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The Concept of 'Interests of Justice' and Colombian Special Jurisdiction for Peace

A path to impunity? Effects of the concept of 'interests of justice' elaborated by the International Criminal Court on the operation of the Colombian Special Jurisdiction for Peace, concerning state agents who are not members of the public force.

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Finally, to the thousands of victims of the Colombian armed conflict. The true recognition of their battles depends on justice, peace and truth. Eternal gratitude to the organization Madres de los Falsos Positivos de Colombia - MAFAPO. Their words show that the dawn of a new era is yet to come. May the struggle of the people dictate the path to a better country…

Abstract

In 2016, a peace agreement was signed between the Colombian government and the largest guerrilla in the country, '*Fuerzas Armadas Revolucionarias de Colombia*' (*FARC*). As a result, the Special Jurisdiction for Peace – SJP [*Jurisdicción Especial para la Paz – JEP*] was created, a domestic criminal court whose main function is to investigate serious human rights violations during the Colombian conflict and accuse those individuals considered as the most responsible. However, there are legal provisions that condition the personal jurisdiction of the SJP in a way that could maintain serious levels of impunity in the country and affect the right to the truth at the same time: state agents who are not members of the public forces will only be tried if they accept the jurisdiction of the SJP voluntarily, something that in practice will certainly not happen. The objective of this thesis is to analyze the possible intervention of the International Criminal Court (ICC) in Colombia with the purpose of prosecuting said state agents that the SJP is not going to take charge of. The study is conducted exploring the discretionary power of the Prosecutor of the ICC, as well as the concept of the 'interests of justice', stated in article 53 of the Rome Statute of 1998.

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1 Introduction

Transition from war to peace is a major challenge for any civilization. Making mistakes in the construction of a new society is common and totally predictable, even more when transitional justice is built mainly by sanctioning domestic norms that seek to transform society and prosecute crimes committed during the war. That is why, in this scenario, any legal provision can have serious negative repercussions in the medium and long term. Any legal or administrative decision must be taken with the greatest possible responsibility and transparency, always thinking about the consequences for the population in the future. One of the countries that is recently in the middle of a transitional justice process is Colombia, after decades of war and human rights violations.

Colombian peace process completed between the government and the FARC guerrilla[1] is characterized by numerous difficulties. One of which is the challenging political and social 'post-conflict' phase that has been going on since the signing of the peace agreements in 2016. The implementation of the transitional policies has not been entirely effective and Colombian society is currently at a critical point of political polarization where a large part of the population disapproves many of the core goals and partial results of the peace agreements.

The armed conflict in Colombia began in 1948 with the assassination of Jorge Eliecer Gaitán, liberal leader and pre-candidate for the presidency. From that moment on, the violence between the two main political parties - *Conservative* and *Liberal* - permeated the national territory to the point that different illegal armed groups were born throughout the country in order to defend regional ideals. The creation of the left-wing guerrillas FARC and ELN[2] in 1964 was such an important event that it is commonly seen as the beginning of the modern armed conflict in Colombia.

For more than four decades, the conflict between the guerrillas and the Colombian army became increasingly intense as other agents entered the dispute; extreme right-wing paramilitary

[1] FARC-EP: Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo (The Revolutionary Armed Forces of Colombia-People's Army), currently a political party called *Comunes*.

[2] ELN: Ejército de Liberacion Nacional (The National Liberation Army), the second largest guerrilla group after FARC, is militarily active like many other Colombian armed groups.

groups, criminal gangs and drug cartels. In a scenario of highly escalating urban and rural violence, where numerous human rights violations were committed by each armed group, the peaceful resolution of the conflict was perceived as the mission to be fulfilled by many governments in the eighties and nineties. However, it was not until 2012 under the government of Juan Manuel Santos that a large-scale peace process began with the FARC, which by then was the largest and most powerful guerrilla group in the nation. Four years later the peace agreements were signed and both parties - guerrilla leaders and the Colombian government - committed to carrying out various tasks, being the core of the agreements the transition of Colombian society towards a stable and lasting state of peace.

