

“A pioneering Court in peril”



**Report on the work of the
Special Jurisdiction for Peace
in the context of Transitional Justice in Colombia**

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Interviews conducted during our field study in Bogota, Colombia in February 2019

Name	Role/ Organization	Place and Date of the Interview
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Iván Cepeda Castro	Senador por el Polo Democrático Alternativo	Residence, 25th of February 2019
Oscar Parra Verra	Judge SJP (Chamber of Recognition)	25th of February 2019
Gabriel Rojas Andrade	The International Center for Transitional Justice	26th of February 2019
Juanita Durán Velez	Office of the General Attorney	26th of February 2019
Mathias Zeller	Embassy of Switzerland	26th of February 2019
Alexandra Sandoval Mantilla	SJP (Amnesty Chamber)	26th of February 2019
Diego Fernando Tarapués Sandino	SJP (Review Section)	26th of February 2019
Sebastián Escobar	Attorney	27nd of February 2019
Federico Andreu Guzmán	Unit for the Search for Missing Persons	27nd of February 2019
Juan Diego Restrepo	Verdad Abierta	27nd of February 2019
Camilo Fagua	Defense lawyer, of the FARC (Fuerza Alternativa Revolucionaria del Común)	28th of February 2019
Carlos Enrique Arévalo Narvaez	University La Sabana	28th of February 2019
Estella Durán	Taller de Vida (NGO)	1 st of March 2019
Juan Pérez	ICRC - Colombia	1 st of March 2019
Julieta Lemaitre Ripoll	SJP (Chamber of Recognition)	1 st of March 2019
Juliette Vargas	Lawyer working on victims' participation	1 st of March 2019
Juan Ramón Vargas	SJP (Section of Recognition)	1 st of March 2019
Álvaro Leyva Durán	Politician	1 st of March 2019

The Colombian Peace Agreement and the creation of the Special Jurisdiction for Peace

After more than five decades of conflict and several years of negotiation, the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC) signed a historic peace agreement on November 24th 2016, which was endorsed by the Colombian Congress.¹ The agreement formally ended the conflict between the warring parties, transformed the FARC into a political party and envisioned a sophisticated transitional justice program.

The Peace Agreement consists of six pillars:

(1) An integral agrarian reform; (2) the political participation of the FARC; (3) the end of the conflict and the definitive ceasefire; (4) solutions to the problem of illicit drugs; (5) an agreement regarding the victims of the conflict; and (6) implementation and verification mechanisms.

The fifth point dealing with the victims of the conflict constitutes the main feature of the transitional and restorative justice framework stemming from the Peace Agreement. It created an “**Integrated System of Truth, Justice, Reparation, and Non-Repetition**”, and for that purpose four bodies were established:

- A Truth Commission,
- A Special Unit for the Search for Missing Persons,
- A Comprehensive Victim Reparation Program
- and the Special Jurisdiction for Peace (SJP).

This report’s main goal is to focus on the implementation of the SJP and its work until June 2019, describing its structure, current functioning and underlining the main challenges it has been facing so far.

The SJP is one of the very few mechanisms that has been operational following the Peace Agreement, since March 2018. It should be noted that—although with reduced violence—the civil war with other non-state actors persists (ICRC). Furthermore, President Iván Duque Márquez, who was elected in June 2018, has been a strong opponent of the agreement and its mechanisms. Thus, the implementation of the Peace Agreement as a whole—including the functioning of the SJP—has been under notable pressure coming from the government and part of public opinion in Colombia.

¹ "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace" available at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>

1. The SJP: A hybrid jurisdiction?

In its initial version, the Peace Agreement had designed the Special Jurisdiction for Peace as an internationalized hybrid court, very innovative in its structure and partly inspired by the hybrid tribunals' model implemented in other transitional justice contexts.² Characteristics of this hybridity included a combination of both national and international judges³, and the fact that decisions from the SJP could not be reviewed by any Colombian high court.⁴

Yet, following the failed referendum of October 2016 and political pressures, the final agreement did not end up containing these characteristics, which reduces the hybrid character of the Court.⁵ Indeed, the Constitutional Court has a final say over the review of “*tutelas*” (petitions for judicial protection) (see the Legislative Act 01). Moreover, in a decision of November 2017, the Constitutional Court ruled that conferring “foreign jurists the competence of having an impact on the decision-making process (of the jurisdiction)” was unconstitutional, in virtue of “the principles of autonomy, independence and impartiality” of the Colombian justice.

Although the SJP seems to have lost a number of its initial hybrid characteristics, it still contains several international components, namely:

(a) The process of selecting the judges

After the Peace Agreement was signed, a selection committee was established in 2017 for the selection of SJP judges. To guarantee a certain level of neutrality which was thought to be essential for the political and societal legitimacy of the Court and its future work, it was decided that the committee members had to come from neither the Colombian government nor the FARC.⁶ Consequently, the selection committee was brought forward by five different actors from different areas of the international community and Colombian society:

1. The Council of Colombian Public Universities;
2. The International Center for Transitional Justice (ICTJ, the Colombian branch);
3. The Criminal Chamber of the Colombian Supreme Court;
4. The United Nations Secretary General (Ban-Ki Moon, at the time);
5. The President of the European Court of Human Rights

² Alvaro Leyva, a former Colombian minister was one of the six negotiators of the Peace Agreement, confirmed that the initial design of the Court was one of hybridity, rooted in international law. (Interview with Alvaro Leyva).

³ Initially, the number of Colombian judges were supposed to be around twenty, with three or five foreign judges. See Ambos, K. “Colombia- How much justice can the peace take?”, *OpinioJuris*, 2015. Available at <http://opiniojuris.org/2015/10/08/guest-post-colombia-how-much-justice-can-the-peace-take/> accessed on the 9th of April, 2019.

⁴ Olasolo, H. Ramirez Mendoza, “The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition”, *Journal of International Criminal Justice*, Volume 15, Issue 5, December 2017, p. 1027.

⁵ On October 2nd, 2016, a referendum was held to approve or reject the final agreement concluded between the Colombian government and the FARC. The “No” vote won with a score of 50,22%, which compelled the parties to revise it before putting it to vote in Congress. The Congress approved the revised Peace deal on October 30th, 2016.

⁶ Interview with Álvaro Leyva and with Oscar Parra.

These all chose one committee member to take part in the selection of magistrates.⁷ Before the plebiscite on the Peace Agreement of October 2nd, 2016, the aim was to also include Pope Francis to appoint a committee member, however he declined the request.

From there, the selection procedure consisted of three competitive stages:

1. Around 3000 applications for magistrate positions at the SJP were received by the panel.
2. From these applications, 60 potential candidates were chosen.
3. These 60 candidates were subsequently interviewed by the selection panel.⁸

Gabriel Rojas, of the International Centre for Transitional Justice (ICTJ) in Bogotá, explained that the whole selection process was aided by a newly developed software with the help of the ICTJ, to make it as objective as possible, taking into account a list of criteria.⁹

The *Joint Communication No. 88* from the Government and the FARC specified the criteria of selection of the judges and the selection committee's work: "The members of the committee will select the magistrates by a 4/5 majority, with a voting system that promotes consensus. The selection committee will enjoy all the autonomy and independence for it to fulfill its functions impartially."¹⁰

Moreover, it states that the magistrates should "include experts in different branches of law, with emphasis on knowledge of IHL, Human Rights or conflict resolution"; the procedure should follow "criteria of gender equity and respect for ethnic and cultural diversity" and "in the selection process, the international standards of judicial independence and the high moral qualities of the candidates will be taken into account, as well as the Spanish language proficiency."¹¹

All in all, the selection committee has had great influence on the work of the SJP and the Integrated System in general, as it was also responsible for the election of the director of the Search Unit for Missing Persons, the director of the Unit of Investigation and Prosecution, the members of the Truth Commission, and the director of the Special Unit of Investigation and Dismantling of Criminal Organizations.¹² It was also in charge of the selection of the SJP's *amicus curiae*, which leads us to a second internationalized aspect of the Court: the presence of foreign jurists within the Court.

⁷ Interview with Oscar Parra. See for the five members of the panel: Comité de Escogencia, *Integrantes*, <http://www.comitedeescogencia.com/#>. Interviews with the aspiring magistrates before the panel can also be found here.

⁸ Interview with Oscar Parra.

⁹ Interview with Gabriel Rojas.

¹⁰ "The parties will agree on a composition and functioning of the selection committee, which will also regulate the mechanisms for nomination and election, mechanisms that will have due publicity and transparency guarantees in a way that facilitates the monitoring and oversight by the society and that allows for comments and opinions of people and organizations about the candidates ". [Translated from Spanish] *Comunicado Conjunto No 88*, August 12th, 2016, La Havana, Cuba, retrieved from <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/documentos-y-comunicados-conjuntos/Paginas/Comunicado-Conjunto-No-88.aspx>.

¹¹ [Translated from Spanish] Op. Cit. *Comunicado Conjunto No 88*.

¹² Comité de Escogencia, *Entrevistas*, <http://www.comitedeescogencia.com/#>

(b) Foreign jurists as *amicus curiae*

Ten foreign jurists, and four alternates were nominated as *amicus curiae* to the SJP¹³ : since they are not considered to be judges, the Constitutional Court recognized that they could participate in proceedings “in order to provide their expert opinions as *amicus curiae*.”¹⁴

According to the Legislative Act 01, they need to be invited by the SJP’s judges to provide their views, and can do so “under the same conditions as the magistrates but without the right to vote”.¹⁵ This provides for an innovative understanding of *amicus curiae* as involving a quasi-judicial role, with amici curiae participating in an oral form and deliberating with magistrates, when they are usually not appearing in person in courts.¹⁶

Yet, in practice, according to one judge from the Amnesty Chamber that we interviewed, the current functioning consists of judges only asking for the help of an *amicus curiae* for legal questions, and they just have the possibility to check the cases.¹⁷

(c) The budget

The SJP’s budget is essentially constructed from international donors such as the European Union, Norway, Germany, Sweden and Switzerland.¹⁸ Another example of the international cooperation currently funding the SJP, is the United Nations Post-Conflict Multi-Partner Trust Fund, established in 2016. It aims to help with the implementation of the Peace Agreement through different projects related to victims’ reparation, institutional capacity-building and improvement of security, and therefore includes the SJP. The total of contributions for the period 2016-2020 is 110,178,569 US\$.¹⁹ The fact that the Court’s funding is now mainly coming from such external donors may guarantee its functioning over the years, despite the current hostility of the government.

(d) The UN monitoring and international community scrutiny

From the beginning, the Security Council has been following closely the implementation of the Peace Agreement in Colombia and the work of the SJP.²⁰ In this sense, first and by its [Resolution 2261](#) of January 2016, the United Nations established a political mission of

¹³ There is four Amicus Curiae for the SJP Tribunal, namely: Kai Ambos (German), José Ricardo De Prada Solaesa (Spanish), Julissa Mantilla Falcon (Peruvian), Elizabeth Silvia Salmón Gárate (Peruvian); six for the SJP Chambers: Juan Pablo Albán Alencastro (Equatorian), Michael Duttwiler (Swiss), Salvador Herencia Carrasco (Peruvian), Alexandra Valeria Hunneus Quesney (Chilean), Karla Irasema Quintana Osuna (Mexican), Naomi Roht Arriaza (from the United States). There is two supplicants for the Tribunal: Daniela Kravetz Miranda (Chilean) and Fabián Raimondo (Argentina); and two for the chambers: Claudia Daniela Josi (Swiss) and Marcos Criado de Diego (Spanish). See https://caracol.com.co/radio/2017/12/06/judicial/1512575819_539228.html

¹⁴ Constitutional Court, Communication of 14th November 2017. <http://www.altocomisionadoparalapaz.gov.co/Prensa/Documentos%20compartidos/corte-constitucional-acto-legislativo-01-2017-procedimiento-legislativo-especial-paz.pdf>

¹⁵ Ambos, K. Aboueldahab, S. “Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?”, 2017. <https://www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/> accessed on the 9th of April, 2019.

¹⁶ Ibid.

¹⁷ Interview with Alexandra Sandoval.

¹⁸ Interview with Matthias Zeller.

¹⁹ Colombia Post-Conflict UNMPF, <http://mptf.undp.org/factsheet/fund/4CO00>.

²⁰ Interview with Alvaro Leyva.

unarmed international observers to monitor the ceasefire and cessation of hostilities. Once the Final Agreement was signed in November 2016 and the laying down of arms and ceasefire were a reality, on July 10th 2017, by its resolution 2366 (2017), the Security Council established the UN Verification Mission in Colombia (UNVMC).

