Combining the Purposes of Criminal Law and Transitional Justice in the Special Jurisdiction for Peace

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Abstract

This text analyzes how criminal law mechanisms can help the Special Jurisdiction for Peace (JEP) to fulfill the essential objectives of Transitional Justice (TJ), such as promoting justice, accountability and reconciliation. In particular, this article studies three mechanisms: the conditionality regime (*régimen de condicionalidad*), special sanctions (*sanciones propias*) and the imposition of ordinary sanctions if the objectives of TJ are not met. These mechanisms allow former combatants, members of the state armed forces, public officials, and civilians to contribute to the truth and reparation of the victims.

1. Introduction

Transitional Justice (TJ) is composed of a set of special measures of a historical, restorative, criminal, administrative and constitutional nature aimed at achieving a peaceful transition (Teitel, 2000, p. 50; De Greiff, p. 12; Werle, 2018, p. 1). All these mechanisms are essential to fulfil the main purposes of TJ: dealing with the past (Kritz, 1995, pp. 21–30; Mihr, 2017, p. 2; Murphy, 2017, pp. 182–186), ensuring reconciliation (Teitel, 2000, pp. 29–30), and recognizing the rights of victims (De Greiff, 2012, p. 42).

Criminal law plays an important role in contexts where massive abuses or serious human rights violations affecting an entire population must be overcome (Kritz, 1994, p. 21). However, the objective of criminal proceedings in a transitional context goes beyond retribution (Kovras, 2014, p. 4; Murphy, 2017, pp. 21–30). Their aim is to draw a line between the previous and the new era and to condemn the violence of the past, distinguishing between the just and the unjust and delegitimizing the crimes perpetrated (Teitel, 2000, pp. 29–30). In this context, Criminal law is essential in TJ processes because it allows for the recognition and stigmatization

of wrongdoing, which is a fundamental element in any society undergoing a process of transformation (Teitel, 2000, p. 50).

Therefore, TJ differs from ordinary criminal justice in that it is more restorative in nature (Kovras, 2014, p. 4). Indeed, it is part of a system meant to achieve national reconciliation, guarantee reparation for victims, and reconstruct the events that took place during the time of the conflict (Ferrajoli, 2016, p. 26).

Under this framework, justice is understood in its broadest sense, as contemplated in Article 1 of the Procedural Law of the Colombian Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP) according to which its purposes are closely related to the purposes of criminal punishment: (i) to ensure reconciliation and a stable and lasting peace; (ii) to guarantee the principle of legality; and (iii) to remedy damages caused and provide reparation to victims affected by the armed conflict (JEP Procedural Law, JPL, Article 1).

This text analyzes how criminal law mechanisms included in the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement), namely, the conditionality regime, special sanctions, and the possibility of imposing ordinary sanctions (if the objectives of TJ are not met), can help the JEP to fulfill the essential goals of TJ, such as promoting justice, accountability and reconciliation.

2. Objectives of TJ under the JEP

2.1. Achieving a transition that ensures reconciliation and peacemaking

The first element of TJ derives from its very name: it is applied to societies undergoing a transitional process. The aim of this transition is to consolidate democracy (Teitel, 2000, pp. 29–30) and overcome massive abuses or serious human rights violations caused by situations that affect the entire population (Mihr, 2017, p. 1).

The transition therefore has to deal with events that transpired during an armed conflict, which gave rise to legal, social, and political aberration, and must be overcome through TJ. Article 1 of the JPL states that one of the objectives of justice is to "guarantee the necessary conditions that will ensure reconciliation and a stable and lasting peace".

When TJ is applied to an armed conflict, its primary goal is to resolve the strong tension that emerges between justice and peace; between the legal imperative of satisfying the rights of victims and the need to cease hostilities (Elster, 2012, p. 88). This requires striking a balance between

putting an end to hostilities and preventing a re-emergence of violence (negative peace) and consolidating peace through structural reforms and inclusive policies (positive peace) (Lambourne, 2009, p. 34).

Post-conflict justice generally aims to "end the internal war and achieve peace for all combatants, on the basis of a reconciliation among all actors, to guarantee non-repetition" (Ferrajoli, 2016, p. 23). Ordinary justice is insufficient for these purposes because: (i) violence in a context of war cannot be assessed or qualified using ordinary criminal justice criteria that would normally be applicable; and (ii) in order to achieve peace, combatants cannot be treated as criminals, unless they have been involved in war crimes or crimes against humanity. These crimes are the *ratione materiae* limit of TJ. Furthermore, there is another substantive limit which is that, traditionally, only the most responsible individuals are subjected to this justice.

In order to accomplish its objectives, the JEP relies on an important mechanism to ensure that individuals do not commit new crimes: the conditionality system. According to this system, an individual appearing before the JEP must fulfil specific obligations related to truth, justice, reparation, and non-repetition (SLJ, Article 20). If it is proven that said individual has breached these obligations and has been involved in new crimes, he or she may be tried by ordinary courts and lose the benefits of the JEP (Sala de Reconocimiento de Verdad y de Responsabilidad de la JEP, SRVR, AT 061, 2019, Colombia). Moreover, if it is established that the individual has taken up arms once again, he or she may be excluded from the JEP altogether (Court Constitutional, C-080, 2018). In addition, "recurrence" of criminal conduct can lead to exclusion from the JEP and its benefits (Rojas Betancourth, 2021, p. 276).

