

Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After its Entry into Operation

Executive Summary

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Executive Summary

I. EXECUTIVE SUMMARY¹

The International Commission of Jurists (ICJ), in furtherance of its objective to promote accountability, justice and the rule of law in Colombia, has been continuously monitoring the implementation of the mechanisms and institutions created as the result of the peace negotiations between the Colombian National Government and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP). Among these mechanisms and institutions, the Special Jurisdiction for Peace (JEP) is of particular importance because it is the institution that was designed to investigate, prosecute and punish those responsible for the most serious human rights violations committed during the armed conflict in Colombia. Furthermore, the JEP has broad responsibility in relation to guaranteeing the rights of the victims of violations and abuses arising from the conflict.

The ICJ recognizes the importance of supporting the JEP’s work from a critical but constructive perspective, to facilitate the strengthening and implementation of its functions in full compliance with international law, in particular regarding the rights of victims. Indeed, guaranteeing the rights of victims is fundamental for the JEP’s legitimacy and is also necessary to consolidate peace in Colombia.

For this reason, the ICJ sent a high-level mission to visit Colombia from January 21 to 25, 2019, to analyze and evaluate the implementation of the Special Jurisdiction for Peace. This mission was made up of Commissioners Carlos Ayala (ICJ Vice-President, Venezuela), Wilder Tayler (Uruguay) and Philippe Texier (France) who spoke to a wide range of people. The mission’s initial findings have been expanded upon and complemented with an analysis of the JEP’s main decisions. Additionally, it was reviewed and analyzed the actions undertaken by other authorities when these are relevant to the JEP’s implementation.²

This report presents the findings of the ICJ’s Mission and review.³ In general, the findings indicated considerable advances in the implementation of the JEP, exposing both strengths and challenges. The ICJ was accordingly able to recommend concrete actions to strengthen effective participation by victims in JEP proceedings and guarantee their right to justice and comprehensive reparations. Finally, the findings demonstrated the importance of guaranteeing the JEP’s judicial independence to ensure the proper exercise of its functions.

A. Strengths identified

Strength 1. Quick entry into operation. Within a year and a half of its entry into operation, the JEP had begun to take actions to prevent impunity for the serious human rights violations and abuses that were committed during the armed conflict, as well as ensuring that the victims shall receive reparations for these violations and damages. These processes are even more significant considering that the JEP has been operating in a highly polarized atmosphere, and without its Statutory Law, which was only passed on June 6, 2019.

Strength 2. Coordination among the Comprehensive System of Truth, Justice, Reparation and Non-repetition institutions. The Comprehensive System (SIVJRNR for its

¹ This translation into English of Colombian institutions and legal concepts is informal and unofficial, adopted from various sources. Considering there is no single authoritative translation of many of these terms.

² Review and analysis up to June 7, 2019.

³ The report also presents the international human rights framework as a point of reference for the national implementation of transitional justice instruments and mechanisms (Chapter III); a description of Colombian law relevant to the JEP (Chapter IV) and; a detailed analysis of the JEP’s operations and procedures (Annexes).

acronym in Spanish) comprises three institutions: the Truth, Coexistence, and Non-Recurrence Commission (CEV); the Search Unit for Persons Presumed Disappeared in the context and by reason of the armed conflict (UBPD); and the JEP. This design requires coordinated work among the institutions that make up the system.

In general, the JEP, the CEV, and the UBPD have aimed to work jointly and in coordination. When it has considered appropriate to do so, the JEP has informed the CEV and the UBPD of its decisions and invited them to be part of its proceedings.

Strength 3. Respect for the JEP's jurisdiction by Colombian high courts. Within the framework of their powers, Colombian courts have acknowledged that it is important that the JEP exercise its jurisdiction with the legal tools and mechanisms necessary to fully guarantee victims' rights and legal certainty for the accused.

Strength 4. Widespread support from the international community. The international community has given broad political and financial and resource support to the process of implementing the peace agreement in Colombia. The entities that make up the SIVJRNR have international legitimacy. The international community has supported the JEP's work and has emphasized the importance of having all the necessary tools for action.