Still in place today, the UNVMC aims to continue the verification of the implementation by both parties of specific parts of the agreement, mainly the political, economic and social reintegration of FARC-EP and the implementation of personal and collective security measures for communities and organizations in the territories. It reports every three months to the Security Council on the matter.

According to Álvaro Leyva, a former Colombian minister who was also one of the six negotiators of the Peace agreement, the SJP was not meant to be a local tribunal, but truly a hybrid court, partly because it received the blessings of the UN Security Council, but also because its status allegedly was inspired by the ICC Statute.²¹ Indeed, the ICC has been playing an important role in the development of transitional justice in Colombia.

2. The ICC and the SJP through the lens of complementarity

The International Criminal Court has been an important external actor in the Colombian transitional justice process. Following Colombia's ratification of the Rome Statute in August 2002, the Colombian conflict case has been under preliminary investigation since June 2004²² In accordance with the complementarity principle, the ICC monitors domestic proceedings to determine whether there is "reasonable grounds to proceed to investigation at an international level."²³ Hence the ICC scrutinizes the national proceedings held under the ordinary justice system, the Justice and Peace Law (JPL)²⁴ and the Special Jurisdiction for Peace since November 2017. Following the reception of 229 communications relating to the Colombian case, the Office of the Prosecutor (OTP) determined that there was a reasonable basis to believe that crimes against humanity and war crimes had been committed by different actors during the conflict relevant to its jurisdiction.

In addition to this admissibility assessment, the complementarity principle also takes the form of "positive complementarity," notably through symbolic communications from the ICC and interactions with domestic actors, providing Colombian actors with incentives to conform to international law standards.²⁵ Hence, ICC's overseeing position most likely played a role in shaping the Peace Agreement's justice mechanisms, pushing for the agreement not to be a "trade of impunities," and the prospect of potential investigations most likely acting as a deterrent for warring parties, especially the FARC.

²¹ Interview with Alvaro Leyva.

²² The ICC has jurisdiction over crimes against humanity committed on the territory of Colombia or by nationals from November 1st 2002 onwards, and war crimes committed since November 1st 2009 only, following Colombia's declaration relative to article 124 of the Statute.

²³ Rome Statute of the International Criminal Court, 17 July 1998, Article 17.

²⁴ The Justice and Peace Law Tribunals have been implemented following the Law 975 of 2005 in order to demobilize paramilitary groups and judge them for their human rights violations.

²⁵ For examples of such communications and interactions, see Marina Aksenova, "The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice", in Bergsmo and Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, 2018.

Today, the OTP has been focusing on four cases as highlighted in its 2018 report: false positives, forced displacement, sexual and gender-based violence, and the financing of paramilitary groups.²⁶ It had previously looked into the issue of paramilitaries' extradition under the JPL mechanism as well, as touched on in the OTP's 2012 Interim Report on the Situation in Colombia summarizing its preliminary findings.²⁷ All in all, the ICC is likely to continue assuming an important role in the development of transitional justice in Colombia in the following years.

The Special Jurisdiction for Peace: from theory to practice



The entrance of the SJP

The SJP is the judicial component of the Integrated System for Truth, Justice, Reparation and Non-Repetition. It is designed to investigate, establish the facts and prosecute grave violations of human rights and international humanitarian law committed during the conflict between the FARC and the government before the 1st of December, 2016. The judicial bodies of the SJP also have jurisdiction to grant special treatment—pardon or amnesty—for other crimes.

The system seeks to further victims' rights to learn the entire truth regarding past events, receive reparations and obtain guarantees of non-repetition, promote the acceptance of responsibility by those who participated in the conflict; and reconcile the Colombian society in order to move forward.

²⁶ International Criminal Court, *Report on Preliminary Examination Activities 2018*, 5 December 2018.

²⁷ International Criminal Court, *Situation in Colombia Interim Report*, November 2012.

1. Normative foundations: Laws, Jurisdiction and Structure

(a) National legislation relevant to the SJP

- **The Legislative Act 01 of April 2017**

The Legislative Act 01 is the foundational law of the Integrated System. It establishes the procedures of the different mechanisms including the SJP and provides a “special emphasis on restorative measures and aims to achieve justice not only through retributive sanctions” (art. 1(4)).

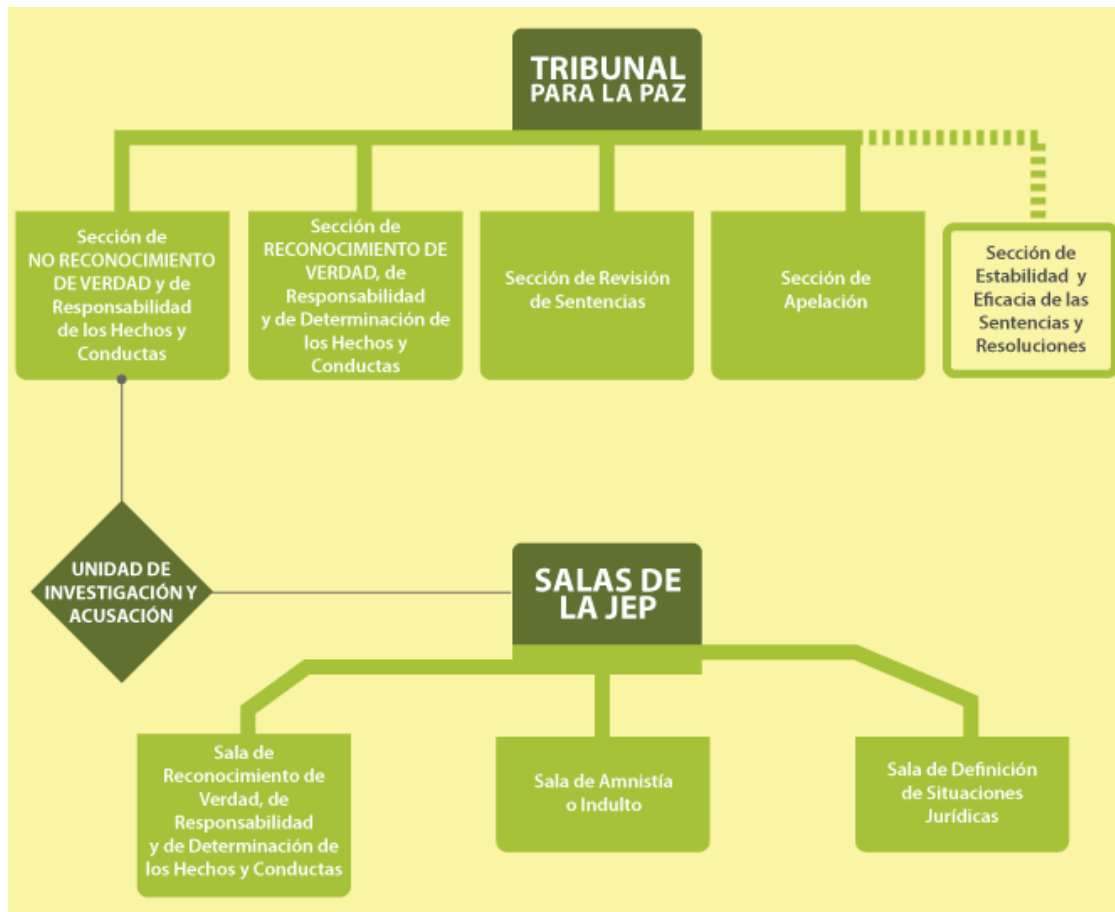
It defines the main objectives of the SJP as *“to fulfil the right of victims to justice; offer truth to Colombian society; protect rights of victims; contribute to the achievement of a stable and lasting peace; and decisions giving full legal certainty to those who participated directly or indirectly in the internal armed conflict”* (transitory art. 5(2)).

To that extent, the law defines the jurisdiction of the Court (transitory art. 6), the process of the selection of judges (transitory art. 14), the sanctions (transitory art. 13) and missions of the SJP. It provides the SJP with primacy of jurisdiction over other jurisdictions for crimes committed before December 10th, 2016, by the FARC and the military (transitory article 5(4)).

It also lays out the structure of the Court:

- **Three Chambers** where perpetrators can confess in order to get amnesty or limited sanctions;
- **A Tribunal for Peace** which is the highest instance of the SJP, divided in **four different sections**;
- **A Unit of Investigation**, meant to investigate facts concerning the case of those who have not confessed their crimes.

Transitory article 12 of the law provides for the elaboration by the judges of further procedural rules aimed at governing the functioning of the SJP, in light of victims’ right to truth, justice and reparation.



Source: SJP official website

- **The 2016 Amnesty Law** (Law 1820 of December 20th, 2016)

This law frames the application of amnesties for former FARC fighters and adopts special treatments for the state agents who have committed punishable acts throughout the armed conflict. The amnesty and pardon provisions defined in this law do not apply to international crimes nor crimes falling outside of the scope of the Peace Agreement. Consequently, it is not in conflict with the national and international duty of the Colombian State to investigate, clarify, prosecute and punish serious violations of human rights.

- **The Rules of Procedure** (RP-SJP/Law 1922 of July 18th, 2018)

The Rules of Procedure of the SJP were enacted as complementary to the legal norms implemented by the Legislative Act 01 of 2017. It is constituted of 76 articles, divided into 3 parts: the first introduces general provisions regulating the functioning of the Court like the difference between parties and interveners, the second deals with special processes before the SJP such as the interaction between Chambers, and the third incorporates special provisions on other aspects of the SJP work such as the measurement of criminal sanctions.

Yet, some measures of the RP-SJP are not explicit and fail to settle a tough foundation for the SJP. For instance, the RP-SJP only introduces a few guidelines when talking about the rules of evidence of the SJP, not specific nor fundamental information on the admissibility and evaluation of the evidence. This lack of legal-procedural foundations is problematic since transitory article 12 of the Statutory Law, which provides the elaboration of such rules of

procedure, requires a strict corroboration of the information on which the SJP's decisions are based.

(b) The Jurisdiction of the SJP

Personal jurisdiction : The SJP has competence to try those who directly or indirectly participated in the armed conflict.²⁸ This refers mostly to the signatories of the Peace Agreement, meaning state agents and members of the FARC, but not only, as Article 16 of the Legislative Act 01 provides that third parties can also be included in the SJP on a voluntary basis. This last provision has been subject to controversy. The Peace Agreement had initially given full jurisdiction to the SJP over third parties involved in crimes committed during the armed conflict. However, due to political pressure, the Constitutional Court issued the sentence C-674 of 2017 and specified that third parties could only present themselves to the SJP voluntarily. Still, members of the paramilitaries, corporations and politicians currently have their cases before the SJP.

Material jurisdiction : The SJP has jurisdiction over crimes committed “as a result of, in the course of, directly or indirectly in connection with the armed conflict, in which the existence of the armed conflict was causal to the commission of the crime or played a substantial part in the perpetrator’s ability to commit the crime, the decision to commit it, the manner in which it was committed or the purpose for which it was committed.”²⁹ While the Chambers of the SJP deal with minor offences that can be subject to amnesty and pardon, the Tribunal for Peace has jurisdiction on the most serious human rights violations and breaches of international humanitarian law.

Temporal jurisdiction : The SJP’s jurisdiction covers crimes that were committed prior to the 1st of December, 2016, the date of the Peace Agreement ratification, in the context of the armed conflict. It is worth noting that neither the Peace Agreement nor the Legislative Law provides a specific date for the beginning of the armed conflict as it is still subject to controversy.

Institutional jurisdiction : The SJP has a limited mandate in time as it is supposed to function for **ten years** with a possibility of a **five-year extension**. Beyond this date, the SJP will have no further judicial activities. This will also depend on the political will in the country and on questions related to the budget.

○ **Conflict of jurisdiction with the Office of the General Attorney and the Justice and Peace Law mechanism**

The separation of jurisdiction between the SJP and the Office of the General Attorney (OGA) remains ambiguous. The Peace Agreement³⁰ and the Legislative Act 01³¹ grant total jurisdiction to the SJP three months after a resolution of conclusion is presented by the Chamber of Recognition. Within this period, both the SJP and the OGA can continue their investigations in parallel, however the latter cannot charge, prosecute, sentence or act in any

²⁸ Transitory Article 23 of Legislative Act 01 and Section “Jurisdicción para la Paz”, Chapter 1, Article 2 of the Peace Agreement

²⁹ ICRC translation of the Peace Agreement, Article [29] <https://casebook.icrc.org/case-study/colombia-peace-agreement>

³⁰ Chapter 5.1.2 Part 48 j

³¹ Chapter III, Transitory Article 6

“material” way with the suspects. Beyond these three months, the OGA will have to end its investigations and hand over the case to the SJP.

