The Special Jurisdiction for Peace in Colombia: Transdisciplinary Inquiries

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Abstract

The article highlights current conflicts regarding the implementation of the peace process and especially its transitional justice component in Colombia. It stresses some important gains of the transitional justice institutions and discusses current challenges regarding dealing with the past in Colombia. The article closes by presenting four discussions that will be important for both future interdisciplinary research and political discussions on transitional justice on an international level.

During the last five to ten years Colombia has been the focus of attention in international peace and conflict studies. Arguably, this changed with the Russian war of aggression against Ukraine. However, especially regarding peacebuilding in the aftermath of internal armed conflicts, the Colombian case continues to be of relevance. A growing number of journal articles as well as ongoing research projects deal with the continuing peace process in Colombia. International politics, human rights activists and civil society groups are also following the peace process closely (Birke Daniels & Kurtenbach 2021; Fabra-Zamora et al. 2021). This can hardly come as a surprise: After all, the signing of the peace agreement between the Colombian government and the FARC-EP guerrilla organization in 2016 was truly historic. A conflict that had lasted for over fifty years was settled; the largest and oldest guerrilla movement in the Western Hemisphere was demobilized and began the difficult process of reincorporating itself into society. The successful peace negotiations in Havana and the signing of the peace agreement in the Colombian coastal city of Cartagena seemed to pave the way to a better and more peaceful future for Colombia and was enthusiastically supported by the international community in particular.

However, there is a striking contrast between the euphoria of both the international community and the peace and conflict research community and the tone of the general public debate in Colombia. At home, the peace process was heavily criticized, particularly by actors from the

right-wing political spectrum. After a polemic debate about the real and supposed contents of the peace accords, the agreement failed to win a majority in a plebiscite called by then Colombian President Juan Manuel Santos on October 2, 2016. With a low voter turnout (even by Colombian standards) of 37.43%, a razor-thin majority of 50.21% rejected the peace agreement.[1] Various analyses have identified the reasons for the lack of a majority backing the historical peace agreement. These include effective political marketing based on a campaign of fear and fake news by the right-wing opposition, as well as low interest in the peace process among large segments of the mostly urban population that has been less affected by the internal armed conflict (Bello, 2016; Botero, 2017; Esguerra Muelle 2017; González, 2017; Basset, 2018). In addition, during the last years, it became apparent that certain aspects of the agreement reached in the peace negotiations met with rejection within broad segments of the population. This was particularly true of the guaranteed mandates for former FARC combatants in the Colombian parliament in the 2018–2022 and 2022–2026 legislative periods, as well as the design of the transitional justice mechanisms and, in particular, the *Jurisdicción Especial para la Paz* (JEP, Special Jurisdiction for Peace) (see the contributions by Ambos & Aboueldahab and Gómez in this volume). Thus, the way how to deal with the past and especially the design of the Transitional Justice process is at the heart of the political conflict related to the peace agreement.[2]

Dealing with the Past in Colombia

Colombia is notable not only for its long history of political violence, but also for its multiple attempts to deal with its violent past. Jefferson Jaramillo Marín (2011) identifies eleven non-judicial commissions for dealing with the past for the period from 1958 to 2007, none of which meet the requirements of a truth commission "in the strict sense" (Jaramillo Marín 2011: 234). This is complemented by a variety of memory enterprises at a local, regional, and national level as well as countless initiatives in peace education (see. e.g. CNMH 2013; CNMH 2015; Chaux et al. 2021). Still, there is a striking contrast between this variety of academic production

1 For the results of the plebiscite see https://elecciones.registraduria.gov.co/pre_plebis_2016/99PL/DPLZZZZZZZZZZZZZZZZZ_L1.htm

2 Of course, public contestation on how to deal with the past is rather a common trait of transitional societies (see e.g. Lessa 2014; Jelin 2017).

and grassroot initiatives on the one hand, and a rather poor knowledge about the internal armed conflict and a general lack of successful public policies aiming to mainstream the confrontation with the violent past throughout the Colombian society (Sánchez Meertens 2017).