2.2. Dealing with the past

The second element of TJ is that it focuses on dealing with the past (Fijalkowski, 2017, p. 94; Fornasari, 2013, p. 4; Kritz, 1995, pp. 21–30; Mihr, 2017, p. 2; Murphy, 2017, pp. 182–186). The TJ system recognizes that it is not only important to establish individual responsibility and accountability, but also to issue a judgment on the wrongdoing itself. As such, criminal trials are not only important because they are the materialization of the victims' right to justice, but also because trials in a transitional context draw a line between the old and the new era and condemn the violence of the past, distinguishing between the just and the unjust and delegitimizing the crimes perpetrated. This is a fundamental

step in consolidating a new democracy and constructing a new legal order (Teitel, 2000, pp. 29–30).

This stigmatization of wrongdoing does not refer to isolated situations, but rather to wide-ranging actions that affect a significant part of the population. In other words, it refers to generalized wrongdoing as described by Malamud-Goti, which has concrete effects on the mind, freedom, and rights of individuals (Malamud-Goti, 2006, pp. 158–159). This, of course, includes individuals that, in many cases, are themselves victims (e.g. of forced recruitment) or who have simply followed and applied the rules of a deeply rooted subculture within society (Cockburn, 2004, p. 31).

Considering this reality, an official narrative must always accompany any transition (Teitel, 2000, p. 69). Uncovering the truth makes it possible to acknowledge victims' suffering and guarantee future coexistence by allowing all parties involved to overcome the events that took place (Buckley-Zistel, 2014, p. 145). This process, known as historical justice, is a mechanism designed to help alleviate the burden of memory of gross human rights violations. In other words, the aim of historical justice is to put an end to the trauma of an enduring cycle that feeds on itself, as violations become wounds of memory that are constantly reopened and unlikely to heal on their own (Messuti, 2008, p. 145).

For Ferrajoli, justice and peace can only achieve a balanced reconciliation if there is a public historical judgment. In order to guarantee non-repetition, it is necessary to build a collective memory of the events that occurred; in this process, the truth must be verified and those responsible must be identified (Ferrajoli, 2016, p. 27–28). In psychosocial terms, having a collective memory helps heal wounds and avoid denial and terror, which in turn will ensure non-repetition (Arias López, 2012, p. 142), although some have also questioned those effects (Rieff, 2016, pp. 87–90).

Regrettably, collective and political wrongdoing has become commonplace in Colombia (Murphy, 2021, p. 256). The Constitutional Court declared in 2004 the existence of an unconstitutional situation with regard to victims of forced displacement and violence; indeed, Colombia itself and several decisions of the Inter-American Court of Human Rights (IACtHR) have recognized massive violations of human rights in this country (e.g. IACtHR, Diecinueve comerciantes vs. Colombia, Masacre de Mapiripán vs. Colombia, Matanza de Pueblo Bello vs. Colombia, Masacre de Ituango vs. Colombia, Masacre de la Rochela vs. Colombia, Valle Jaramillo y otros vs. Colombia, Las Palmeras vs. Colombia).

By judging actions under its jurisdiction as wrong and as underlying sources of the conflict, the justice system could contribute to broader relational change (Murphy, 2021, p. 256). In this context, the JEP is in a

position to build collective memory as a component of restorative justice, through its investigations governed by Article 11 of the JPL. The objective of these investigations is to obtain a complete truth of the events that occurred:

1. Determine the geographic, economic, social, political and cultural circumstances in which the crimes under the jurisdiction of the JEP took place.
2. Where appropriate, describe the structure and functioning of the criminal organization, its support networks, the characteristics of attacks, and the macro-criminal patterns.
3. Unveil the criminal plan.
4. Connect cases and situations.
5. Identify those responsible.
6. Identify the most serious and representative crimes.
7. Identify the victims and the particular conditions that affected them individually.
8. If applicable, determine the motives underlying the criminal plan and, especially, those involving discrimination based on ethnicity, race, gender, sexual orientation, gender identity, religious convictions, political ideologies, or similar.
9. Establish drug trafficking routes and illicit activities, as well as the assets of the perpetrators and criminal organizations.

Based on the above, the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR, for its acronym in Spanish) does not specifically intend to shed light on isolated events, but rather to obtain the truth through macro-cases, unveiling patterns, following the model indicated in the Legislative Act 01 of 2012 (Legal Framework for Peace)[1] and reiterated in Legislative Act 01 of 2017 and in the Decisions

1 Eckhardt, 2016, 36: "On 31 July 2012 the constitutional amendment "Acto Legislativo 01 de 2012" also known as Marco Jurídico para la Paz (in the following: MJPP) was promulgated, after having been adopted by both chambers of the Colombian parliament. It comprises the two transitional articles 66 and 67, stipulating special conditions for the peace process. The formative term of the law is "transitional justice". The particular provisions of the constitutional norms are defined as instruments of transitional justice, being stipulated in the title and explained in the beginning of the transitional article 66. Pursuant to this first paragraph, instruments of transitional justice are exceptional and aim at facilitating the end of the internal armed conflict and the achievement of a stable and long-lasting peace; guarantees of non-repetition and security for all Colombians

C-579 of 2013 and C-080 of 2018 of the Constitutional Court. In this system *"investigations should be carried out from a systematic perspective in order to reveal macro criminal structures and a "global truth"* (Eckhardt, 2016, 389).

