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Colectivo de Abogados
José Alvear Restrepo

Colombia at Risk for Impunity: The Blind Spots in Transitional Justice and International Crimes under ICC Jurisdiction

Table of Contents

| | |
|---|-----------|
| Introduction | 5 |
| 1. The prosecution of crimes committed by State Forces is encumbered by the lack of articulation among jurisdictions and the methodological difficulties encountered when prosecuting the persons who bear the greatest responsibility, according to the standards of truth and justice. | 8 |
| 1.1 The legal framework: The prosecution of State Forces before the JEP has suffered from changes in procedures and in the benefits that are granted to the perpetrators without clear constraints and conditions. | 8 |
| 1.2. Loopholes for impunity in the prosecution of State Forces | 8 |
| 1.2.1 The restrictive interpretation of Article 79 (j) of the JEP's Statutory Law hinders the transfer of jurisdictional powers from the ordinary courts to the JEP, which results in the inability to pursue investigations against State Forces. | 8 |
| 1.2.2. Failure of the Military and Police Criminal Justice [system] (Justicia Penal Militar y Policial - JPMP) to transfer case reports and files as provided for under Article 79(b) to elucidate crimes committed by State Forces | 9 |
| 1.2.3. The need for greater clarity in the methodology used for investigations and in the assessment of the commitment to right to truth on the part of the persons who bear the greatest responsibility in extrajudicial execution cases before the JEP. | 10 |
| 1.2.4. Assessment of contributions to the truth -scope and quality of the information- made by persons appearing before the JEP. | 12 |
| 1.2.5. The decisions taken by the JEP on the criteria used for assessing the correlation between sexual violence and conflict can lead to impunity in the case of gender-based crimes committed against women and LGBTI people. | 12 |
| 1.3. The landmark case of retired General Mario Montoya Uribe under investigation for his alleged participation in extrajudicial executions | 13 |
| 2. Responsible civilian third parties and non-combatant state agents: the failure to investigate or conduct due diligence for the prosecution of these categories of perpetrators are signs of the lack of willingness and of capacity to conduct genuine investigations. | 15 |
| 2.1. Legal framework: the investigation of international crimes committed by civilians in Colombia | 15 |
| 2.2. Obstacles to the investigation of third parties and non-combatant State agents involved in international crimes | 16 |
| 2.2.1. Availability of information on the state of investigations | 16 |
| 2.2.2. Progress on investigations against third parties (civilians) and non-combatant State agents in the ordinary justice system is limited to cases derived from "transferred case files" and old Justice and Peace process cases. | 16 |
| 2.2.3. The Office of the Attorney General does not have the capacity to investigate crimes committed by third parties or non-combatant State agents because of the multiplicity of cases and the poor coordination capacity of its investigative bodies | 16 |
| 2.2.4. Although the jurisdiction of the JEP for cases involving third parties and non-combatant State agents has been extended, the JEP has not yet taken this extension into account in his guidelines. | 17 |
| 2.2.5. The risk of impunity is greater with non-combatant State agents who have been granted constitutional privileges | 18 |

| | |
|---|-----------|
| 2.3. The exception: the landmark case against Chiquita Brands employees | 18 |
| 3. Recommendations | 20 |
| 3.1. With respect to international crimes committed by State Forces related directly or indirectly to the armed conflict. | 20 |
| 3.2. Recommendations to reduce impunity for international crimes committed by third party civilians and non-combatant State agents in the context of, or in direct or indirect relation to, the armed conflict. | 22 |

Introduction¹

The signing of the Final Peace Agreement between the Government of Colombia and the former FARC-EP, on 24 November 2016, was a historic moment; a milestone that marked the possibility of overcoming the prevailing patterns of violence and of laying the foundations for a peaceful society characterized by social justice. Today, this means strengthening transitional justice institutions so that victims can fully exercise their rights to truth, justice, reparation and guarantees of non-recurrence.

In Colombia, more than 50 years of internal armed conflict and violence have left a gaping trail of pain of chilling magnitude. According to official reports, rebel armed groups, paramilitaries, state law enforcement agents, and non-combatants are responsible for:

- at least 4,210 documented massacres between 1958 and 2018;
- 60,630 forced disappearances between 1970 and 2015;
- 37,165 kidnappings between 1958 and 2018;
- 24,447 deaths;
- 615,738 victims of sexual violence between 1958 and 2018; and
- the incredible figure of 7.7 million forced displacements between 1985 and 2018.

Due to the 99% rate of impunity that prevails in the ordinary justice system, the Colectivo de Abogados José Alvear Restrepo - CAJAR and the International Federation for Human Rights - FIDH, along with other organisations, have documented and denounced some of these crimes before the International Criminal Court (ICC). According to articles 7 and 8 of the Rome Statute, the acts, such as forced disappearances, homicides, extrajudicial executions, and sexual violence, which occurred in the context of the conflict, can constitute war crimes and crimes against humanity that fall within the jurisdiction of the ICC, for which, under article 15 of the Statute, the Prosecutor can initiate investigations *propio motu*²

The Comprehensive System of Truth, Justice, Reparation and Guarantees of Non-Recurrence (Sistema Integral de Verdad, Justicia, Reparación y Garantías de No Repetición – SIVJRNR) also known the Comprehensive System or SIVJRNR, an emanation of the Final Peace Agreement (Acuerdo final de la paz),³ is a set of transitional judicial and extra-judicial measures; the first of its kind to be established by a State in accordance with the obligations of the Rome Statute. The Preliminary Examination initiated by the ICC Office of the Prosecutor (OTP) in 2004 to assess the effectiveness of the justice system in Colombia has been central to discussions on international norms and this new system. Consequently, the ICC-OTP monitors the progress of the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz - JEP),⁴ it should count with the collaboration of the investigative and judicial bodies of the ordinary justice system in charge of prosecuting the perpetrators with the greatest degree of responsibility in the commission of crimes against humanity and war crimes, and of ensuring the right to remedy and reparations for the victims.

1. This document is a summary of the report initially published in Spanish. See: https://www.fidh.org/IMG/pdf/fidh-cajar_informe_colombia_en_riesgo_de_impunidad.pdf (accessed 22 June 2020).

2. In *Situation in Colombia Interim Report*, November 2012, the OTP of the ICC recognized the existence of a reasonable basis for the occurrence of these crimes within its jurisdiction. <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf> (accessed 22 June 2020).

3. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Section 5 Agreement regarding the Victims of the Conflict: “Comprehensive System for Truth, Justice, Reparations and Non-Recurrence”, including the Special Jurisdiction for Peace; and Commitment on Human Rights <https://www.peaceagreements.org/viewmasterdocument/1845> (accessed 23 June 2020).

4. The Special Jurisdiction for Peace (Jurisdicción Especial para la Paz – JEP) is a judicial body that is part of the Comprehensive System as are Special Unit for the Search for Persons deemed as Missing in the Context of and due to the Conflict (Unidad para la Búsqueda de Personas dadas por Desaparecidas - UBPD) and the Commission for the Clarification of Truth, Coexistence and Non-repetition (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición – CEV).

On 5 December 2019, the ICC-OTP published their last report on preliminary examinations activities, which stated that “The Colombian authorities appear to have made progress in fulfilling their duty to investigate and prosecute conduct constituting war crimes and crimes against humanity under the Rome Statute [...]”.⁵ The report acknowledges the progress made by the JEP with respect to: (i) proceedings relating to the promotion and expansion of paramilitarism, including in the cases of David Char Navas, Ashton Giraldo, and Ramiro Suárez; (ii) forced displacements in Cases 002, 004 and 005 before the JEP, which can be attributed to the progress made with voluntary statements (*versiones voluntarias*), court testimonies, victim accreditation, and proceedings; (iii) proceedings relating to sexual and gender-based crimes in cases 002, 004 and 007 before the JEP, in which some of the accredited victims were children and adolescents; (iv) and false positive cases, which gave rise to the accreditation of 314 victims, 119 voluntary statements (*versiones voluntarias*), the participation of 16 victims and 8 organizations in proceedings, and the submission of 31 victim reports.⁶

One of the “macro-cases” opened by the JEP is case 003: “Deaths illegitimately presented by state agents as combat casualties”⁷ false positives. These deaths have involved the highest levels of military command and civil officials in Colombia.⁸ Since the coming into force of the Rome Statute, at least 5,763 extrajudicial executions have taken place, described as the murder of civilians illegally presented as combat casualties.⁹ The ICC-OTP has been monitoring progress in the investigation and trial of the highest responsible for these events in the context of the preliminary examination of the situation in Colombia.¹⁰

The purpose of Case 003, which is before the Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct (Sala de Reconocimiento de Verdad y Responsabilidad de los Hechos y Conductas - SRVR), is to compare the information received from state institutions, the persons appearing before the institutions and that have submitted voluntary statements, and civil society to determine the facts, to contribute to the historical truth, and to effectively punish the perpetrators who bear the greatest responsibility. Since the opening of the case, we have documented important advances, for example: 1) the expansion of victim participation and that of their representatives in voluntary statements and as observers in the hearings,¹¹ both were obtained by our organizations and demonstrate the commitment of the magistracy to reaffirm the centrality of victims¹²; 2) Case 003 has had the largest number of voluntary statements submitted to date, 237;¹³ and 3) other sections of the JEP - the Investigation

5. ICC-OTP Report on Preliminary Examination Activities 2019, 5 December 2019, para. 132. <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (accessed 23 June 2020).

