The Special Jurisdiction for Peace and Sui Generis Transitional Justice

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Abstract: This article argues that both the Tribunal for Peace and the Chambers of Justice of the Special Jurisdiction for Peace (SJP) can be considered *sui generis* jurisdictional institutions. They have been established taking into account the rich experience of international criminal justice institutions and Colombia's own experiences in transitional justice (TJ). The principles of preference and exclusive jurisdiction that govern the SJP entail its focus on cases associated with the armed conflict, which previously fell into the mandate of different judicial bodies. This article aims to discuss the SJP's institutional nature as an institution in charge of adjudicating crimes committed during the Colombian armed conflict, highlighting several features that makes it distinct from other domestic criminal justice institutions.

Introduction

The Special Jurisdiction for Peace (SJP or Jurisdicción Especial para la Paz, JEP) is part of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR); it is the justice element within this holistic transitional justice (TJ) system. Its primary function is to enforce the victims' right to justice and to fulfil the State's duty of investigating and prosecuting serious human rights violations, however, it pursues a restorative rather than a retributive approach (Ambos & Aboueldahab, 2020, p. 5). Although the JEP is part of the Colombian legal and political system, the nature and objectives of this institution arguably go beyond the mandate of the ordinary justice system. The JEP thus complements the international fight against impunity in situations of macro-criminality, but differs in its core features from other domestic criminal justice institutions.

In fact, the creation of the JEP as a result of a political agreement and with a temporary mandate after the relevant events occurred is atypi-

cal in Colombian institutional history. The most similar institution are the Chambers of Justice and Peace by Law 975 of 2005 (Ambos, 2010); however, these Chambers were created within the domestic system, concretely within local courts, and thus were part of the ordinary justice system. Moreover, these Chambers' prosecutors were part of a special unit within the Attorney General's Office (Ambos, 2010, p. 38–39). In other words, the Justice and Peace model did not create a special jurisdiction with its own organs, nor did it have administrative or financial autonomy, nor was it designed as a result of a negotiation between the respective actors.

Yet, the JEP is partly based on national experiences and has been designed according to both the Colombian Justice and Peace Law and the so-called Legal Framework for Peace, a specific constitutional framework created in 2012 by Legislative Act (LA) 01. At the same time, the JEP was inspired by foreign experiences (Tarapués, 2017). As a result, the JEP is an *ex post facto* and *ad hoc* tribunal set up to investigate certain crimes committed before its establishment. The following analysis looks at the main features of the JEP's Tribunal for Peace (Tribunal para la Paz) and Chambers of Justice (Salas de Justicia) in order to understand their peculiar institutional structure.

1. *The Institutional Nature of the Special Jurisdiction for Peace*

The initial model agreed upon in Havana envisaged an institutional design of the JEP (both of the Tribunal for Peace and the Chambers of Justice) in line with contemporary trends in international law, namely the establishment of hybrid criminal tribunals with a mixed composition of judges (Ambos, 2021a, pp. 62 ff.). However, the rejection of the original Agreement in the plebiscite on 2 October 2016 led to a renegotiation with the opponents of the peace process, which resulted, *inter alia*, in the exclusion of foreign judges. The original model, including foreign judges, placed the JEP in the same category as the Iraqi Higher Criminal Court and the International Crimes Tribunal in Bangladesh. None of these tribunals is based on a bilateral agreement with the UN or any regional organization, unlike the Special Tribunal for Lebanon, the Extraordinary Chambers in the Court of Cambodia, the Special Court for Sierra Leone or the Kosovo Specialist Chambers.

Ultimately, foreign jurists have been accepted as so-called *amici curiae*, who were selected by the same (international) selection committee as the JEP's (national) judges. There is also a certain internationalization by way

of other factors. Thus, for example, the JEP is bound by international standards (LA 01, 2017, Provisional Art. 22; Constitutional Court, judgment C-080, 2018) and defence lawyers can, in theory, be from any country ("freedom to choose an attorney accredited to practice law in any country"[1], LA 01, 2017, subsection 1 of Provisional Art. 12). Last but not least, the JEP is largely funded by foreign donations being part of the Post-Conflict Multi-Donor Fund (2017) and the Colombia in Peace Fund (2017–2018). All these particularities must be taken into account.

1.1 The negotiated nature of the JEP

First, it should be recalled that the JEP was created by virtue of a political agreement signed between the former Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) and the Colombian government. This agreement put an end to the armed conflict between the Armed Forces of the Colombian State and the insurgent group (Pastrana, 2019). It is crucial not to overlook this aspect, which, on the contrary, should be the starting point for the JEP's general understanding. As the JEP was created only after the political transition to peace was agreed upon, it can be seen as a clear expression of the *lex pacificatoria* (Bell, 2008).