To achieve this objective, in addition to the mechanisms to aid the criminal investigation, the JEP has important instruments that guarantee full disclosure of the truth by the individuals who appear before it:

(i) A punitive system that depends on the acknowledgement of the truth, under which individuals could be convicted for up to 20 years in prison if they do not acknowledge the crime committed, or could receive non-custodial sanctions if they acknowledge responsibility early in the process.
(ii) Special proceedings upon breach of the conditionality mechanism if the complete truth is not provided, which could entail the loss of benefits such as parole (Constitutional Court, C-080, 2018).
(iii) A special scheme under which individuals who did not play an essential role in the crimes could be prompted to denounce those individuals who were most responsible.

2.3. Achieving justice

TJ is first and foremost justice written large. It does not have a purely symbolic or philosophical content; on the contrary, it entails concrete consequences for individuals and must therefore be formally and materially fair. Thus, TJ has been constructed by comparing the consequences of wrongdoing in societies undergoing a transition and not simply based

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shall be granted and the rights of the victims to truth, justice and reparation shall be guaranteed. The constitutional framework determines transitional justice as the superordinate concept for the subsequent sub-constitutional law that shall reflect the results of the peace agreement on this topic. The main aspect of the transitional article 66 is related to criminal justice, as it permits various deviations from ordinary criminal prosecutions and criminal punishment. In particular, it allows extrajudicial sanctions, alternative sentences, cancelation of existing sentences, special modalities for the execution of sentences and the renunciation of prosecution. Furthermore, the article stipulates in paragraph 5 that any special penal treatment will be conditioned to the demobilization and the termination of the armed conflict and to contributions of the perpetrators to the rights of the victims to truth and reparation. Moreover, regulations on the scope of application, the creation of a truth commission, the possibility of extrajudicial processes, conditions on the contributions of the perpetrators and political participation are provided for".

on theoretical or political analyses. The JEP establishes a system on the expectation that, through their institutions, post-conflict states can address responsibility for grave human rights abuses, achieving three essential goals: accountability for severe violations of human rights, satisfaction of victims' rights, and the potential for reintegration of the ex-combatants (McCoy, J. Subotic, J. & Carlin, R., 2021, pp. 164 – 169).

It is therefore imperative to respect due process (Elster, 2004, p. 3; Kritz, 1995, p. 14; Williams et al., 2002, p. 5) and its essential guarantees (Elster, 2004, p. 88), especially the following: adversarial and public proceedings; the right to choose counsel; the right to appeal; non-retroactivity; respect for statutory limitations; the presumption of innocence; reasonable time limits; and sufficient deliberation. The application of criminal law and, in particular, of sanctions, requires certain minimum requirements of legitimacy and sovereignty. If any of these elements is lacking within a State, either because of the existence of a dictatorship or the absence of institutional control, the determination of accountability could be obstructed (Silva Sánchez, 2018, p. 82).

In this regard, Fornasari rightly points out the main risk that guarantees face in a TJ context: the transformation of criminal law from a *Magna Carta for criminals* to a *Magna Carta for Victims* that turns modern criminal law into a criminal law of revenge, ultimately becoming a criminal law of the victors or of the enemy. Therefore, it is necessary to understand that the basic guarantees of criminal law with regard to accused individuals are non-negotiable (Fornasari, 2013, pp. 202–207).

To ensure these guarantees, the Procedural Law of the JEP establishes various mechanisms that uphold due process and grant legitimacy to the system:

(i) The safeguarding of the *pro homine* principle (JPL, Article 1.d), as well as of the principles of due process (lit.e) and presumption of innocence (lit. f) contemplated in its Article 1.
(ii) Procedures that respect due process and the right to defense in the adversarial process (JPL, Article 35).
(iii) A system of motions for reconsideration (JPL, Article 12), appeals (JPL, Article 13), and complaints (JPL, Article 14).
(iv) An evidentiary system that respects guarantees (JPL, Article 19).

3. The purposes of criminal punishment and criminal law in TJ and the JEP

An important lesson for TJ processes with regard to the purposes of criminal punishment can be drawn from situations of non-international armed conflict. These are particularly valuable in terms of adjusting the special characteristics required to fulfil the societal purposes of criminal punishment.

3.1. Specific negative deterrence

The purpose of criminal punishment in the context of specific negative deterrence is to incapacitate offenders, thus keeping them from committing further crimes against the society (Roxin/Greco, 2020, p. 134; Ambos, 2021, p. 119; García Arán & Muñoz Conde, 2007, p. 48; Mir Puig, 2011, p. 84). Specific negative deterrence is therefore directly related to one of the essential objectives of TJ: the guarantee of non-repetition of crimes. Indeed, one of the aims of a transition process is to prevent further crimes against the population. A critical element in this process is to ensure a substantive dismantling of illegal groups and their illicit activities. Otherwise, these groups are likely to continue committing massive crimes against the population or transform into new groups with different names but similar objectives.

Even though the JEP does not rely on imprisonment to fulfill this objective, it does rely on two very important measures: (i) if individuals commit new crimes they will be subject to ordinary jurisdiction (JEP Statutory Law, JSL, Article 62) and, therefore, could immediately lose their liberty and; (ii) if they are involved in an incident that violates the conditionality mechanism, they could lose the benefits granted by the JEP (Constitutional Court, C – 080, 2018).

