and visible consequences for individual perpetrators as well as for victims and victim groups, and thus also generates great high public interest. The JEP focusses its efforts on especially important macrocases and to saction those most responsible for serious human rights violations. In this sense, the JEP also challenges powerful interests. This can be seen currently with regard to the macrocase on the 'false positives'. Whereas ordinary justice has sanctioned only lower-rank perpetrators, in the context of the JEP a general and four coronels participate in public audiences on false positives in the Department of Norte de Santander.[8] This case highlights the relevance of the JEP and its potential to focus on crimes committed by powerful actors.

On the other hand, compared to the CEV, the JEP has a much longer mandate and, above all, is much better equipped than the CEV and the UBPD. For example, having in mind the general lack of sufficient budget (Figari Layús et al. 2021: 9p.), in the 2021 budget year, the JEP was allocated higher funds by the Colombian government (330,748,287,686 Colombian pesos) than the CEV (116,992,092,190 Colombian pesos) and the UBPD (127,889,007,500 Colombian pesos) combined (Ministerio de Hacienda y Crédito Público 2020: 320–324).

Despite this, and in addition to the difficulties mentioned earlier that affect the entire SIVJRNR, the JEP faces several specific challenges. The JEP in particular crystallizes the political polarization around coming to terms with the past in Colombia. This is partly explained by the fact that the JEP is an innovative instrument of transitional justice that can be understood as a hybrid structure that combines aspects of retributive

7 Personal communication by a leading Colombian Peace researcher.
8 Personal communication by a judge from the JEP.

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and restorative justice.[9] A key challenge of the JEP is to comply with standards of international criminal law and especially the Rome Statute (Björkdahl & Warvsten 2021). This means that serious human rights and war crimes are explicitly excluded from amnesty (Ambos & Cote Barco 2019: 4). However, the JEP grants amnesties for less serious crimes, and will provide alternatives to prison sentences. Opponents of the peace process have repeatedly argued that the JEP advocates impunity. Although this has already been refuted several times with convincing arguments (see for example: Reyes Alvarado 2020; Ambos & Aboueldahab in this volume), these accusations generate strong political pressure on the JEP.[10]

At the same time, the work of the JEP is under international scrutiny. The JEP and in general the SIVJRNR can be seen as an innovative instrument that manages "to address both peace and justice simultaneously" and thus "has […] been able to push back the ICC and to secure agency" (Björkdahl & Warvsten 2021: 2, 22). In other words, its success guarantees that the International Criminal Court (ICC) will not intervene in Colombia. In October 2021, the Prosecutor of the ICC, Karim A.A. Khan QC, announced during a visit to Colombia the closure of the preliminary examination of the Colombian case based on the assessment that "the national authorities in Colombia are neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes" (ICC 2021). In return the Colombian government signed an agreement, committing itself to closely cooperate with the ICC and particularly to support the national judiciary system including the transitional justice mechanisms (Ambos 2021a; ICC 2021). However, a key question is whether the ordinary justice system will intervene in crimes committed by actors who are not compulsorily subject to the JEP. Responsibilities of Colombia's ex-presidents and corporate actors (e.g., cattle ranchers) can be mentioned in this context.

Furthermore, in view of the high number of victims and crimes committed and the risk of work overload for judges and juridical staff of the JEP, the question of how to select and prioritize the negotiated macro-cases of the JEP arises (Sánchez León & Jiménez Ospina 2020). By the beginning of 2022, the JEP had opened seven macro-cases, which can be divided into thematic cases and regional ones. Nevertheless, a large number of

9 For a discussion on the role of restorative justice in transitional justice see for instance de Gamboa Tapias (2020).

10 In this sense, Quinn (2021) has recently argued for a basic consensus on the need for serious efforts to deal with the past. As a consequence, she states that "[t]ransitional justice must not be implemented in a society where the population is not ready for it" (Quinn 2021: 136).

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crimes and regions are so far missing from the list of macro-cases. This applies in particular to conflict-related gender-based and sexual violence (5 Claves 2021), forced disappearances (Movice 2021: 64), forced displacement, and regional cases, such as those relating to the Magdalena Medio region, Arauca or the Amazon/Orinoquía region. However, the JEP will probably rather open three new macrocases based on perpetrators (FARC-EP and armed forces alike) and determined victims (indigenous people).[11] Yet, this decision is rather contested. Especially victims' organizations do not only demand more participation in prioritization and selection of cases, but they also raise concern that several severe human rights violations like gender-based and sexual violence, forced disappearances or forced displacement might not get the attention it should.