In comparative terms, this process of political transition can be classified as a process of "accountability" regarding its content and as typical of "democratically legitimated transitions" with regard to its procedure (Uprimny, 2006, p. 21 and 32 ff.). In other words, the process did not impose a punitive model of judicialization, nor an amnesic model that rendered the victims invisible (Uprimny, 2006, p. 24 ff.). Instead, the model focused on the creation of a comprehensive system centred on the rights of the victims. In addition, the parties placed particular emphasis on the provisions of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL), in accordance with the provisions of the "Declaration of Principles" from 7 June 2014 (Goebertus, 2021).

Within this comprehensive system, the most responsible perpetrators cannot waive criminal prosecution for the most representative crimes committed and those who appear before the JEP must fully comply with a con-

1 The original version in Spanish reads: "libertad de escoger abogado acreditado para ejercer en cualquier país". Translation here and in the following by Enago.

ditionality regime designed to ensure their contribution to the judicial and extrajudicial mechanisms that make up the SIVJRNR (Tarapués, 2020). The purpose of this is to ensure compliance with the obligations undertaken and to guarantee the realization of the victims' right to truth, justice, reparation, and non-repetition (LA 01, 2017, Provisional Art. 5; Law 1820, 2016, Art. 14, 33, and 50; Law 1922, 2018, Art. 67 and 69; Law 1957, 2019, Art. 20).

Indeed, the creation of the JEP is a political product resulting from the negotiation of the "Partial Agreement on the Victims of the Conflict" of 15 December 2015. This was the most challenging item on the agenda (Sánchez, 2019, p. 15–16); its negotiation took longer than the other parts of the peace agreement. It was necessary to create a special commission, composed of three delegates for each negotiating party, to technically and consensually structure what could not be achieved at the negotiating table (Santos, 2021; Jaramillo, 2021).

Pursuant to this agreement members of the FARC-EP committed to appear in court. However, for them to lay down their arms and be held accountable, the FARC-EP politically demanded the creation of a justice system different from the ordinary one that would guarantee them preferential treatment in conformity with the principle of the 'natural judge' (juez natural)[2]. Moreover, they demanded conditions that would provide legal certainty to what was agreed in the Final Peace Agreement. Therefore, not only was the JEP created to deal predominantly with the crimes committed during the armed conflict. In addition, a guarantee of non-extradition was established as a judicial mechanism to ensure legal certainty and the principle of the 'natural judge' in the event of any request from foreign authorities (LA 01 of 2017, Provisional Art. 19; Tribunal for Peace, Judgment SRT-AE 030 of 2019).

As for members of the public forces involved in actions in the context of the armed conflict, it was decided that their legal situation can and should be resolved within this judicial framework. State agents who were not members of the armed forces, as well as any civilian third parties whose actions were related to the armed conflict, may be subject to the JEP, but on a voluntary basis. Hence, Colombia's Constitutional Court has established that the JEP represents "the natural judge of former combatants", because

2 The principle of the natural judge is a guarantee in civil law systems according to which each person must be tried before a competent judge or tribunal (not *ex post facto*) following all the appropriate formalities in each trial in accordance with the relevant laws previously established.

of the obligation to appear in court imposed on both parties involved in the war (Constitutional Court, Judgment C-674 of 2017).

Nevertheless, from the perspective of act-based criminal law, it is possible to qualify the JEP not so much as the natural judge of the ex-combatants, but rather as the judge of the actions conducted within the Colombian armed conflict. The voluntary appearance in court of third parties and state agents who were not combatants is only possible if it pertains to any conduct directly or indirectly related to the armed conflict (Tribunal for Peace, Order TP-SA 020 of 2018).

1.2. The preferential nature of the JEP to hear the crimes committed during the conflict

To support the judicial work entrusted to the JEP, the principle of preference was established as a jurisdictional premise to absorb and concentrate the adjudication of cases linked to the internal armed conflict. These cases were previously dealt with diffusely by different authorities. According to the principle of preference, the JEP administers justice temporarily and autonomously, adjudicating cases "with preference over all other courts and, exclusively, in all cases involving acts committed prior to 1 December 2016, caused by, due to, or directly or indirectly related to the armed conflict by those participating in it, particularly regarding acts deemed as serious violations of International Humanitarian Law or serious Human Rights violations"[3] (LA 01 of 2017, Provisional Art. 5).

The principle of preference is essential to activate the jurisdiction of the JEP, as is the principle of complementarity for the International Criminal Court (ICC), the subsidiarity principle for the Inter-American Court of Human Rights (Corte Interamericana de Derechos Humanos, IACHR), or the principle of universal jurisdiction for a third state that intends to investigate and prosecute international crimes that occurred in another state. In none of these judicial scenarios, including the JEP, it is possible for ordinary authorities to directly hear a case without first meeting the

3 The original version in Spanish reads: "de manera preferente sobre todas las demás jurisdicciones y de forma exclusiva de las conductas cometidas con anterioridad al 10 de diciembre de 2016, por causa, con ocasión o en relación directa o indirecta con el conflicto armado, por quienes participaron en el mismo, en especial respecto a conductas consideradas graves infracciones al Derecho Internacional Humanitario o graves violaciones de los Derechos Humanos".

preliminary procedural requirements of each of these principles to activate jurisdiction.