6. See footnote 5, See also tables published in Observatorio sobre la JEP Boletín #3, 19 December 2019, Comisión Colombiana de Juristas: https://www.coljuristas.org/observatorio_jep/documentos/documento.php?id=45 (accessed 24 June 2020).

7. JEP. Sala de Reconocimiento de Verdad, Responsabilidad y Determinación de los Hechos y Conductas. [Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct] Auto 005 de 2018. Go to: https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-005_17-julio-2018.pdf

8. Inter-American Court of Human Rights. Villamizar Duran et al. v. Colombia. Judgment of 20 November 2018, para. 125.

9. “By mid-2013 the Office of the Attorney General reported receiving 3,925 complaints of extrajudicial executions for the period 2002-2010, the Colombia-Europe-United States Coordination body reported 5763 in the report “False Positives in Colombia and the Role of U.S. Military Assistance, 2000-2010”, In: ROJAS BOLAÑOS, Omar & BENAVIDES SILVA, Fabian. *Ejecuciones extrajudiciales en Colombia 2002-2010: obediencia ciega en campos de batalla ficticios*. Bogotá: Universidad Santo Tomás. 2017, p. 30.

10. Fiscalía de la Corte Penal Internacional. Informe sobre las actividades de examen preliminar 2019. párr. 119 y ss.

11. For example, in Case 003, the Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct heard the voluntary statements of members of the Indigenous Kankuamo People and from the Mothers of Persons from Soacha Involved in False Positive Cases (Madres de Falsos Positivos de Soacha (MAFAPO). See : <https://www.jep.gov.co/Sala-de-Prensa/Paginas/Poco-a-poco-va-saliendo-la-verdad-la-que-he-buscado-toda-la-vida.aspx> See also <https://www.jep.gov.co/Sala-de-Prensa/Paginas/La-JEP-escuch%C3%B3-la-victimizaci%C3%B3n-del-pueblo-kankuamo.aspx>.

12. Jurisdicción Especial para la Paz - JEP. Sala de Reconocimiento de Verdad [Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct]. Auto 080 dated 2019. “*Sobre participación la de las víctimas en las versiones voluntarias en la JEP*” (On the Participation of Victims in Voluntary Statements Before the JEP). See : https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-080_28-mayo-2019.pdf

13. Jurisdicción Especial para la Paz -JEP (Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct), Figures concerning cases before the JEP over a two-year period, See : <https://www.jep.gov.co/Infografas/cifras-febrero-2020.pdf> (accessed 26 June 2020).

and Prosecution Unit¹⁴ and Comprehensive System bodies coordinated their efforts to exhume the bodies of 54 alleged victims of executions and forced disappearance in Dabeiba, Antioquia.¹⁵

We would like to recognize the contributions to the prevention, the investigation, and the punishment of international crimes made during the Preliminary Examination of the situation in Colombia over the last 15 years by the Office of the Prosecutor of the ICC through dialogue with Colombian authorities representing all three branches of government. We would also like to point to the deficiencies in said dialogue, namely the failure by the OTP to duly point out the persistent risks of impunity that could arise with the implementation of the Transitional Justice System due to: the positions taken publicly by Colombian State authorities who do not fully support the efficient functioning of transitional justice and do not contribute positively to consolidating the legal framework; and the proofs of lack of capacity and willingness of the judiciary to prosecute these crimes that we describe in this report. We have, therefore, formulated a series of recommendations that address the latent risk of impunity.



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14. In Spanish: "Unidad de Investigación y Acusación – UIA"

15. Jurisdicción Especial para la Paz. "Esto ha descubierto la JEP en Dabeiba, Antioquia" (What the JEP Uncovered in Dabeiba, Abtioquia), YouTube. (14 April 2020). 2'13": <https://www.youtube.com/watch?v=fhlnR0l85o> (accessed 26 June 2020).

1. The prosecution of crimes committed by State Forces is encumbered by the lack of articulation among jurisdictions and the methodological difficulties encountered when prosecuting the persons who bear the greatest responsibility, according to the standards of truth and justice.

1.1 The legal framework: The prosecution of State Forces before the JEP has suffered from changes in procedures and in the benefits that are granted to the perpetrators without clear constraints and conditions.

Combatant State agents must be tried by the JEP, unless their cases are rejected for failing to comply with the established conditions or with the duty to fulfil the rights of victims. The current majority in the Congress that promoted the vote against the Peace agreement during the national referendum that took place prior to the signing of the Peace Agreement has managed to change the applicable legal framework, especially for State Forces and third parties (civilians and non-combatant State agents).

The first set of changes to the procedures for trying State Forces at the JEP concerned the non-application of international trial standards¹⁶, the rules to establish jurisdiction and to determine what can be investigated, and the rules determining who can participate in the proceedings¹⁷. These changes have made it more difficult to prosecute alleged perpetrators; a situation which has been compounded by the public position taken by government officials and by further attempts to change the law or dismantle the JEP; all of which has given rise to ongoing political and constitutional debates.¹⁸

The second set of changes, which were incorporated into the Constitution and the law,¹⁹ consisted in the creation of “special, symmetrical and differentiated treatment for criminal cases” favorising State Forces. Indeed, the new obligations for the prosecution of crimes committed by State Forces tried by the Transitional Justice system includes the granting of preliminary benefits *ab initio*, before the voluntary statement and thus without any prior evaluation of the contributions made by the persons to the right to truth of the victims and of society.²⁰

1.2. Loopholes for impunity in the prosecution of State Forces

1.2.1. The restrictive interpretation of Article 79 (j) of the JEP’s Statutory Law hinders the transfer of jurisdictional powers from the ordinary courts to the JEP, which results in the inability to pursue investigations against State Forces.

None of the transitional justice system rules clearly establish the moment at which proceedings before ordinary courts involving members of the security forces should be suspended.²¹ Given this regulatory vacuum, the Office of the Attorney General (Fiscalía General de la Nación - FGN) has interrupted investigations of acts that it deems to have been committed by State Forces

16. See: Constitutional Reform A.L. 01 of 2016, article 24. The Constitutional Court in Sentence C-674 de 2017 that the JEP magistrates will be in charge of determining, case by case, the adequacy of their procedures to international standards.

17. See: For example, Corte Constitucional, Auto 282 de 2019; Sentencia C-112 de 2019; Sentencia C-590 de 2019.

18. Semana. “¿Habrà una nueva cruzada del Centro Democrático contra la JEP?”, 2020. See: <https://www.semana.com/nacion/articulo/habra-una-nueva-cruzada-del-centro-democratico-contra-la-jep/656609>

19. See: Art. Transitorio 17 del Acto Legislativo 01 de 2017, Título IV de la Ley 1820 de 2016 y Capítulo II de la Ley 1957 de 2019, entre otras.

20. Jurisdicción Especial para la Paz. Tribunal para la Paz. Sección de Apelación. Sentencia interpretativa, SA. TEP. SENIT 01 de 2019 “Sobre beneficios provisionales, régimen de condicionalidad y participación de víctimas”. See: <https://www.rcnradio.com/judicial/el-95-de-los-militares-que-se-sometieron-la-jep-están-en-libertad>; Art. 51 Ley 1820 de 2016; Art. 19 de la Ley 1957 de 2019.

21. Special Jurisdiction for Peace, Legal Situation Chamber. Consideración [Deliberations] 48. Resolution 001142 of 28 February 2020, Person under investigation: Mauricio Santoyo.

in the armed conflict context. This situation had been denounced in previous communications to the ICC-OTP.²² Monitoring activities have shown that with the application of Circular 003 of 3 October 2018, updated on 22 July 2019, the problem persists.²³ In this regard, there is an ongoing litigation on the duties of the ordinary justice at the head of the Attorney General (FGN) to continue the investigations against the former Army Commander General, Mario Montoya, until the JEP formally and fully assumes its powers in this case²⁴.