In TJ contexts, a well-known specific negative deterrence measure is *lustration*, which consists of removing persons involved in serious human rights violations from public office (Elster, 2006, pp. 52–53). Nevertheless, it is important to ensure that this measure is not used for politically motivated exclusions. In the context of the JEP, Legislative Act 01 of 2017 allows for individuals to participate in politics. However, Constitutional Court Decision C – 674 of 2017 provided special considerations for individuals who wish to rejoin public life under the conditionality mechanism: (i) individuals who do not contribute to the achievement of the objectives of the JEP will not be qualified to hold public office; (ii) individuals may lose the right to hold public office if they fail to comply with

the criteria of the conditionality mechanism; (iii) individuals who have been sentenced under ordinary jurisdiction will not be qualified to hold public office; (iv) in principle and pursuant to the paragraph of transitory article 20, a sentence handed down under ordinary jurisdiction may be suspended, which means that the qualification to hold public office and to exercise other political participation rights extends to individuals who have been sanctioned under ordinary jurisdiction. However, this suspension of the sentence and of the right to participate in politics is also conditioned to the progressive compliance in good faith with the obligations of the system; (v) should members of the FARC wish to register as political candidates, the High Commissioner for Peace must certify their affiliation with the FARC and the Executive Secretary of the JEP must certify their commitment to submit to the system; and (vi) it is the responsibility of the JEP to verify compliance with the conditionality mechanism.

3.2. Rehabilitation

One of the most important purposes of criminal punishment is to reintegrate wrongdoers into society (Roxin/Greco, 2020, p. 136; Mir Puig, 2011, 2011, p. 84). This purpose, also known as rehabilitation, is especially difficult in societies in which crime has more incentives than obstacles. Furthermore, the decision to commit a specific crime depends not only on the needs of the individual, but also on the situational context and the information available about that context.

Rehabilitation cannot be seen as a simple treatment; it must include occupational re-education so that, after serving their sentence, wrongdoers can be integrated into support networks that help them find work and housing, which in itself is quite difficult, as well as provide other types of support (Elster, 2006, p. 51). In this context: *"Violence therapy has to learn from disease therapy: include prevention build cultural and structural peace- and include rehabilitation–, meaning build cultural and structural peace again."* (Galtung, 2004, p. 80).

An individual will compare the expected benefits from a criminal conduct with those from a non-criminal conduct. If committing a crime yields greater benefits than not committing it, the individual will decide in favor of committing the crime. This implies that being caught is considered an acceptable risk compared to the potential benefit (Cornish & Clarke, 1986, p. 20). Given that criminality during an armed conflict is organized and inexpensive, it becomes very profitable, which in turn leads to high levels of recidivism. Similarly, prison often becomes nothing more than a college

of crime where individuals enhance their criminal skills. For that reason, in terms of avoiding recidivism, a TJ system is more conducive to accessing jobs and economic opportunities than the prison system.

Rehabilitation must therefore ensure sustainable peacebuilding, *"preserving 'negative peace' (absence of physical violence) and building 'positive peace' (presence of social justice), as well as alleviation, if not elimination, of the underlying causes of conflict"* (Lambourne, 2009, p. 34).

In order to prevent recidivism and the continuation of a cycle of criminality (negative peace), the JEP has tied rehabilitation to alternative sentences, and demands commitment by wrongdoers who wish to benefit from them: "To be eligible for an alternative sentence, recipients shall be required to commit to their rehabilitation through work, training or study during the time they remain in custody and, where appropriate, to promote activities aimed at non-repetition" (JSL, Article 142). Meanwhile, the State must provide a social, cultural, and economic environment for building *'positive peace'* through the implementation of the other mechanisms of the Final Agreement.

3.3. General negative deterrence

In TJ, deterrence plays a role in the form of trials and convictions, which seek to prevent armed conflicts and new crimes from being committed. In the words of Justice Robert Jackson during the Nuremberg trials, it is necessary "to make war less attractive to those who have governments and the destinies of peoples in their power" (cit. p. Elster, 2006, p. 49). However, the application of general negative deterrence in TJ faces several problems: (i) the precedent of severe punishment in one country is unlikely to be automatically applied in a completely different country; (ii) given that situations of turmoil or volatility arise in TJ contexts, government officials might not be readily willing to apply said precedents; (iii) the deterrent effect in these cases is greatly diminished by the inordinate temporary benefits obtained by individuals who abuse power, such as dictators; and (iv) individuals behind the massive commission of crimes often see themselves as part of a crusade against a certain social situation, which influences their motivation and reasoning (Elster, 2006, p. 50).

Deterrence is crucial in a TJ process because the rigor of the mechanisms and the effective sanctioning of the individuals responsible will determine whether or not the criminal conduct is repeated by other armed groups or if the original perpetrators of the crimes become repeat offend-

ers. However, sanctions can take the form of alternative sentences designed to have a positive impact on society as a whole.