As the SJP is still building its foundations, several stakeholders, such as politicians and the General Attorney himself, foresee future conflicts over competence and jurisdiction.³² For example, all the files remain in the OGA and the SJP cannot take the procedural documents out of the OGA. This is the case for third parties, whose files remain at the OGA unless they voluntarily submit to the SJP.

In particular, since the SJP has taken up its duties, demobilized paramilitary combatants from the Justice & Peace Law (JPL) process have been requesting to have their cases moved to the new jurisdiction. This was for example the case in 2018 for Salvatore Mancuso, a former chief commander of the paramilitaries who had been extradited to the US for drug trafficking charges.³³ Several high-ranking paramilitary members have indeed been extradited before having complied with their truth obligations under the JPL mechanism, which could be of interest to the SJP. In order to move to the SJP, former paramilitary members are required to contribute to the truth on the armed conflict by giving more information than what they provided in the previous process. Furthermore, if they have already been judged under the JPL system, they can only change jurisdiction for a new conduct unless they want the SJP to revise their sentence. In either case, they will have to renounce the JPL mechanism as it is impossible to be in both at the same time.

○ **Clarifications following the December 2018 Constitutional Court Decision**

In September 2017, the Colombian Constitutional Court invited the ICC to provide a legal opinion addressing the conformity of the Legislative Act 01 and the Amnesty Law relative to the SJP with international law and the Rome Statute. In her *Amicus Curiae* brief—the first ever to be provided by the ICC—Prosecutor Ms Fatou Bensouda addressed three main questions in particular: (1) The definition of command responsibility, (2) The definition of “grave” war crimes, (3) The implementation of sentences.

The Constitutional Court decisions of March 1st and July 13th of 2018 declared the general constitutionality of the two laws with exceptions related to the three issues raised by the ICC, and clarifying the ways in which these notions should be interpreted and applied by the SJP.

As for command responsibility, there was a concern that article 24 of the Legislative Law was giving too restrictive of a definition for the notion, requiring that an officer had to have legal authority over perpetrators and direct knowledge of the violations to be held responsible. Such a restrictive interpretation would have made it easy for paramilitaries and senior leadership to stay unpunished. As a consequence, the Constitutional Court underlined the necessity for magistrates to interpret this article “mindful of how the notion of command responsibility has developed in international law.”³⁴ Effectively, international law standards currently correspond to a “should have known” standard of knowledge, which means that a commander who fails to remain informed of his troops’ actions can still be held responsible for

³² Interview with Juanita Durán Velez.

³³ Adriaan Alsema, “From his US prison, former paramilitary chief submits to Colombia’s war crimes tribunal”, *Colombia Reports*, April 17, 2018, <https://colombiareports.com/from-his-us-prison-former-paramilitary-chief-submits-to-colombias-war-crimes-tribunal/>

³⁴ *Op. Cit.* ICC report 2018. Page 42.

their violations, as it is posited that he has the duty to take the necessary measures to secure knowledge of the conduct of his troops.³⁵ The notion of command responsibility in international law is also currently understood through an “effective control standard,” which means that there is no need for legal authority to constitute responsibility, the material ability to effectively control forces is enough.³⁶

As for the definition of “grave” crimes, the Amnesty Law stated that to be considered “grave”, crimes had to be committed in a “systematic” manner, therefore potentially leading to amnesties for individuals responsible for war crimes not committed in a systematic manner. The Constitutional Court rejected that definition, recalling “the state’s duty to investigate, prosecute and sanction grave Human Rights and IHL violations, *whether committed in a systematic manner or not.*”³⁷

As for the implementation of sentences, the ICC had raised a concern regarding alternative penalties, affirming that while the principle of such penalties was compatible with the Statute, suspended or commuted sentences were not, as it would amount to impunity. Effectively, the Constitutional Court affirmed that there was a need for a “genuine intent to bring the convicted person to justice” in the implementation of sanctions, as well as proportionality in relation to the degree of responsibility, the gravity of crimes and the degree of restriction of liberty.³⁸

Lastly, in its 2018 report, the ICC underlined that the **special procedure for state agents** could be interpreted as questioning the genuine aspect of the proceedings, which could potentially lead to the admissibility of cases regarding state agents.³⁹

³⁵ Human Rights Watch, « Colombia : Amicus Curiae regarding the Special Jurisdiction for Peace », July 17, 2017.

³⁶ Ibid.

³⁷ Op. Cit. ICC report 2018. Page 42.

³⁸ Constitutional Court of the Republic of Colombia, [Fe de Erratas al Comunicado No.55](#), 14 November 2017 (last accessed 07 April 2019).

³⁹ Op. Cit. ICC report 2018. Page 42.

2. The SJP in Practice



The SJP's building

Following the Peace Agreement, and its endorsement by national laws, the SJP was established and came to operate in the building of a former telecommunication company, situated in the heart of the business quarter of Bogotá.

It has been operating since March 2018 with currently 800 employees, including 100 social scientists, notably historians. Working in an open space, they have 10 years to resolve the cases that will be brought forward to them, with a possibility of extension for another 5 years.



Open Space mode of working

In this part, we will first proceed to talk about the profiles of the SJP judges (a), then describe the different tracks for prosecution within the SJP, and highlight the innovative concept of alternative sanctions (b), before turning to the current functioning of the chambers and the tribunal (c). Lastly, we will look at the participation of victims within the SJP proceedings as it is currently envisaged, as well as the reparation programs and its limitations (d).

(a) Who are the judges?

There are currently 38 magistrates: 20 at the Tribunal and 18 within the Chambers.⁴⁰ Preferences for specific magistrate positions at the SJP were clarified by the magistrates themselves and by means of a survey. Those positions were then distributed, with attention for a balanced division. For example, the selected judges tried to have one indigenous person and one afro-descendant person working in each Chamber, in accordance with the predetermined criteria of diversity mentioned earlier.⁴¹ Similarly, the President of each Chamber was elected by the staff members, after which an alphabetical order will be followed every year.⁴² Each magistrate was also given the opportunity to choose three assistant magistrates to help with the work in their respective Chamber or Section.⁴³

For the purpose of dividing the work evenly, some Chambers receive help from magistrates appointed to other positions at the SJP, in a process called ‘mobility’. For example, because of the currently large number of applications to the Amnesty Chamber, magistrates working in the Tribunal (where cases have yet to arrive) temporarily take up amnesty cases to assist their colleagues.⁴⁴ Through the general application procedure, the self-determined division of work, the rotational organization and the mobility process, the judicial work at the SJP can thus be seen as a joint effort by people to serve the Court as a whole, rather than simply focusing on their own niche or work position.

As decided when drafting the Peace Agreement, the judges of the SJP indeed show a wide variety in terms of profile. Among them are academics, indigenous people, human rights defenders and other victims of the conflict.⁴⁵ In terms of previous professions, within the Court we find lawyers from the Inter-American Commission on Human Rights; university law professors; jurists from the Colombian Commission of Jurists; racial discrimination investigators; legal advisors to indigenous communities; women’s rights defenders; judges from military tribunals; and much more. Many have studied abroad, often in Europe or in the United States, but others have completed their education in Colombia. Of the 38 magistrates, there are 18 men and 20 women. Within individual Sections or Chambers, the gender division is also almost equal: nowhere do we see an all-female Chamber or an all-male Section.⁴⁶

The fact that some magistrates have a background working for human rights organizations and defending victims or have been victimized themselves during the Colombian conflict has led to some criticism by politicians and public opinion. There is a fear that the group of judges is leaning towards the left politically and is biased against the state in the cases before the SJP. By some, they are labeled as ‘communists’.⁴⁷ Indeed, many of the elected judges are not connected to the State as they have never held high positions in domestic courts in Colombia.

⁴⁰ Please find the individual profiles on: Jurisdicción Especial para la Paz, *JEP: Perfiles*, <https://www.jep.gov.co/Paginas/JEP/Perfiles.aspx>

⁴¹ Interview with Oscar Parra; Interview with Julieta Lemaitre.

⁴² Interview with Julieta Lemaitre. At the time of the interview with Ms Lemaitre, she held the position of President of the Recognition Chamber. On March 1st, she passed on the Presidency to Óscar Parra.

⁴³ Interview with Diego Tarapues.

⁴⁴ Interview with Alexandra Sandoval.

⁴⁵ Interview with Oscar Parra.

⁴⁶ Jurisdicción Especial para la Paz, *JEP: Perfiles*, <https://www.jep.gov.co/Paginas/JEP/Perfiles.aspx>

⁴⁷ Interview with Oscar Parra; Interview with Matthias Zeller.

However, this ‘outsider’ position might have been the precise reason why they were viewed as appropriate candidates by the selection panel, especially considering the polarized political climate they have to work in. Through the three-step selection of judges, with panel members not being part of either the Colombian Government nor the FARC-EP, parties to the conflict had hoped to circumvent this problem.

SALA DE RECONOCIMIENTO DE VERDAD, DE RESPONSABILIDAD Y DE DETERMINACIÓN DE LOS HECHOS Y CONDUCTAS



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Some judges from the Chamber of Recognition

Source: SJP official website

(b) A Creative Vision: Amnesty, Prosecution and Alternative Sanctions

i. The Prosecution Tracks

The Special Jurisdiction for Peace has a complex structure of operation, which is based on two main tracks:

(1) **The amnesty and pardon track** (for political and other crimes, therefore excluding international crimes).

Ex-FARC Members: Amnesty/pardon

State Officials: Special Treatment

(2) **The criminal procedure track** (for war crimes and gross violations of human rights).

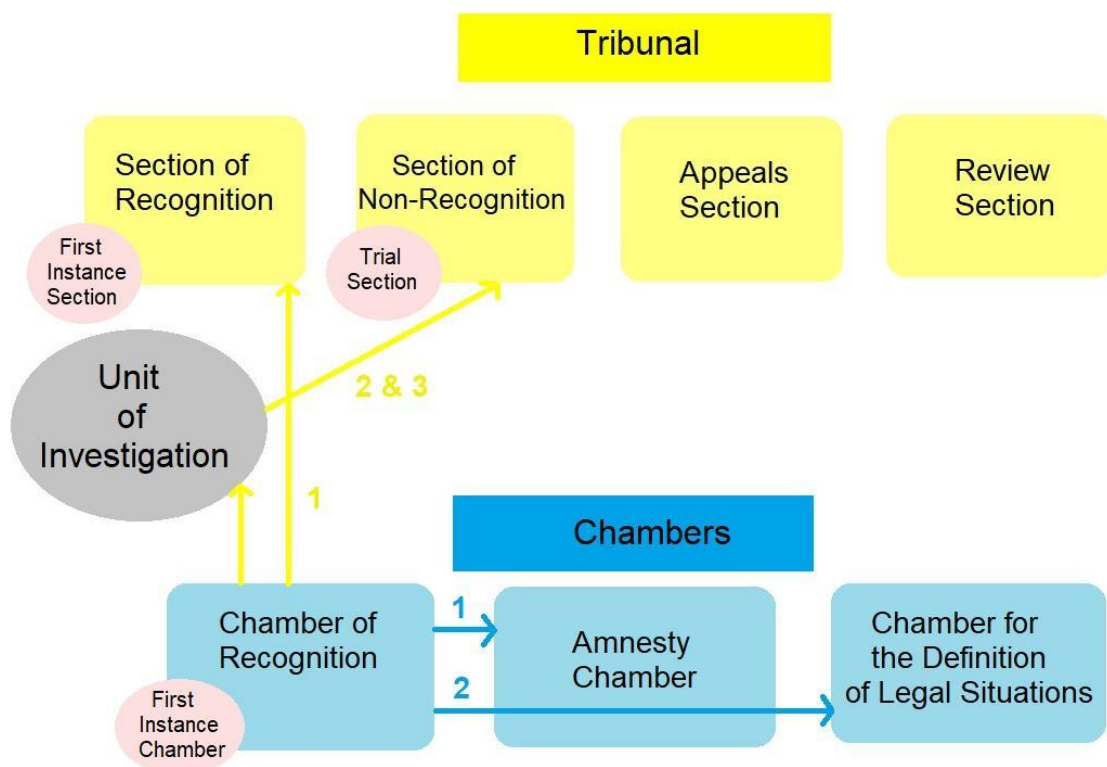
Gross human rights or international humanitarian law violations:

1. Full Recognition: Alternative Penalties

2. Late Recognition: Prison Sentence up to 8 years

3. Non-Recognition: Prison Sentence 15-20 years

Aside from the type of crimes committed, the specific route of a defendant before the SJP also depends on whether they recognize responsibility for those crimes or not. In the case that the defendant does not acknowledge responsibility, the criminal procedure track provides for a regular criminal trial and prison sentence of up to 20 years. Those who are willing to establish the truth and recognize responsibility for their acts may be given *alternative penalties*. The defendant can propose to the court such an alternative penalty project developed with the victims, and this will last between 5 and 8 years.