To dissipate doubts about the rules for the transfer of jurisdiction, the JEP has ruled that proceedings can only be suspended if “the investigation phase has concluded, and either enough material has been collected to file a charging document directly with a Court, to go to trial in accordance with the procedure set out in Law 600 of 2000; or if an indictment hearing has been set following the procedure set out in Law 906 of 2004. The transfer of jurisdiction from the ordinary court is done in accordance with Order 348 of 2019 of the Constitutional Court”.²⁵

This rule, however, has been disregarded by the Office of the Attorney General (FGN) despite the repeated efforts of clarification by the JEP. Thus, the FGN has paralyzed criminal proceedings involving criminal acts which could potentially be characterised as the most serious international crimes. This affects the State’s capacity and willingness to administer justice effectively. It is also detrimental to the mainstays of the transitional justice process. The JEP’s Investigation and Prosecution Unit (Unidad de Investigación y Acusación (UIA) de la JEP) does not have the capacity to conduct all the investigations. It was meant to rely partly on the FGN’s investigations until the transfer of jurisdictional powers, but as mentioned those have been suspended.

1.2.2. Failure of the Military and Police Criminal Justice [system] (Justicia Penal Militar y Policial - JPMP) to transfer case reports and files as provided for under Article 79(b) to elucidate crimes committed by State Forces

The JPMP has not informed about any report or decision, nor is there any record on information being sent to the JEP. On the contrary, the JPMP has failed to make progress on cases and to collaborate with the JEP in solving cases on extrajudicial executions. For example, the discovery of mass graves in the Dabeiba cemetery, containing at least 32 bodies of persons extrajudicially executed by State Forces²⁶ were not all investigated. Indeed, the JPMP is only investigating 10 cases, none of which has significantly progressed.²⁷ Thus, the JEP is clearly not receiving the information they need: “[...] *the Special Jurisdiction for Peace continues to await the*

22. Colectivo de Abogados José Alvear Restrepo [José Alvear Restrepo Lawyers’ Collective] (CAJAR), Communication in accordance with article 15 of the Rome Statute of the International Criminal Court, submitted on 30 November 2019.

23. Specifically, the case for the murder of Daniel Franco Yaruro, in which members of Infantry Battalion No. 15 “SANTANDER” were involved in 2004; the case for the murder of Miguel Ardila Vaca 24 July 2007, in Sogamoso where members of the army were involved and for which three criminal investigations have been opened; the case of the Coyaima massacre, allegedly carried out by members of the military among them RUBIEL BUSTOS ESCARRAGA, ALEX D, ALBERTO RODRIGUEZ FERNANDEZ, ROBINSON ERNESTO QUIÑONEZ CARO, WILSON GABRIEL LIZCANO GUITIERREZ, EVER CAICEDO MELO, and DIEGO FERNANDO BRAVO VANEGAS; the case for the murder of David Leonardo Osorio who was allegedly executed by members of Infantry Battalion No. 1 “Simón Bolívar” in 2008; and the case for the murder of Marco Antonio Negro, committed by members of Road and Energy Battalion No. 11 Puerto Asis in Putumayo; and the case involving torture during the takeover of the Palace of Justice.

24. Case before the Superior Tribunal of Cundinamarca (Acción de Tutela). Luz Helena Peña, victim of extrajudicial executions vs. Third Delegated Prosecutor before the Supreme Court of Justice. September 9, 2020.

25. Jurisdicción Especial para la Paz. Sala de Definición de Situaciones Jurídicas [Chamber for the Definition of Legal Situations]. Resolución 1142 dated 28 February 2020, pg. 33.

26. Vega, Santiago, “Falsos positivos en Dabeiba: una prueba de las negligencias de la Fiscalía y la Justicia Penal Militar” [“False positives in Dabeiba: Proof of the Negligence of the Prosecutor’s Office and the Military Criminal Justice”], Pacifista, 16 December 2019. See: <https://pacifista.tv/notas/falsos-positivos-en-dabeiba-una-prueba-de-las-negligencias-de-la-fiscalia-y-la-justicia-penal-militar/> (accessed 26 June 2020).

27. “En ejercicio de sus funciones, el despacho relator solicitó el 4 de octubre de 2018 información a la Dirección Ejecutiva de la Justicia Penal Militar y recibió respuesta el 2 de noviembre de 2018 contentiva de algunos elementos para la apreciación general de competencias e insuficiente como respuesta de fondo” [“In the exercise of its functions, the rapporteur requested information from the Executive Directorate of Military Criminal Justice on 4 October 2018 and received a reply on 2 November 2018 containing some elements for the general assessment of competence and insufficient as a substantive response”]. Jurisdicción Especial para la Paz. Sala de Reconocimiento de Verdad y Responsabilidad de los Hechos y Conductas [Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct and Conduct] Auto of 2 March 2020. See: https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-04-01-09-20_03-marzo-2020.pdf

fulfilment of the commitments of the Criminal Military Justice under the current framework of applicable law.”²⁸ All of this points to the repeated failings of the JPMP in fulfilling its duty to prosecute serious human rights violations and to contribute to the transitional justice process.



© José Jans Carretero P. "Plantón Audiencia de Versión Voluntaria ante la JEP de Mario Montoya." ["Sit-in JEP Voluntary Statement Hearing of Mario Montoya"] 12 February 2020.

1.2.3. The need for greater clarity in the methodology used for investigations and in the assessment of the commitment to right to truth on the part of the persons who bear the greatest responsibility in extrajudicial execution cases before the JEP.

Despite the progress with respect to Case 003 on extrajudicial executions committed by State Forces mentioned previously, one of the concerns is the lack of clarity in some of the criteria used to determine responsibility and to investigate the perpetrators who bear the greatest responsibility.

Firstly, there is a need to consolidate and clearly define criteria applicable to all judicial proceedings and Chambers. It would facilitate the organization of the prosecution of perpetrators and provide for the highest standards for the fulfilment of victims' rights. The good practices adopted so far in certain cases before the Chambers should be systematized and applied for all the JEP instances to fill the gap in the law and statutes. These include the presentation of joint reports for the victims²⁹ and the mechanisms used to publicize proceedings as well as the process for victim accreditation, for example.

Secondly, for progress to be made in the investigation of senior officials, the criteria applied by the JEP to assign responsibility within the chain of command need to be defined; this is still pending. The ICC-OTP has repeatedly pointed out in their annual reports the risk that arises by

28. Ibid.

29. For example: Submission of the Mixed Report on Sexual Violence in Urabá (Antioquia), Case 004 the Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct Go to: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/104.-Comunicado-104---Primera-entrega-de-informe-sobre-violencia-sexual-ante-la-JEP-en-Urab%C3%A1.aspx>; <https://www.jep.gov.co/Sala-de-Prensa/Paginas/Comunidades-chocoanas-entregan-informe-a-la-JEP.aspx>; and Case 001 on kidnappings perpetrated by the FARC-EP, Go to: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/El-informe-es-importante-en-caso-001.aspx>

ignoring the application of international criminal law in this area.³⁰

Thirdly, conducting investigations against currently senior military officers is also essential because it is a guarantee of non-recurrence. Several of the alleged perpetrators of extrajudicial executions who have not been called by the JEP continue to hold positions of command and to rise in rank within the National Army hierarchy.

Nicacio de Jesús Martínez Espinel, for example, former Commander General of the National Army, when in command allegedly issued instructions that led to the practice of “false positives”³¹ and was allegedly involved in the illegal wiretapping of politicians, journalists, and human rights defenders.³² These acts were connected to cases involving extrajudicial executions and other human rights violations where victims were represented before the JEP. The lack of protection for victims and their representatives is detrimental to access to justice and to the guarantees of non-recurrence.

Fourthly, criteria to evaluate whether the perpetrators really contribute to the right to truth of the victims are needed. For instance, the Hearing for Voluntary Statements where former General Montoya testified is noteworthy. Instead of providing a macro-criminal perspective and describing the motives, modus operandi and participants, former General Montoya made statements that were re-victimizing in nature and denied any responsibility of high officials or of the State in the said acts.³³

This brings us to a fifth issue, the failure to act with the same effectiveness against breaches of the Conditionality Regime of State Forces. An example of this is the case involving Freddy Francisco Espitia Espinosa, a sergeant in the National Army with the 39th Sumapaz Infantry Battalion based in Fusagasugá.³⁴ Since 2 November 2018, the JEP and the victims have rejected several times the perpetrator’s proposal to provide reparation to the victims due to its not accomplished minimum standards. This situation constituted a breach of his duty regarding contributions to truth, justice, reparation, and guarantees of non-recurrence.³⁵ However, no decision has been taken to exclude him from said regime, disregarding the conditionality principle of each benefit under the transitional justice system.³⁶

30. CAJAR. “Agentes estatales podrían ser juzgados por la CPI con modificaciones a la JEP”, [“State Agents Could Be Tried by the ICC if Changes are made to the JEP.”] 2018, Bogota, Go to: <https://www.colectivodeabogados.org/?Agentes-estatales-podrian-ser-juzgados-por-la-CPI-con-modificaciones-a-la-JEP> (accessed 4 July 2020).