This is not to disregard important efforts to deal with the past by the Colombian governments (Riaño Alcalá & Uribe 2016). Transitional justice measures were introduced for the first time in Colombia during the process of demobilizing the paramilitary *Autodefensas Unidas de Colombia* (AUC, United Autodefenses of Colombia). Colombia thus joined the international trend of resorting to transitional justice mechanisms to address human rights crimes after brutal dictatorships or civil wars. The "Age of Transitional Justice" (Adler 2018) gained momentum in the early 1980s in the context of increasing efforts to deal with the past of the civil-military dictatorships in the Southern Cone and rapidly became part of the standard peacebuilding toolkit (Buckley-Zistel & Oettler 2011; Lekhra Sriram 2017: 15; Figari Layús 2021).

However, the Colombian transitional justice process in the context of the demobilization of the AUC (*Ley de Justicia y Paz*) is generally not seen as a successful textbook case. Rather it has been criticized early on for example by Uprimny Yepes et al. (2006), pointing out the flaws of a transitional justice process without transition. Criticism was particularly directed at the lack of protection of victims' rights to truth, justice, and reparations (Uprimny Yepes 2006; Cortés Rodas 2007: 73–79; Gómez 2012). This was partly rectified with the passage of the Victims' Law (*Ley de Víctimas y Restitución de Tierras*) in 2011 and the Law 1592 of 2012. The Victims' Law has been hailed by Sikkink et al. (2014: 61) as an "impressive compromise to provide redress to the victims" (see also Sikkink et al. 2021: 119) Nevertheless, a multitude of problems remained including the narrow financial scope with simultaneously high expectations of victims (Rettberg 2015), but also the lack of access to justice for vulnerable groups in particular (Rivera Revelo & Peters 2017).

In the context of the current peace process in Colombia, the transitional justice mechanisms from the *Ley de Justicia y Paz* and the Victims' Law continue to operate. However, they coexist with a new transitional justice system – the *Sistema Integral de Verdad, Justicia, Reparación y No-Repetición* (SIVJRNR; Integral System of Truth, Justice, Reparation and Non-Repetition). The SIVJRNR is composed of three institutions created in the context of the peace agreement: the JEP, the Truth Commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No-Repetición*, CEV) and the Special Unit for the Search of Disappeared Persons (*Unidad de Búsqueda de Personas dadas por Desaparecidas*, UBPD). While the

JEP is responsible for the legal prosecution, the Truth Commission, as a non-judicial institution, is particularly dedicated to clarifying the patterns of violence in the past.[3] The UBPD has a humanitarian component and focuses on the search for the victims of enforced disappearance and has a temporary mandate of 20 years.

The Colombian transitional justice system is a subject of great interest among scholars and international policymakers. Colombia can even be considered a model student of the transitional justice community. The SIVJRNR integrates lessons learned from past transitional justice processes and recommendations from academic literature on transitional justice. The SIVJRNR aims to deal with the crimes of the past while contributing to social reconciliation and preventing the repetition of past violence.[4] In addition, the SIVJRNR highlights it victim-centeredness and includes differential approaches that aim to take into account the diversity of the Colombian population. Moreover, exiled victims are considered as well in the Colombian transitional justice system (González Villamizar et al. 2020; González Villamizar & Bueno-Hansen 2021; see also the contribution by Murillo Palomino & Pedraza Camacho to this volume).