One of the main goals of the peace agreement was the creation of the Special Jurisdiction for Peace-SJP[3] (*Jurisdicción Especial para la Paz-JEP*), a new court whose main function is to judge human rights violations committed during the armed conflict.[4] This new court has begun its operation prosecuting guerrilla leaders and army commanders, investigating and clarifying facts of the conflict, punishing those accountable, and ordering reparations for the victims. This is a very valuable advance within the framework of post-conflict Colombian justice,[5] showing – seemingly - that Colombia can actually prosecute those responsible without the need for international institutions (the International Criminal Court-ICC in particular) to intervene.[6]

However, there are provisions in the legal framework that created the SJP that attract attention; one of them is that state agents who do not belong to the public force are not obliged to act as accused before the new court and their hypothetical responsibility will not be declared by the SJP. After a legal and political analysis, this situation may result in a continuation of

[3] Government of Colombia and FARC-EP. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace. (24 November 2016), §5.1.2. Available at: https://www.peaceagreements.org/wview/1845/Final%20Agreement%20to%20End%20the%20Armed%20Conflict%20and%20Build%20a%20Stable%20and%20Lasting%20Peace

[4] According to the temporal jurisdiction of the SJP; Crimes committed no later than the signing of the peace agreements - that is, December 1st 2016 - will be judged.

[5] International Commission of Jurists. Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half after its Entry into Operation. Geneva, Switzerland. (2019), 61. Available at: https://www.icj.org/colombia-the-special-jurisdiction-for-peace-one-year-after-icj-analysis/

[6] Luisa Brandão Bárrios. "La relación de la Corte Penal Internacional con el proceso de paz en Colombia" [*The relationship of the International Criminal Court with the peace process in Colombia*], Revista Derecho Penal y Criminología, vol. 41, n.º 110, Universidad Externado de Colombia, Bogotá. (January-June 2020), 133. DOI: https://revistas.uexternado.edu.co/index.php/derpen/article/view/7182

the pre-existing impunity and a violation of certain principles that international criminal tribunals have developed in their jurisprudence over the years.

In the next chapter I will address the questions that led me to carry out this study and I will explain the methodological aspects of the research. Later I will describe the Colombian context; the experiences of the armed conflict, the legal framework of both the state and the SJP. After that, in the subsequent chapter I will explore the ICC structure and will embark on a deep analysis of the concept of 'interests of justice'.

I will continue analyzing the specific difficulties of the SJP and - consequently - will describe a solution that could lead to the intervention of the ICC in Colombia. Coming to an end, in the last chapters I will carry out a study of the implications of human rights in the case and some final conclusions will be presented.

2 Methodology

2.1 Justification of the research

The hope of a stable and lasting peace in Colombia has multiplied the conversations about human rights in political and academic spheres. The peace agreements with FARC stimulated real interest in a solid transitional justice project; despite the logical difficulties, there is a legitimate expectation regarding the reparation to victims, prosecution of those accountable, a construction of historical memory and – naturally - respect for the right to truth. It is necessary to understand the significance of the SJP court in a country like Colombia where high levels of impunity have made human rights violations during the conflict quite repetitive.

It is a special episode in modern Colombian history: a high court created exclusively to try crimes against human rights and international humanitarian law committed by members of the FARC and the Colombian National Army. It is undeniable that the task of the SJP will be of supreme importance for an optimal transitional process and - as society has perceived - the actions under the jurisdiction of the SJP have been effective so far, showing that the court acts with impartiality and transparency.

The problem - which is also the core of this research - is revealed in certain provisions of specific norms created by the peace agreements. The SJP was designed and structured by constitutional provisions and ordinary laws.[7] Law 1957 of 2019 is the Statutory Law that regulates the operation of the SJP, including personal jurisdiction:[8]

> Personal Jurisdiction: The SJP will also apply with respect to state agents who have committed crimes' due to, on the occasion or in direct or indirect relation' to the armed conflict, application that will be made differently, granting equitable, balanced, simultaneous and symmetrical treatment. In said treatment, the guarantor of rights role by the state must be taken into account. Regarding state agents not members of the public force, the jurisdiction of the Special Jurisdiction for Peace will only include those who have voluntarily expressed their intention to submit their cases to the SJP.

Well, it is – to say the least - irrational for a court that seeks to clarify the truth of the crimes committed during a long-armed conflict to decide to prosecute the top military leaders of both sides but to reject the obligation to bring non-military state agents to trial. Why is it irrational? For the very reason that in Colombia the armed forces are controlled directly by civilians; the President of the Republic, who is the commander-in-chief of the armed forces and the Minister of Defense, who is the highest authority of military and security affairs in the whole nation.

The crimes committed by both sides during the armed conflict were devastating for the Colombian population. Determining responsibility is necessary in order to protect the right to the truth[9] and thus prevent similar crimes from being committed in the future. For instance: one of the cases before the SJP are the 'murders and forced disappearances presented as casualties

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[7] In the Colombian legal framework, one of the ways to modify the 1991 Constitution is Legislative Acts; they are norms that modify, derogate or add the constitutional text. Statutory laws are norms that have constitutional status but do not directly alter the text of the Constitution. Both the Legislative Acts and the statutory/ordinary laws are created by the Congress of the Republic.