31. El País. “El jefe del Ejército de Colombia dirigió una brigada acusada de matar a civiles” [“The Head Of The Colombian Army Led A Brigade Accused Of Killing Civilians.”], 2019, Madrid. Go to: https://elpais.com/internacional/2019/06/04/colombia/1559607159_600734.html (accessed 4 July 2020).

32. CAJAR. “La verdad sobre crímenes de Estado: blanco de inteligencia ilegal del Ejército” [“The Truth about State Crimes: The Target of Illegal Army Intelligence”], 2020, Bogota. Go to: <https://www.colectivodeabogados.org/La-verdad-sobre-crimenes-de-Estado-blanco-de-inteligencia-ilegal-del-Ejercito> (accessed 4 July 2020).

33. Semana. “Nadie puede decir que el general Montoya mandó a matar” [“No One Can Say That General Montoya Ordered The Killing”], 2020, Bogota, Go to: <https://www.semana.com/nacion/articulo/terminada-la-version-del-exgeneral-mario-montoya-las-victimas-piden-que-sea-excluido-de-la-jep/651874> (accessed 4 July 2020).

34. Charged with aggravated murder in the death of union leader Jorge Darío Hoyos Franco, and with aggravated conspiracy to commit a crime, that of forced displacement involving the family of Mr. Hoyos Franco, and for the attempted murder of Jhon Willington Cañón Piña.

35. Jurisdicción Especial para la Paz. Tribunal para la Paz. Sección de Apelación. Sentencia interpretativa, SA. TEP. SENIT 01 de 2019 “Sobre beneficios provisionales, régimen de condicionalidad y participación de víctimas”. [JEP, Peace Tribunal, Appeals Section. Interpretative Judgment, SA. TEP. SENIT 01 of 2019 “On provisional benefits, conditionality regime and victims’ participation”].

36. CAJAR. Solicitud de apertura de incidente de incumplimiento y acumulación al caso priorizado 006 [Request for inquiry into non-compliance and delays with regard to prioritized it under case 006], Bogotá D.C. 2019.



© JEP, "Observaciones a versiones voluntarias de las madres de víctimas de falsos positivos de Soacha y Bogotá." [Voluntary Contribution Hearing for the mother of the victims of false-positives from the cities of Soacha and Bogota – MAFAPO] 17 October 2019.

1.2.4. Assessment of contributions to the truth -scope and quality of the information- made by persons appearing before the JEP.

A deliberative (dialogical) approach makes it possible to construct a collective account that comes closer to the truth. However, to apply this approach, the JEP needs to implement a framework for the assessment of the truth. This framework has not been explicitly defined yet. We consider it should include a clear test that should carefully weigh the testimony of the appearing person. We suggest to analyze, first, the amount of information provided by the appearing person compared with the information previously gathered within the justice system (the **quantitative criterion** being **sufficiency of information** provided). It involves comparing the information previously obtained by the JEP to determine if the appearing person admits to having committed any of the facts attributed to him or her, and if he or she provides additional information about the facts or about other unknown facts. Second, should also be assessed the quality of the information provided and its relevance to the purposes of the JEP investigation (the **qualitative criterion** referring to the **reliability and value of the information** for the aims of JEP's research). That implies to ask: does the information contribute to elucidating patterns and the criminal plan? Does it contribute to establishing responsibility or to identifying victims and motives? Third, **stricter degrees of scrutiny** could be applied according to the particular circumstances of the appearing person and their testimony, such as his/her level of knowledge or degree of alleged responsibility or his/her attitude towards the victims that call into question his or her credibility, such as acts of discrimination or revictimization.

1.2.5. The decisions taken by the JEP on the criteria used for assessing the correlation between sexual violence and conflict can lead to impunity in the case of gender-based crimes committed against women and LGBTI people.

Organisations dedicated to the protection of women's and LGBTI rights for the victims of gender-based violence and who litigate before the JEP³⁷ have criticised the JEP Appeals Section (Sección de Apelación del Tribunal de Paz) for establishing criteria that exclude sexual crimes from the JEP's

37. Among which: Women's Link Worldwide. Resúmen ejecutivo- Informe "Violaciones a derechos reproductivos de mujeres y niñas al interior de las FARC-EP: una deuda de la justicia" [Executive Summary - Report "Violations of Reproductive Rights of Women and Girls within the FARC-EP: A Debt to Justice"] 2019. Go to: <https://www.womenslinkworldwide.org/files/3102/resumen-ejecutivo-informe-violaciones-a-derechos-reproductivos-de-mujeres-y-ninas-al-interior-de-las-farc-ep.pdf> (accessed 5 July 2020); Alianza 5 claves. "Conexidad entre violencia sexual y el conflicto armado: un llamado al no retroceso en la Jurisdicción Especial para la Paz" ["The connection between sexual violence and armed conflict: a call for non-regression in the Special Jurisdiction for Peace."] 2019. Bogotá D.C. Go to: https://www.humanas.org.co/alfa/dat_particular/arch_contenidos/i_e_63809_q_Final_cinco_claves.pdf (accessed 5 July 2020); Communication to the ICC of 12 December 2019 signed by the Colombian Commission of Jurists, Colombia Diversa, Colectivo de Abogados José Alvear Restrepo, Sisma Mujer, Corporación Humanas, International Federation for Human Rights at a side event held during Assembly of States Parties "The role of the ICC in the context of an unfinished transition" Go to: <https://www.publicinternationallawandpolicygroup.org/lawyer-ing-justice-blog/2019/12/13/asp18-side-event-colombia-the-role-of-the-icc-in-the-context-of-an-unfinished-transition>

jurisdiction by establishing categories of sexual violence deemed to be “constitutive” or “circumstantial” to the armed conflict.³⁸ These decisions are contrary to national and international standards. They go against the rights and interests of the victims, against the guarantee of access to justice that they expect,³⁹ and against the gender-based focus that radiates throughout the SIVJRNR;⁴⁰ and they demonstrate the continued lack of will and capacity on the part of the State to investigate them. They also compound the difficulties in the fight against impunity in the ordinary justice system. Within the JEP the debate has been characterized by attempts to exclude these acts from its jurisdiction.



© José Jans Carretero P. "Plantón Audiencia de Versión Voluntaria ante la JEP de Mario Montoya." ["Sit-in JEP Voluntary Statement Hearing of Mario Montoya"] 12 February 2020.

1.3. The landmark case of retired General Mario Montoya Uribe under investigation for his alleged participation in extrajudicial executions

Mario Montoya is said to have been one of the main members of the armed forces who promoted providing incentives for those who killed the greatest number of persons in combat.⁴¹ This could explain the number of civilians reported as combat casualties, 200 between 2002 and 2003, when Montoya was commander of the army's Fourth Brigade. Subsequently, this figure rose to 600 between 2003 and 2005, when Montoya was commander of the army's First Division; and to over 2000 between March 2006 and November 2008, when Montoya was the Army's Commanding General.⁴²

38. Jurisdicción Especial para la Paz. Tribunal para la Paz. Sección de Apelación, Auto 171 de 2019, párr. 10. See: https://relatoria-jep.gov.co/documentos/providencias/7/1/Auto_TP-SA-171_08-mayo-2019.pdf

39. Alianza 5 claves. "Conexidad entre violencia sexual y el conflicto armado: un llamado al no retroceso en la Jurisdicción Especial para la Paz", 2019. Bogotá D.C. pp. 9-10. See: https://www.humanas.org.co/alfa/dat_particular/arch_contenidos/i_e_63809_q_Final_cinco_claves.pdf

40. Acto Legislativo 01 de 2017. Artículo transitorio 1, párrafo 1.

41. Human Rights Watch. "Colombia: New Evidence Against Ex-Army Chief". 2016, Washington D.C., Go to: <https://www.hrw.org/news/2016/12/20/colombia-new-evidence-against-ex-army-chief> (accessed 4 July 2020).

42. Colombia-Europe-United States Coordination. "Extrajudicial executions in Colombia 2002-2010. Crimes against Humanity under the mandate of democratic security". 2013. Bogotá D.C., Go to: <https://coeuropa.org.co/wp-content/uploads/2017/05/Documentos-tematicos-8-FINAL-1.pdf> (accessed 4 July 2020).

