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The Colombian Peace Process and the Special Jurisdiction for Peace

Il processo di pace colombiano e la Giurisdizione Speciale per la Pace

El proceso de paz colombiano y la Jurisdicción Especial para la Paz

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GIUSTIZIA PENALE DI TRANSIZIONE

JUSTICIA PENAL TRANSICIONAL

TRANSITIONAL CRIMINAL JUSTICE

ABSTRACTS

In 2016, the Colombian Government and the Revolutionary Armed Forces of Colombia – People’s Army concluded the Final Peace Agreement, which marks the official end of more than 50 years of internal conflict. At the heart of this agreement is the so-called Integral System of Truth, Justice, Reparation and Non-Repetition, which includes different mechanisms. This article focuses on the Special Jurisdiction for Peace, describing its structure, the way it operates and presenting the main controversies evolving around it.

Nel 2016, il governo colombiano e le Forze Armate Rivoluzionarie della Colombia - Esercito del Popolo hanno concluso l'accordo di pace definitivo, che segna la fine ufficiale di oltre 50 anni di conflitto interno. Al centro di questo accordo c'è il cosiddetto Sistema Integrale di Verità, Giustizia, Riparazione e Non Ripetizione, che include diversi meccanismi. Questo articolo si concentra sulla Giurisdizione Speciale per la Pace, descrivendone la struttura, il modo in cui opera e presentando le principali controversie che si stanno creando attorno ad essa.

En 2016, el Gobierno Colombiano y las Fuerzas Armadas Revolucionarias de Colombia celebraron finalmente un acuerdo de paz, el cual pone fin oficial a más de 50 años de conflicto interno. Parte fundamental de este acuerdo es el denominado Sistema Integral de Verdad, Justicia, Reparación y No Repetición, el cual incluye diferentes mecanismos. El presente trabajo se concentra en la Jurisdicción Especial para la Paz, describiendo su estructura, la forma en la cual opera y presentado las principales cuestiones controvertidas que plantea.

SOMMARIO

1. Judicial Structure of the Special Jurisdiction For Peace. – 2. Limitations of the Special Jurisdiction for Peace. – 3. Selection and Prioritization of Cases, Most Responsible. – 4. Controversies Evolving Around the Special Jurisdiction for Peace.

The Final Peace Agreement that was concluded on 24 August 2016 between the Colombian Government and the Revolutionary Armed Forces of Colombia – People’s Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*, FARC-EP), marks the official end of more than 50 years of internal conflict between this group and the Colombian State. However, the original agreement was defeated in a referendum on 2 October 2016 by a slim majority of 50.2% of the votes. Following this setback for the negotiators, the Colombian Government and the FARC-EP made several changes and signed a revised peace agreement on 30 November 2016. This version was subsequently adopted by the Colombian Congress and thus constitutes the Final Peace Agreement. Its general aim is not only to end the conflict but also to build a lasting peace. The so-called Integral System of Truth, Justice, Reparation and Non-Repetition (*Sistema Integral de Verdad, Justicia, Reparación y No Repetición*, SIV-JRNR) lies at the heart of the Final Peace Agreement. It is designed as a “holistic” system in which the different components are connected and mutually reinforcing. These mechanisms are: a Truth Commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*), a Search Unit for the Disappeared (*Unidad de Búsqueda para Personas dadas por Desaparecidas*), the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*) and comprehensive reparation measures for peacebuilding and guarantees of non-repetition (*medidas de reparación integral para la construcción de paz y garantías de no repetición*). The purpose of this integral system is to consolidate a temporary transitional institutional setting that satisfies and redresses the rights of the victims of the armed conflict and contributes to national reconciliation.