This constitutional principle is the core of the JEP's jurisdictional scope because it is a specialized jurisdiction that operates in the domestic institutional sphere, taking up tasks from the traditional courts. Without this principle, there would be no clear and precise understanding as to what the JEP has to investigate, adjudicate, and resolve, because this principle enables *ad hoc* and *ex post* hearings of cases by the bodies of this jurisdiction.

Establishing such a principle in order to justify the hearing of cases leads to a strict delimitation of the concurrent jurisdictional factors that trigger the preference of this jurisdiction. Therefore, the provision setting forth this principle also includes the criteria defining the *Kompetenz-Kompetenz* of the JEP's judicial bodies.

As stated in Provisional Art. 5 of the LA 01 of 2017, the preference and exclusive jurisdiction of the JEP to hear cases is only possible if three conditions are met: (i) in terms of *ratione personae*, the act must have been conducted by actors who participated in the armed conflict, according to the defined universe of combatants and civilians subject to and accepted by the SIVJRNR (LA 01 of 2017, subsection 1 of Provisional Art. 5; Law 1957 of 2019, Art. 63 and 64; (ii) in terms of *ratione temporis*, the acts must have been committed during the armed conflict, with the entry into force of the Final Peace Agreement as a reference point, until 1 December 2016 – the only exception to this rule are the crimes related to the process of laying down arms (LA 01 of 2017, paragraph 1 of Provisional Art. 5; Law 1957 of 2019, Art. 65) – and (iii) in terms of *ratione materiae*, the acts must have been caused by, generated by or related directly or indirectly to the armed conflict, with special attention to acts considered to be serious violations or breaches of IHRL and IHL (LA 01, 2017, Provisional Art. 5, paragraph 1, and Provisional Art. 23; Law 1957, 2019, Art. 62).

In this sense, the armed conflict constitutes the cross-cutting element that is present in the temporal, material, and personal factors set forth by the principle of preference when determining the jurisdiction of the JEP. Its ubiquity can be explained by the essential purpose of the SIVJRNR, which is to build components that allow to clarify and overcome the events of the Colombian armed conflict; thus, the JEP is the judicial element that must deal with the criminal nature of the acts linked with the conflict.

The assessment of the relationship with the armed conflict can occur procedurally at different stages, not only when activating jurisdiction but also when granting minor and major benefits. Therefore, the Tribunal for

Peace has defined that especially the material relationship with the armed conflict must be evaluated to varying degrees of intensity, depending on the stage of the proceedings and the evidence (Tribunal for Peace, orders TP-SA 020, 048, 068 and 070 of 2018). The JEP exercises the exclusive and preferential jurisdiction the Constitution has granted it, in order to overcome, clarify, and determine responsibilities for the events that occurred in the context of the armed conflict.

This preferential jurisdiction is coupled with the JEP's prevailing jurisdiction over the cases it admits. In this regard, the Constitution states: "It shall prevail over criminal, disciplinary, or administrative proceedings for acts committed due to, because of, or in direct or indirect relation with the armed conflict, by having exclusive jurisdiction over such acts"[4] (LA 01 of 2017, Provisional Art. 6, paragraph 1). These areas of prevalence are reproduced in Art. 36 of the Statutory Law of the JEP, which includes fiscal proceedings.

Moreover, Provisional Art. 27 of the LA 01 of 2017 proposes an ultra-active clause related to the prevalent application of the Final Peace Agreement in the event that subsequent regulations are issued which "cause the (combatants or non-combatants who have committed acts directly or indirectly related to the conflict) to be excluded from the jurisdiction of the Special Jurisdiction for Peace, or which result in the non-application of such jurisdiction". In relation to these parties, "the Special Tribunal for Peace shall exercise its preferential jurisdiction in matters within its jurisdiction in accordance with this Legislative Act", regardless of what may be otherwise provided by legal norms in the future. This clause has been strongly supported by constitutional case law (Constitutional Court, Judgment C-674 of 2017).

In conclusion, first, the preferential and exclusive nature of the JEP entails a new judicial approach to hear all cases involving conduct related to the armed conflict under the three conditions established in the Final Peace Agreement (personal, temporal, and material). Second, the JEP's prevalent nature, both in operational and temporal terms, shows an institutional structure that is atypical compared to other Colombian judicial bodies.

4 The original version in Spanish reads: "prevalecerá sobre las actuaciones penales, disciplinarias o administrativas por conductas cometidas con ocasión, por causa o en relación directa o indirecta con el conflicto armado, al absorber la competencia exclusiva sobre dichas conductas".