According to the information provided by army officials, former commander Mario Montoya exerted pressure on the troops to continuously increase the number of casualties, which in turn was exerted by different officers in the chains of command. For example, Robinson González del Río, who was a lieutenant colonel between 2006 and 2008, pointed out in a declaration before the Office of the Attorney General, as well as Pedro Nel Ospina Battalion and other members of the Military Forces, that they recognized their responsibility in “false positives cases”, but not without also pointing out that the former Commander Montoya was more than privy to the “policy”, he was also its main “proponent”.⁴³

Nevertheless, despite the Office of the Attorney General having a lot of concluding information like these testimonies about alleged Mario Montoya’s responsibility, this instance decided to suspend all proceedings. This case illustrates how the Office of the Attorney General, in the criminal investigation against the former army general decided to contravene the JEP’s pronouncements on the matter⁴⁴ and to ignore its duties to exercise complementary jurisdiction. In addition, there are other problems in that case that exhibit many burdens to victims’ rights. For instance, there are many obstacles in accessing the case file for the victims under ordinary procedures, added to the mentioned obstacles under transitional justice to the exercise of the victims’ rights in this case due to the lack of clear criteria for their prosecution. Such difficulties derived from a changing regulatory framework that delayed the Mario Montoya’s call by the JEP, the differences in criteria for the organization of hearings, and the lack of criteria for assessing contributions to the truth or for applying the conditionality regime that keeps him under transitional law despite their manifest conducts undermining their duties with the victim’s rights.

43. Human Rights Watch. *“On Their Watch: Evidence of Senior Army Officers’ Responsibility for False Positive Killings in Colombia / Colombia: Top Brass Linked to Extrajudicial Executions”*. 2015, Washington D.C. Go to: <https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings> (accessed 4 July 2020).

44. JEP, Peace Tribunal, Appeals Section, Order 286 of 2019, para. 26. The Appeals Section, on the basis of Order 286 of 2019, considered that it has exclusive jurisdiction over acts related to the conflict committed prior to December 1, 2016 and that “exclusive”, means “that it has sole and exclusive jurisdiction, and therefore not share with any of the other courts of the State”.

2. Responsible civilian third parties and non-combatant state agents: the failure to investigate or conduct due diligence for the prosecution of these categories of perpetrators are signs of the lack of willingness and of capacity to conduct genuine investigations.

2.1. Legal framework: the investigation of international crimes committed by civilians in Colombia

The Final Peace Agreement provided that the JEP would investigate all persons, combatants and non-combatants, who had committed crimes in the context of the armed conflict.⁴⁵ However, Ruling C-674 of 2017 changed the rules that had been agreed to. Thus now, the jurisdiction of the JEP as an ad hoc and ex post tribunal can only be exercised in cases where non-combatant State agents and third parties have freely expressed their will to submit to its jurisdiction with regard to contributions to the rights of the victims and the determination of their legal situation.⁴⁶

To do so they must have made a statement to that effect within the three months following the expiration of the Statutory Law or within the first three months of the formal opening of an investigation in the ordinary courts for **all crimes committed** directly or indirectly during the armed conflict. This was obtained by organizations in a Constitutional Court ruling that amended the procedural law (Law 1922 of 2018) that restricted the JEP's power only to crimes related to funding armed groups (article 11).⁴⁷



© Alexandra X. Gómez - Colombia Plural. Acción por la memoria "Cuerpos Gramaticales, invitación a sembrarse, no a enterrarse" [Action for Remembrance "Grammatical Bodies, an invitation to plant yourself rather than burying yourself"]. 13 August 2017.

45. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Section 5 Justice 5.1.2 para 32 page 158, Go to <https://www.peaceagreements.org/viewmasterdocument/1845> (accessed 23 June 2020).

46. Corte Constitucional, Sentencia C-674 de 2017. [Constitutional Court, Ruling C-674 of 2017].

47. See: Sentencia C-050 de 2020. [Ruling C-050 of 2020].

2.2. Obstacles to the investigation of third parties and non-combatant State agents involved in international crimes

2.2.1. Availability of information on the state of investigations

In November 2019, the Office of the Attorney General was asked for information regarding the status of the investigations derived from the “transferred case files” (“Compulsas de copias”) involving third parties and non-combatant State agents that fall under the framework of the current transitional justice process. On 19 December 2019 Office of the Attorney General responded, through Oficio No. DAIASC-20320, by denying access to the requested information, in contravention of national and international standards on access to public information.

2.2.2. Progress on investigations against third parties (civilians) and non-combatant State agents in the ordinary justice system is limited to cases derived from “transferred case files” and old Justice and Peace process cases.

Many of the investigations against third parties and non-combatant State agents continue to fall under the jurisdiction of the ordinary justice system and stem from the previous Transitional Justice process. Under the former Transitional Justice process called “Justicia y Paz”, 16,772 documents containing potential inculpatory evidence⁴⁸ were transferred from the Justice and Peace Courts, from the Prosecutor’s Offices delegated to Transitional Justice, and from other bodies to the Office of the Attorney General (FGN).⁴⁹

This was due to the lack of jurisdictional power of that former transitional justice system to prosecute crimes committed by third parties or state agents; their principal aim was the responsibility of paramilitary members. However, many former paramilitaries provided information to the Justice and Peace process (“Justicia y Paz”) about their links to third parties for the commission of several crimes; as this jurisdiction couldn’t research those people, that is why they “transferred case files” to ordinary justice instances. At least 2,311 of these cases concerned third party civilians, while 1,835 concerned non-combatant State agents allegedly named in the voluntary statements given by paramilitaries and other demobilized troops.⁵⁰

Consequently, a considerable portion of the workload of the ordinary justice system in head of the Office of the Attorney General corresponds to the judicial investigation of third parties or non-combatant State agents who have been identified in the above-mentioned transferred documents, instead of recent or further investigation of their responsibilities. Nonetheless, there have been no significant results to date in the prosecution of third parties or non-combatant State agents bearing the greatest responsibility for international crimes.

2.2.3. The Office of the Attorney General does not have the capacity to investigate crimes committed by third parties or non-combatant State agents because of the multiplicity of cases and the poor coordination capacity of its investigative bodies

The lack of coordination within the Office of the Attorney General and the ensuing failure to tackle the problem are perceived as an additional obstacle to justice. The entity in charge of investigating third

48. What it is called in Colombia “Compulsa de copias”

49. Fiscalía General de la Nación. “Fiscalía concluye estudio sobre terceros civiles vinculados al conflicto armado”, [“Office of the Attorney General, “Prosecutor’s Office Concludes Study on Third Party Civilians linked to the armed conflict”] Boletín 27004, 23 May 2019, Bogota, Go to: <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-concluye-estudio-sobre-terceros-civiles-vinculados-al-conflicto-armado/> (accessed 4 July 2020).

50. Redmas. “Más de 2.000 terceros civiles tuvieron relación con el conflicto armado: Fiscalía.”, 2019. See: <http://www.redmas.com.co/justicia/mas-2-000-terceros-civiles-tuvieron-relacion-conflicto-armado-fiscalia/>

party cases is the Transitional Justice Directorate⁵¹ (Dirección Nacional de Fiscalías Especializadas en Justicia Transicional para 2015 - National Directorate of Prosecutors Specialized in Transitional Justice for 2015), which has a working group that investigates and prosecutes crimes associated with the financing and support of paramilitary forces. However, most of the transferred case files are assigned to prosecutors attached to different offices within FGN, as the Office of the Attorney General in Charge of Public Safety, which also has other specialized working groups. Thus, there are conflicts and non-concurrent efforts between those and other instances inside the FGN to prosecute third parties.⁵²

Also, the profiles of the prosecutors for the Justice and Peace process were different, and transferred case files could be sent to any prosecutor in the country, thereby creating difficulties such as the duplication of proceedings, the disassociation of the contexts of the investigations, and the archiving of several cases.⁵³ These difficulties mean that most of the cases involving third parties probably will not be investigated. These situations have evinced the failure of the Office of the Attorney General to conduct coordinated investigations and to prosecute cases involving third parties and non-combatant State agents, as well as their lack of transparency with regard to the progress of said cases.

Since 24 May 2018, when the Office of the Attorney General (FGN) announced 29 macro investigations into third parties in relation to the conflict, no significant progress [in these cases] has been made public,⁵⁴ with the exception of the Office of the Attorney General reports that are communicated directly and privately to the ICC-OTP. That means that there is no public information, nor victims' participation in the announced 29 macro investigation that is supposed to fill the gap of power of JEP in the prosecution of third parties and state agents.

In this regard, we believe that the OTP should consider this situation as it is indicative of a lack of will and/or capacity in the assessment of the conditions needed to open an investigation involving crimes allegedly perpetrated by third parties or non-combatant State agents. If these shortcomings persist, almost all of these crimes and their perpetrators will go unpunished, and this should trigger an investigation conducted by the OTP.

2.2.4. Although the jurisdiction of the JEP for cases involving third parties and non-combatant State agents has been extended, the JEP has not yet taken this extension into account in his guidelines.

The JEP has established some criteria to detect patterns in macro crimes committed by third parties and non-combatant State agents that voluntarily appear before this Court. The guidelines give priority to investigations into the collaboration of civilians with the paramilitary units⁵⁵ and into civilian involvement in extrajudicial executions.⁵⁶ However, the referred changes (see 2.1) have not been taken into account in the JEP's policies, so it is limited to acts of funding paramilitarism offences. Similarly, the Appeal Section of the JEP Peace Tribunal had not been admitting the testimony of third parties before the JEP for crimes other than those related to the financing and promotion of illegal armed groups.