The combination of those tracks, amnesty and pardon for crimes not amounting to international crimes, and prosecution of international crimes with the possibility of alternative penalties, elaborated by the victims and the perpetrators, make the SJP an avant-garde jurisdiction, the first of its kind, offering a creative way of moving forward encouraging restorative justice and reconciliation, when opportune, and criminal repression, when not.

Before turning to the structure and functions of the different organs of the SJP, it is important to explain in more detail the idea of alternative penalties and underline the originality of their creation.

ii. Alternative penalties

Defendants before the SJP may be eligible for alternative penalties should they fully recognize their liability for the most serious crimes. These sentences act as both sanctions for the defendants and reparations for the affected communities. In this sense, alternative penalties embody the idea of restorative justice. A report conducted by Dr. Luke Moffett interestingly highlights that alternative penalties “sit somewhere between punishment and amnesty,” in that they ensure a criminal prosecution for the most serious crimes while keeping in mind the ultimate goal of reconciliation.⁴⁸

As we are still at an early stage in the SJP proceedings, we can estimate that the sanction program will not start before at least two years.⁴⁹ Undoubtedly, the system of alternative penalties and its implementation will be one of the most interesting developments to follow. To a certain extent, the success of the SJP will depend on the implementation of these alternative penalties.

In concrete terms, alternative sentences are chosen from a pre-established list of sanctions and are applicable to those who fully, exhaustively and in detail, disclose the truth. Defendants then get an effective restriction of liberty for a period of 5 to 8 years during which they will be compelled to carry out restorative work. For that purpose, the defendants must choose a project in direct negotiation with the victims at the pre-trial stage, these negotiations being facilitated by the SJP. It is worth noting that the defendants performing alternative penalties will still be able to participate in political life while serving their sentence.

According to Julieta Lemaitre, the SJP is developing a new approach to criminology, aimed at putting the victims—and not the criminals—at the center of the analysis through the study of the crimes’ impact on the victims. For this purpose, a team of 100 social scientists is working full-time in the Court. They assist the judges and provide them with a historical, geographical, cultural, and gender-related contextualization of the crimes committed, which is then used to assess the adequacy of the reparation project proposed by the perpetrators.

The Section of Recognition of the Tribunal will later supervise the effective compliance of the defendants with their sanctions and the UN Monitoring and Verification Mission in Colombia

⁴⁸ Luke Moffett, Cheryl Lawther, Kieran McEvoy, Clara Sandoval and Peter Dixon, “Alternative Sanctions Before the Special Jurisdiction for Peace”, *Reparations, Responsibility & Victimhood in Transitional Societies*, 31 March 2019.

⁴⁹ Interview with Gabriel Rojas.

will monitor the process as well.⁵⁰ Any defendant can start doing reparation activities *proprio motiu*, negotiating directly with the affected communities. As mentioned by their defense lawyer, some FARC members are currently engaging in these activities although they have not yet been convicted.⁵¹ This type of voluntary initiative will likely result in reduced sentences for the defendants once they get to the Tribunal stage. The Executive Secretariat of the SJP is currently reviewing these voluntary activities in order to develop an instrument to evaluate them.

The hybrid nature of the sanctions—between prison sanctions and alternative penalties—requires a lot of criminal and legal creativity.⁵² This is also one of the aspects of the SJP that is most criticized. Due to the politically sensitive nature of the conflict, part of the public opinion tends to equate alternative sanctions with impunity. In that regard, a member of the ICTJ referred to “punitive emotions,” which lead people to ask for more severe and restrictive sentences for the perpetrators to pay for the damage and pain they inflicted. On the other hand, human rights organizations believe this is due to a lack of pedagogy on alternative penalties on the part of the SJP. They explain that it is complicated for victims to understand why the perpetrators remain “free.”⁵³

This new model of judicial penalties based on restorative activities reinvents the idea of justice and challenges the traditional punishments for mass crimes. It remains to be seen, however, how this model will be implemented by the SJP.

(c) The Functions of the Chambers and Tribunal Sections

Every case begins at the Chamber of Recognition, a sort of Pre-Trial Chamber. From there on, different tracks can be traced.

i. The Chamber of Recognition (here in after: The Pre-Trial Chamber)

The Chamber of Recognition or Pre-Trial Chamber is responsible for the selection, prioritization and preparation of cases. The judges establish the facts and assemble all the legal evidence into “macro-cases.” The general procedure at the SJP starts with the arrival of reports (around 170 reports have been received as of March 2019), the majority coming from the Attorney General, and some others from different human rights NGOs. These reports are received and analyzed in the Pre-Trial Chamber. In this process, the competence of the SJP is determined and the more serious and representative cases are identified (brought together in the macro-cases). The main issue according to some of the judges concerns the amount of legal evidence. In the Chamber, each judge has a team of seven people, as well as a special team for the analysis of legal evidence composed of around 80 people.⁵⁴

● The prioritization and selection of cases

⁵⁰ “How Colombians renegotiated criminal accountability for international crimes”, Center for International Criminal Justice, November 29, 2016 <https://cicj.org/2016/11/how-colombians-renegotiated-criminal-accountability-for-international-crimes/>

⁵¹ Interview with Camilo Fagua.

⁵² Interview with Gabriel Rojas.

⁵³ Interview with Sebastian Escobar.

⁵⁴ Interview with Oscar Parra.

The Chamber of Recognition selects cases based on a methodology of prioritization criteria which were approved on 28 June 2018.⁵⁵ In the methodology guide, the adoption of the prioritization policies is said to be coherent with the constitutional mandate of the SJP: i. satisfying the right of victims to justice; ii. offering truth to Colombian society; iii. protecting the rights of victims; iv. contributing to the achievement of a stable and lasting peace; and v. adopting decisions that provide full juridical security to those who participated directly or indirectly in the internal armed conflict.⁵⁶

The methodology for prioritization is structured in three stages: clustering, concentration and prioritization.⁵⁷

- “**Clustering**” refers to the delimitation of cases and situations falling within the jurisdiction of the Pre-Trial Chamber.

- “**Concentration**” constitutes the preliminary work of collection and analysis of information of determined groups of people or cases in order to adopt decisions of prioritization.

- Finally, “**prioritization**” involves the Chamber of Recognition determining the order of case management and the financial assignation of resources.

Prioritization is further defined as a management tool of focalization that attempts to classify, organize and define strategic criteria for the investigation of issues and situations of violations and abuses.⁵⁸ The guide **differentiates prioritization from selection** in so far that selection is a mechanism of establishing which issues are processed and which are discarded, while prioritization seeks to determine the order of issues to be investigated. The Constitutional Court was quoted as clarifying that the practice of prioritization does not mean that other cases can never be selected.⁵⁹

The prioritization criteria involve two dimensions: **impact** (subjective and objective) and **availability of information**.

- Subjective impact refers to the characteristics of victims and alleged perpetrators, considering the condition of vulnerability of victims and the differentiated impact on ethnic communities and their lands, as well as other collective subjects, and the representation of the alleged perpetrators.

- Objective impact refers to facts, based on the gravity of the offense, the magnitude of direct and indirect victimization, and the representation of offenses.

- As a complementary criterion, the availability of information considers the obligation of due diligence in bearing in mind the complexity of the facts and the context in which they happened in order to achieve the objective of uncovering the truth.

⁵⁵ *Criteria and Methodology of Prioritization for Cases and Situations in the Chamber for the Recognition of Truth, Responsibility and Determination of the Facts and Conducts*, Bogotá. Full text: <https://www.jep.gov.co/Relatoria/Sala/de/Reconocimiento>

⁵⁶ Political Constitution of Colombia. Transitory Title, Transitory Article 5°; *Criteria and Prioritization Methodology for Cases and Situations*, Introduction, 3.

⁵⁷ These methodology criteria can be revised and adjusted based on their effective contribution to the objectives set out by the Special Peace Jurisdiction and the Integral System for Truth, Justice and Non-Repetition.

⁵⁸ *Criteria and Prioritization Methodology of Cases and Situations*, 16.

⁵⁹ Constitutional Court, Judgment C-579 of 2013.

Through the formation of “macro-cases”, new reports are created and the participation of victims is organized. So far, **seven cases** have been opened, using different criteria of prioritization and a principle of symmetry among the accused. This is reflected in the fact that the SJP has opened one case in which the FARC is particularly involved (kidnappings), then two territorial cases in which both parties to the Peace Agreement (FARC and the State’s military forces) were involved, and then a case in which especially the State’s military forces are involved (“Falsos Positivos”). This is important for societal legitimacy and to respect the principle of impartiality, holding perpetrators from both sides of the conflict equally accountable.

- **Ongoing cases**

There are currently seven macro-cases under review at the Pre-Trial Chamber, involving thousands of persons suspected of the commission of war crimes or gross human rights violations. Those cases will go to the criminal track and depending on their recognition of responsibility the case will be referred to the tribunal for considering the alternative penalty project proposal or for prosecution in a regular trial.

At the University of La Sabana in Bogotá, an international law research group has established an SJP Observatory to monitor and document the ongoing SJP trials. Through newsletters, they explain the work of the SJP but also the legal issues that present themselves in the Court’s macro-cases.

Case 001 emphasizes the alleged responsibility of members of the FARC-EP and members of the Police Force regarding the illegal retention of persons attributable to the FARC-EP in the period between 1993 and 2002 (**kidnappings**). In order to achieve this objective, the Chamber of Recognition relies on report No. 2 referred by the General Attorney’s Office named “Illegal Retention of persons by FARC-EP.” The Chamber decided to convene 32 FARC members to the proceedings by July, 2018.

Case 002 documents the situation in the municipalities of Ricaurte, Tumaco and Barbacoas in the **Department of Nariño**, which includes acts allegedly committed by FARC-EP members and the security forces between 1990 and 2016. The Chamber complied with the criteria established in the prioritization guide so as to adopt an ethnic and territorial approach within this case. The criteria used are the following: victims’ vulnerability; the impact on collective populations; the representativity of perpetrators; the severity of events; the magnitude of victimization; the representativity of the facts and the availability of information. This case was opened on July 10th 2018.

Case 003 emphasizes deaths illegitimately presented as combat deaths by the State agents, more commonly known as “**false positives**.” The Chamber relies on report No. 5 referred by the General Attorney’s Office with the same name, which established that 2248 victims were reportedly turned into false positives by national military regiments in 29 out of the 32 Departments of Colombia between 1985 and 2016. Besides, the Chamber documented, based on the Preliminary Report on the Colombian situation issued by the Prosecutor’s Office of the ICC in December 2017, that 10 military brigades potentially committed such extrajudicial killings. These brigades were attached to the First, Second, Fourth, Fifth and Seventh Divisions of the National Army. This case was opened on July 17th, 2018.

Case 004 prioritizes potential crimes and grave situations of human rights abuses allegedly committed directly or indirectly in relation to the armed conflict by members of the FARC-EP and the Public Force against populations within the territory of the **region of Urabá**. In the Urabá region, the Chamber of Recognition documents the potential violations within the municipalities of Turbo, Apartado, Carepa, Chigorodó, Mutatá and Dabeiba in the Department of Antioquia and in the municipalities of El Carmen del Darién, Riosucio, Ungula and Acandí, in the Department of Chocó. The actions investigated range from January 1st, 1986 to December 1st, 2016. In this Case 003, the Chamber of Recognition, developing the objectives and guiding criteria, applied the territorial approach as one of the strategies to achieve a better understanding of the regional dynamics of the conflict and the particularities of the context in the affected territories. This case was opened on September 11th, 2018.

Case 005 prioritizes the grave human rights abuses against populations within the municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribio y Caldon, in the Northern **region of Cauca** which includes the acts presumably committed by members of the FARC-EP and the Colombian Armed Forces, between January 1st, 1993 and December 1st, 2016. This case was opened on November 8th, 2018.