3.4. Positive general prevention (positive Generalprävention)

Finally, positive deterrence is aimed at restoring society's trust in the legal system by consolidating the rule of law, strengthening democracy, and dismantling criminal organizations (Roxin / Greco, 2020, p. 141; Ambos, 2013, p. 71). The existence of armed conflict in a society has three profoundly harmful effects that must be corrected if crime is to be reduced:

- Endemic violence within a population turns the use of force into a means of achieving power (Mcclelland, 1989, p. 289) and superiority over others (Adler, 1958, p. 58). This use of force inevitably materializes in aggressive acts as a mechanism to dominate others (Cooper et al., 2002, p. 208; Hogg et al., 2010, p. 350), which in turn radically changes social values, ultimately creating subcultures and countercultures dominated by aggression (Martín Baró, 2003, p. 80). This pattern of aggression is learned and assimilated during childhood only to develop later as a form of domination (Cooper et al., 2002, pp. 208–209) over the most vulnerable groups (Worchel, 2001, p. 661), resulting in acts that violate human rights and human dignity, and feeding the cycle of criminality, which eventually becomes routine (Dexter, 2018, p. 219). Indeed, endemic violence mutates the criminal issue from a subsistence criminality to a power-hungry mafia or terrorist criminality, taking over the economy, becoming an illegal recruiter of petty criminals, and exploiting ignorance, misery, and fanaticism (Ferrajoli, 2007, p. 353).
- The involvement of organized crime. According to Article 1.1 of Additional Protocol II to the Geneva Conventions (AP II), for a non-international armed conflict to exist there must be "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a State's] territory as to enable them to carry out sustained and concerted military operations". The Rome Statute of the International Criminal Court (ICC) states that armed conflicts take place "when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" (ICC, Rome Statute, Article 8.2). In other words, there must be an organized policy with central command, a hierarchical structure, and the capacity to conduct military operations (Ambos, 2014, p. 125). Armed conflicts therefore require the participation of organized groups

which have to meet certain criteria, turning them into organized actors being part of organized crime. Organized crime is understood as the set of activities carried out by the members of a highly organized and disciplined group dedicated to supplying illegal goods and services (Finkenauer, 2010, p. 26), generating structures within society that affect people's behavior.

- A culture of illegality in the affected areas. Although territorial control is not necessarily considered an element of armed conflict for the purposes of applying International Criminal Law (Ambos, 2014, p. 128), it is a requirement under Article 1.1 AP II and it is also a frequent element in the major conflicts that have occurred worldwide. Territorial control creates countercultures dominated by armed groups, which seep into social groups thereby reproducing the pattern through social learning for decades. In such contexts, the social paradigm rewards imitative behavior—which is why children develop a generalized habit of reproducing the responses of successive patterns—and subsequently the learned patterns of behavior spread into situations different from those in which they were learned (Bandura & Walters, 1990, pp. 18–21; Felson & Cohen, 1979, p. 589). In the war context this situation becomes massive, illegality becomes an almost routine activity and violence a serious disease in the society (Galtung, 2004). Similarly, crime becomes so deeply rooted in society as a result of the armed conflict that it is very difficult to eradicate, which is exacerbated by the fact that it is further cultivated in prisons by the criminal system itself.

In view of these challenges, positive general prevention is one of the most complex purposes to accomplish when attempting to legitimize TJ, as it relies on whether the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition achieves its core objectives.

3.5. Retribution

Society channels retributive emotions such as anger, contempt, indignation, and hatred through criminal laws (Elster, 2006, p. 37). In TJ, however, there are complexities that make these arguments less straightforward, such as the difficulties in determining the severity of crimes and having punishments commensurate with these crimes (pp. 47–48). Moreover, retribution tends to be seen as an impenetrable obstacle for broad-ranging trials of human rights violations related to internal armed conflicts, because crimes particularly during internal armed conflicts characteristical-

ly involve a large number of perpetrators. Given political realities and practical difficulties, carrying out wide-ranging trials leads to widespread impunity: everyone must be punished, so therefore no one is (Nino, 2006, p. 258).

Despite its complexities, retribution is undoubtedly a necessary component in TJ processes; not necessarily from a perspective of punishment, but rather because it is by seeking retribution that the unjust nature of a conduct is determined, and wrongdoing is recognized and stigmatized. Indeed, all of these processes are essential for any society undergoing a transformation (Elster, 2006, p. 50).

The international law argument on the duty to punish is based on several conventional and customary norms, which, however, are not defined as enforceable rights that any State is bound by. In fact, even the duty to punish is discretionary in democratic States, and said conventional and customary norms are considered satisfied after alternatives have been granted. This was recognized by the Inter-American Court of Human Rights when it stated in the Velásquez Rodríguez case that the State's obligations could be fulfilled through remedies, investigations, and reparations. Conversely, when the Court rendered an opinion on the amnesty laws of Argentina and Uruguay, it considered that these States breached numerous obligations of the American Convention on Human Rights, including the right of victims to seek justice (Teitel, 2000, p. 55). However, this duty should not be confused with any specific right of the victim to have the offender punished, as this would distort the protective function and the public nature of criminal law. Nevertheless, it does allow the victim to voice the injustice suffered and it offers a guarantee of non-repetition, thereby restoring the victim's trust in the system and in society. Furthermore, it keeps the victim from becoming de-socialized or alienated from society (Gil, 2016, p. 31).

Turning to the practical difficulties involved in attempting wide-ranging retribution, it is clear that issuing a universal judgement would lead to extended impunity. In response to this predicament, special mechanisms must be put in place to make prosecutions more effective and to avoid completely arbitrary and discretionary punishments.