The *Special Jurisdiction for Peace* (SJP), which was officially set up in March 2018, is the system’s exclusive judicial component. Its objectives are to bring to justice those who participated directly or indirectly in the internal armed conflict and to protect the rights of the victims – especially with regard to acts that constitute serious breaches of International Humanitarian Law (IHL) and serious violations of Human Rights. Since the SJP forms part of a larger transitional justice (TJ) project, a guiding paradigm of this jurisdiction is the idea of *forward-looking, prospective justice*, which aims to put an end to the conflict (cf. Art. 4 Statutory Law on the Administration of Justice of the SJP (*Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz*, hereinafter “Statutory Law”). Therefore, and since serious breaches of IHL as well as serious violations of Human Rights can cause long-term harm, redressing victim’s rights is a central and constitutive element of the SJP’s activities. Given the *holistic nature* of the TJ system, the SJP will hand down lighter sentences to those who confess their crimes and become involved in reparatory activities for victims. This includes particularly an exhaustive and detailed account of the (criminal) acts and the circumstances in which they were committed, as well as necessary and sufficient information in order to facilitate the attribution of responsibilities, and thus ensure that the victims’ rights to reparations and guarantees of non-repetition are realized. Consequently, the SJP has a *restorative and reparative function*. Its holistic approach thus promises justice, truth and guarantees of non-repetition of past crimes in order to contribute to a stable and lasting peace. The SJP will be in function for 10 years as from 15 January 2018,¹ with an optional subsequent period of 5 years and a maximum period of 20 years in total to complete its judicial activities (cf. Art. 34 Statutory Law of the SJP).

1. Judicial Structure of the Special Jurisdiction for Peace.

The SJP carries out its judicial functions autonomously concerning the matters within

¹ Cf. Resolution 001 of 15 January 2018, passed by the President of the SJP; available [here](#).

its competence (cf. No. 9 of the Final Peace Agreement). Its jurisdiction *ratione materiae* covers crimes against humanity, genocide, serious war crimes – that is, any violation of IHL committed systematically or as part of a plan or policy – hostage taking or another severe deprivation of physical liberty, torture, extrajudicial executions, forced disappearance, violent sexual intercourse and other forms of sexual violence, child abduction, forced displacement, and the recruitment of minors (cf. No. 40 of the Final Peace Agreement and Judgment C-579 of the Constitutional Court of 2013). The SJP's jurisdiction *ratione personae* covers demobilized members of the FARC-EP and state agents. Furthermore, it covers third parties who voluntarily submit themselves, as long as they participated directly or indirectly in the armed conflict (cf. Nos. 32, 63 of the Final Peace Agreement). After the presidential elections on 7 August 2018, won by the *Centro Democrático* candidate Iván Duque, supported by former President Uribe, the Congress incorporated a provision in the SJP's procedural norms, which excludes members of the armed forces from the SJP. Instead, the provision foresees a special procedure for the latter within the SJP (cf. Art. 75 Rules of Procedure and Evidence (RPE)).² It remains to be seen what the consequence of this provision will be – which currently is still under examination by the Constitutional Court (CC). Certainly, the establishment of a distinct jurisdiction for the military would go against the spirit of the peace agreement as implemented by the Colombian Constitution.

The SJP's jurisdiction *ratione temporis* covers crimes committed since the beginning of the armed conflict until 1st December 2016 (the date of the ratification of the Final Peace Agreement). Crimes that were committed after that date fall under Colombia's ordinary jurisdiction, with two exceptions: First, this timeframe is extended to cover crimes committed by FARC-EP ex-combatants that are closely related with the disarmament process. In these cases, the jurisdiction *ratione temporis* is expanded (beyond 1st December 2016) until this process is completed. Second, the SJP's jurisdiction also covers crimes that were committed before the 1st of December 2016 but persist beyond that date (*crímenes continuos*).³

The SJP's law foresees *two different procedures*. The first procedure resembles an admission of responsibility/ guilt procedure. The second procedure provides for a normal adversarial trial. Acknowledgments of truth and responsibility under the first procedure may be individual or collective, oral or by means of a letter sent to the SJP's Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts (*Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas*) (cf. Nos. 28, 47 and pp. 182 et seq. of the Final Peace Agreement). This procedure leads to three consequences:

1. For those who recognize their responsibility for SJP-crimes before the Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conduct, the sanction will have a component of restriction of freedoms as well as the obligation to carry out certain works and activities, directed at satisfying the victims' rights (cf. Art. 128 Statutory Law).
2. Those who recognize very serious crimes prior to the judgment shall be sentenced to a minimum of five (5) years and a maximum of eight (8) years of effective restriction of liberty under special conditions (cf. Art. 130 Statutory Law).
3. Persons who express the recognition of their responsibility following the judgment of the SJP (*reconocimiento tardío*) shall be punished with imprisonment from five (5) to eight (8) years in an ordinary prison (*cárcel*).