[8] Law 1957 of 2019. Article 63- §12.

[9] Maria Paula Saffon and Rodrigo Uprimny, "Derecho a la verdad: alcances y límites de la verdad judicial" in *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*. ed. Centros de Derecho, Justicia y sociedad (Bogotá: Ediciones Antropos, 2006), 143-144. Available at: https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20transicional%20sin%20transici%C3%B3n.pdf

in combat by state agents' between 1988 and 2014,[10] showing a rebound in cases between 2002 and 2008. In these cases, members of the Colombian Army executed innocent civilians to present them as guerrilla casualties and thus, aspire to media recognition and bonuses. The crimes were committed in numerous regions of the country, under similar guidelines and strategies. The command responsibility doctrine – one of the principles of international criminal law - basically states that military superiors or people who act as military commander will be accountable[11] for the crimes committed by their inferiors under their control and effective command, in cases where said hierarchical superior should have exercised control properly over such forces.[12]

Those responsible beyond the military commanders necessarily must be the civilian high commanders; the Minister of Defense and the President of the time when the events occurred. Though, the personal jurisdiction of the SJP – which is by nature a criminal court - says that those civil commanders can only submit their case to the SJP if they *voluntarily* express it. This means that the responsibility reaches only to high military commanders, but those who are higher up enjoy a '*de facto* immunity' since the SJP could not judge them.

The problem is that the norms that regulate the SJP say that state agents who are not members of the military forces will be tried by their constitutional judges and not by the new court.[13] This means that the titled institution to try those agents is the Congress of the Republic through its prosecution commissions.[14] What is the situation here? that the Congress is an institution that, for years, have consisted of political and not properly judicial members. These members - also - do not have impartiality, since most of the corporation belongs to political parties that are ideologically related to the hypothetical defendants.

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[10] Special Jurisdiction for Peace. Caso 03: Asesinatos y desapariciones forzadas presentados como bajas en combate por agentes del Estado [*Case 03: Murders and forced disappearances presented as casualties in combat by State agents*]. Chamber for the recognition of truth, responsibility, determination of facts and conducts ruling no. 033 of 2021. Available at: https://www.jep.gov.co/especiales1/macrocasos/03.html

[11] International Criminal Court. Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional Sobre la Jurisdicción Especial Para la Paz [*Amicus curiae of the International Criminal Court Prosecutor on the Special Jurisdiction for Peace*]. The Office of the Prosecutor. Ref. RPZ-0000001 & RPZ-003. (18 October 2017), 3-4. Available at: https://www.icc-cpi.int/itemsDocuments/2017-10-18-icc-otp-amicus-curiae-colombia-spa.pdf

[12] Rome Statute of the International Criminal Court. Article 28.

[13] Legislative Act 01 of 2017. Article 5, paragraph 1.

[14] Political Constitution of Colombia. Republic of Colombia. (4 July 1991), Article 174. Available at: https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en

The relevance of this situation with respect to the high levels of impunity in Colombia is patent. There is a legitimate concern about how the right to the truth of the victims of hundreds of crimes committed during the armed conflict would be violated. In particular, those who seek justice and accountability for serious human rights violations (right to life, prohibition of torture and inhuman or degrading treatment); such as extrajudicial executions or the numerous crimes against international humanitarian law committed during decades of war.

2.2 Research objectives and research questions

The task of this study is to analyze whether these provisions on personal jurisdiction in the SJP affect the transitional justice process and the human rights of victims of the armed conflict (i.e. right to the truth). Likewise, to determine whether the ICC would be competent to act in those particular cases that the SJP does not take into account. Thus, the research question is stated as follows:

> *Under the concept of the interests of justice, could the ICC intervene in cases where the Colombian Special Jurisdiction for Peace does not judge in relation to state agents who are not members of the public force?*

In addition, there are numerous questions derived from the main research question:

- *Have state agents who are not members of the public force committed crimes under ICC jurisdiction?*
- *Are there cases against state agents who are not members of the public force that would be admissible under ICC jurisdiction?*
- *Would the prosecution against state agents who are not members of the public force serve the 'interests of justice'?*
- *What effects on human rights are produced by not prosecuting state agents who are not members of the public force? Can this situation maintain high levels of impunity in Colombia?*

2.3 Method

Although this is fundamentally a juridical study, my intention is not that the methodology is only based on a single study of law. Instead, my purpose is to achieve the objective of explaining how the research problem is generated from a critical situation of human rights violations in Colombia, using multidisciplinary sources:[15] legal, political science and historical approaches. It is not expected to propose 'direct or immediate' solutions to the problem, but rather explanations on how it should be approached. Due to the characteristics of the topic, the success of transitional justice and the protection of the right to the truth depends in this specific case on the responsibility of individuals, responsibility that will only arise from a judgment of domestic or international courts.