Additionally, in the everyday practice crucial questions regarding the concrete materialization of the participation of victims within the JEP (see the contribution by Vargas Trujillo in this volume) as well as the concrete content of the 'alternative punishment, restorative sanctions, reparative works and actions' arise (JEP 2020). Victims' expectation as raised in the reports presented to the JEP are often high and include concrete measures. However, there is the risk of generating frustration as the expectations will probably not be totally fulfilled (Sandoval Villalba et al. 2021: 45pp.; Vargas Trujillo et al. 2021). Moreover, based on survey data in conflict-ridden and historically marginalized municipalities covered by the Territorially Focused Development Program (*Programa de Desarrollo con Enfoque Territorial*), a recent study by PRIO and UNDP (2021) highlights that a majority of the interviewees "consider that the upper and middle-rank perpetrators should pay for their crimes with prison without any type of sanction reduction" (PRIO/UNDP 2021: 60). This is arguably at odds with the design of the transitional justice mechanism and the alternative punishments.

Further Research Avenues

Of course, the academic contributions to this volume have only been able to provide insights on a small part of the broad need for research generated through the concrete application of further developments of the transitional justice framework in daily practice. As a consequence, the JEP offers

11 https://www.elespectador.com/judicial/jep-abrira-tres-nuevos-macrocasos-guerrilleros-y-fuerza-publica-lo-senalados/

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a number of additional research avenues for the future that will shape developments in transitional justice far beyond Colombia. In conclusion, four key challenges to transitional justice in general and the Colombian peace process in particular will be highlighted.

First of all, the persistence of extreme and enduring social inequalities in Colombia (Peters 2021: 254–256) leads to the question of expectations about the impact of the SIVJRNR. In recent years, transitional justice has been repeatedly criticized for focusing unilaterally on the legal treatment of serious human rights violations, neglecting the forms of "structural violence" (Galtung 1969) and the violations of economic, social, and cultural human rights. Consequently, current discussions from the field of transformative justice explicitly include the goal of reducing inequalities and thus changing persistent social structures and gender relations (Ní Aoláin 2019; Szablewska & Jurasz 2019). This position seems to gain support within the transitional justice community. For instance, Louise Arbour (2013), a former chief prosecutor of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia, criticizes the "neglect of economic, social, and cultural rights" (Arbour 2013: 5) in transitional justice and argues that transitional justice should take seriously the principles of the indivisibility and interdependence of human rights (Arbour 2013).[12] Moreover, a transformative justice approach is also seen as a way to address the causes for conflict and violence and, therefore, contribute to the no-repetition of the violent past (Arbour 2013; Lekhra Sriram 2017). While Waldorf (2012) argues that such approaches overburden transitional justice institutions and distract from their core tasks, several scholars call for transformative justice as a more holistic alternative to transitional justice (Lambourne 2009; Gready & Robins 2019). In this sense, and with regard to the goal of non-repetition, Sharp (2019: 588) highlights that "a transitional justice project that does not at least

12 Arbour (2013: 26) is very clear regarding this point and enunciates a fierce critique of (transitional) justice: "In spite of many achievements and occasional exceptions, transitional justice has, like mainstream justice, not yet dealt with economic, social and cultural rights adequately or systematically. I suggest that transitional justice should take up the challenges to which mainstream justice is reluctant to rise: acknowledging that there is no hierarchy of rights and providing protection to all human rights including economic, social, and cultural rights. As with all human rights, economic, social, and cultural rights call for constitutional protection, legislative promotion and judicial enforcement. A comprehensive strategy for transitional justice would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place."

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highlight and contest the roots and drivers of conflict risks rendering the refrain 'never again' somewhat hollow." In a nutshell, transformative justice approaches situate political violence in a continuum that encompasses interpersonal and structural violence, and recognize human rights as universal, interdependent and indivisible (Gready & Robins 2019). Given the notorious negation of basic social rights as well as the extreme and historical persistent social inequalities in Colombia and other conflict-ridden societies of the Global South, transformative justice appears to be a very welcome new benchmark for sustainable peacebuilding.

Secondly, the emphasis of the Colombian peace agreement, the SIVJRNR, and the JEP on differential approaches and the focus on victim participation raise a number of questions regarding the materialization of these noble goals. First of all, it must be assumed that the extreme social inequalities also limit access to justice for marginalized social groups, while easing it for privileged social groups. Transitional justice is not a space in which power is absent. This is particularly evident when taking an intersectional perspective (Crenshaw 1987; Viveros Vigoya 2016). For instance, Rivera Revelo (2022) analyzes the example of indigenous Awá women from the *Departmento* Nariño in southwestern Colombia, who were victims of conflict-related sexualized violence in the context of the armed conflict, to show how multiple oppressions along the imbrications of race, class and gender negatively affect access to justice. On a more general level, the JEP faces the challenge of effectively centering victims in a context characterized by limited financial and time resources. At the same time, there is a tension between the implementation of differential approaches as shown in the JEP's guidelines for the implementation of the ethnic approach (JEP 2021) and the JEP's general orientation towards justice based on liberal principles. Arguably, the individual-theoretical approach of mainstream (liberal) transitional justice might be at odds with the reality of local contexts and contradicts recent demands for a 'local turn' in transitional justice (Shaw & Waldorf 2010). In this sense, critical authors such as Boaventura de Souza Santos (2020) even argue for a decolonization that recognizes legal pluralism[13] in transitional justice in general and the JEP in particular. However, this would bring plenty of new inquiries regarding the materialization of a decolonization of transitional justice in legal practice.