51. Fiscalía General de la Nación. "*Justicia Transicional*". [Office of the Attorney General, "Transitional Justice", Go to: <https://www.fiscalia.gov.co/colombia/justicia-transicional-2/> (accessed on 4 July 2020).

52. Becerra Ostos, S. "*Organizaciones Sucesoras del Paramilitarismo*." ["Successor Organizations to Paramilitarism"], Comisión Colombiana de Juristas Bogotá; 2018, pages 256-257. Available at: https://www.coljuristas.org/nuestro_quehacer/item.php?id=208 (accessed on 4 July 2020).

53. *Ibid.* page 261.

54. El Espectador, "*Fiscalía anuncia 29 macro investigaciones a terceros por el conflicto*" [Prosecutor's Office Announces 29 Macro Investigations into Third Parties Related to the Conflict] 24 May 2018, Bogota, Go to: <https://www.elespectador.com/noticias/judicial/fiscalia-investiga-29-macro-investigaciones-terceros-por-el-conflicto-articulo-790410> (accessed 4 July 2020).

55. Of the Autodefensas Unidas de Colombia - AUC (United Self-Defence of Colombia), specifically the Northern Bloc and the United Self-Defence Forces of Córdoba and Urabá.

56. Jurisdicción Especial para la Paz. Sala de Definición de Situaciones Jurídicas [Definition of Legal Situations Chamber], Resolution No. 008017 of 24 December 2019 which established guidelines for the investigation of third parties and non-combatant state agents in the JEP's Definition Legal Situations Chamber.

2.2.5. The risk of impunity is greater with non-combatant State agents who have been granted constitutional privileges

There is risk of impunity for non-combatant State agents who may be involved in international crimes and who in addition to not being under the compulsory jurisdiction of the JEP, have special privileges, provided for in the Colombian Constitution, that protect them from investigation and prosecution by ordinary courts. They are: (i) the President of the Republic or whomever is acting as his or her representative; (ii) judges in high judicial bodies; and (iii) the Attorney General of the Nation, all of whom are tried by the Senate of the Republic, after being charged by the Investigation and Accusations Commission of the House of Representatives. Members of Congress, however, are investigated and tried directly by the Supreme Court (in two instances, to guarantee the right to appeal) after investigation by the recently created Special Chamber of Instruction of the Supreme Court. (Acto Legislativo [Act] 01 of 2018)

In this regard, traditionally, impunity has prevailed in the Investigation and Accusations Committee of the House of Representatives. By assigning investigative and prosecutorial functions to deliberative and political authorities of the State, private and partisan interests have taken precedence over the interests of justice. The NGO “Corporación Excelencia en la Justicia” denounced that: “[...] it has been an ineffective institution in Colombia when it comes to the criminal investigation of persons with privileges; it has only adopted one decision on merits in its 22 years of existence [...]”.

It has only referred for trial 1 of the 3,500 proceedings that have been initiated. It is a source of concern because this body is in charge of investigating former presidents of the Republic, former high court judges and former attorneys general of the Nation; precisely, these persons are the ones who have been excluded from the jurisdictional powers of JEP for their participation in international crimes, and also ones of the greatest responsible. It means that their alleged crimes, even those that fall under the jurisdiction of the ICC, are in a serious risk to go unpunished.

Furthermore, there are serious doubts concerning the guarantees of independence and impartiality provided under the legal framework for the functioning of the Special Chamber of Instruction of the Supreme Court of Justice, which investigates members of congress. Firstly, an active member of the National Army was appointed to serve on the Special Chamber, in contravention of the international principle prohibiting military authorities from trying civilians. Secondly, the lack of clarity in the guidelines, for recusal, used to identify conflicts of interest has led to situations such as that of a judge who was allowed to take over the investigation of crimes allegedly committed by her former superiors; this situation continued until her recusal was finally approved.⁵⁷

2.3. The exception: the landmark case against Chiquita Brands employees

The investigation conducted by the Office of the Attorney General (FGN) on the crimes committed by third parties during the armed conflict concluded, in the case of Chiquita Brands, a multinational company with subsidiaries in Colombia (Banacol and Banadex), that the company's executives allegedly participated in events characterized as crimes against humanity.⁵⁸ They were able to do this by establishing close links with the paramilitary forces in Urabá with whom they were allegedly involved in the planning, financing, and reporting of the criminal activities committed by said groups. Money from the Chiquita Brands company was allegedly used by its subsidiaries, Banadex and Banacol, to finance the Arlex Hurtado Front led by Raúl Emilio Hasbún Mendoza, alias Pedro Bonito who was involved in criminal activities in the areas around Urabá and Santa Marta.⁵⁹

57. Corte Suprema de Justicia. 10 de mayo de 2019. Radicado N. 52240. Recusación en contra de H. Magistrada Cristina Lombana Velázquez sustentada por apoderado de la parte civil. [Supreme Court of Justice. 10 May 2019. Document no. 52240. Decision to recuse Honourable Magistrate Cristina Lombana Velázquez substantiated by counsel for the civil party]

58. Fiscalía General de la Nación/Office of the Attorney General, “Fiscalía dictó resolución de acusación contra exdirectivos de Chiquita Brands por presuntos nexos con grupos de autodefensas” [“The Attorney General’s Office Brings Charges against former Chiquita Brands Executives for Alleged Ties to Self-defence Groups], Bogotá, Boletín 24007, 31 August 2018, Go to: <https://www.fiscalia.gov.co/colombia/justicia-transicional/fiscalia-dicto-resolucion-de-acusacion-contra-exdirectivos-de-chiquita-brands-por-presuntos-nexos-con-grupos-de-autodefensas/> (accessed 5 July 2020)

59. Ibid.

These conclusions were made public after national and international human rights organizations working on litigation presented a communication before the Office of the Prosecutor of the ICC, under article 15 of the Rome Statute.⁶⁰ The communication contained a presentation and analysis of the facts and of evidence supporting the participation of 22 employees of Chiquita Brands, in the commission of crimes against humanity which fall under the jurisdiction of the ICC. This situation is precisely what the ICC Office of the Prosecutor acknowledges in its 2019 Report on Preliminary Examination Activities with respect to Colombia.

Chiquita Brands is one of many companies involved in the armed conflict in Colombia since 1971. They have allegedly been involved in the killing of at least 4,335 people, among them members of the Patriotic Union and of the Colombian Communist Party. They have also allegedly participated in enforced disappearances, in forced displacements, and in the persecution of trade unionists between 1995 and 2004; this was done with the help of paramilitary forces who were thus able to sustain themselves and expand the presence of their organization in the region, with the support from Chiquita Brands.⁶¹

Considering the companies and businesspersons who have interceded or participated in serious human rights violations, the Chiquita Brands case is probably the one that has progressed the most in the ordinary court system. Even so, it has met with the type of difficulties that most investigations against third parties struggle with and that lead to impunity: delays; the complexity inherent to investigating and trying foreigners;⁶² the fact that charges have been limited to aggravated conspiracy to commit a crime, other acts that could constitute international crimes being excluded; the decrease in the number of people who finally go to trial,⁶³ as evidenced by the dismissal of the trial of four persons, who were connected initially, and of other civilians. Similarly, other important cases against third parties do not progress or are not the object of public pronouncements in the ordinary justice system. This is true for the cases involving Ecopetrol, the Termotasajero thermoelectric plant, and industry organisations such as Fedegan⁶⁴ and other similar organisations who were mentioned in Justice and Peace fora.⁶⁵

The lack of capacity and willingness seen within the ordinary justice system raises concern because the same lack of coordination that existed before has been replicated with respect to the JEP. Third parties find no incentive to voluntarily submit to the jurisdiction of the transitional justice system, not even when cases are very advanced, as is with Chiquita Brands (moreover, they can no longer do so because the period of time has expired). We are left to wait for a decision to be handed down by the ordinary courts, or for them to appear in court, if and when the rules change. The JEP could have heard the facts in the Chiquita case with Case 004, but no request was made to that effect.⁶⁶

60. CAJAR, FIDH and the International Human Rights Clinic of Harvard Law School. La contribución de ejecutivos de Chiquita en la comisión de crímenes de lesa humanidad en Colombia: Comunicación bajo el artículo 15 del Estatuto de Roma de la Corte Penal internacional. 17 de mayo de 2017 [The Participation of Chiquita Executives in Crimes Against Humanity in Colombia, Communication made in accordance with under Article 15 of the Rome Statute of the International Criminal Court, 17 May 2017]. Available at: <https://verdadabierta.com/especiales-v/2017/chiquita/InformeChiquitaBrandsCPI.pdf> (accessed 5 July 2020).