1.3 The role of foreign jurists in the JEP

The initial design of the JEP was characterized by a mixed composition like the hybrid courts established for other countries such as Kosovo (thereto Ambos, 2021a, pp. 66 ff.). As a consequence, the original Peace Agreement included the following provision when establishing the composition of the Tribunal for Peace: "Twenty Colombian judges shall be elected and, in addition, four foreign judges who shall act in the Sections if so requested", specifying that "if the number of judges is increased, the number of foreign judges shall be increased proportionally". Furthermore, the participation of foreign judges in the three Chambers of Justice was contemplated because the following was agreed upon: "Regarding the nationality of the judges, there may be up to two foreign judges per Chamber, upon request of the appearing party" (Peace Agreement, 2016, p. 143 ff.).

The "Agreement for the Development of Paragraph 23" of the "Agreement for the Creation of a Special Jurisdiction for Peace" of 15 December 2015 reaffirmed this mixed composition of both the Tribunal for Peace and the Chambers of Justice and set forth the participation of foreign prosecutors as follows: "The Investigation and Prosecution Unit of the Special Jurisdiction for Peace will be composed of a minimum of sixteen (16) prosecutors, of which twelve (12) will be Colombian and four (4) will be foreign".

The inclusion of foreign judges and prosecutors in the JEP was primarily required by the FARC-EP as an additional guarantee of impartiality, to which the government did not object. Consequently, in the course of the negotiations, both parties considered that "the participation of foreign judges ensured the compatibility of the case law with the international standards, especially with regard to a possible ICC intervention" (Ambos & Aboueldahab, 2017, p. 27).

Although the institutional involvement of foreign judges in the Tribunal and in the Chambers of Justice would have resembled the institutional nature of mixed courts, the removal of foreign judges and prosecutors, as well as the institutional readjustment of the JEP based on the second and Final Peace Agreement, did not erase all legal and institutional particularities associated with international law. This is evident, for example, in maintaining the participation of foreign jurists in the JEP as *amicus curiae* (Ambos & Aboueldahab, 2017).

In this regard, Provisional Art. 7 of Legislative Act 01 of 2017 establishes that the Tribunal for Peace "shall have four foreign legal experts who shall intervene" in its proceedings. The relevant Section of the Tribunal "that

will hear the case shall request the intervention, as *amicus curiae*, of up to two foreign jurists of recognized prestige". This will be performed on an exceptional basis and "at the request of the parties subject to its jurisdiction or on the court's own motion". The rule emphasizes that foreign jurists shall act with the sole purpose of providing concepts or *amicus curiae* on the subject matter of the case under study to obtain elements of judgment or information relevant to the case. The same *amicus* figure is envisaged in the formation of the Chambers of Justice that have "six expert foreign jurists", to fulfil the same purpose and under the same conditions as in the Tribunal for Peace.

The *amicus curiae* are "broadly recognized by international (criminal) courts of law", where the *amicus* participates in proceedings in an independent manner, providing "specialized information on relevant matters in which his [or her] specialized knowledge is required" (Ambos & Aboueldahab, 2018, p. 28–29). The purpose of this is to "facilitate the adoption of trial, information and assessment elements by the judges in the courts, which may be necessary to make any decisions regarding the proceedings" (Ambos & Aboueldahab, 2018, p. 29).

The special features of this figure in the Final Peace Agreement and in the constitutional reform that gave life to the JEP led to the belief that *amici curiae* even fulfilled "a quasi-judicial role" (Ambos & Aboueldahab, 2017). In addition to the peculiarities related to the numerical restriction of *amici*, as well as the requirements and process of selection of foreign jurists by the same Selection Committee that selected the judges, paragraphs 2 and 3 of Provisional Art. 7 of the LA 01 of 2017 indicated that foreign jurists "shall participate in the debates of the Section [or Chamber] in which their intervention is required, under the same conditions as the judges, but without a right to vote".[5]

This constitutional provision empowered foreign jurists to participate in the deliberation and decision-making processes of the Sections of the Tribunal and the Chambers of Justice under the same conditions as the sitting judges, the sole difference being that they did not have the right to vote. However, this competence of the *amici* was deemed unconstitutional because it "invades and obstructs the performance of judicial work" (Constitutional Court, Judgment C-674 of 2017). In terms of this judgment, *amici* are formally included in the constitutional, legal, and internal regulations

5 The original version in Spanish reads: "estos participarán en los debates de la Sección en la que se hubiera requerido su intervención, en las mismas condiciones que los magistrados, pero sin derecho de voto".

of the JEP (LA 01 of 2017, Provisional Art. 7; Law 1957 of 2019, Art. 98–101 and 108). However, in practice, they do not perform the role envisaged in the Final Peace Agreement. The intervention of the *amici* can occur at the request of the persons submitted to the JEP or *ex officio*, but each Chamber of the JEP or Section of the Tribunal for Peace decides autonomously on its necessity. The Internal Regulations of the JEP state that their selection must be made through the use of technological tools established by each Chamber or Section (Internal Regulations of the JEP, Agreement ASP 01 of 2020, Art. 35). Finally, it should be noted that the Chamber for Amnesty or Pardon has requested an *amicus curiae* opinion in only two cases to date (Díaz, 2020, p. 211).