Strength 5. Implementation of the differential approach in the proceedings before the JEP. The JEP has begun to take actions to use the differential approach⁴ in its proceedings. In particular, it is worth highlighting the creation of three permanent committees within the JEP (the Territorial and Environmental Committee, the Ethnic Committee and the Gender Committee), the use of the differential approach in the cases opened by the Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (Judicial Panel for Acknowledgement of Truth), and diversity among the judges within the jurisdiction.

Strength 6. Implementation of criteria for prioritization. In order to carry out its function to investigate the most serious and representative crimes committed during the armed conflict, the Judicial Panel for Acknowledgement of Truth issued a document on "Criteria and methodology to prioritize cases and situations." This document establishes a case management methodology focused on the identification and delimitation of types of cases, based on patterns and macrocriminality. Despite some critique that the definition of criteria has attracted, this document has made it possible for the Panel to be more organized and transparent in its handling of cases.

Additionally, the methodology proposed in the document could contribute to better access to justice for the victims. It also may help manage victims' expectations concerning the proceedings before the Panel. For this to be achieved, it is important that the public and the victims are aware of the prioritization criteria and efforts are made to ensure that the victims understand the rationale for these criteria with a view to gaining their acceptance. In the same vein, it should be implemented measures to guarantee the rights of victims in non-prioritized cases.

⁴ The "differential approach" (*enfoque diferencial*) essentially involves the interpretation and application of the law using a perspective that contemplates the specific needs of certain sectors of the population such as women, ethnic groups, and the LGBTI Community.

Regarding human rights violations, it takes into account that the harm and consequences of a violation may not be the same for all victims. Therefore, the measures adopted to guarantee victims' rights cannot be uniform and unique. For instance, considering women inequality and the disproportionate impact of the armed conflict on women, the design and implementation of reparation measures should have a specific component to reduce gender gaps and address specific harms suffered by women.

Strength 7. Coordination with the Indigenous Peoples Jurisdiction. The JEP has undertaken actions and made progress to establish permanent and fluid dialogue with the indigenous authorities. Of particular importance has been the work with the *Permanent Board for Consultation with Indigenous Peoples and Organizations* to guarantee the right of indigenous groups to prior consultation in relation to the instruments that govern the JEP. Furthermore, the Judicial Panel for Acknowledgement of Truth has coordinated with indigenous authorities and has invited indigenous communities to submit reports concerning the cases the Panel is handling.

Strength 8. Opportunities for dialogue with victims and their associations. The JEP has organized several events to explain victims (i) its operation, (ii) the opportunities of participation in its proceedings, (iii) the procedure to receive legal advice, and other topics. The JEP has also undertaken actions to be recognized as a court that guarantees victims' rights and that counters impunity for serious human rights violations committed during Colombian armed conflict. Nevertheless, several challenges persist in this area, which will be discussed below.

B. Challenges

B.1. Challenges regarding judicial independence

The success of the JEP depends, to a large extent, on how it effectively fulfills its functions in light of its purposes and objectives. However, the influence of external factors cannot be disregarded. In particular, in order for the JEP to function adequately, public authorities must recognize its judicial independence. On this point, the JEP faces several challenges:

Funding

For 2019, the JEP received less budget than it had requested. The same is true of the CEV and UBPD. In particular, the UBPD only received 32 percent of the funding it had requested. Although this underfunding does not necessarily indicate that there is a specific intention to weaken the functioning of the SIVJNR entities, it does point to a worrying change in the new government's priorities. Furthermore, it raises questions about the amount of State funding for the SIVJNR in coming years.

In this regard, the national government must keep in mind that the SIVJNR was created to guarantee the rights of the victims of the conflict. Therefore, it is essential for the State to finance the system in order to comply with international human rights obligations.

Recognition and respect for the JEP as a court of justice

Some authorities have questioned the JEP's ability to tackle impunity in cases of serious human rights violations, and to adopt measures that guarantee the victims' right to reparation and non-repetition. This has heightened polarization about the JEP and has affected its legitimacy.

Therefore, even when they do not agree with the JEP's decisions, it is important that the authorities exercise their functions with a view to strengthening and not undermining the JEP. Furthermore, it is essential that clear and concrete language be used to transmit criticisms and propose reforms. The authorities should not underestimate the negative impact of

spreading partial truths or unverified information, particularly because the peacebuilding process is taking place in a complex context.