Case 006 documents the victimization of members of the **Unión Patriótica (UP)** by state agents based on report no. 3 presented by the Attorney General “Victimization of members of the Patriotic Union (UP) by agents of the state,” the report by the corporation Reiniciar “Live memory of a national shame,” and the report of the National Center of Historic Memory (CNMH) “Everything happened before our eyes. The genocide of the Patriotic Union 1984-2002.” The Chamber of Recognition found evidence that suggested the existence of a systematic pattern of violence against members of the UP, as well as the recognition of its juridical personality. This case was opened on February 26th, 2019.

Case 007 acknowledges the recruitment and use of girls and boys in the Colombian armed conflict as a prioritized case (**child soldiers**). The Chamber of Recognition defines the distinct forms in which minors are victimized and uses the denomination of child soldier for recruited minors. The Chamber will organize the case through a provisional grouping according to three categories: recruitment modalities, the structure of the FARC-EP, and the role played by the accused both within and outside the organizations’ guidelines. This case was opened on March 1st, 2019.

- **Voluntary submissions**

In the Pre-Trial Chamber, perpetrators can voluntarily submit their voluntary versions to the SJP. So far, around 55 have done so.⁶⁰



War and peace
FARC leader Timochenko first to testify before Colombia's war crimes tribunal

by Julia Kincaid | February 14, 2019

Source: Colombia Reports⁶¹



Dr Sharon Weil (far right) during the interview in the presence of FARC Leader Timochenko

During our visit in February 2019, the FARC provided voluntary submissions concerning case 001. Those hearings were carried out behind closed doors and we could not attend them (as is the case in the investigation phases of both common law and civil law systems). We conducted, however, an interview with the FARC leader Timochenko and his defense lawyer a week after their deposition on the 14th of February 2019.

- **Victims' testimonies**

Then, victims testimonies are taken into account in order to compare and cross-check with the facts from the reports and the testimonies of the accused. Subsequently, the public hearings of acknowledgement of responsibility take place. Until now, this remains a work in progress, and the SJP is currently working on the rules of procedure and the ways in which victims can adequately participate in this cross-checking procedure. So far, the rules of procedure do not define other details such as the duration of the hearings, or how open and transparent the hearings will be.

- **Final assessment**

At the end of the process, the Chamber of Recognition provides conclusions and a jurisdictional decision (not a judicial decision), identifying those responsible and if they recognized the facts or not.

From there, in cases of international crimes, the case can be:

(1) **sent to the investigation unit** for further investigation in case of non-recognition of the facts by the accused;

⁶⁰ Interview with Oscar Parra. To see some of the submissions: JEP, Youtube Channel, <https://www.youtube.com/channel/UCay5mclHBbWQTO8fhoNCWow>.

⁶¹ <https://colombiareports.com/farc-leader-timochenko-first-to-testify-before-colombias-war-crimes-tribunal/>

(2) **referred to the tribunal** in cases of acknowledgment of the facts for an alternative penalty to be considered. In this case, the Chamber of Recognition proposes an alternative sanction program, after negotiations between the perpetrator and the victims.

In cases of minor/political offenses, the cases are **referred to the amnesty and pardon chambers**.

ii. The Amnesty and Pardon Chamber

The Chamber on Amnesty and Pardon is concerned with cases dealing with political offences or crimes that do not amount to grave violations of IHL and human rights, which can be subject to amnesty, pardon or special treatment.

- **Amnesty** can be granted when the defendant has not been the subject of a conviction.
- **Pardon** can be granted for people already convicted and imprisoned.
- State agents and army officials cannot benefit from amnesty because self-amnesty is prohibited under international law.⁶² As a result, state agents will receive **special treatment**, which offers comparable conditions to the amnesty that can be granted only to a member of a non-state armed group.

This is the reason why two distinct chambers have been established, each one dealing with either non-state actors or State officials: the Amnesty Chamber has exclusive jurisdiction over the FARC and the Special Treatment Chamber has exclusive jurisdiction over State agents (See section below).

The Agreement states that amnesty can only be granted to FARC members who participated in the conflict for charges of political crimes or conducts related to political crimes. These can include, but are not limited to, rebellion, rioting, illegal carrying of weapons, criminal conspiracy or illegal retention of command.⁶³ *De-jure* amnesty is applied to everyone who was accused of rebellion. In this case, if someone is identified as a FARC member and convicted for the crime of rebellion, they should be freed. However, if someone was a member of the FARC and was also convicted for other crimes, the SJP has to evaluate the situation, notably determining if the crimes committed were in direct relation to the internal armed conflict.

While analyzing the cases, the Chamber provides conditional freedom on the basis of the Peace Agreement, the same procedure that was carried out by the ordinary justice system by presidential order before the SJP was created. According to article 14 of the Amnesty Law, a number of conditions on disclosure of truth and acceptance of responsibility must be met prior to accessing amnesty (for non-state armed groups), pardon or special treatment (for state agents). The defendants will have to follow a strict conditionality regime or else they risk to be excluded from the system and lose their legal benefits. They are therefore expected to continue

⁶² Marina Aksenova, "The ICC Involvement in Colombia - Walking the Fine Line Between Peace and Justice", in Morten Bergsmo and Carsten Stahn, *Quality Control in Preliminary Examination: Volume I*, September 2018, p.278

⁶³ Section "Contenidos, alcances y límites de la concesión de amnistías e indultos así como de otros tratamientos especiales", Article 38, Final agreement to end the armed conflict and build a stable and lasting peace, 24 November 2016

to fully cooperate with the SJP and they can be called at any time in order to contribute to other proceedings.

At the moment, the Amnesty Chamber is collapsing as they are overwhelmed with cases and experience a lack of time. The Chamber is supposed to have 10 days to respond to an application for release and three months for an amnesty request, but that period can be extended. It is important to mention that the three months begin from the moment the file is received by the Chamber, coming from the ordinary justice system. Thus, the delays at the Amnesty Chamber are sometimes a consequence of the delays within the ordinary justice system.

As of March 2019, the Chamber has been receiving around 30 cases per week, of which the majority concerns applications for release. 85% of these applications get rejected, as most of the applications come from individuals who did not belong to the FARC and/or have not committed crimes directly related to the conflict.⁶⁴ As of January 22nd, 2019, 7725 FARC members signed commitment acts for political, social and economic reintegration.⁶⁵

The cases arrive through all kinds of ways. For example, they can arrive through e-mails and letters. People do not have to present themselves physically before the SJP or send a lawyer. The minimum that the Chamber needs to know is where the individual is located, the file number he has under the ordinary justice system and his or her ID number. Then, they proceed with a request for the respective files from the ordinary justice. The Amnesty Chamber applies a system of prioritization, in order to respond to all demands in an efficient manner. The applications for release have priority over amnesty requests. Furthermore, they prioritize according to the date of arrival of the application.

So far, the work overload experienced by the Chamber has been tackled with the help of judges from other chambers through the mobility system, which enables judges to move between different chambers if needed.

iii. The Chamber on the Definition of Legal Situations (or the Special Treatment Chamber)

This chamber is in charge of defining the cases in which state agents could benefit from special treatment and commuting sentences. It can do so:

- Upon request of the Chamber of Recognition,
- *Ex officio*, in case it becomes aware of an individual case eligible,
- Upon application by state agents.⁶⁶

⁶⁴ Interview with Alexandra Sandoval.

⁶⁵ The Balance of Subscription of Acts under the Application of Law 1820 of amnesty and special treatments FARC-EP can be found at <https://jepvisible.com>.

⁶⁶ Olasolo, H., Ramirez Mendoza, J. "The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition", *Journal of International Criminal Justice*, Volume 15, Issue 5, December 2017, p. 1027.

As of January 22nd, 2019, 1938 people from the public force submitted commitment acts.⁶⁷ Around 600 civilians are trying to become part of the SJP procedure.⁶⁸ This is because this Chamber receives voluntary submissions from third parties, even though it was not designed as such in the Peace Agreement.

The Chamber on the Definition of Legal Situations also determines the legal situation of the concerned individuals when special treatment is rejected. In addition, according to the article 28(7) of the Amnesty Law, the Chamber is competent to take preliminary decisions on whether pardon can be granted to those convicted of crimes committed in the context of illegal protests or public disturbances.⁶⁹ If the decision is affirmative, it sends the case to the Amnesty Chamber. Otherwise, it decides on the legal situation of the person concerned.⁷⁰

iv. The Tribunal and its Sections

The Tribunal is reserved for crimes amounting to gross human rights violations and grave breaches of international humanitarian law. Cases will reach the tribunal either via the Unit of Investigation— in case of non-recognition of the facts—, or via the Pre-Trial Chamber, which can decide to send the case to the Tribunal together with a resolution of conclusion—in case of recognition.

- **Cases Involving the Acceptance of Facts and Responsibility**

In this Section, the defendant fully recognizes his liability for the alleged crimes. In the event of a guilty verdict, defendants will be eligible for alternative sanctions instead of imprisonment. The Section will examine and decide upon the sanction program proposed by the Chamber of Recognition in its resolution of conclusion.

- **Trial Section**

A defendant who initially does not recognize his responsibility will be subject to a proper adversary procedure and will have a prison sentence if found guilty. In this case, the Chamber of Recognition will send the case to the Investigation Unit for further evidence.

If the Unit finds reasonable grounds to believe that the crimes did occur and that the defendant was involved, it can send a prosecution request to the Trial Section. The Trial Section will issue an ordinary criminal trial and a sentence of up to 20 years of imprisonment (less than in the regular criminal system).

Defendants are encouraged at all stages to recognize their responsibility and contribute to the disclosure of the truth. This is also why defendants have the right to the last word before the

⁶⁷ Figures available at <https://jepvisible.com>.

⁶⁸ Interview with Gabriel Rojas.

⁶⁹ Op. Cit. Olasolo and Ramirez Mendoza.

⁷⁰ Ibid.

issuance of the sentence, and if the defendant accepts his liability in the Trial Section before the judgement, his prison sentence can be reduced to 8 years.

- **Appeals Section**

If the defendant decides to file an appeal against any resolution issued by one of the three Chambers of the SJP or against the judgments of the First Instance Section or the Trial Section, their case is referred to the Appeals Section.

- **Review Section**

The Review Section will finally review any judgment, decision, resolution or directive issued by any of the Chambers or Sections. It can only do so if a new fact or new form of juridical qualification was brought to its attention.⁷¹ This is the section which holds the most functions of the SJP, and it is where all judicial proceedings end. It constitutes the last judicial instance of the SJP.

The functions of the Review Section are multifold, as it can notably:

- Review decisions and penal sanctions issued by the Attorney General and ordinary Courts;
- Revise, on an exceptional basis, resolutions and sentences taken by other bodies of the SJP;
- Settle conflicts of competence.

In addition, this Section can also review “*tutelas*,” which constitute petitions for judicial protection, in case of omission by an organ of the SJP that violates fundamental rights. Such decisions can be appealed and sent to the Appeals Section. In this case, they will be automatically sent to the Constitutional Court which has the power to revise such “*tutelas*” as a last instance. The fact that the Constitutional Court has a final say concerning *tutela* decisions is a result of political pressure which achieved to add this provision following the failed referendum of the Peace Agreement of 2016. It effectively undermines the role of the Review Section.

(d) Victims’ participation and reparation: disappointed hopes?

i. Victims’ participation within the SJP proceedings

Victims’ rights have been a central topic both within the Colombian peace process and the initial design of the Integrated System of Truth, Justice, Reparation and Non-Repetition.