1.4 The selection process of senior officials in the JEP

The composition of the JEP's judicial bodies differs significantly from that of the ordinary courts due to the selection process not only of its judges and *amici* but also of the Director of the Investigation and Indictment Unit and the Head of the Executive Secretariat. The process for the creation of the JEP and the entire SIVJRNR was designed by a mixed Selection Committee that included national and foreign members by means of Decree 587 of 2017, following the guidelines of paragraph 1 of Provisional Art. 7 of the LA 01 of 2017 for the selection of the senior officials of the JEP, the members of the Truth Commission and the director of the Unit for the Search of Disappeared Persons.

This Selection Committee played a temporary, autonomous, and independent role and was composed of three foreign and two Colombian members[6], which meant a significant representation of the international community in the process of the JEP's formation. It is worth noting that Art. 2 of the aforementioned Decree established that the members of this Committee would be appointed by: (i) the Criminal Division of the Colombian Supreme Court of Justice, (ii) the Secretary General of the United Nations, (iii) the Permanent Commission of the State University System, (iv) the President of the European Court of Human Rights (ECHR), and (v) the delegation of the International Center for Transitional Justice (ICTJ) in Colombia.

6 The members of the Selection Committee were Claudia Vaca González (Colombia), José Francisco Acuña (Colombia), Diego García-Sayán (Perú), Juan Méndez (Argentina) and Álvaro Gil Robles (España).

The Selection Committee opted to deviate from the traditional selection process of co-option, which is used to elect the judges of the Supreme Court of Justice and the Council of State, as well as from the special procedure to elect judges of the Constitutional Court by the Senate. It performed its duty in a highly transparent fashion based on an open call and through the use of inclusive technological means of consultation and participation; the process could be followed on the internet. Moreover, this selection process was subject to the condition that each selection had to be made by a "majority consisting of 4/5 of the members participating in the vote" to promote consensus (Decree 587 of 2017, Art. 6).

1.5 The comprehensive and autonomous structure of the JEP

Beyond the creation of a court or specialized chambers, the agreement in Havana established an entire autonomous jurisdiction, *ad hoc* and *ex post facto*, designed to resolve the criminal legal situation of former combatants and to investigate and adjudicate serious international crimes. In accordance with LA 01 of 2017, the JEP has its own legal system with administrative, budgetary, and technical autonomy and all of its bodies administer justice jointly, temporarily, and autonomously.

Furthermore, the JEP is guided by constitutional objectives aimed at (i) upholding the right of the victims to justice; (ii) providing truth to the Colombian society; (iii) contributing to the achievement of a stable and lasting peace; and (iv) adopting decisions that provide full legal certainty to those who participated directly or indirectly in the internal armed conflict (LA 01 of 2017, Provisional Art. 5).

In judicial terms, the JEP has been assigned three operational tasks based on its accusatory, jurisdictional, and monitoring function (Tribunal for Peace, judgment TP-SA-SENIT 01 of 2019). In accordance with constitutional jurisprudence, each of these duties have a time limit. In this regard, the Constitutional Court notes that Provisional Art. 15 establishes the following: "the term for the accusatory duty is 10 years from the effective start of the operations of all the chambers and sections of the JEP; the jurisdictional duty has a term of an additional five years, which can be extended by law, at the request of the judges" (Constitutional Court, Judgment C-674 of 2017). The JEP's Statutory Law on the Administration of Justice provides for the same terms, stipulating that "the completion of the duties and missions of the JEP, in any of its chambers or sections, may not exceed 20 years" (Law 1957 of 2019, Art. 34).

In this sense, the JEP cannot be compared to higher courts, such as, at the national level, the Constitutional Court, the Council of State, or the Supreme Court of Justice or, at the international level, the IACHR, or the ECHR. The JEP is somewhat broader and more structured than a single (judicial) body, it constitutes an entire jurisdiction that encompasses a group of bodies, in which the Tribunal for Peace acts as the high court (LA 01 of 2017, Provisional Art. 7, paragraph 2; Law 1957 of 2019, Art. 90). This has been expressly stated in constitutional case law, emphasizing that "the JEP is not a single judicial body, but a jurisdiction with different institutions, whose closing court is the Tribunal for Peace, and which has special characteristics assigned by Legislative Act 01 of 2017" (Constitutional Court, Judgment C-080 of 2018).

Thus, the JEP's judicial bodies are led by the Tribunal for Peace, which, in addition to being the high court of the jurisdiction, is the only one in charge to try serious human rights violations (LA 01 of 2017, Provisional Art. 7, paragraphs 1 and 2; Law 1957 of 2019, Art. 91). The Tribunal for Peace has four sections. Two of these sections are of first instance and the cases heard vary depending on whether the appearing parties plead guilty or not[7], which, in turn, defines the type of trial to be conducted through dialogical or adversarial proceedings, respectively (Law 1957 of 2019, Art. 92–93).

