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

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Abstract

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

II. Collective victim participation in criminal proceedings

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

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

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

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

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

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

1. Collective participation at the International Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Victim participation before the JEP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 2: JEP Macro-cases and recognised victims

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

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

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

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

IV. Challenges to collective victim participation mechanisms at the JEP

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

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

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

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

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

1. Exceptions to collective participation

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

2. The dialogical principle and collective participation

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

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

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

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

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

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

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

V. Conclusions

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

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

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

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

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

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

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