Already in June 2014, a ten-point joint-declaration from the FARC and the Colombian government was released, which shifted the process towards a victims-centered approach,

⁷¹ Interviews with Diego Tarapues and judge Patricia Linares, found at [rcnradio](#) March 5th 2018.

emphasizing the importance of victims' rights, notably participation and reparation.⁷² A very unprecedented declaration in the history of Colombia, whose principles have been taken up in the negotiations of the Peace Agreement: victims' engagement during the peace talks between the Colombian Government and FARC was crucial to achieve a comprehensive and inclusive final agreement. The inclusion of victims at the negotiating table of the La Habana talks enabled them to tell their personal stories, to express their opinions and points of view on future steps, and to push the negotiations to continue, given the threat of a deadlock. Consequently, the 5th section of the Final Peace Agreement, concerned with the creation of the integrated system including the Special Jurisdiction for Peace (SJP), is entitled "agreement regarding the victims of the conflict." Hence, because they were meant to be in the center of the system on paper, the Peace Agreement created very high expectations for the victims of the conflict, especially regarding the implementation of the SJP.⁷³

Yet, in practice, victims' participation within the jurisdiction has been relatively limited, as argued by several stakeholders.⁷⁴ Indeed, while several victims' defense organizations had pushed for a "maximalist" form of participation⁷⁵—with the possibility of hearings, open trial and confrontation between victims and defendants—victims can only provide written observations following the voluntary versions of the defendants in the current implementation of the procedure. Hence, during the accusatory process in the chambers, victims can only participate as "special interveners." During the hearings of the defendants as well, victims can only make observations. According to Frederico Andrew, victims' participation is all the more limited and deterred since the amnesty law states that "fallacious reports" are liable for prosecutions.⁷⁶ As for the adversarial procedure, when the perpetrator does not recognize the truth, even though this procedure is also called "dialogical," no dialogue between the perpetrator and the victims is currently envisaged.⁷⁷ As of March 2019, hearings of defendants have not been open to the public nor the victims, judges having decided it was too early to provide for such transparency, disappointing many victims.⁷⁸

During our interview, a judge from the Chamber of Recognition confirmed that oral reports and hearings of victims would be exceptional, and will mostly concern indigenous people, with a possibility for the SJP to go get their observations and testimonies directly in their communities.⁷⁹ Yet, a hearing has taken place for Ingrid Betancourt, victim of the FARC, who was able to give her testimony from Paris, while individual reports are supposed to be excluded.⁸⁰ Indeed, other interviewees observed a certain asymmetry between the victims, with more space for participation being given to FARC victims and less for victims of state agents.

⁷² "Acuerdo sobre las víctimas del conflicto," Pares Fundacion Paz y Reconciliacion, 2015, <https://pares.com.co/2015/12/15/acuerdo-sobre-las-victimas-del-conflicto/>

⁷³ In the words of the judge Juan Jamon Vargas: "The whole system revolves around the victims."

⁷⁴ Interviewees such as Gustavo Gallon, Frederico Andrew or Sebastian Escobar defended this argument that victims' participation was (too) limited within the SJP.

⁷⁵ Such as the one of Sebastian Escobar, defense lawyer (Interview Sebastian Escobar).

⁷⁶ Interview Frederico Andrew.

⁷⁷ Ibid.

⁷⁸ Interview Oscar Parra.

⁷⁹ Ibid.

⁸⁰ Only collective reports are supposed to be taken into account, with a principle of exclusion of individual victims. Another controversy concerns victims of sexual violence which started to resort to the jurisdiction directly. Whether their case can be taken up directly is still under discussion. (Interview of Ivan Cepeda)

Because the jurisdiction of the Court includes paramilitaries only if they come forward and provide voluntary versions, victims of paramilitaries are all the more left aside.



Hearing of Ingrid Betancourt in front of the SJP, July 2018 Source: SJP official website.

Another problem raised by stakeholders was the difficulty to coordinate and reach all victims: many victims are not organized and are not receiving the relevant information which would enable their effective participation. The SJP is supposed to create regional branches to inform victims and collect testimonies, but their implementation is still obscure.

Even with the current number of victims reached and participating in the process, there is a real difficulty for judges to properly select and prioritize cases: to decide which cases constitute the “most representative” is a sensitive issue. Those who are not considered as such will likely not have access to the SJP proceedings (even though they are supposed to have access to the ordinary justice and the truth commission), a possibility which some have described as a risk of “re-victimization,” if victims who have spent time and energy building a report get rejected, being told that their case was not representative enough.

In fact, the details regarding the extent of victims’ participation within the SJP proceedings as well as the way to carry out selection and prioritization were to be defined in the statutory law, which has been partly objected by president Duque in March 2019. Therefore, in the absence of defined rules, the Court had to develop its own practice with uncertainty, notably as to how to define the extent of victims’ participation.

To remedy these limitations, some organizations are carrying a **strategy** to improve victims’ participation, for example to have victims participate directly in the audiences to ask questions and make their observations, as it was possible within the Justice and Peace Law mechanism. Also, there has been a discussion within congress to grant seats to victims as special constituencies within the SJP, but this proposition was never adopted.⁸¹ The General Attorney’s Office on the other hand, has been one of the principal opponents to the expansion of victims’ participation, arguing that as part of these processes and as a representative of the public ministry, his Office was in position to represent the victims’ interests directly.

⁸¹ Interview Sebastian Escobar, 27th February 2019.

In addition, victims' security still remains an important challenge, with many of them coming from rural areas in which the conflict is still ongoing. Some are facing threats because they are participating in the jurisdiction's proceedings, and there have been limitations in the protection which has been awarded to them, as deplored by some stakeholders.⁸²

ii. The reparation of victims

When it comes to the reparation of victims, it is worth noting that attempts at reparation and compensation can be found prior to the implementation of the Peace Agreement. The Victims' Law, for example, was approved by the government in 2011 and aims at providing victims of the conflict with state-funded reparation and restitutive measures. This program was later complemented by the fourth item of the Integrated System: the Comprehensive reparation measures for peace building purposes. This mechanism seeks to ensure far-reaching measures of reparation through compensation, land restitution, psychosocial rehabilitation and the collective reparation of the most vulnerable communities.

However, the ambitious objectives announced are seriously undermined by a current lack of funding and political will to implement them. The scale and duration of the conflict also further hinder the feasibility of such extensive programs. Therefore, the incapacity of these mechanisms to provide effective reparation adds to the frustration of the millions of victims. In this sense, the SJP may offer an interesting alternative to the more "traditional" reparation measures.

Being a distinctive mechanism of the Integrated System, the SJP only provides collective and symbolic reparations aimed at reconciliation purposes. In addition to acknowledgements of responsibility and apologies, alternative penalties constitute the main reparations granted by the jurisdiction. It remains to be seen, however, how alternative sanctions will work in practice since we have not reached that stage yet. The context of macro criminality would require that victims get organized and group themselves, which might prove to be challenging.

Some victims also view alternative sanctions as impunity rather than reparation measures aimed at their benefit. But considering the difficulties faced by the other mechanisms, the alternative sanctions might reveal to be the most concrete forms of reparation granted to victims, if implemented successful

The Special Jurisdiction for Peace under threat: political pressures and public opinion challenges

From the beginning, the Peace Agreement and the SJP have been suffering from a crisis of legitimacy due to a general opposition and distrust within the public opinion of Colombians. During the Peace Agreement referendum campaigns, there has been a proliferation of "fake news," misinformation and online aggression. The opposition argued that the Peace Agreement would lead Colombia to become the next Venezuela in the region, and that giving a political

⁸² Interview Juliette Vargas, 29th February 2019.

voice to the FARC would lead “Castro-Chavismo” to reign in the country⁸³ (a supposed leftist ideology that could allow communism to be installed in Colombia). Also, this was mixed with economic problems, with claims that the subsidies and the pension system would be cut, or that more taxes would be created, in order to finance the Peace Agreement.⁸⁴ The conservative opposition additionally used the term “gender ideology” to attack the Peace Agreement. Because of this alleged “ideology,” the opposition argued that the peace accord would convert children into homosexuals by attacking the traditional family, ripping the parents of the right to educate their children in a traditional way.⁸⁵ This argument was also rooted in claims that the Peace Agreement was giving a “preferential treatment” to LGBTQ +victims.⁸⁶ However, it should be mentioned that in the regions most affected by the conflict, the “Yes” vote won in 2016.⁸⁷

Nowadays, public opinion criticizes the SJP, and tends to consider it as a scene of impunity.⁸⁸ This is mainly supported by the current government, who is arguably a strong opponent of the Peace Agreement and the SJP.⁸⁹ This could be observed with the hashtags promoted on Twitter and other social networks by political leaders from the Centro Democrático (current ruling party in Colombia), such as #JEPCómplicesDeFARC (“SJP accomplices of the FARC”), #JEPMiente (“SJP lies”), or #JepEsImpunidad (“SJP is impunity”). Other campaigns have been created by opposition politicians supporting the SJP such as #YoLeCreoALaJEP (“I believe the SJP”). This shows how in a polarized country such as Colombia, the peace process, and the SJP in particular, are easy targets.

Further, the political pressure against the SJP is reflected in the budget cuts it has suffered, which will be addressed below, and are perceived as an attempt to dismantle the Peace Agreement by depriving it of its funding.⁹⁰ Also, as discussed with one of the defense lawyers of the FARC, the government makes it harder for them to do their job, as they are reducing budgets for the legal team.⁹¹

The attempts to hinder the work of the SJP can also be seen when it comes to some political appointments fundamental for the transitional process and demobilization of the FARC. In this regard, the directress of the National Library of Colombia, Consuelo Gaitán, was asked to resign without a proper justification. However, her stance towards the internal conflict in Colombia and the projects that were conducted under her mandate is likely to have justified her removal.⁹² Along with Consuelo Gaitán, Daniel Castro (director of the National Museum), and Armando Martínez (director of the General Archive of the Nation), were asked to resign,

⁸³ International Crisis Group, <https://www.crisisgroup.org/es/latin-america-caribbean/andes/colombia/shadow-no-peace-after-colombias-plebiscite>

⁸⁴ Asuntos Legales, <https://www.asuntoslegales.com.co/actualidad/el-no-ha-sido-la-campana-mas-barata-y-mas-efectiva-de-la-historia-2427891>

⁸⁵ International Crisis Group, <https://www.crisisgroup.org/es/latin-america-caribbean/andes/colombia/shadow-no-peace-after-colombias-plebiscite>

⁸⁶ LGBTQ+ refers to Lesbians, Gays, Bisexuals, Transsexuals, Transgenders, Intersex, Queers and others.

⁸⁷ La Silla Vacía, <https://lasillavacia.com/blogs/un-vistazo-los-resultados-del-plebiscito-58200>

⁸⁸ Semana magazine, <https://www.elespectador.com/opinion/propuesta-de-impunidad-de-la-jep-columna-806626>

⁸⁹ Interview with Senator Ivan Cepeda.

⁹⁰ Interview with Gabriel Rojas.

⁹¹ Interview with Camilo Fagua.

⁹² Semana magazine, <https://www.semana.com/cultura/articulo/entrevista-con-consuelo-gaitan-sobre-su-salida-de-la-biblioteca-nacional/603067>

again without any explanation. Nevertheless, their posture towards the historical memory of the State and the Colombian internal conflict seem to be the main motivation behind their dismissal.⁹³ With these removals, the appointment of the director of the National Historical Memory Center (appointed by the president), Darío Acevedo, who openly denies the existence of an armed conflict in Colombia,⁹⁴ suggests a political strategy for the reinterpretation of the historical memory of Colombia: for the Centro Democrático, there has never been an internal conflict in Colombia, rather a war on terror.⁹⁵

Another illustration of the political pressure currently exerted on the SJP can be found through the controversies around the question of extraditions.

1. The question of extradition

Extradition or the implementation of security measures for purposes of extradition are not supposed to be granted with respect to acts or conduct subject to the jurisdiction of the SJP.⁹⁶ When it is alleged that the conduct attributed in the extradition request had occurred after the signing of the Final Agreement, the Review Section of the SJP has the competence to evaluate the conduct attributed to determine the precise date of its conduct, and decide the appropriate procedure.⁹⁷ This provision shows that according to the Legislative Act 01, the SJP's competence is supposed to prevail over extradition, in opposition to the ordinary justice system.

Yet, such a stance has been facing contestation, notably from the Office of the Attorney General. As of now the main jurisdictional problem between the SJP and the ordinary jurisdiction lies indeed in the question of extradition, as illustrated by the Santrich case. This case leads to a deeper reflection on extradition, which is still a grey zone even for the ordinary jurisdiction.

Extraditions are heterodox, as the international treaty between the United States and Colombia is quite ambiguous. On one side, Colombia subscribed to an extradition treaty with the United States in 1979. But on the other side, the law 27 of 1980, approving the extradition treaty with the United States, was declared unconstitutional and ruled invalid under Colombian law by the Colombian Supreme Court in 1986. Then in 1991, the new constitution expressly prohibited the extradition of Colombian nationals by birth.⁹⁸ Thereafter, extradition of Colombians continued to be subject to polemics, expressing itself mostly through administrative procedures and presidential decrees.