There is also a Review Section (Sección de Revisión), which has been assigned a special set of functions, such as that of resolving conflicts of competence within the JEP or resolving requests for guarantees of non-extradition. However, its main focus is on judicial proceedings for the review of judgments and the substitution of the SIVJRNR sanctions in cases involving convictions of criminal acts not eligible for amnesty or waiver of criminal prosecution (Law 1957 of 2019, Art. 97). There is also an Appeals Section (Sección de Apelación) serving as the second instance of the Chambers of Justice and Sections of the Tribunal for Peace (Rojas, 2021). In addition, this Section has been legally designated as the interpretative closing court of the JEP (Law 1957 of 2019, Art. 25 and 96). Finally, the Tribunal for Peace is entrusted with implementing and enforcing the judicial decisions made by the JEP through the Stability and Effectiveness Section (Sec-

7 In Spanish "Sección de Primera Instancia para Casos de Reconocimiento de Verdad y de Responsabilidad de los Hechos y Conductas" and "Sección de Primera Instancia para Ausencia de Reconocimiento de Verdad y de Responsabilidad de los Hechos y Conductas".

ción de Estabilidad y Eficacia) to be constituted (Law 1957 of 2019, paragraph of Art. 91).

In addition to the Tribunal for Peace, the JEP's judiciary is composed of three other independent judicial bodies: The Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conduct, the Chamber for Amnesty or Pardon and the Chamber for the Definition of Legal Situations[8] (Law 1957 of 2019, Art. 79, 81 and 84). These three Chambers of Justice were created to assist in the resolution of the legal situation of defendants, but no trial functions were assigned to them (LA 01 of 2017, paragraphs 1 and 3 of Provisional Art. 7). Therefore, the Chambers of Justice do not pass judgments, but define legal situations by means of judicial resolutions.

The JEP also has an Investigation and Indictment Unit (Unidad de Investigación y Acusación), which is responsible to investigate and prosecute cases in which there is no acknowledgment of responsibility. This Unit encompasses a team of prosecutors and investigators led by a director who acts as the general prosecutor of the JEP and who has autonomy to designate a prosecutor and the investigators for each case (LA 01 of 2017, paragraphs 1 and 5 of Provisional Art. 7).

Moreover, the Permanent Executive Board has an Executive Secretariat (Secretaría Ejecutiva) that is also a constituent institution of the JEP (Law 1957 of 2019, Art. 72). The Secretariat is responsible for the administration, management, and execution of the JEP's resources. It is composed of a group of administrative officials who, in addition to handling the administration of the JEP, coordinate the public defence system and enable communication with victims (LA 01 2017, Provisional Art. 7, paragraphs 1 and 9).

Despite the various autonomous institutions that form part of the JEP, the jurisdiction is represented externally by a single person, who is its president (LA 01 of 2017, paragraph 1 of Provisional Art. 7). Hence, the judge who assumes the temporary two-year presidency of the JEP represents not just the Tribunal for Peace, but the entire set of institutions that the JEP encompasses. In order to adequately represent all of these institutions, the JEP has a Governing Body that takes the primary administrative decisions for the entire jurisdiction. It is composed of representatives of each of the institutions mentioned above (Law 1957 of 2019, Art. 110).

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8 In Spanish "Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas", "Sala de Amnistía o Indulto" and "Sala de Definición de Situaciones Jurídicas".

In addition to these institutions of constitutional origin, the Statutory Law on the Administration of Justice of the JEP establishes the creation of the Coordination Committee of the SIVJRNR (Comité de Coordinación del SIVJRNR), which is regulated in the Internal Regulations of the JEP (Law 1957 of 2019, Art. 155; Internal Regulations of the JEP, Agreement 01 of 2020). Moreover, in the framework of the administrative, budgetary, and technical autonomy conferred to it by the Constitution, the JEP has designed a set of departments and collegiate bodies created by regulations. These are the Information Analysis Group and its Direction Committee (GRAI), the Judicial Secretariat (Secretaría Judicial), the Rapporteurship (Relatoría), as well as the Territorial and Environmental (Comisión Territorial y Ambiental), Ethnic (Comisión Étnica), Gender (Comisión de Género), Participation and Transitional Justice Policy Implementation Commissions (Comisión de Política Transicional) (Internal Regulations of the JEP, Agreement 01 of 2020, Art. 73, 79, 84 and 104 ff.).

1.6 The institutional status of the JEP, separate from the ordinary judiciary

The JEP has been designed as an autonomous jurisdiction separate from the traditional judiciary. Contrary to the model envisaged in the Justice and Peace Law, the JEP is not part of the judiciary, namely, a component of the constitutional architecture that brings together the different jurisdictions that exist in Colombia: The ordinary, the contentious-administrative, the constitutional, and the special jurisdiction for indigenous communities. The only exception to date has been the military criminal jurisdiction, which is associated with the executive branch.