At the same time, the Colombian transitional justice process faces a variety of challenges. *Firstly*, the context within which institutions of the SIVJRNR operate is shaped by the ongoing presence of illegal violent actors (neo-paramilitary actors, ELN guerrillas, FARC dissidents) and a very precarious security situation in various – mostly remote and historically marginalized – regions of the country (Ríos & Niño 2021). Social activists, human rights' defenders and ex-combatants are especially exposed to the violent actors. This scenario makes the work of the institutions of the SIVJRNR extremely difficult, especially when it comes to ensuring victims' participation (Interview with Luz Marina Monzón, Director of the UBPD, 10–07–2020; see also Rivera Revelo 2022; and the contribution by Pearce & Velasco to this volume).[5] *Secondly*, this is closely linked to the enormous complexity of the internal armed conflict in Colombia and, consequently, of the peace process itself. According to the continuously updated *Registro Único de Víctimas* (RUV), the armed conflict in Colombia has claimed

3 The CEV will present its final report at the end of June 2022.

4 However, although it is generally taken for granted that judicial prosecutions contribute to preventing the repetition of human rights violations, empirical results on this forward-looking pillar of transitional justice are rather weak and there is an important methodological problem in ascertaining whether deterrence worked (Lekha Sriram 2017: 21; Davidovic 2021: 387).

5 Interview with Luz Marina Monzón, Director of the UBPD, 10–07–2020.

more than 9,230,000 victims as of the end of January 2022.[6] At the same time, a variety of different actors have been operating in the armed conflict. These include security forces, several guerrilla groups, and paramilitary actors, with various illegal armed actors still operating in the country. Moreover, rather than having clear distinctions between victims and perpetrators these lines are often blurred and there are plenty of cases of "complex political victims" (Bouris 2007) that challenge the construction of a victim-perpetrator binary in transitional justice (Weber 2021). Related to the huge number of victims, *thirdly*, is the tension between the expectations of victims and the actual ability of transitional justice institutions to implement victim participation and fulfill expectations regarding material and symbolic reparations and the content of the works and activities with restorative content (*Trabajos, Obras y Actividades con contenido reparador*, TOAR) in the context of very limited material and time resources (Vargas Trujillo et al. 2021; see also the contribution by Vargas Trujillo to this volume). *Fourth*, an extremely multilayered and complex transitional justice system has been established in Colombia, which is hardly understandable for broad segments of the population, including victims and perpetrators, and consequently creates the problem of expectations based on insufficient or incorrect information. So far, these challenges have not been sufficiently met by educational measures to convey the basics of the Colombian transitional justice system (PRIO/UNDP 2021: 60). This is compounded, *fifthly*, by the low level of support the peace process receives from the current government of President Iván Duque (2018-2022). The Duque government's skeptical attitude toward the peace agreement manifests itself particularly in discussions about the JEP and was evident not least in the discussions about the *Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz* (Statutory Law of the Administration of Justice in the Special Jurisdiction for Peace) at the beginning of 2019. The new law was approved by the Constitutional Court only after heated debates and corresponding delays, and was finally signed by the president despite his objections (Matías Camargo 2019). *Finally*, the SIVJRNR was also negatively impacted by the effects of the Corona pandemic and, in particular, by the harsh lockdown measures taken to contain the pandemic in the months from March to around August 2020. In particular, the

6 https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394. The majority of the victims are internally displaced persons. Others are victims of murder, forced disappearances, *falsos positivos*, forced recruitments, gender-based and sexual violence, torture, etc.

restrictions made it difficult to work with marginalized victims of the conflict living in remote areas of the country or conduct field visits to solve crimes and attend face-to-face events (Figari Layús et al. 2020).

The Role of the JEP in the Task of Dealing with the Past

Within the process of coming to terms with the past in general and the SIVJRNR in particular, the JEP plays a very prominent role. The focus on the JEP even raises concerns regarding a hegemonic position of the JEP within in SIVJRNR.[7] This results, on the one hand, from the fact that the JEP issues legal judgments with direct and visible consequences for individual perpetrators as well as for victims and victim groups, and thus also generates great high public interest. The JEP focusses its efforts on especially important macrocases and to saction those most responsible for serious human rights violations. In this sense, the JEP also challenges powerful interests. This can be seen currently with regard to the macrocase on the 'false positives'. Whereas ordinary justice has sanctioned only lower-rank perpetrators, in the context of the JEP a general and four coronels participate in public audiences on false positives in the Department of Norte de Santander.[8] This case highlights the relevance of the JEP and its potential to focus on crimes committed by powerful actors.