At this point, it is worth remembering that the effects sought by the system of the JEP are not purely restorative; they also have concrete retributive elements that may lead to a restriction of rights, depending on the case:

- In the case of special sanctions (*sanciones propias*), the Final Agreement itself recognizes that the system must provide for the restriction of

rights and freedoms. This is further determined in JSL, which states that sanctions "shall include effective restrictions of freedoms and rights necessary for their execution, such as freedom of residence and movement, and shall also guarantee non-repetition" (JSL, Article 127).

- The very performance of actions in favor of communities implies carrying out specific tasks that demand time and commitment from the individuals subject to the JEP who must adhere to specific timetables and conditions (JSL, Article 127).
- With respect to alternative sanctions (*sanciones alternativas*), JSL states that "their function will be essentially a retributive deprivation of liberty for five (5) to eight (8) years" (JSL, Article 128).
- Lastly, ordinary sanctions (*sanciones ordinarias*) can result in an effective deprivation of liberty for 15 to 20 years (JSL, Article 130).

4. *Articulation between the objectives of TJ and the purposes of criminal punishment*

Beyond a purely semantic content, combining the objectives of TJ with the purposes of criminal law has particular effects on the entire system, which must find a way to make them compatible. Among these effects, the following stand out: (i) the conditionality mechanism as an instrument for specific deterrence, (ii) the imposition of special sanctions and (iii) ordinary sanctions if the objectives of TJ are not met.

4.1. The conditionality mechanism as an instrument of specific deterrence

There are multiple instruments aimed at achieving a transition that will ensure reconciliation and the establishment of a stable and lasting peace. It is therefore essential to have the necessary mechanisms that will guarantee specific negative deterrence by keeping individuals included in the system from committing crimes again and at the same time guarantee specific positive deterrence through their rehabilitation. In this regard, it becomes particularly important to establish a conditionality mechanism to ensure that individuals adhering to the JEP fulfill their obligations and, in particular, refrain from taking up arms again.

In this sense, subsection 5 of transitory article 1 of Legislative Act 01 of 2017 stipulates that the mechanisms of the system "will be interconnected through conditionality links and incentives [for individuals] to access and

maintain any special justice treatment, always based on the acknowledgement of truth and accountability." Furthermore, subsection 8 of transitory article 5 of Legislative Act 01 of 2017 links the special justice treatment to compliance with obligations to render a complete and truthful account of events, provide reparation to victims, and guarantee non-repetition. Moreover, it states that individuals who fraudulently provide false information or fail to comply with any of the conditions of the system will lose access to said special treatment.

The Constitutional Court has indicated that under the conditionality mechanism of the SIVJRNR, "special criminal treatment is subject to the duties of providing a complete and truthful account of events, making reparation to the victims, and guaranteeing non-repetition" (Constitutional Court, C-674, 2017) and therefore "any benefit depends on the individual's acknowledgement of the full, detailed and exhaustive truth, and on satisfying the victims' rights to reparation and non-repetition" (Constitutional Court, C-674, 2017).

The scope of these obligations was specifically established in Article 20 of JSL, as follows: (i) the obligation to provide a complete and truthful account of the facts, which involves providing information, when known, on crimes within the jurisdiction of the JEP and on illegally acquired assets, including the identity of those who have lent their name to acquire, hold, administer and possess them; (ii) the obligation to guarantee non-repetition, which implies abstaining from committing new intentional crimes for which the minimum prison sentence is equal to or greater than 4 years, as specified in the list of legally protected rights (Constitutional Court, C-180, 2014); and (iii) contributing to the reparation of victims and, in particular, to uncovering the truth with regard to the procedures and protocols for completing an inventory of all types of goods and assets. Additionally, in the case of demobilized FARC-EP combatants, compliance with the following obligations must also be ensured: "(a) the laying down of arms, (b) the obligation to actively contribute to guaranteeing the success of the process of reincorporation into civilian life in a comprehensive manner, and (c) the surrender of minors."

In any case, the consequences for violating the conditionality mechanism must be proportional to the seriousness of the breach (Constitutional Court, C – 080, 2018). These can range from a loss of benefits such as conditional release, as initially happened in the case of Hernán Darío Velásquez (JEP, SRVR, AT 061, 2019), to expulsion from the JEP, as was the case of Iván Márquez Marín, José Manuel Sierra and Henry Castellanos (JEP, SRVR, AT 216, 2019). They were taken out of the JEP for the creation of a new armed group in 2019 called *"Nueva Marquetalia"*.

In particular, expulsion from the JEP can only occur under exceptional circumstances, namely:

> "when the basic condition of non-repetition is breached, abandoning the peace process to take up arms again, when false information is provided fraudulently, or when the other conditions of the system are breached, as decided by the JEP in accordance with the principles of proportionality and gradualness, even in cases related to other actors responsible for acts within the jurisdiction of the JEP." (Constitutional Court, C – 080, 2018).

Both the Constitutional Court (C-674, 2017) and the Appeals Chamber of the JEP (*Sección de Apelación, SA*) consider that the commitment of non-repetition, which consists of abstaining from again taking up arms against the State or from joining organized armed groups, constitutes

> "an essential requirement for access to the JEP and for obtaining and maintaining the benefits, special treatment, rights, and guarantees provided for in the transitional system. Furthermore, these are requirements to remain under this system, and must be fulfilled continuously by all former members of the FARC-EP" (JEP, SA, TP-SA 288, 2019).