Thus, to answer the research questions, I will start a comprehensive study of domestic and international norms. From the understanding and interpretation of the legal framework, it will be possible to elaborate a detailed hypothesis - responding to whether the jurisdiction of the SJP, being limited, effectively opens the doors for the ICC prosecutor to initiate a criminal investigation against state agents who are not members of the military forces - that will serve as a guide for the collecting of texts, norms and various sources that are useful for the study. Meanwhile, the research will be mainly carried out as ‘desk research’ and the convenient method is the legal one.

Among the research plans, the intention to establish direct contact with a specific group of victims of the Colombian armed conflict was considered. This involved conducting an analysis of the information collected from an interview with the association *Madres de los Falsos Positivos de Colombia* (Mothers of False Positives of Colombia - MAFAPO). The personal data management project was registered at NSD (Norwegian Center for Research Data), and the institution successfully approved the interaction with the Colombian organization after doing assessment of the data management plan.

[15] Siobhán McInerney-Lankford. "Legal methodologies and human rights research: challenges and opportunities". In Research Methods in Human Rights. Cheltenham. UK: Edward Elgar Publishing. (2017), 53. DOI: https://doi-org.ezproxy.uio.no/10.4337/9781785367793.00010

The research will be doctrinal[16] and the analysis of norms will cover the entire variety of the legal framework for the creation of the SJP, which is not only limited to Colombian ordinary laws but also laws of constitutional rank. On the other hand, it is also necessary to study international norms such as treaties (especially Rome Statute of 1998) and other international instruments that describe and deepen principles of international criminal law.

The jurisprudential analysis is also necessary in a study of this type since the interpretation of norms given by judicial decisions of domestic (high courts of Colombia) and international courts (ICC and other international criminal tribunals) will be of great help to answer the research questions. The use of legal writing; academic articles, books, essays and other scholar material is necessary to complement the understanding of both legal frameworks (internal and international). The basic topics of this legal bibliography will be international criminal law, international human rights law, international humanitarian law and constitutional law.

As I explained before, I will fulfill a juridical study[17] using bibliographic sources from various fields of study as well, such as history and political science. The latter is to explain the Colombian social and political scenario and comprehend how impunity is existent in Colombian justice; for instance, describing the excessive power of the executive/presidential branch and how not prosecuting high civilian military commanders - even after proving state responsibility for various crimes – is expected in a country like Colombia.

The election of the correct sources will be crucial to contextualize the problem. Naturally, there are laws that will not be left out of the study, since they are the ones that structure the research question. The first step will be to contextualize, describe and interpret the domestic rules; first on the structure of the SJP and then specifically on the personal jurisdiction of the court, who it can bring to trial and why some individuals are excluded from its jurisdiction. Subsequently, the description and interpretation of international standards will be carried out in order to explain certain principles of international criminal law, including the historical

[16] Daniel Bodansky, "Legal realism and its discontents", *Leiden Journal of International Law*, Foundation of the Leiden Journal of International Law, Leiden, Vol. 28, No. 2, (2015), 3. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585650

[17] Bård Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, "Human rights research method". In *Research Methods in Human Rights*. Cheltenham. UK: Edward Elgar Publishing. (2017), 5. DOI: https://doi-org.ezproxy.uio.no/10.4337/9781785367793.00007

international criminal tribunals (e.g., Nuremberg and Tokyo Tribunals) and with specific emphasis on the current ICC doctrine. Once this is done, I will be able to start answering the research questions one by one and focus on the research objective, making use of Colombian and international jurisprudence and the legal bibliography of various academic sources, mainly legal and then historical or political.

The nature of this study topic means that the research questions do not have absolute answers. In addition, there will be multiple counter arguments that must be analyzed at the time of addressing the research objectives. It is not difficult to assume the main counter arguments but going beyond the obvious point of view is a duty in studies that have a legal core.

However, I will ensure that the theory does not consume an active study of one of the many issues that were born from this episode of transitional justice on which the rights of hundreds of thousands of people depend.