In cases where the Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conduct decides that there is an individual acknowledgment of responsibility, the following two bodies of the Jurisdiction can assume the competence for the case: The Chamber for Amnesty or Pardon (*Sala de Amnistía o Indulto*) and the Chamber for the Definition of Legal Situations (*Sala de Definición de Situaciones Jurídicas*). Additionally, the SJP is composed of the so-called Peace Tribunal (*Tribunal para la Paz*), which is the jurisdiction's appeal instance and also the first instance for special cases.

The second procedure applies to persons who refuse to acknowledge their criminal responsibility (individually or collectively) or when the acknowledgment is false or incomplete (cf.

² Cf. Rules of Procedure and Evidence (Law 1922) adopted by the Colombian Congress on 18 July 2018, available [here](#).

³ Cf. Transitional Article 5 of Legislative Act No. 01, 4 April 2017, available [here](#).

No. 46 of the Final Peace Agreement). They shall be sentenced to imprisonment for up to 20 years to be served in an ordinary prison (*cárcel*). These cases will be referred to the Investigation and Indictment Unit (*Unidad de Investigación y Acusación*) (cf. No. 47, 60 and pp. 182 et seq. of the Final Peace Agreement). This sophisticated system shows how the SJP's restorative character is put into practice by creating incentives to tell the truth, thus promoting the dialogic process which contributes to the restoration of victims' rights.

Another particularity of the SJP is the distinction between those crimes that are eligible for amnesty and those that are not. Based on the Final Peace Agreement, the Colombian *Amnesty Law* 1820 of 2016 provides, *inter alia*, for several provisions on amnesty, pardon and special treatment within the framework of the SJP (hereinafter "Amnesty Law"). In accordance with International Criminal Law (ICL), conditional amnesties are admissible under the Amnesty Law, provided that the national legislation complies with certain requirements. The beneficiaries of conditional amnesties should be required to reveal the facts as well as acknowledge their responsibility and show remorse in order to contribute to true reconciliation. Crimes against humanity, genocide and war crimes must not go unpunished and as such shall not be covered by amnesties. The Colombian legal framework complies with these standards and even goes beyond them, denying amnesties to crimes other than the most serious international crimes. Colombia adopted a comprehensive approach that seeks to ensure an effective investigation of other equally serious crimes. Therefore, with respect to crimes that are not eligible for amnesties, the Colombian legal framework is consistent with ICL and goes even further than its requirements.

With regard to those crimes that are eligible for amnesties, the situation is more complex. The Amnesty Law regulates amnesties and pardons for political and related offences as a special criminal treatment. In contrast to the international level, in Colombia political offenders enjoy a privileged treatment, which is even extended to offences related to political crimes (*crímenes conexos*). The political offence doctrine has a long tradition in Colombia. Based hereon, left-wing guerrilla groups have always been privileged over right-wing paramilitary groups, based on the assumption that only the former are political offenders since they want to change the State and the society towards an alternative and better future. The Colombian Constitution of 1991 makes explicit reference to political offences as opposed to ordinary ones and provides for a differential treatment in terms of amnesties and pardons. The Criminal Cassation Chamber (*Sala de Casación Penal*) of the Colombian Supreme Court ruled in 2007 that the mere forming and belonging to a paramilitary group cannot be considered a political offence. The Court argued that these groups act for "selfish" reasons and are supported by important institutional sectors. In line with this tradition, only political and related offences committed by members of guerrilla groups may be subject to amnesty within the framework of the SJP (cf. Art. 7, 8 and 9 of the Amnesty Law). Offences that cannot be qualified as "political" or "related" are not granted such privileged treatment. On the other hand, the Amnesty Law foresees a renunciation of criminal prosecution for members of the Armed Forces (including both the Military Forces and the National Police) (cf. Article 44 et seq. of the Amnesty Law).