B.2. Challenges regarding victims' rights

Challenge 1. Need for concrete actions to apply the principle of centrality of the victims. The justice system that was created by the final Peace Agreement will not be successful unless it effectively guarantee victims' rights. Although this task does not fall exclusively to the JEP, the JEP has a leading role as the judicial component of the SIVJRNR. As a consequence, the Colombian State's compliance with its international obligations to effectively investigate and punish serious human rights violations relies, to a considerable extent, on how the JEP fulfills its functions. Despite JEP' efforts to guarantee that victims' rights, it faces some important challenges:

Effective participation

Accreditation. The JEP must establish clear and uniform procedures to accredit victims. This is essential so that victims may exercise their rights before the JEP.

Opportunities for participation. Participation by victims must be guaranteed in all proceedings and all stages, which will require expanding the current opportunities for such participation. In particular, victims must be allowed to participate in the hearings for cases that are before the Judicial Panel for Acknowledgement of Truth.

Similarly, regarding the Judicial Panel for Determination of Legal Situations and the Judicial Panel for Amnesty or Pardon, victims should be given the same opportunities for participation in the different proceedings. Particularly, victims should have the same opportunities of participation in the proceedings where (i) temporary legal benefits are granted⁵ and (ii) the individual criminal responsibility of the alleged perpetrators is established.

Defining the right to participate. Unless there is clarity about the specific parameters of victims' participation at each stage of the proceedings, and resources are available to make this possible, it would be meaningless to say that broad participation by the victims in the proceedings is guaranteed. Victims must have clear and complete information about the purpose of the hearings and other procedural opportunities in which they participate.

The victims not only have the right to be heard, but to present arguments and evidence that could influence the JEP's decisions. This is not possible unless they have information about the specific stages of the proceedings. Therefore, the JEP should produce a guide to participation to explain the objectives and purposes of the different stages of the proceedings.

Reparations

Although the JEP adopts a restorative approach in accordance with its functions, including the imposition of sanctions, it still has the obligation to guarantee victims' right to integral reparations. As a consequence, the restorative component of the sanctions should be

⁵ These benefits include granting freedom, changing or revoking custodial measures and the suspension of arrest warrants.

understood as the mechanism through which comprehensive reparation will be made effective.

Additionally, considering the JEP is not the only State entity that has responsibilities for delivering reparations, it is essential that it works jointly with the other public entities that have obligations in this area.

Finally, it should be emphasized that the above does not imply changes in the JEP's regulations. On the contrary, given that the regulations recognize and seek to guarantee the rights of the victims, the JEP must simply interpret the regulations in a way that develops, deepens and implements in the best manner, the principle of centrality of the victims in its proceedings.

Challenge 2. The role of reporting as a way for the victims to participate in the JEP.

The victims' organizations' reports⁶ presented before the Judicial Panel for Acknowledgement of Truth are considered to be one of the most important forms of participation in the JEP. Certainly, presenting a report has often been greatly symbolic and has served to emphasize the victim's role inside the JEP. Likewise, some of the reports submitted by the victims have contributed to drawing attention to some crimes committed during the conflict with a low level of investigation and prosecution by the ordinary courts.

In spite of the above, the presentation of reports entails some challenges in terms of guaranteeing the victims' right to participate. First, there is the management of expectations, in particular in relation to reports about crimes that will not be prioritized by the Judicial Panel for Acknowledgement of Truth. In such cases, the JEP needs to have a procedure to live up to the expectations of victims' organizations concerning the JEP's work.

Second, it is important that the victims understand that making a report is one of many opportunities for participation in the JEP. The presentation by victims of a report should not be conceived as the main mechanism for participation or as an essential element for the Judicial Panel for Acknowledgement of Truth to receive information about serious human rights violations committed during the conflict. This is because the State has the obligation under international law to investigate these violations regardless of the victims' participation in the legal proceedings.

Finally, the confidentiality and safety of the victims must be guaranteed throughout the proceeding, even after the report has been presented. In that regard, the Judicial Panel for Acknowledgement of Truth must be especially careful with the information provided to alleged perpetrators, especially when the reports contain information related to criminal responsibility of persons over whom the JEP has no jurisdiction or are not fulfilling their legal obligation with the JEP.

⁶ JEP regulation allows and encourages victims' organizations to present reports on human rights violations committed during the armed conflict. In general terms, it is expected that the information provided by the organizations includes human rights violations against one of their members. However, they are free to include any information they consider would be useful for the JEP.