13 For a critical discussion of the perils of the local turn, legal pluralism and recent tendencies to romanticize grassroots methods in transitional justice, see the contribution by Kochanski (2018).

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Thirdly, there are still huge research gaps concerning the role of business in human rights violations. This is especially true concerning the question how to hold corporate actors accountable for their role during internal armed conflicts or repressive dictatorships and how to provide redress for affected victims. Actually, the role of corporate accountability in transitional justice processes has only recently received growing interest (Payne, Pereira & Bernal Bermúdez 2021). This is rather surprising having in mind the direct or indirect relations of (transnational) corporate actors – for instance from the extractive industries (e.g. Sachseder 2020), the industry (e.g. Kopper 2018) or the banking sector (e.g. Altamura 2021) – with gross human rights violations in the context of dictatorships or civil wars.

Finally, the negative socio-environmental consequences of the conflict are increasingly becoming the focus of attention in academia, civil society and transitional justice institutions. This does also include discussions on the possibility of legal prosecution of crimes against the environment in the context of transitional justice. Recently, the JEP made a crucial point in formally accrediting territories inhabited by Indigenous and Afro-Colombian communities as victims of the internal armed conflict in the macro-cases 02 and 05 (Huneeus & Rueda Sáiz 2021). This entails further demand for research on international law and its application in the protection of the environment (Pereira, Sjörstedt & Krause 2021).[14] However, a lot of challenges remain, including the consequences of a doubtful equation of ecocide with genocide (Ambos 2021b) and inquiries of how to repair the harms the territories or the environment have suffered.

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14 These recent developments are very much in line with recent trends in legal studies, social sciences and humanities to strengthen the rights of the environment and to increasingly punish perpetrators of environmental damage (see e.g. Ávila Santamaría 2020; Ciesielski, García Carvajal & Vargas Trujillo 2021).

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List of Authors

Susann Aboueldahab, Research Fellow and PhD Candidate at the Law Faculty of the Georg-August-Universität Göttingen, Germany and at the Study Center for Latin American Criminal and Criminal Procedural Law (CEDPAL).

Kai Ambos, Chair for Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen, Germany and Judge at the Kosovo Specialist Chambers, The Hague as well as Advisor (Amicus Curiae) of the Colombian Special Jurisdiction for Peace, Bogotá; Director of the Study Center for Latin American Criminal and Criminal Procedural Law (CEDPAL).

Carlos Guillermo Castro Cuenca, Professor at the Universidad del Rosario, Doctor in Law from Universidad de Salamanca and Law Clerk of the Special Jurisdiction for Peace.

Gustavo Emilio Cote Barco, Associate Professor, Department of Criminal Law, Faculty of Law, Pontificia Universidad Javeriana in Bogotá, Colombia.

Gabriel Ignacio Gómez, Full Professor at the Faculty of Law and Political Science and Member of the Research Group Law & Society at the Universidad de Antioquia.

Indira Yiceth Murillo Palomino, Scientific Collaborator and Coordinator of the project "Peace process stabilization through justice, truth and human rights" at the German-Colombian Peace Institute (Instituto CAPAZ) in Bogotá.

Oscar Parra-Vera, Judge of the Special Jurisdiction for Peace and Professor at the National University of Colombia.

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Jenny Pearce, Research Professor Latin America and Caribbean Centre, London School of Economics.

Laura Ximena Pedraza Camacho, Legal Advisor for the International Protection Programme at Corporación Opción Legal in Bogotá.

Stefan Peters, Professor for Peace Studies at the Justus-Liebig-Universität Gießen and Academic Director of the German-Colombian Peace Institute (Instituto CAPAZ) in Bogotá.

Diego Tarapués, Professor at the Universidad Santiago de Cali, Colombia. Researcher at the the Study Center for Latin American Criminal and Criminal Procedural Law (CEDPAL). Assistant Judge of the Special Jurisdiction for Peace.

Juliette Vargas Trujillo, Scientific Collaborator at the German-Colombian Peace Institute (Instituto CAPAZ) and at the Study Center for Latin American Criminal and Criminal Procedural Law (CEDPAL). PhD Candidate at the Georg-August-Universität Göttingen.

Juan David Velasco, Lecturer at the Pontificia Universidad Javeriana and Advisor to the Chief Prosecutor of Colombia's Special Jurisdiction for Peace.

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