On the other hand, compared to the CEV, the JEP has a much longer mandate and, above all, is much better equipped than the CEV and the UBPD. For example, having in mind the general lack of sufficient budget (Figari Layús et al. 2021: 9p.), in the 2021 budget year, the JEP was allocated higher funds by the Colombian government (330,748,287,686 Colombian pesos) than the CEV (116,992,092,190 Colombian pesos) and the UBPD (127,889,007,500 Colombian pesos) combined (Ministerio de Hacienda y Crédito Público 2020: 320–324).

Despite this, and in addition to the difficulties mentioned earlier that affect the entire SIVJRNR, the JEP faces several specific challenges. The JEP in particular crystallizes the political polarization around coming to terms with the past in Colombia. This is partly explained by the fact that the JEP is an innovative instrument of transitional justice that can be understood as a hybrid structure that combines aspects of retributive

7 Personal communication by a leading Colombian Peace researcher.
8 Personal communication by a judge from the JEP.

and restorative justice.[9] A key challenge of the JEP is to comply with standards of international criminal law and especially the Rome Statute (Björkdahl & Warvsten 2021). This means that serious human rights and war crimes are explicitly excluded from amnesty (Ambos & Cote Barco 2019: 4). However, the JEP grants amnesties for less serious crimes, and will provide alternatives to prison sentences. Opponents of the peace process have repeatedly argued that the JEP advocates impunity. Although this has already been refuted several times with convincing arguments (see for example: Reyes Alvarado 2020; Ambos & Aboueldahab in this volume), these accusations generate strong political pressure on the JEP.[10]

At the same time, the work of the JEP is under international scrutiny. The JEP and in general the SIVJRNR can be seen as an innovative instrument that manages "to address both peace and justice simultaneously" and thus "has […] been able to push back the ICC and to secure agency" (Björkdahl & Warvsten 2021: 2, 22). In other words, its success guarantees that the International Criminal Court (ICC) will not intervene in Colombia. In October 2021, the Prosecutor of the ICC, Karim A.A. Khan QC, announced during a visit to Colombia the closure of the preliminary examination of the Colombian case based on the assessment that "the national authorities in Colombia are neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes" (ICC 2021). In return the Colombian government signed an agreement, committing itself to closely cooperate with the ICC and particularly to support the national judiciary system including the transitional justice mechanisms (Ambos 2021a; ICC 2021). However, a key question is whether the ordinary justice system will intervene in crimes committed by actors who are not compulsorily subject to the JEP. Responsibilities of Colombia's ex-presidents and corporate actors (e.g., cattle ranchers) can be mentioned in this context.

Furthermore, in view of the high number of victims and crimes committed and the risk of work overload for judges and juridical staff of the JEP, the question of how to select and prioritize the negotiated macro-cases of the JEP arises (Sánchez León & Jiménez Ospina 2020). By the beginning of 2022, the JEP had opened seven macro-cases, which can be divided into thematic cases and regional ones. Nevertheless, a large number of

9 For a discussion on the role of restorative justice in transitional justice see for instance de Gamboa Tapias (2020).

10 In this sense, Quinn (2021) has recently argued for a basic consensus on the need for serious efforts to deal with the past. As a consequence, she states that "[t]ransitional justice must not be implemented in a society where the population is not ready for it" (Quinn 2021: 136).

crimes and regions are so far missing from the list of macro-cases. This applies in particular to conflict-related gender-based and sexual violence (5 Claves 2021), forced disappearances (Movice 2021: 64), forced displacement, and regional cases, such as those relating to the Magdalena Medio region, Arauca or the Amazon/Orinoquía region. However, the JEP will probably rather open three new macrocases based on perpetrators (FARC-EP and armed forces alike) and determined victims (indigenous people).[11] Yet, this decision is rather contested. Especially victims' organizations do not only demand more participation in prioritization and selection of cases, but they also raise concern that several severe human rights violations like gender-based and sexual violence, forced disappearances or forced displacement might not get the attention it should.