In fact, the JEP is embedded in the political system of the Colombian State as part of a temporary institutional structure within the SIVJRNR. This system is alien to any existing public power and has been incorporated by means of a transitional title in the Constitution. In this respect, the JEP's judicial bodies differ from other domestic courts due to their unique institutional nature, their objectives and the strong autonomy and independence granted to them by the constitutional system.

For the above reasons, constitutional case law has specified that the LA 01 of 2017 "not only altered *ex post* the regular scheme of distribution of jurisdictional powers, but also, in doing so, transferred its powers to a court created *ex post* and *ad hoc*, separate from the judiciary, and structured on the basis of goals and principles different from those that gave rise to

the Judicial Branch in the Constitution"[9] (Constitutional Court, Judgment C-674 of 2017).

1.7 The atypical manner in which the JEP carries out its jurisdictional work

In addition to these institutional characteristics of the JEP, a relevant aspect should be added in relation to its judicial practice. Regarding the hearing of cases under its jurisdiction, the processing of the cases in not initiated under the procedural tradition, after having received the *notitia criminis* through a complaint, lawsuit, or special request, as in the ordinary criminal justice system (Law 600 of 2000, Art. 26 ff.; Law 906 of 2004, Art. 66 ff.). This has been indicated by constitutional case law stressing that the JEP "does not receive nor process individual complaints" (Constitutional Court, Judgment SU-139 of 2019).

In fact, cases aimed at establishing criminal liability begin through a sophisticated and complex process, which involves the interaction of several institutions of the JEP such as the Chamber for the Recognition of Truth, Accountability, and the Determination of Facts and Conduct, the Investigation and Indictment Unit, and the Tribunal for Peace. The way the JEP carries out its jurisdictional work aimed at prosecution is based on the judicial activity performed by the Recognition Chamber, which plays a very similar role to that of the Pre-Trial Chamber of the ICC.

This Chamber has the duty to decide whether the alleged conduct falls under its jurisdiction. It receives and compiles reports from certain state entities and from victims and human rights organizations; it receives statements of truth and acknowledgement, and then decides whether to issue its findings. The cases in which these documents are issued are then prosecuted through the dialogical principle that governs the processes of the First Instance Section with Recognition of the Tribunal for Peace (Cote, 2020). Alternatively, this Chamber may refer conduct to the Investigation and Prosecution Unit so that it may bring criminal proceedings and file the respective charges in an adversarial proceeding before the Trial Section of the Court, when there was no recognition of truth (LA 01, 2017, Provisional Art. 15; Law 1922, 2018, Art. 27–27d; Law 1957, 2019, Art. 78–80).

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9 The original version in Spanish reads: "no solo alteró ex post el esquema regular de distribución de competencias jurisdiccionales, sino que además, al hacerlo, traslado sus competencias a un organismo creado ex post y ad hoc¸ separado del poder judicial, y estructurado a partir de objetivos y principios diferentes de los que dieron lugar a la Rama Judicial en la Constitución".

1.8 Applicable international law

Finally, it should be pointed out that the normative sources to be relied on by the JEP are not only based on domestic law but also on international law, namely on the rules and principles of IHRL, IHL and ICL, especially the Rome Statute (Ambos & Cote, 2021). These rules seek to protect and effectively implement human rights entailing individual criminal responsibility (Ambos, 2014, p. 100–102). This contributes to better ensure the rights of the parties to the proceedings and of the victims because of a broad recourse to international law – part of the "bloque de constitucionalidad"[10] – on the basis of the more favorable provision (principle of favorability) (Ambos & Cote, 2021). Along these lines, the Constitution establishes that judges have the power to resort to international law: "When issuing judgments or adopting resolutions, the JEP shall make a legal classification of the system with respect to the actions in the case heard. Such classification shall be based on the Colombian Criminal Code and/or on IHRL, IHL or ICL, always with the mandatory application of the principle of favorability"[11] (LA 01 of 2017, paragraph 7 of Provisional Art. 5).

This provision is contained in Art. 23 of Law 1957 of 2019, which refers to the law applicable by the Tribunal for Peace, the Chambers of Justice and the Investigation and Indictment Unit. This statutory provision refers to what is set forth in the constitutional text, which adds in the second paragraph that the qualification "may be different from the one previously made by the judicial, disciplinary, or administrative authorities for these actions, since international law is understood to be applicable as the legal framework of reference". This has been endorsed by constitutional case law (Constitutional Court, Judgment C-080 of 2018).

In addition to the role that international law plays in the substantive law applicable to the JEP, its procedural rules indicate in their referral

10 In this regard, Art. 93 of the Colombian Constitution states about this "bloque" that "International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency prevail in the internal legal order. The rights and duties mentioned in this charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia".