This distinction – which has no basis in international law – is complemented by the further distinct treatment of civilian third parties (*terceros civiles*) and members of demobilized paramilitary groups. The Amnesty Law explicitly refers in the first paragraph of its Article 21 to Article 6 (5) of Additional Protocol II of the Geneva Conventions (GC), which calls for the widest possible amnesty without distinguishing between state forces and guerrillas. In fact, the idea of a differential treatment does not exist in IHL since from an international law perspective, State and guerrilla are both simply parties to the (non-international armed) conflict. Even though making such distinction does not constitute an IHL violation *per se*, from a legal point of view it was not necessary to take this option. The reasons are clearly of a political nature, since the Colombian public (armed) forces do not want to be treated like the guerrillas, just as the guerrillas do not want to be treated like the paramilitary groups.

2.

Limitations of the Special Jurisdiction for Peace.

Even though the SJP is designed as an independent and autonomous judicial organ, its jurisdiction is limited by various other systems and institutions. First and foremost, the ordi-

nary jurisdiction sets limitations to the SJP since the Colombian Supreme Court retains its full competence. In addition, the Justice and Peace Law (*Ley 975 de Justicia y Paz*), adopted in 2005 (under the government of former President Álvaro Uribe) in order to facilitate the collective and individual demobilization of armed groups (mostly de facto paramilitaries), sets limitations to the SJP's jurisdiction. This Law foresees a Special Criminal Jurisdiction for Justice and Peace that is competent for acts committed during the armed conflict. It led to the establishment of specialized chambers (*Salas de Justicia y Paz*) that are, however, part of the ordinary jurisdiction. The coexistence of several independent systems of criminal prosecution in the context of the armed conflict poses a procedural challenge for the SJP. We will return to that later.

Currently, 38 judges and 16 prosecutors occupy positions at the SJP. In the Peace Tribunal, 20 judges are supported by 60 legal officers (*magistrados auxiliares*) and 100 specialized experts (*profesionales especializados*) as well as technical-administrative staff.⁴ The three chambers of the JEP are equipped with 18 judges who are supported by 108 specialized experts and additional technical-administrative staff. While the first Peace Agreement envisaged a mixed SJP composed of Colombian as well as foreign judges (giving the Colombians a two thirds majority, cf. p. 170 of the first Peace Agreement), these have been substituted by the so-called *amici curiae* (*advisors*) in the final version of the peace accord. There are ten of them from eight countries (Peru (3), Chile (1), Spain (1), Switzerland (1), Ecuador (1), Germany (1), Mexico (1), USA (1)), plus four reserve *amici*.⁵

The role of foreign jurists in the SJP has been a controversial issue from the very start of the peace negotiations.⁶ Their participation was especially demanded by the FARC-EP but also supported by the government. Both sides particularly stressed that the participation of foreign judges ensured the compatibility of the SJP's case law with international standards, especially with regard to a possible International Criminal Court (ICC) intervention. However, the participation of foreign *judges* proved to be unacceptable for those opposing the original agreement. The strong opposition to the agreement, led by former President Uribe, forced the government to limit the influence of foreign jurists by substituting foreign judges with foreign special advisors (*amici curiae*) in the Final Peace Agreement. According to this Agreement, whenever the intervention of foreign jurists is requested by the Colombian judges, they will participate in the debates of the Section/Chamber in which their intervention is required "under the same conditions as the magistrates but without the right to vote" (cf. section 5.1.2., para 65, subsection 1 and para 66, subsection 2 of the Final Peace Agreement). While *amici curiae* rarely appear in person before most courts or tribunals and instead submit written statements or recommendations (*amicus curiae* briefs), the Final Peace Agreement conveys the idea of a more dynamic participation in an oral and direct form, deliberating together with the actual judges. In a nutshell, the *amici* have the right to discuss and deliberate, but no right to vote (not being judges). Thus, it is fair to say that the *amici* operate as a kind of expert witnesses but under the tight control and at the discretion of the Colombian judges. At the time of writing (January 2019), the judges of the SJP have not requested the *amici's* support. Hence it is not quite clear what role they will ultimately play before the court.