61. Pacifista. "El nuevo dolor de cabeza de Álvaro Uribe tiene el sello de Chiquita Brands.", 2018. See: <https://pacifista.tv/notas/el-nuevo-dolor-de-cabeza-de-alvaro-uribe-tiene-el-sello-chiquita-brands/>

62. United States Court of Appeals for the Eleventh Circuit Cardona, et al. v. Chiquita Brands Int'l, et al., No. 12-14898 (11th Cir. 2014) Filing date: 07/24/2014. Available at: <http://media.ca11.uscourts.gov/opinions/pub/files/201214898.pdf> (accessed 5 July 2020).

63. ICC-OTP Report on Preliminary Examination Activities 2019, 5 December 2018, para. 151. Available at: <https://www.icc.org/https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (accessed 5 July 2020).

64. The Meat Producers federation is in first place when it comes to economic actors, natural persons, having been mentioned 140 times, and in third place when it comes to legal persons, mentioned more than 25 times. Sabine Michalowski, Nelson Camilo Sánchez León, Daniel Marín López, Alejandro Jiménez Ospina, Hobeth Martínez Carrillo, Valentina Domínguez Mazhari, Lina Arroyave Velásquez, *Entre coacción colaboración. Verdad judicial, actores económicos y conflicto armado en Colombia*. (Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia Bogota, 2018), pages 42 and 43. Available at: <https://www.dejusticia.org/wp-content/uploads/2018/08/Entre-coaccion-y-colaboraci%C3%B3n-PDF-para-WEB-agosto-16.pdf> (accessed 5 July 2020).

65. Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz. Radicación No. 11001600253200680008, Sentencia del 31 de octubre de 2014. M.P. Alexandra Valencia Molina. [Superior Court of the Judicial District of Bogotá, Justice and Peace Chamber. Filing No. 11001600253200680008, Judgment of 31 October 2014, Alexandra Valencia Molina, Public Prosecutor].

66. In this case specifically, priority is given to the Urabá region with respect to the serious human rights violations that occurred during the armed conflict, which include violations connected to Chiquita Brands: the financing of paramilitary forces and aggravated conspiracy. Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad y Responsabilidad de Hechos y Conductas [the Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct], Auto No. 040 de 2018.

3. Recommendations

In accordance with the above findings and considerations, and to reduce the risk of impunity, the International Federation for Human Rights - FIDH and the Colectivo de Abogados José Alvear Restrepo [José Alvear Restrepo Lawyers' Collective] - CAJAR make the recommendations listed hereunder.

3.1. With respect to international crimes committed by State Forces related directly or indirectly to the armed conflict.

1. To the Office of the Prosecutor of the International Criminal Court we make the following recommendations.

1.1. To continue the preliminary examination of international crimes committed by State Forces, especially of persons involved in extrajudicial executions, enforced disappearances, sexual violence, and who are connected to the promotion and expansion of paramilitary forces.

1.2 To evaluate progress in the investigation and prosecution of third parties and non-combatant State agents; the ICC-OTP should require high standards of justice that implies more than a few progresses in individual cases.

1.3. To request the Office of the Attorney General of the Nation to provide all information on:

1.3.1 Suspended trials and investigations of State Forces involved in international crimes, specifically, in application of Resolution 003 which rejects the practice of indictment hearings and other investigative activities which fall under its jurisdiction until the transfer of jurisdictional powers, as was established by the JEP.

1.3.2. Cases that were referred to the Military Criminal Justice [JPMP] in or with requests for jurisdiction for alleged international crimes.

1.3.3. Mechanisms for coordination and collaboration with the JEP for the transfer of cases and information related to State Forces.

1.3.4. Cases related to the promotion and expansion of paramilitary forces in which State agents have been linked to combatants.

1.3.5. Cases against State Forces for events that occurred after the JEP was established (1 December 2016) and that may constitute international crimes or those transferred from the JEP due to the exclusion of an applicant from the transitional justice system.

1.4. To request the Supreme Court to provide information on the number of investigations and trials, the status and progress made, and the names of the persons connected to international crimes involving State Forces who have not yet been transferred to the JEP.

1.5. To request the Special Jurisdiction for Peace (JEP) to provide all information on investigations against State Forces for acts related to extrajudicial executions, forced disappearances, gender-based violence, and the promotion and expansion of paramilitary forces, in particular:

1.5.1. The mechanisms for collaboration, transfer of jurisdiction, and for communication shared with the Office of the Attorney General of the Nation and used to effectively investigate these crimes.

1.5.2. The number of cases, their status, and the Chamber or Section they are assigned to, specifying which senior officials are involved in these cases.

1.5.3. The guidelines, protocols or methodologies for investigation and coordination applied by its Chambers and Sections to prosecute crimes committed by State Forces while fully guaranteeing the rights of the victims.

1.5.4. The standards applied to assess how contributions align with the conditionality regime; the number of cases where the standards have been applied, and the status and processing of such requests.

1.5.5. Updated information on how well the procedures, prioritization, selection, and

investigation criteria meet international standards, in particular the incorporation of the Rome Statute in the trials of State Forces.

1.6. To request the Military Criminal Justice to provide information on:

1.6.1. All ongoing, dismissed and/or archived cases and investigations of State Forces for acts related to extrajudicial executions, forced, gender-based violence, or the promotion and expansion of paramilitary forces.

1.6.2 All actions taken to guarantee the transfer to the JEP of information, cases and judicial decisions on facts that fall within its jurisdiction, accordingly with Article 79 of the JEP's Statutory Law.

2. Recommendations to the Office of the Attorney General of the Nation

2.1. Move forward decisively with all judicial proceedings and genuinely investigate the crimes committed by State Forces through to the Indictment Hearing or to the complete referral to the JEP, within the framework of its powers under the Statutory Law and the Constitution; and, consequently, amend Resolution 003 to guarantee harmonious collaboration with the JEP.

2.2. Send to the JEP a report on all the facts related to the promotion and expansion of paramilitary forces involving State Forces.

2.3. Prioritise investigations on persons who appear before the Court, especially State Forces who, as a result of the Conditionality Regime, no longer fall under the jurisdiction of the transitional justice system and are returned to the ordinary courts, guaranteeing due diligence and collaboration with the JEP in order to ensure effective prosecution.

2.4. Assume jurisdiction diligently over all facts involving State Forces and international crimes transferred from the Military Criminal Justice system.

3. Recommendations to the Special Jurisdiction for Peace (JEP)

3.1. Make progress in the proceedings against State Forces in Case 003, effectively sanctioning the persons with the greatest responsibility from all tactical units and regions connected to extrajudicial executions, including progress in determining the liability of senior military commanders.

3.2. Prioritize the investigation and prosecution of State Forces involved in acts related to the promotion and expansion of paramilitarism, enforced disappearances, and gender-based violence, coordinating all its Chambers, Sections, and the corresponding bodies of the ordinary justice system.

3.3. Establish criteria for investigation, collaboration and information exchange, victim participation for all Chambers and Sections that incorporate the progress, difficulties and lessons learned from Case 003 and from other cases underway, as well as international and national standards, especially the Rome Statute, additional to the completion of the Protocol on Victims' Participation underway.

3.4. Establish standards to assess how contributions align with the Conditionality Regime, and standards for speed and due diligence in resolving all incidents of non-compliance. In particular, take into consideration the test that could be developed to analyse the extent to which statements have contributed to establishing the truth (see above Section 1.2.4).

3.5. Reinforce the mechanisms and routes of protection for victims and their representatives within the JEP, including decision-making on precautionary measures with respect to those public officials who impede JEP investigations of facts that fall within its jurisdiction.

3.6. Specifically, request the information from the ordinary justice system necessary to assess

the level of risk and possible obstruction of justice that could be caused by illegal wiretapping operations -allegedly carried out by members of the National Army and by civilian government agents- of civilians who have filed complaints, instigated litigation, and defended the human rights of the victims of extrajudicial executions in Colombia.

3.7 Align considerations on the connection between the conflict and all forms of sexual or gender based violence to national and international standards on the matter so that the gravity of the crimes committed against women and LGBTI persons in the context of the conflict is recognised, without distinction for “opportunists” or their exclusion from the jurisdiction.

4. Recommendations to the Military Criminal Justice System

4.1. Refer to the JEP all ongoing, dismissed and/or archived cases and investigations against State Forces for facts related to extrajudicial executions, forced disappearances, gender-based violence, or the promotion and expansion of paramilitary forces.

4.2. Refrain from accepting to hear facts related to the commission of international crimes, because they lie outside of its jurisdiction.

3.2. Recommendations to reduce impunity for international crimes committed by third party civilians and non-combatant State agents in the context of, or in direct or indirect relation to, the armed conflict.

5. Recommendations to the Office of the Prosecutor of the International Criminal Court

5.1. Continue the preliminary examination regarding the willingness and capacity of the Colombian justice system to try third-party civilians and non-combatant State agents.