11 The original version in Spanish reads: "La JEP al adoptar sus resoluciones o sentencias hará una calificación jurídica propia del Sistema respecto a las conductas objeto del mismo, calificación que se basará en el Código Penal Colombiano y/o en las normas de Derecho Internacional en materia de Derechos Humanos (DIDH), Derecho Internacional Humanitario (DIH) o Derecho Penal Internacional (DPI), siempre con aplicación obligatoria del principio de favorabilidad".

clause that in all proceedings pending before the JEP concerning victims of gender-based violence, especially sexual violence, it is necessary to proceed "in accordance with the provisions of the bloque de constitucionalidad" as well as "the Rules of Procedure and Evidence of the Rome Statute" (Law 1922 of 2018, Art. 72). Thus, Law 1922 of 2018 provides for the possibility of referring to Rules of Procedure and Evidence that are an instrument for the application of the Rome Statute of the ICC to be applied in proceedings pending before the JEP.

However, the direct and autonomous application of international law for legal qualification may be problematic when it comes to proceedings aimed at determining criminal responsibility, because its direct use — without any adaptation or alignment with Colombian criminal law — could affect the principle of legality. This has been stated by case law and legal scholars, for example, regarding the retroactivity of the figure of command responsibility (Constitutional Court, Judgment C-674 of 2017; Cote, 2019).

Conclusions

The Tribunal for Peace and the Chambers of Justice of the JEP are judicial bodies modeled after domestic and international institutions that seek to prosecute the most serious human rights violations and breaches of IHL committed during the Colombian armed conflict. The JEP constitutes the first criminal justice institution created in Colombia by mutual agreement of the parties to the conflict with the aim of overcoming the decades long non-international armed conflict. From a constitutional perspective the design of the JEP has been innovative and unique given its complex and atypical institutional structure. Thus, for example, the judges of the JEP have been selected by a mixed Committee, including national and foreign members; also, the JEP directly applies international norms.

Given the special features of the negotiations and the strong influence of international law, it is fair to say that for the first time in Colombia international standards have been taken into account in the most comprehensive way possible, not only regarding the criminal prosecution of the most serious and representative crimes and the most responsible perpetra-

tors, but also regarding the amnesty model which fully complies with international law[12].

Within this comprehensive and holistic TJ system, the feature of conditionality becomes the primary legal aspect of all the judicial and extrajudicial elements of the SIVJRNR, of which the JEP forms part. The JEP's Tribunal for Peace and the Chambers of Justice have to comply with the aim to effectively enforce the victims' rights to truth, justice, reparation, and non-repetition. The JEP administers justice for Colombians but also responds to a supranational duty to prosecute international core crimes. While the crimes to be dealt with were committed in Colombia, they shock and concern humanity as a whole and thus have triggered the (financial) support of various States. Indeed, the Colombian peace process with the JEP as its core judicial component has been discussed and supported in various international settings, including the UN Security Council (International Commission of Jurists, 2019). If the said crimes are not investigated and dealt with by the JEP, they may be brought before international institutions, especially the ICC, or investigated by third States under the principle of universal jurisdiction (Ambos, 2018, p. 97 ff.). In the framework of the international criminal justice system (Ambos, 2018), the JEP can be considered a domestic institution created to enable the territorial State (at the first level) to take a specialized, preferential, and predominant approach to deal with the most serious and representative crimes committed during the conflict. The JEP's special relationship with the ICC has been reaffirmed by the recent Cooperation Agreement between the

12 Cf. Kai Ambos affirming that "the international law framework has emerged along the lines of a bifurcated focus distinguishing between absolute and conditional amnesties. Absolute (blanket) amnesties, which have the primary goal of concealing past crimes by prohibiting any investigation into anybody, are unequivocally prohibited by international law. Unlike these amnesties, conditional amnesties do not automatically exempt from punishment, but make the benefit of an amnesty conditional on certain concessions or acts by the benefitted person. This is why conditional amnesties may (depending on the concrete conditions and circumstances of the particular case) contribute to true reconciliation. Article 6 (5) of Additional Protocol (AP) 11 to the Geneva Conventions (GC) makes explicit reference to amnesties after an armed conflict, demanding that they must remain possible as an appropriate and necessary tool to achieve reconciliation if this does not undermine the State's duty to prosecute under international law. Pursuant to this approach, supported by the overwhelming doctrine, conditional amnesties under certain and exceptional circumstances are allowed under current international law" (Ambos, 2021b, p. 123).

Court's Office of the Prosecutor and the Colombian government (Ambos, 2021c).

In a nutshell, the JEP seeks to fulfil the work of international and mixed tribunals in order to address the most representative crimes committed during the Colombian armed conflict. The JEP encompasses a set of *sui generis* institutions (Tribunal for Peace, Chambers of Justice, Investigation and Prosecution Unit, etc.), shaped by international experiences, thus displacing the ordinary criminal justice system with regard to conduct associated with the armed conflict and committed before December 1, 2016.

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