3. Selection and Prioritization of Cases, Most Responsible.

Given that the SJP only has a 15-20-years life span, it will not be possible to fully investigate all serious offences committed during the armed conflict – particularly in view of its long duration and intensity. This is why the SJP needs a *strategy for the selection and prioritization of cases*. The Final Peace Agreement does not define which cases shall be subject to prioritization and leaves it to the SJP to establish prioritization and selection criteria (however, the Peace Agreement contains certain references, cf. Nos. 48, 51, 60 of the Final Peace Agreement). On 28 June 2018, the SJP's Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts published its criteria and methodology for prioritizing cases and situations. The document – which is however not agreed upon with other Cham-

⁴ Cf. Agreement N° 005 of 8 February 2018, passed by the President and the Executive Secretary of the SJP; available [here](#).

⁵ Cf. Communiqué 31 of the Selection Committee (6 December 2017), available [here](#).

⁶ Cf. Ambos e Aboueldahab (19 December 2017).

bers and for that reason alone controversial – determines that the Chamber will prioritize emblematic cases and key positions within the structure of criminal organizations – depending on the impact of the case and the availability of information (cf. paras 36 et seq. of the document). Within this framework, the Chamber gives particular emphasis to the gravity and representativeness of the offences and also to the scale of the victimization these offences caused (especially the number of victims as well as the extent and concentration of the victimizing events in a particular territory). Consequently, the SJP focuses on paradigmatic crime patterns in the context of macro criminality committed during the armed conflict (see in this regard also Judgment C-080 of the CC of 2018). This strategy also reflects the prioritization criteria determined by the General Attorney's Office (*Fiscalía General de la Nación*) (Directive 001 of 2012). According to that document, the gravity of the crimes depends on the extent to which fundamental rights are being affected and on how exactly the conduct has been executed. The representativeness of the crimes on the other hand is correlated to the gravity of the acts and should illustrate the complex range of facts and behaviors that account for the dynamics of the crimes committed (cf. p. 30 of the Directive 001 of 2012). These categories encompass not only offences that are established in the ICC's Rome Statute, but also several serious individual crimes, such as extrajudicial executions or child abduction (cf. No. 40 of the Final Peace Agreement).

Furthermore, only those most responsible for serious crimes under the Rome Statute and international conventions ratified by Colombia will be prosecuted under the SJP. The Final Peace Agreement establishes that the *responsibility of commanders* shall not be based exclusively on rank, hierarchy or jurisdiction, but rather on:

1. the effective control of the respective conduct of the subordinates,
2. the knowledge based on the information previously received before, during or after the respective conduct,
3. and the means at the commander's disposition to prevent, or – if the conduct had already occurred – promote the necessary investigations.⁷

In fact, the Colombian approach to the responsibility of commanders is not in line with the standards set out in the Rome Statute – being more restrictive especially as to the mental element.⁸ In addition to commanders, subordinates might also be classified as those most responsible. This can be the case especially where a subordinate committed particularly notorious crimes (cf. the Attorney General's Directive 001 of 2012). Furthermore, persons who had an essential role in the criminal organization – such as financing the commission of crimes – might be qualified as those most responsible (cf. Judgment C-579 of the CC of 2013).