In this regard, the Appeals Chamber has been clear in pointing out that "the armed and deliberate desertion from the peace process is equivalent to a self-exclusion from the transitional jurisdiction due to its voluntary, public and unequivocal nature" (JEP, SA, TP-SA 288, 2019).

This system would not be complete, however, without a procedural tool with which to determine whether breaches to the system have been committed. This tool is contemplated in the first subsection of Article 67 of the JPL which created the special proceeding for non-compliance: "The Chambers and Divisions shall monitor compliance with the Conditionality Regime and with the sanctions they have imposed through their resolutions or sentences."

The purpose of this special proceeding is to fully guarantee the rights of the victims as well as the legal security of all individuals subject to the JEP. Under this proceeding, evidence on the alleged breach is collected and presented and individuals can fully exercise their right to intervene in litigation. This special proceeding may be initiated *ex officio* by the Judges of the Chambers and Divisions of the JEP or at the request of the victim, of his or her representative, of the Public Prosecutor's Office, the General Prosecutor's Office, or the JEP's Investigation and Prosecution Unit (UIA), as provided for in the second subsection of Article 67 of JPL.

This system illustrates an interesting combination of the specific deterrence function of criminal punishment with the guarantee of non-repetition inherent in a TJ system that safeguards due process, through a special proceeding in which the right to participate must be respected.

4.2. Special sanctions as a mechanism to achieve the preventive purposes of criminal law

Prevention of future crimes is one of the most important objectives of Criminal Law (Roxin, Greco, 2021, p. 151). This must include mechanisms of specific negative deterrence – preventing individuals from committing further crimes against society – as well as rehabilitation that must have a component of labor re-education (Elster, 2006, p. 51). Special sanctions achieve both purposes, because they allow the application of effective restrictions on freedoms and rights – such as freedom of residence and movement – as well as participation in collective reparation programs for the victims.

The Final Agreement created a new system of penalties called special sanctions, which can be applied to individuals who fully disclose the truth and acknowledge responsibility, as verified by the Acknowledgement Section of the JEP's Peace Tribunal. These special sanctions are of a restorative nature and may entail from 5 to 8 years of effective restriction of liberty, albeit without imprisonment. Furthermore, special sanctions include work and activities aimed at repairing victims (JSL, Article 126).

The essential purpose of the sanctions imposed under the Comprehensive System for Truth, Justice, Reparation and Guarantees of Non-Repetition must be the satisfaction of the rights of the victims and the consolidation of peace. Consequently, retribution and reparation for the damages caused must take precedence, taking into account the degree of acknowledgement of truth and responsibility. Point 60 of the Final Agreement states that such sanctions shall include effective restrictions of freedoms and rights, necessary for their implementation, such as freedom of residence and movement, and shall also guarantee non-repetition. Article 13 of Legislative Act 01 of 2017 reiterates the purpose of criminal punishment and refers to the content of the aforementioned agreement, describing and classifying sanctions:

> "Sanctions imposed by the JEP will have the essential purpose of satisfying the rights of victims and consolidating peace. They shall favor restoration and reparation of damages caused, always taking into ac-

count the degree of acknowledgement of truth and accountability. The sanctions may be special, alternative, or ordinary and in all cases shall be imposed under the terms set out in numbers 60, 61, and 62 and in the list of sanctions in sub-section 5.1.2 of the Final Agreement."

These sanctions are applicable with respect to those persons who acknowledge the full, detailed and complete truth before the JEP. Sanctions especially related to participation in collective reparation programs are the following (JSL, Article 141):

- In rural areas, participation in or execution of: (i) effective reparation programs for displaced persons; (ii) programs for environmental protection of natural reserves; (iii) programs to construct and repair infrastructure in rural areas: schools, roads, health centers, housing, community centers, municipality infrastructure, etc.; (iv) rural development programs; (v) waste disposal programs in areas in need; (vi) programs to improve the supply of electricity and communications networks in agricultural areas; (vii) programs for the substitution of illicit crops; (viii) environmental recovery programs in areas affected by illicit crops; (ix) programs for the construction and improvement of road infrastructure necessary for the commercialization of agricultural products from illicit crop substitution areas.
- In urban areas, participation in or execution of: (i) programs to construct and repair infrastructure in urban areas: schools, public roads, health centers, housing, community centers, municipal infrastructure, etc.; (ii) urban development programs; and (iii) programs for access to drinking water and construction of sanitation networks and systems.
- Additionally, sanctions also include tasks to clear and eradicate explosive remnants of armed conflict and anti-personnel mines from areas within the national territory that have been affected by these devices: (i) participation in or execution of programs for the clearance and eradication of explosive remnants of war and unexploded ordnance; and (ii) participation in or execution of programs for the clearance and eradication of anti-personnel mines and improvised explosive devices.

With respect to the severity of sanctions, the JSL states that the following criteria must be considered: (i) the degree of truth told and its promptness, (ii) the gravity of wrongdoing, (iii) the level of participation and responsibility and the circumstances of greater or lesser punishability, and (iv) the commitments in terms of reparation to the victims and guarantees of non-repetition.