Additionally, in the everyday practice crucial questions regarding the concrete materialization of the participation of victims within the JEP (see the contribution by Vargas Trujillo in this volume) as well as the concrete content of the 'alternative punishment, restorative sanctions, reparative works and actions' arise (JEP 2020). Victims' expectation as raised in the reports presented to the JEP are often high and include concrete measures. However, there is the risk of generating frustration as the expectations will probably not be totally fulfilled (Sandoval Villalba et al. 2021: 45pp.; Vargas Trujillo et al. 2021). Moreover, based on survey data in conflict-ridden and historically marginalized municipalities covered by the Territorially Focused Development Program (*Programa de Desarrollo con Enfoque Territorial*), a recent study by PRIO and UNDP (2021) highlights that a majority of the interviewees "consider that the upper and middle-rank perpetrators should pay for their crimes with prison without any type of sanction reduction" (PRIO/UNDP 2021: 60). This is arguably at odds with the design of the transitional justice mechanism and the alternative punishments.

Further Research Avenues

Of course, the academic contributions to this volume have only been able to provide insights on a small part of the broad need for research generated through the concrete application of further developments of the transitional justice framework in daily practice. As a consequence, the JEP offers

11 https://www.elespectador.com/judicial/jep-abrira-tres-nuevos-macrocasos-guerrilleros-y-fuerza-publica-lo-senalados/

a number of additional research avenues for the future that will shape developments in transitional justice far beyond Colombia. In conclusion, four key challenges to transitional justice in general and the Colombian peace process in particular will be highlighted.

First of all, the persistence of extreme and enduring social inequalities in Colombia (Peters 2021: 254–256) leads to the question of expectations about the impact of the SIVJRNR. In recent years, transitional justice has been repeatedly criticized for focusing unilaterally on the legal treatment of serious human rights violations, neglecting the forms of "structural violence" (Galtung 1969) and the violations of economic, social, and cultural human rights. Consequently, current discussions from the field of transformative justice explicitly include the goal of reducing inequalities and thus changing persistent social structures and gender relations (Ní Aoláin 2019; Szablewska & Jurasz 2019). This position seems to gain support within the transitional justice community. For instance, Louise Arbour (2013), a former chief prosecutor of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia, criticizes the "neglect of economic, social, and cultural rights" (Arbour 2013: 5) in transitional justice and argues that transitional justice should take seriously the principles of the indivisibility and interdependence of human rights (Arbour 2013).[12] Moreover, a transformative justice approach is also seen as a way to address the causes for conflict and violence and, therefore, contribute to the no-repetition of the violent past (Arbour 2013; Lekhra Sriram 2017). While Waldorf (2012) argues that such approaches overburden transitional justice institutions and distract from their core tasks, several scholars call for transformative justice as a more holistic alternative to transitional justice (Lambourne 2009; Gready & Robins 2019). In this sense, and with regard to the goal of non-repetition, Sharp (2019: 588) highlights that "a transitional justice project that does not at least

12 Arbour (2013: 26) is very clear regarding this point and enunciates a fierce critique of (transitional) justice: "In spite of many achievements and occasional exceptions, transitional justice has, like mainstream justice, not yet dealt with economic, social and cultural rights adequately or systematically. I suggest that transitional justice should take up the challenges to which mainstream justice is reluctant to rise: acknowledging that there is no hierarchy of rights and providing protection to all human rights including economic, social, and cultural rights. As with all human rights, economic, social, and cultural rights call for constitutional protection, legislative promotion and judicial enforcement. A comprehensive strategy for transitional justice would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place."

highlight and contest the roots and drivers of conflict risks rendering the refrain 'never again' somewhat hollow." In a nutshell, transformative justice approaches situate political violence in a continuum that encompasses interpersonal and structural violence, and recognize human rights as universal, interdependent and indivisible (Gready & Robins 2019). Given the notorious negation of basic social rights as well as the extreme and historical persistent social inequalities in Colombia and other conflict-ridden societies of the Global South, transformative justice appears to be a very welcome new benchmark for sustainable peacebuilding.