4. Controversies Evolving Around the Special Jurisdiction for Peace.

Only a few weeks after the SJP's entry into function in March 2018, tensions around the court peaked when Seusis Pausías Hernández Solarte, a.k.a. Jesús Santrich, (one of the most high-ranking FARC-EP representatives during the peace negotiations, who had recently been appointed as a congressman) was arrested in Bogotá on charges of exporting cocaine to the United States. Since the alleged crime was allegedly committed in January 2017 – after the signing of the Peace Agreement – it did not fall under the jurisdiction of the SJP and, as a consequence, could not be covered by the Amnesty Law. However, the SJP requested access to the evidence, which supposedly incriminated Santrich in order to determine whether it had jurisdiction over the case. Subsequently, a legal controversy arose regarding the question if the SJP could decide for itself upon its competence (*“competence de la competence”/“Kompetenz-Kompetenz”*). In June 2018 the CC put a temporary end to the dispute, deciding that the SJP (as a special and autonomous jurisdiction) has the competence to make such decisions itself (cf. Auto 402/18 of the CC). The CC further made clear that the Attorney General had to

⁷ Cf. No. 44 of the Final Peace Agreement and Transitional Article 24 of Legislative Act No. 01 of 4 April 2017.

⁸ Regarding the controversial issue of how exactly the command responsibility shall be understood in the context of the SJP, see: Steward (30 May 2018), paras. 96 et seq.; ICC Office of the Prosecutor (5 December 2018). Cf. also Ambos (15 June 2018).

deliver Santrich's file to the SJP. Despite this unequivocal decision, Attorney General Néstor Humberto Martínez refused to release Santrich. This controversial case shows the antagonism between the ordinary justice system and the SJP. The Santrich case is only one example of the existing distrust in some parts of the Colombian society towards the SJP, which argue that the SJP is a FARC-Tribunal.⁹ It shows the divide in Colombian society regarding state institutions: While on the one hand their crucial role in the TJ process is recognized, on the other a bias towards the FARC-EP is criticized.

The parliamentary group of the *Centro Democrático* (the party led by Colombian president Iván Duque, which is opposed to the Final Peace Agreement) launched a proposal for a constitutional amendment in August 2018. According to the proposal, all TJ organs, in particular the Truth Commission and the SJP would be denied access to confidential information affecting national security. This proposal amounts to a frontal attack on the TJ-system and is directed at undermining its constitutional framework, as has been pointed out elsewhere.¹⁰ Its central component is the establishment of (historical) truth and, based on this, a collective memory. Such a cultural memory is important for any transitional society in its entirety and also for both victims and perpetrators, as both groups are part of this society. But how can historical truth be established without access to the information in question? How can a proposal that practically hinders the establishment of truth and memory be reconciled with victims' rights that the new government has repeatedly called for, in particular the right to truth? This is especially doubtful if access to the information is impeded in such a broad way (by excluding any information, data, confidential documents relating to national security), so categorically ("under no circumstances or under any circumstances ...") and in an authoritarian fashion ("Ignorance [of this prohibition] ... constitutes a serious offense" sanctioned by disciplinary action) – with not only all public servants being covered, but also private persons exercising or having exercised a public office. The amendment would not only undermine the possibility of the organs of the TJ-system to effectively investigate but would also be contrary to the provisions that guarantee a comprehensive cooperation between these organs and the State. Ultimately, the proposed amendment clearly conflicts with (inter)national legislation that forbids limitations to access information regarding serious human rights abuses under IHL. Even though the proposal did not become law (because of the majority formation in the Congress), its sheer existence raises concerns about the government's concrete plans. It follows clearly from it that the new government is making every effort to further privilege the Armed Forces and thus risks eventually turning the TJ-system into a one-sided instrument against the FARC-EP. This contradicts not only the basic idea of the peace agreement, but also the very concept of TJ.¹¹