In order to develop the restorative component of the special sanctions, the JEP created so-called Works, Occupations, and Activities with Repar-

ative and Restorative Content (Trabajos, Obras y Actividades con Contenido Reparador-Restaurador, or "TOAR" for its acronym in Spanish) that must be verified by the Acknowledgement Section of the JEP's Peace Tribunal. TOAR must fulfill the following requirements: (i) guarantee the participation of victims; (ii) address the effects caused; (ii) respect the rights of victims; (iii) contribute to the reconstruction of social ties; and (iv) be conducive to rehabilitation (Guidelines on Special Sanctions and Works, Occupations, and Activities with Reparative and Restorative Content). This new concept can help the JEP achieve the objective of rehabilitation by building trust between victims and perpetrators.

4.3. The imposition of ordinary sanctions if the objectives of TJ are not met

The JEP also includes the alternative of a normal adversarial trial for persons who refuse to acknowledge their criminal responsibility (individually or collectively) or when the acknowledgment is false or incomplete (Ambos, 2021, p. 89). In these cases, ordinary sanctions may be imposed to favor the retributive purpose of criminal punishment and uphold the victims right to truth.

This system incentivizes the recognition of responsibility and truth by those involved in any conduct against human rights through the imposition of less severe sanctions than those typical of the Colombian legal system (Ambos, 2021, p. 89, Gallón Giraldo G., & Ospina, J., 2021, p. 110). It is also a mechanism to connect the restorative purposes of the SIVJRNR and the obligations of the conditionality system. In these events, the imposition of sanctions follows a tiered process:

- If an individual never acknowledges truth and responsibility, sanctions of 15 to 20 years of deprivation of liberty will be imposed, which may involve confinement (JSL, Article 143).
- If an individual makes a belated admission of truth and responsibility, sanctions of 5 to 8 years of deprivation of liberty will be imposed, which may involve confinement (JSL, Article 130).
- If an individual does not acknowledge truth and responsibility but did not play a decisive role, he or she may be sentenced to between 2 and 5 years of deprivation of liberty, which may include imprisonment (JSL, Article 130).

In these cases, the JEP establishes an adversarial and public proceeding that applies the rules of ordinary criminal proceedings (JPL, Articles 39 – 41) and must respect due process and the right to defense (JPL, Article

35). This structure seeks to guarantee *"the security and legal stability to the processes of reintegration of former combatants and to protect the victims' right to participation, to the truth of what occurred during the conflict, and the application of restorative justice focused on the elimination of the conflict's structural causes"* (Gallón Giraldo G., & Ospina, J., 2021, p. 111).

The JEP includes among its special sanctions a plea bargain option for those who collaborate with the Justice system. This situation disproves the argument from its critics regarding the alleged impunity granted by the JEP, considering that ordinary criminal law accepts confessions and whistleblowing as valid grounds for penalty reduction, house arrest, parole and probation. It also proves that the criminal law component of the JEP is not accessory but essential in the operation of the whole system.

In fact, the most significant difference between transitional law and ordinary criminal law is that the conditionality mechanism is not applied as an effect of the judicial decision, but as an initial condition to enter the JEP. In this context some purposes of criminal law are conditions to remain in the system, and are tied to the essential objectives of TJ:

- Specific negative deterrence is deeply connected with reconciliation, peacemaking, and guaranteeing non-repetition for the victims.
- Rehabilitation under the JEP's system must be achieved through contributions to the truth and reparation of victims, helping them to deal with the past.
- General negative deterrence is also connected with guaranteeing non-repetition for the victims by preventing armed conflicts and new crimes from being committed.

Finally, even if retribution is not an essential part of the system, it is applied in the JEP through its sanctions system:

- In ordinary sanctions as an effective deprivation of liberty for 15 to 20 years (JSL, Article 130),
- In alternative sanctions as a retributive deprivation of liberty for 5 to 8 years (JSL, Article 128), and
- In special sanctions as effective restrictions of freedoms and rights (such as freedom of residence and movement) that guarantee non-repetition (JSL, Article 127).

5. Conclusions

The purposes of criminal punishment are deeply related to the TJ objectives of the JEP, namely, realizing a transition that ensures reconciliation

and peacemaking, dealing with the past, achieving justice and ensuring reconciliation. These objectives are tied to the purpose of deterrence, while dealing with the past inevitably includes a retributive component that begins with the prosecution of wrongdoing itself.

However, in order for the system to be effective in achieving these objectives, mechanisms must be in place that directly link the fulfillment of the goals of TJ with specific criminal consequences. In this respect, at least three concrete mechanisms have been put in place:

- The conditionality mechanism, which is directly tied to the obligations of the system and, among these, in particular to non-repetition. This, in turn, is related to negative deterrence. In specific cases, the JEP has had to apply the criteria of this mechanism to exclude individuals from the system who have taken up arms again.
- Special sanctions not only seek to ensure reconciliation through restoration but are also directly connected to specific positive deterrence through work with communities.
- The possibility of imposing ordinary or alternative sanctions that may involve imprisonment if truth and responsibility are not acknowledged renders the victim's right to truth of great importance. Undoubtedly, there is a direct relationship between satisfying the victims' right to truth and facing a more retributive purpose of criminal punishment if an individual chooses not to cooperate in the process. From a legal point of view, the existence of ordinary sanctions shows that the JEP includes plea bargains in its criminal law system, which can be applied under special sanctions for those who collaborate with the Justice system, and it also proves that the criminal law component is not accessory but essential in the operation of the system as a whole.

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