The Santrich Case and the SJP's Prosecutor Bribery

⁹³ El Espectador, <https://www.elespectador.com/noticias/cultura/las-controversiales-renuncias-que-pidio-el-ministerio-de-cultura-articulo-842225>

⁹⁴ El Tiempo, <https://www.eltiempo.com/politica/proceso-de-paz/criticas-a-ruben-dario-acevedo-por-negar-el-conflicto-y-vetar-cursos-academicos-325624>

⁹⁵ Pacifista, <https://pacifista.tv/notas/implicaciones-historicas-decir-pais-no-hay-conflicto-armado-centro-memoria-historica/>

⁹⁶ Transitory Article 19 of the Legislative Act 01 of 2017.

⁹⁷ Ibid.

⁹⁸ <https://www.state.gov/s/1/16164.htm>

One case that reflects the jurisdictional problems that arose between the ordinary justice and the SJP is the one of Zeuxis Pausias Hernández, also known as Jesús Santrich. Santrich was elected by the FARC's political party (Common Alternative Revolutionary Force) to represent them in Congress in accordance with the point 2 of the Peace Agreement (Political Participation). However, on April 2018, before Santrich had taken possession of leadership, the OGA ordered his arrest after Interpol issued a red notice to find him and prosecute him for the crime of drug trafficking. The notice was issued after a federal court of New York had found Santrich guilty of conspiracy to export 10 tons of cocaine to the United States.

According to the evidence provided by the US court the meeting for this agreement took place between June 2017 and April 2018, after the signing of the Peace Agreement. If this is found to be true, Santrich would not have been protected by the Peace Agreement at that time, and therefore could, indeed, be found guilty of conspiracy and extradited to the United States.

After he was apprehended, the SJP asked for the evidence to determine the exact moment Santrich had committed the crime. Indeed, if it was committed before the Peace Agreement, he would receive judicial benefits and avoid extradition as part of the transitional justice mechanism. The request of the SJP caused controversy, since the opposition to the agreement indicated that this court did not have the jurisdiction to review cases of extradition. However, as Santrich submitted to the SJP, the tribunal considered it was authorized to review the case. The OGA objected to the competence of the SJP in the case. Lastly, the Supreme Court took the case and ruled that the SJP should verify if the crimes were committed after the signing of the Agreement.

In June 2018, the Constitutional Court ruled that the capture of Santrich was legal and that the SJP could not suspend the extradition procedure. However, it did acknowledge the SJP's request to check whether the events were committed before or after the Peace Agreement. The SJP was commissioned to review the case "only for the purpose of evaluating the conduct attributed to determine the precise date of its conduct and to decide the appropriate procedure."⁹⁹

In September 2018, the SJP requested the OGA to deliver the audios and videos that would prove Santrich's responsibility. General Attorney Néstor Humberto Martínez replied that he had no evidence, that they were held by the US justice, where the trial against the former commander of the guerrillas began. The General Attorney continued confronting the SJP's jurisdiction over the case, claiming that the SJP did not have the competence to ask for evidence in an extradition proceeding.

In December 2018, the SJP sent a letter to the New York Court to obtain the evidence against Santrich. The letter was apparently sent to the chancellery and the Justice Ministry was in charge to send it to the United States. However, before the deadline, it was found that the letter sent by the SJP was lost in transit and never reached the US. The letter was then resent, and the U.S. Department of Justice's Office of International Affairs refrained from sending new evidence.

During our field trip to Colombia, the US justice denied the delivery of more evidence, and that same day, the OGA announced the capture of the prosecutor Carlos Bermeo, from the Investigation Unit of the SJP, together with four other people. The situation was highly covered by the media as the OGA reported that the apprehension took place following an

⁹⁹ As stated in the Legislative Act 01 of 2017.

<http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%20N%2001%20DE%204%20DE%20ABRIL%20DE%202017.pdf>

attempt to influence the extradition process of Jesús Santrich. In response, the SJP publicly condemned such an alleged act of corruption and affirmed that, in any case, the public prosecutor Bermeo had no power to influence Santrich's case, at least not directly. He worked as a prosecutor in support of the director of the Investigation and Accusation Unit of the SJP, and his functions consisted of guaranteeing the logistics of the judicial police and of the delegates of the investigations, without any link to the extradition case.



Screen shot from the video of the member of the Investigation Unit allegedly accepting a bribe
Source: <https://www.rcnradio.com/judicial/fiscalia-revela-video-que-seria-prueba-reina-contra-carlos-bermeo>



Journalists waiting for the press conference at the SJP, organized in emergency on our last day...

2. Budget challenges

Another important challenge for the SJP linked to the political pressure it has been facing concerns its budget. Indeed, recently, the government has been reducing the SJP's funding significantly. For example, the SJP itself applied for 372.000 million pesos, but is set to receive only 292.000 million, creating a budget gap of 80.000 million pesos, still required for the proper functioning of the Court.¹⁰⁰ Moreover, the Unit for the Search of Missing Persons missed out on almost half its planned budget (83.000 million pesos), and the Truth Commission has been suffering from budget cuts as well.¹⁰¹ More generally, the implementation of the Peace Agreement has been facing obstacles, especially because of the sensitive topics it contains (such as the rural reform), which have also contributed to keeping Congress from financing the SJP in a more substantial way. Consequently, as mentioned previously, the budget of the SJP has come mainly from external donors: in fact, the proper functioning of the Court has been ensured to an important extent through the support given by the international community to the Peace Agreement in general, and to the SJP in particular.

3. The Statutory Law

The opposition facing the SJP and the tentative to obstruct its work also took the form of a political turmoil around its statutory law: more than two years after the signing of the Peace Agreement, the SJP still does not have a statutory law, which considerably hinders its proper functioning. Indeed, in a televised address on the 10th of March, 2019, President Duque partially vetoed the Statutory Law (6 of the 159 articles), with the implication that it could take another 12 months between the debates and propositions for the proper changes to be included.

This is an unprecedented situation because it is the first time in the history of the country that a President has refused to sign a statutory law already approved by Congress and the Constitutional Court. It was also perceived as the beginning of a process to effectively dismantle the legal basis of the Peace Agreement.¹⁰² In this sense, on March 11th, 2019, the UN Verification Mission made a public statement, emphasizing the need to remove all legal and political burdens, as it is necessary to ensure the independence, legitimacy and full autonomy of the key judicial framework that represents the SJP. Nevertheless, the President sent the statutory law back to Congress, so that his objections can be discussed, approved or rejected.

Since then, public opinion has been divided over the future of the SJP and the peace process as a whole. On the 8th of April, the majority of the House of Representatives rejected the vetoes presented by the Executive, leaving the final decision to the Senate. On the 30th of April, 2019, 47 senators voted to reject the objections presented by the President. However, the speaker of the Senate and member of the ruling party (Centro Democrático) considered that the required

¹⁰⁰ La Nación, *JEP pidió más presupuesto para el 2019*, October 11th, 2018, <https://www.lanacion.com.co/2018/10/11/jep-pidio-mas-presupuesto-para-el-2019/>.

¹⁰¹ Interview with Matthias Zeller

¹⁰² https://www.abcolombia.org.uk/uncertainty-for-colombias-special-jurisdiction-for-peace-jep/#_edn1

quorum to reject the objections was 48 votes. On the 2nd of May, 2019, some senators left the plenary to prevent a new voting from taking place. As of now, the Constitutional Court must decide how many votes are required in the Senate to reject the presidential objections to the statutory law. Under Colombian law, if Congress rejects the objections, the President must sanction the law. If the President still refuses to sign the bill, then the President of Congress is authorized to sanction it into law anyway.

Objections from President Duque to the Statutory Law¹⁰³

- (i) Compensation to victims by members of FARC-EP
- (ii) Competency over the verification process determining who is part of the FARC-EP and who can submit directly to the SJP (the list of the FARC-EP members).
- (iii) Limits to investigations carried by the Office of the General Attorney on persons being investigated by the SJP.
- (iv) Alleged impunity that could be granted to crimes against humanity, genocide or war crimes
- (v) Competency over extradition processes
- (vi) Extradition and participation of parties that are not members of the Armed Forces of the FARC-EP.

4. An ongoing conflict

Another key issue for the SJP, and the future of the Peace Agreement in general, is the long-standing disagreement concerning the classification of the Colombian conflict, which continues today. In line with former president Uribe who campaigned for the “No”-vote to the Peace Agreement, members of the current government, which are from the same party—Centro Democrático—, have decidedly different perspectives on the appropriate classification of the conflict, meaning that its existence is sometimes being denied.¹⁰⁴ Indeed, the ruling party tends to frame the conflict as the State defending itself against terrorists and criminal organizations. Another problem is the fact that there is no agreement on whether the conflict is really over since the Peace Agreement was signed in 2016, or whether it is still ongoing, be it with the FARC or with other insurgency groups.

¹⁰³ Dejusticia, presented to Congress a report concluding that the first four of the six political objections listed above had already been addressed and decided by the Court in its decision C-080/2018 (https://www.dejusticia.org/wp-content/uploads/2019/04/Audiencia-C%C3%A1mara-de-Representantes-Objeciones-JEP_RUY.pdf).

¹⁰⁴ Interview with Matthias Zeller. An example is the new director of the Centro Nacional de Memoria Histórica, who effectively holds the position that what happened in Colombia cannot be called an armed conflict. In Colombian news, Darío Acevedo stated: “Although the Victims Law says that the experience was an armed conflict that can not become an official truth” (Semana, ‘Pese a la polémica, Gobierno nombra a Darío Acevedo en la dirección del Centro de Memoria’, February 19, 2019, <https://www.semana.com/nacion/articulo/gobierno-nombro-a-dario-acevedo-en-la-direccion-del-centro-de-memoria-historica/601972>).

Magistrates of the SJP have argued that the conflict is still alive and very much visible, not only through the continuing suffering of the victims but also since the fighting is still ongoing in the country.¹⁰⁵

An incentive for some not to recognize the existence of the conflict or the fact that it still continues to this day, is that Colombian law provides relatively good protection to ‘rebels’ in a non-international armed conflict. According to the ICRC in Colombia, an internal armed conflict continues to exist in Colombia as we speak, between various insurgency groups and the State. The ICRC provided a classification listing the different conflicts still ongoing within the country:

- the Government versus the National Liberation Army (ELN);
- the Government versus the Popular Liberation Army (EPL);
- the Government versus the group “Autodefensas Gaitanistas de Colombia” (AGC);
- the Government versus ex-FARC-EP (three fronts who did not demobilize after the Peace Agreement);¹⁰⁶
- and the ELN versus the EPL.¹⁰⁷

Reports show that up until today, social leaders and ex-FARC members are still being killed, even after the Peace Agreement. Dissident groups of the FARC, paramilitaries and the army still seem to be fighting in some violent areas. The Pacific region in particular has experienced an increase of armed violence, including the killing of human rights defenders and fighting between rival armed groups or narco-traffickers.¹⁰⁸ All of this makes the Peace Agreement and the transition from conflict to peace very fragile, questioning the very relevance of the expression “transitional justice” to qualify the framework currently in place in Colombia.

Concluding Remarks and Recommendations

The innovation and originality that represents the Special Jurisdiction for Peace is striking to anyone who looks beyond the current political turmoil around it: the SJP is a pioneering Court in many regards. The Peace Agreement and the subsequent laws which came to govern its functioning have set incredibly ambitious goals for the jurisdiction: to judge those who committed crimes and gross human rights violations on all sides during a decades-long conflict, in only ten years. To that aim, a number of important innovations have been put in place. The most outstanding takes the form of alternative penalties for those perpetrators who confess and disclose the entire truth about their acts: the possibility of sanction programs, negotiated directly with the victims, involving community work rather than prison. It constitutes a landmark possibility, inventing new ways to balance between the necessity for peace and restoration and that of bringing justice to victims. The selection process of the judges by actors outside of the conflict, and the attention given to the gender and ethnic

¹⁰⁵ Interview with Juan Ramón Vargas.

¹⁰⁶ However, some argue that there are hardly any dissidents of the FARC to really classify them as in conflict with the Government. Interview with Álvaro Leyva.

¹⁰⁷ Interview with Jose Serralvo, ICRC.