In line with this, the *Centro Democrático* introduced another controversial proposal for a constitutional amendment in October 2018. The proposal foresees the creation of "special chambers" within the SJP, which would have the exclusive competence to try members of the Colombian Armed Forces – thus creating a sort of military jurisdiction within the SJP. The proposal was the result of a debate that had already started earlier at the time of the negotiations regarding the SJP's RPE. It evolved around the introduction of Article 75 RPE, which provides for a special procedure for the Armed Forces in relation to the crimes committed during the armed conflict. The rule was finally adopted (see above) and ultimately paved the way for the recent proposal. The authors of the proposal (among them former President Uribe, one of the Peace Agreement's most vocal opponents) consider that the Armed Forces "have fought in the name and in favor of the legitimate State", including those members that committed crimes not eligible for amnesty; in contrast, the FARC-EP are characterized as a "criminal organization pursuing criminal purposes" (Explanatory Statement to the proposal (ES), p. 11 [all translations by the authors]). The proposal's aim was, of course, to strengthen the position of the Armed Forces, especially of those members involved in international crimes and thus possibly subject to national or international proceedings. In essence, as has been criticized elsewhere,¹² the proposal is based on a highly ideological narrative.

⁹ Another example is a controversy that evolved around the SJP's competence regarding property and assets of the FARC-EP that had not been handed over during the demobilization process, see Durán Núñez (21 January 2019).

¹⁰ Cf. Ambos (22 August 2018); Ambos (27 August 2018).

¹¹ It should be noted, however, that the CC held in its Judgment C-080 of 2018 that the access to confidential information has to be granted to the TJ-mechanisms which were created by the Final Peace Agreement.

¹² Cf. Ambos (5 October 2018); Ambos (19 October 2018).

The ideological motivation of the proponents also explains the unfounded allegation that the selection process of the judges (and of the *amici curiae*) by the independent selection panel (*Comité de Escogencia*) was biased – and thus, that all SJP judges are biased – for the mere fact that three “foreigners” formed part of this five-person panel (ES, p.12). It is worth noting that the three foreign members of the panel are renowned and highly respected international justice experts (Diego García Sayán from Peru, former President of the Inter-American Court of Human Rights; Juan Méndez from Argentina, former UN Special Rapporteur on Torture and Álvaro Gil-Robles from Spain, former Commissioner of Human Rights of the Council of Europe). Despite all this, the proposal concludes with the further unfounded statement that the panel’s selection procedure was carried out for the sole purpose of satisfying the “demands of the FARC” (ES, p. 12), thereby transforming the SJP into a mere FARC-Tribunal. The distortion of the facts ultimately becomes evident when it is being asserted that the former Santos government said that “the judgment and treatment of the Armed Forces would not be part of the negotiating table” (ES p. 10) – which is plainly wrong. What was excluded was not the SJP’s jurisdiction over the Armed Forces (how could it be in such a type of international negotiation and in light of Colombia’s international obligations?) but only their doctrine, structure, and composition. Ultimately, the proposal did not pass the Congress, following the argument that it would create an unjustifiable differential treatment between former FARC-EP combatants and the Armed Forces. Still, one must sadly conclude that such a kind of legislative proposal, with such a highly ideological narrative and even plainly wrong allegations, does a disservice to the Colombians’ search for justice and reconciliation.

On 31 October 2018, various political parties reached an agreement to add 14 judges to the SJP. Unlike the already selected judges, the 14 new judges would not be selected by the independent *Comité de Escogencia* but by a board that is only composed of Colombian State entities. This distinction suggests an instance of so-called “court-packing”, through which the involved parties wanted to guarantee the new judges’ loyalty to the State and their ability to understand the Colombian military. The bill passed the first step of parliamentary ratification and is currently being reviewed by the Parliament. Just as the proposed constitutional amendment, the bill is deeply problematic since it openly questions the impartiality of the SJP’s current judges and the legitimacy of the *Comité de Escogencia*. In doing so, it hinders inevitably the work of the SJP and weakens the already fragile confidence Colombian citizens have in it.

All this shows the complex political conditions under which the SJP was born and the ongoing controversies that continue to hamper its proper functioning. Even though the Colombian transitional justice legislation is probably the most sophisticated one so far in a post-conflict process, its effective implementation depends in large part on the political will of the dominating political forces, especially the current government, and the willingness of cooperation by other important institutional actors, especially the General Attorney’s Office.

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