5.2. Request from the Office of the Attorney General all information regarding compliance with the obligation to prioritize the trials of third-party civilians and non-combatant State agents, in particular:

5.2.1. Clearly indicate the case numbers and dates and which cases were opened in application of (i) Law 975 of 2005 on justice and peace, (ii) of Law 600 of 2000, and (iii) Law 906 of 2004.

5.2.2. Provide information on the cases opened for new facts committed by paramilitary successor structures involved in international crimes, the persons involved, the status of the case and the progress of the investigations.

5.2.3. Report on recent changes in the entity's administrative structures and guidelines, and how the changes affect the investigation of crimes.

5.2.4. Report on the 29 macro investigations, the (i) procedural status and progress, (ii) case number (iii) unit (iv) events being investigated and (v) the names of the persons connect to the events.

5.2.5. Verify the number of case files transferred under Law 975 of 2005 involving non-combatant state agents and third-party civilians, and indicate (i) which ones gave rise to criminal investigations and (ii) case status , (iii) case number, (iv) the unit to which they were assigned, (v) the events under investigation, and (vi) the names of the persons connected to the events.

5.3. Request the Supreme Court to provide information on the number of investigations and trials, their status and progress, and the names of the persons involved in international crimes who benefit from constitutional or legislative privileges and are not under jurisdictional power of JEP.

5.4. Request the Special Jurisdiction for Peace (JEP) to provide all information on investigations against third-party civilians and non-combatant State agents, particularly on

5.4.1. The mechanisms for collaboration, transfer of jurisdiction or transfer of case files with

the Attorney General's Office, with the aim of effectively investigating international crimes;

5.4.2 The number of trials against third-party civilians and non-combatant State agents, their status, and the Chamber or Section before which they are brought, and specifically those cases related to the promotion and expansion of paramilitary forces;

5.4.3. The number of case files transferred by this entity to the Office of the Attorney General concerning facts involving third parties or non-combatant state agents;

5.4.4. The guidelines, protocols or methodologies for investigation and coordination, between its Chambers and Sections, used to prosecute crimes committed by non-combatant State agents and third parties; and

5.4.5. In particular, those guidelines, protocols, and methodologies for the investigation of crimes, before their Chambers and Sections, related to the promotion and expansion of paramilitary forces.

5.5. Request that the Investigation and Indictment Committee of the House of Representatives provide all information regarding the trials of non-combatant State agents under its jurisdiction for all acts constituting international crimes, including the status of the cases, recent actions, related crimes, and clearly indicating those cases related to the promotion and expansion of paramilitary forces.

6. Recommendations to the Office of the Attorney General of the Nation

6.1. Make decisive progress in strengthening institutional capacities for the effective investigation of crimes committed by third-party civilians and non-combatant State agents.

6.2. Incorporate methodological, criminal policy and/or administrative guidelines aimed at guaranteeing harmonious collaboration with the JEP in the investigation of third parties and non-combatant state agents.

6.3. Guarantee the transparency of information on the progress of macro-investigations of third parties and non-combatant State agents, and on all prioritized cases in compliance with Legislative Act 01 of 2017 and in the exercise of complementary jurisdiction inherent to the transitional justice process.

7. Recommendations to the Special Jurisdiction for Peace (JEP)

7.1. Make decisive progress in the cases against third-party civilians and non-combatant State agents who have voluntarily submitted to its jurisdiction, especially by incorporating mechanisms for collaboration, analysis, and exchange of information among all its Chambers and Sections.

7.2. Advance in the identification of all third-party civilians and non-combatant State agents who participated in the conflict, using the information provided by the persons who testified, civil society, or State entities, in order to submit the information to the JEP or to the ordinary justice system, as appropriate.

8. Recommendations to the Supreme Court of Justice, continue the process of adapting its procedures to guarantee the highest standards of transparency and judicial independence, including those related to conflicts of interest, incompatibility, and other practices that may hinder the investigation of persons with constitutional or legislative privileges.



Colectivo de Abogados
José Alvear Restrepo

The Colectivo de Abogados José Alvear Restrepo is a non-profit non-governmental organization that has worked for the defence of Human Rights in Colombia since 1978, with consultative status before the Organization of American States (OAS) and the United Nations (UN). It comprehensively defends and promotes human rights, environmental rights and the rights of peoples, from a perspective of indivisibility and interdependence, with the aim of contributing to the construction of a fair and equitable society from the perspective of political, economic, social and cultural inclusion.

Contact information:

<https://www.colectivodeabogados.org/>

<https://www.facebook.com/colectivodeabogados>

@ccajar

recepcion@cajar.org



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Director of publication:

Alice Mogwe

Editor in chief:

Éléonore Morel

Authors:

José Jans

Carretero Pardo,

Jimena Reyes

Demougin,

Colectivo de

Abogados José

Alvear Restrepo

- CAJAR

Design:

FIDH

fidh

CONTACT

FIDH

17, passage de la Main d'Or

75011 Paris - France

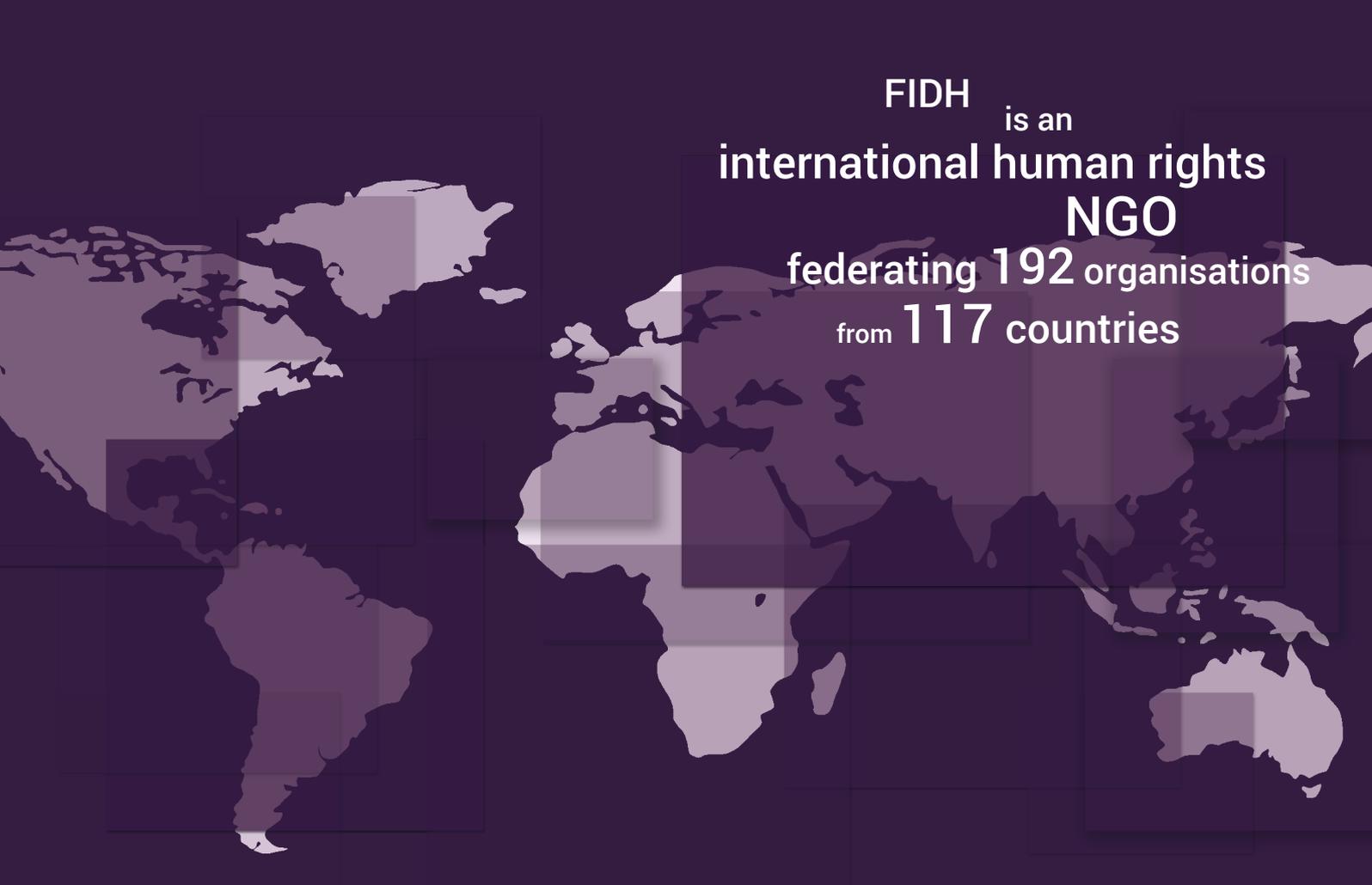
Tel: (33-1) 43 55 25 18

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