Secondly, the emphasis of the Colombian peace agreement, the SIVJRNR, and the JEP on differential approaches and the focus on victim participation raise a number of questions regarding the materialization of these noble goals. First of all, it must be assumed that the extreme social inequalities also limit access to justice for marginalized social groups, while easing it for privileged social groups. Transitional justice is not a space in which power is absent. This is particularly evident when taking an intersectional perspective (Crenshaw 1987; Viveros Vigoya 2016). For instance, Rivera Revelo (2022) analyzes the example of indigenous Awá women from the *Departmento* Nariño in southwestern Colombia, who were victims of conflict-related sexualized violence in the context of the armed conflict, to show how multiple oppressions along the imbrications of race, class and gender negatively affect access to justice. On a more general level, the JEP faces the challenge of effectively centering victims in a context characterized by limited financial and time resources. At the same time, there is a tension between the implementation of differential approaches as shown in the JEP's guidelines for the implementation of the ethnic approach (JEP 2021) and the JEP's general orientation towards justice based on liberal principles. Arguably, the individual-theoretical approach of mainstream (liberal) transitional justice might be at odds with the reality of local contexts and contradicts recent demands for a 'local turn' in transitional justice (Shaw & Waldorf 2010). In this sense, critical authors such as Boaventura de Souza Santos (2020) even argue for a decolonization that recognizes legal pluralism[13] in transitional justice in general and the JEP in particular. However, this would bring plenty of new inquiries regarding the materialization of a decolonization of transitional justice in legal practice.

13 For a critical discussion of the perils of the local turn, legal pluralism and recent tendencies to romanticize grassroots methods in transitional justice, see the contribution by Kochanski (2018).

Thirdly, there are still huge research gaps concerning the role of business in human rights violations. This is especially true concerning the question how to hold corporate actors accountable for their role during internal armed conflicts or repressive dictatorships and how to provide redress for affected victims. Actually, the role of corporate accountability in transitional justice processes has only recently received growing interest (Payne, Pereira & Bernal Bermúdez 2021). This is rather surprising having in mind the direct or indirect relations of (transnational) corporate actors – for instance from the extractive industries (e.g. Sachseder 2020), the industry (e.g. Kopper 2018) or the banking sector (e.g. Altamura 2021) – with gross human rights violations in the context of dictatorships or civil wars.

Finally, the negative socio-environmental consequences of the conflict are increasingly becoming the focus of attention in academia, civil society and transitional justice institutions. This does also include discussions on the possibility of legal prosecution of crimes against the environment in the context of transitional justice. Recently, the JEP made a crucial point in formally accrediting territories inhabited by Indigenous and Afro-Colombian communities as victims of the internal armed conflict in the macro-cases 02 and 05 (Huneeus & Rueda Sáiz 2021). This entails further demand for research on international law and its application in the protection of the environment (Pereira, Sjörstedt & Krause 2021).[14] However, a lot of challenges remain, including the consequences of a doubtful equation of ecocide with genocide (Ambos 2021b) and inquiries of how to repair the harms the territories or the environment have suffered.

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14 These recent developments are very much in line with recent trends in legal studies, social sciences and humanities to strengthen the rights of the environment and to increasingly punish perpetrators of environmental damage (see e.g. Ávila Santamaría 2020; Ciesielski, García Carvajal & Vargas Trujillo 2021).

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