¹⁰⁸ Nazish Dholakia, ‘Violence Skyrocketing in Colombian Municipality,’ *Human Rights Watch*, January 11, 2019, <https://www.hrw.org/news/2019/01/11/violence-skyrocketing-colombian-municipality>; Norwegian Refugee Council, ‘More violence marks beginning of 2019 in Colombia’, January 28, 2019, <https://www.nrc.no/news/2019/january/more-violence-marks-beginning-of-2019-in-colombia/>. The ICRC also reports continuing violence in Colombia: See <https://www.icrc.org/en/document/missing-persons-conflict-and-prison-crisis-our-current-concerns-colombia>.

representativity—among other criteria—of the magistrates, are also to be acknowledged as original traits, together with the presence of a group of social scientists working full-time for the Court. Initially designed to be a completely hybrid court, political pressures managed to reduce the extent of its internationalization. Yet, the SJP has kept innovative internationalized characteristics, and its future will largely depend on the support of the international community, not only for its funding but also for its legitimacy. In the background, the presence and possibility of an investigation by the International Criminal Court has also shaped the developments of transitional justice in Colombia, notably through dialogues which have been taking place between the ICC and the SJP embodying a “positive complementarity,” and through the provision by the ICC of its first *amicus curiae* to a domestic court.

Nevertheless, the current political challenges facing the SJP cannot be downplayed: the executive branch allied with the General Attorney seem to do everything in their power to tear down the Peace Agreement and its most important creation, the SJP. President Duque is actively depriving the Court of its funding and of a defined set of rules of procedure which is necessary to guarantee its smooth functioning, while the General Attorney’s Office intends to dispossess the Court of its defendants through the threat of extradition. Because the SJP’s magistrates are confronted with important political pressure, and cannot be immune to what they perceive as negative media coverage and public opinion, the current development of the SJP’s work points to a paradox: while the public and the ruling party decry the alleged impunity of the FARC produced by the Court, the reality of its practice gave us a quite different impression. In fact, if the initial intent of the framework was to favor peace and reconciliation through amnesties and alternative sentences, magistrates seem to have moderated their practice as a result of these political pressures, with what some have described as a reluctance to grant amnesties,[1] and a harsher treatment of the FARC in comparison with state agents. Indeed, many ex-FARC members are still in jail when they are supposed to be freed (hence the important number of *tutelas* brought to the Court’s Review Section). It might be too early to confirm these observations, but it is clear that the overall political context around the Court has been influencing its work, especially of its judges. Another important observation points at the limits placed on the participation and inclusion of victims within the Court’s proceedings. The fact that there is no possibility of interactions between the accused and the victims,[2] and that oral reports and hearings of victims will be exceptional, is likely to have produced important disappointments for many victims whose expectations were set very high by the Agreement’s ambitious goals and objectives to put victims at the center.

Despite its challenges, the Special Jurisdiction for Peace needs to continue its work. The mobilization of Colombian civil society but also of the international community in support of the Court will be essential to guarantee its survival. If the SJP successfully carries on with its crucial work, it will be particularly opportune to further monitor:

- (1) The developments of the SJP’s practice, notably with regards to its rules of procedure in the absence of the statutory law, especially concerning:
 - a. The participation of victims within the proceedings, and if there is a continued apparent asymmetry between the treatment of FARC’s and state agents’ victims,
 - b. The voluntary submissions of paramilitaries and third parties, and the subsequent inclusion of their victims,

- c. The publicity and transparency of hearings and the way they will be carried out,
- d. The work of the social scientists within the Court,
- e. The role of foreign jurists as amicus curiae,
- f. The contentious subject of extraditions and the work of the Review Section in this regard;

(2) The work with victims in general, through :

- a. the possibility of creating regional branches of the SJP,
- b. the ways in which they will achieve to organize the victims and gather their testimonies,
- c. but also and particularly the ways in which reparation projects will be envisaged and implemented;

(3) The development of doctrine in terms of IHL around the SJP's work (with special attention to the monitoring of trials carried out by the University of La Sabana).

[1] Interview with Gabriel Rojas.

[2] Allegedly because this format implemented for the JPL proceedings was too lengthy and led to the relative failure of the mechanism (Interview with Julieta Lemaitre).

Bibliography

Primary sources

Comité de Escogencia, *Integrantes*, <http://www.comitedeescogencia.com/#>

Comité de Escogencia, *Entrevistas*, <http://www.comitedeescogencia.com/#>

Constitution of Colombia, 1991

Constitutional Court, *Communication*, November 14, 2017

Constitutional Court, [Fe de Erratas al Comunicado No.55](#), November 14, 2017

Constitutional Court, *Judgment C-579*, 2013

Constitutional Court, *Review of the constitutionality of Legislative Act 01 of 2017 by means of which creates a title of transitional provisions of the Constitution for the termination of the armed conflict and the construction of a stable and lasting peace and other provisions are made*, Judgment C-80 of 2019, December 2018,

<http://www.corteconstitucional.gov.co/relatoria/2017/C-674-17.htm>

Government of Colombia and FARC-EP, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, November 24, 2016,

[http://especiales.presidencia.gov.co/Documents/20170620-dejacion-
armas/acuerdos/acuerdo-final-ingles.pdf](http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf)

Government of Colombia and FARC-EP, *Comunicado Conjunto No 88*, August 12, 2016, La Havana, Cuba, [http://www.altocomisionadoparalapaz.gov.co/procesos-y-
conversaciones/documentos-y-comunicados-conjuntos/Paginas/Comunicado-
Conjunto-No-88.aspx](http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/documentos-y-comunicados-conjuntos/Paginas/Comunicado-Conjunto-No-88.aspx)

International Criminal Court, *Report on Preliminary Examination Activities 2018*, December 5, 2018

International Criminal Court, *Rome Statute*, July 17, 1998

International Criminal Court, *Situation in Colombia Interim Report*, November 2012

International Criminal Court, *Understanding the International Criminal Court*, n.d.

ICRC translation of the Peace Agreement, [https://casebook.icrc.org/case-study/colombia-
peace-agreement](https://casebook.icrc.org/case-study/colombia-peace-agreement)

Pares Fundación Paz y Reconciliación, *Acuerdo sobre las víctimas del conflicto*, 2015, <https://pares.com.co/2015/12/15/acuerdo-sobre-las-victimas-del-conflicto/>

Special Jurisdiction for Peace, *Criteria and Prioritization Methodology of Cases and Situations in the Chamber for the Recognition of Truth, Responsibility and*

Determination of the Facts and the Conduct of the SJP, June 28, 2018,
<https://www.jep.gov.co/Relatoria/Sala/de/Reconocimiento>

Special Jurisdiction for Peace, *JEP: Perfiles*,
<https://www.jep.gov.co/Paginas/JEP/Perfiles.aspx>

Special Jurisdiction for Peace, *Legislative Act 01 of 2017*

Secondary sources

ABC Colombia, *Uncertainty for Colombia's Special Jurisdiction for Peace (JEP)*, March 21, 2019, https://www.abcolombia.org.uk/uncertainty-for-colombias-special-jurisdiction-for-peace-jep/#_edn1

Aksenova, M., "The ICC Involvement in Colombia - Walking the Fine Line Between Peace and Justice", in Morten Bergsmo and Carsten Stahn, *Quality Control in Preliminary Examination: Volume I*, September 2018

Alsema, A. "From his US prison, former paramilitary chief submits to Colombia's war crimes tribunal", *Colombia Reports*, April 17, 2018, <https://colombiareports.com/from-his-us-prison-former-paramilitary-chief-submits-to-colombias-war-crimes-tribunal/>

Ambos, K. "Colombia- How much justice can the peace take?", *OpinioJuris*, 2015, <http://opiniojuris.org/2015/10/08/guest-post-colombia-how-much-justice-can-the-peace-take/>

Ambos, K. Aboueldahab, S. "Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?", *EJIL: Talk*, December 19, 2017, <https://www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/>

Associated Press, *Colombia's government formally ratifies revised Farc peace deal*, December 1, 2016, <https://www.theguardian.com/world/2016/dec/01/colombias-government-formally-ratifies-revised-farc-peace-deal>

Asuntos Legales, *El No ha sido la campaña más barata y más efectiva de la historia*, October 4, 2016, <https://www.asuntoslegales.com.co/actualidad/el-no-ha-sido-la-campana-mas-barata-y-mas-efectiva-de-la-historia-2427891>

Caracol Radio, *Estos serán los consejeros extranjeros de la JEP*, December 6, 2017, https://caracol.com.co/radio/2017/12/06/judicial/1512575819_539228.html

Colombia Post-Conflict UNMPTF, <http://mptf.undp.org/factsheet/fund/4CO00>

Dejusticia, Audiencia Pública Cámara de Representantes Objeciones Gubernamentales al Proyecto de Ley Estatutaria de Administración de la JEP, April 1, 2019, https://www.dejusticia.org/wp-content/uploads/2019/04/Audiencia-C%C3%A1mara-de-Representantes-Objeciones-JEP_RUY.pdf

Dholakia, N., 'Violence Skyrocketing in Colombian Municipality,' *Human Rights Watch*, January 11, 2019, <https://www.hrw.org/news/2019/01/11/violence-skyrocketing-colombian-municipality>

El Espectador, *Las controversiales renunciaciones que pidió el Ministerio de Cultura*, February 27, 2019, <https://www.elespectador.com/noticias/cultura/las-controversiales-renunciaciones-que-pidio-el-ministerio-de-cultura-articulo-842225>

El Tiempo, *Veto a cursos, la última crítica contra el director del CNMH*, February 21, 2019, <https://www.eltiempo.com/politica/proceso-de-paz/criticas-a-ruben-dario-acevedo-por-negar-el-conflicto-y-vetar-cursos-academicos-325624>

Human Rights Watch, *Colombia : Amicus Curiae regarding the Special Jurisdiction for Peace*, July 17, 2017, <https://www.hrw.org/news/2017/07/17/colombia-amicus-curiae-regarding-special-jurisdiction-peace>

ICRC, *Missing persons, conflict and prison crisis: our current concerns in Colombia*, March 1, 2018, <https://www.icrc.org/en/document/missing-persons-conflict-and-prison-crisis-our-current-concerns-colombia>

International Crisis Group, *Bajo la sombra del “no”: la paz en Colombia después del plebiscito*, January 31, 2017, <https://www.crisisgroup.org/es/latin-america-caribbean/andes/colombia/shadow-no-peace-after-colombias-plebiscite>

La Nación, *JEP pidió más presupuesto para el 2019*, October 11, 2018, <https://www.lanacion.com.co/2018/10/11/jep-pidio-mas-presupuesto-para-el-2019/>

La Silla Vacía, *Un vistazo a los resultados del plebiscito*, October 4, 2016, <https://lasillavacia.com/blogs/un-vistazo-los-resultados-del-plebiscito-58200>

Moffett, L., Lawther, C., McEvoy, K., Sandoval, C. and Dixon, P. “Alternative Sanctions Before the Special Jurisdiction for Peace”, *Reparations, Responsibility & Victimhood in Transitional Societies*, March 31, 2019

Norwegian Refugee Council, *More violence marks beginning of 2019 in Colombia*, January 28, 2019, <https://www.nrc.no/news/2019/january/more-violence-marks-beginning-of-2019-in-colombia/>

OECD, *A mutually beneficial relationship*, May 25, 2018, <https://www.oecd.org/latin-america/countries/colombia/#d.en.345234>

Olasolo, H. Ramirez Mendoza, J.M.F., “The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition”, *Journal of International Criminal Justice* 15(5), December 2017

Pacifista, *¿Qué implica que el nuevo director del Centro de Memoria desconozca el conflicto armado?*, February 11, 2019, <https://pacifista.tv/notas/implicaciones-historicas-decir-pais-no-hay-conflicto-armado-centro-memoria-historica/>

RCN Radio, Interview with judge Patricia Linares, March 5, 2018

Rueda, L., “How Colombians renegotiated criminal accountability for international crimes”, *Center for International Criminal Justice*, November 29, 2016, <https://cicj.org/2016/11/how-colombians-renegotiated-criminal-accountability-for-international-crimes/>

Semana magazine, Propuesta de impunidad de la JEP, August 16, 2018

<https://www.elespectador.com/opinion/propuesta-de-impunidad-de-la-jep-columna-806626>

Semana, *Pese a la polémica, Gobierno nombra a Darío Acevedo en la dirección del Centro de Memoria*, February 19, 2019, <https://www.semana.com/nacion/articulo/gobierno-nombro-a-dario-acevedo-en-la-direccion-del-centro-de-memoria-historica/601972>

Semana, *"Yo estoy esperando a que la ministra me cuente la razón": Consuelo Gaitán*, February 27, 2019, <https://www.semana.com/cultura/articulo/entrevista-con-consuelo-gaitan-sobre-su-salida-de-la-biblioteca-nacional/603067>

Special Jurisdiction for Peace, Youtube Channel,

<https://www.youtube.com/channel/UCay5mclHBbWQTQ8fhoNCWow>