The idea is that victims' organizations provide the information they have been collected throughout the years. In that regard, the reports may have valuable information to clarify crimes and identify those responsible. Certainly, due to the high level of impunity and threats against witnesses and victims' families, it is possible the victims' organizations have crucial information that they have not shared with the ordinary justice system.

Finally, it should be highlighted that State institutions, such as the prosecution office, military forces and ministers, must present reports to the JEP. Specifically, considering their functions, State institutions' reports should contain information on criminal and disciplinary investigations on human rights violations, as well as human rights violations committed against public servants.

Challenge 3. Protective measures for victims. It is necessary to adopt corrective measures to ensure the protection of victims who participate in JEP proceedings. Considering that the JEP's justices and the Investigation and Prosecution Unit⁷ (UIA) have responsibilities in this area, good internal coordination is essential.

Additionally, effective action must be undertaken to enforce protection measures. As it is likely that some of the measures will depend on other State institutions, such as the Ministry of Justice's National Protection Unit, the JEP must have effective communication and coordination channels with these entities.

Challenge 4. JEP training and publicizing decisions. Although there have been efforts to explain the JEP's role as justice tribunal, many victims and the general public still do not understand the JEP's functions and its decisions. This is particularly true in remote rural areas and in places where no victims' organizations are present or operative. Therefore, workshops about the JEP and publicizing its decisions should not merely continue but be stepped up.

Challenge 5. Consolidate the role of the JEP as the justice component of the Final Peace Agreement and encourage the voluntary acceptance of JEP jurisdiction for those who do not fall under mandatory jurisdiction. The JEP has the challenge of encouraging civilians and State agents who are not members of the military forces to accept JEP jurisdiction voluntarily.⁸ Clearly, if the JEP has jurisdiction to investigate and prosecute the crimes committed by those individuals, it will be able to offer victims a satisfactory response in terms of truth and accountability.

To this end, in addition to the legal benefits offered by the SIVJNR, the voluntary acceptance of JEP jurisdiction must be encouraged by consolidating the JEP as the court of justice for serious human rights violations and abuses committed during Colombian armed conflict. This means that proceedings to determine truth and responsibility should provide victims with answers they have not been able to get from the ordinary justice system, especially concerning crimes that have high levels of impunity. This aims to ensure that the voluntary acceptance of JEP jurisdiction is not seen as a form of impunity or a technique of sidestepping the sanctions of the ordinary justice system.

In order to achieve the former, the JEP must correctly apply its system of sanctions to guarantee the rights to justice, reparation and guarantees of non-recurrence. This implies that, although the JEP exercises its functions from a restorative perspective, it must comply with international law and standards concerning the prosecution of those responsible for serious human rights crimes. In this regard, it must be kept in mind that the JEP's sanctions regime might be controversial from a victims' rights point of view and the duty of the State to effectively sanction serious human rights violations, especially in cases related to crimes under international law. Certainly, light sentences that do not entail any time spent in custody may not only be offensive to the victims' right to justice but could even encourage impunity and future repetition of such crimes.

⁷ The UIA is part of the JEP. It is in charge of investigating and prosecuting alleged perpetrators of serious human violations who do not acknowledge truth or responsibility before the Judicial Panel for Acknowledgement of Truth. It is worth noting that the Judicial Panel activates the functions of the UIA. Specifically, when the Panel concludes that a person is not telling the truth or a person does not accept their responsibility, the Panel sends the case to the UIA. Once, the Unit receives the case, it will start the process of investigation. The UIA does not have the autonomy to investigate a person without the authorization of the Judicial Panel.

⁸ Given a decision of the Colombian Constitutional Court, the JEP has mandatory jurisdiction only over two groups of people: previous FARC-EP members and Military Forces members. Over a third group (civilians and State agents who are not members of the military forces, such as politicians or public servants) the JEP has voluntary jurisdiction. This means that the JEP can investigate and prosecute the crimes committed during the conflict by members of the third group only if they accept JEP jurisdiction voluntarily. The voluntary acceptance of JEP jurisdiction is individual.

Therefore, the application of the JEP's sanctions regime must be preceded by serious work to investigate and verify the truth and responsibility confessed by the alleged perpetrators. This is to ensure that the special legal benefits do not undermine victims' rights.

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