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

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Abstract

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

Introduction

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

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

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

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

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

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

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

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

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

6 Jurisdicción Especial para la Paz, JEP

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

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

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

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

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

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

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

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

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

9 Registro Único de Víctimas

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

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

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

Age, sex, and ethnic origin

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

Socioeconomic traits

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

Where are the victims abroad located?

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

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

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

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

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

International protection and immigration status

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

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

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

Crimes committed against victims abroad

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

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

Participation in cases 01 and 06 of the JEP

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

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

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

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

Extra-procedural participation

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

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

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

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

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

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

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

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

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

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

Procedural participation in the cases 01 and 06[18]

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

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

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

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

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

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

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

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

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

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

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

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

Accreditation as special participants

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

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

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

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

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

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

International protection and participation in proceedings before the JEP

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

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

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

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

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

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

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

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

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

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

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

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

Cross-border and transnational forced displacement

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

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

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

Forced displacement from a criminal perspective

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

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

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

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

Victims of forced displacement in Law 1448/2011

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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