2.4 Ethical considerations

Impartiality during research and data analysis will be the main challenge. As Ulrich explains, although it is mainly a desk research, numerous long-term personal ethical conflicts may arise that could affect the way in which the study of norms is understood.[18] Of course, the interpretation of the law is a task that can become difficult if there are elements that affect the bias of the researcher.

In this case there are ideological dilemmas in the middle of the analytical process. My own political position can influence the way in which the study of domestic norms is done and how these can be in contravention of international norms. I am not on the same ideological spectrum as most non-military state agents who will not be tried by the SJP, and not only have I disapproved their management when they were in command of the military forces, but also various administrative and economic measures of their governments.

[18] George Ulrich, "Research ethics for human rights researchers". In *Research Methods in Human Rights*. Cheltenham. UK: Edward Elgar Publishing. (2017), 192. DOI: https://doi-org.ezproxy.uio.no/10.4337/9781785367793.00017

Additionally, there is a certain distrust and skepticism on my part towards some provisions of the Colombian legal framework and even towards the jurisprudence of the high Colombian courts. This is due to the high level of corruption in the law-making process (Colombian Congress) and the perception of little autonomy that Colombian courts have regarding decisions against high-ranking state agents.

Even so, the duty of the investigation is to remain impartial and not to let one's own ideologies influence the analysis of the collected legal documents.[19] I will ensure that any comparison of norms and legal methodology can be transparent and free from any judgment or ideological bias, all for the better development of the hypothesis.

3 Colombia's background

3.1 Historical background

3.1.1 Colombia and its conflicts

Briefly reviewing and understanding the history of Colombia is essential to proceed with a political and legal study of the Colombian armed conflict, the nation's human rights framework and the possible unawareness of principles of international criminal law in the SJP's operations. Unfortunately, the Colombian armed conflict is not a recent event and describing its reasons will make the research and the process of giving answers to the research questions more logical.

To begin with, it should be mentioned that Colombia has been a sovereign and independent country for just over two hundred years. Previously the Colombian people were part of the Kingdom of Spain, which maintained a colony from the 15th to the 19th century. In 1810, a long war of independence began which resulted in the establishment of the *Gran Colombia* (Great Colombia) in 1819;[20] an autonomous 'macro state' constituted by several nations of what are now the states of Colombia, Venezuela, Panama, Ecuador and partially, territories of Peru and Brazil.

[19] Id. 211-212.

[20] Michael LaRosa and Germán Mejía. *Colombia. A Concise Contemporary History*. (London: Rowman & Lilttlefield, 2017), 65.

However, Colombian independence from the Kingdom of Spain did not result in stable and long-term peace for the nation. Various internal conflicts during the 19th and early 20th centuries caused a problematic secession that triggered the independence of the other states and shaped the constitution of 1886; the norm that created the modern Republic of Colombia.[21] Thus, what seemed like a great empire in northern South America turned out to be the birth of a nation with economic problems, weak institutions, ethnic segregation and rural and urban conflicts between different political groups.

The first century of Colombian independence was characterized by multiple conflicts and civil wars that prevented sustainable economic growth in the territory. The Thousand Days War (1899-1902)[22] was a clear image of the region's instability and - to a certain extent - defined the existing political division throughout the territory. As a consequence, during the first half of the 20th century in Colombia, the rivalry between the two main political parties, Liberal and Conservative, became more latent, with marked periods dominated by one or the other.

In 1948 the leader of the Liberal party and candidate for the presidency, Jorge Eliecer Gaitán, was assassinated in Bogotá, a tragic event that provoked riots, disturbances and violent reactions in most of the country's urban centers. This incident almost caused an authentic armed revolution that was split by the military forces in charge of the conservative president Mariano Ospina Pérez.[23] However, the political scenario continued to be under great tension and the clashes between numerous groups of liberal and conservative bandits molded the period known as '*La Violencia*' (The Violence).[24]

In 1953, a historic coup d'état resulted in General Gustavo Rojas Pinilla taking control of the country until 1957. At that time the *National Front* was established,[25] a bilateral agreement in which conservatives and liberals decided to share the power of the nation for four-year presidential terms each, for four periods. However, the political crisis did not cease and the numer-

[21] Ibid.
[22] Ibid, 88.
[23] Ibid, 92-93.
[24] Ibid.
[25] Ibid, 95.

ous groups of liberal bandits in the east of the country organized themselves as guerrillas with a Marxist-Leninist ideology in order to implement a communist government in Colombia.

In 1964 FARC and ELN were born,[26] starting the modern Colombian armed conflict. The war became even more intense during the following decades as new actors entered the conflict; numerous guerrilla groups with leftist ideology, extreme right paramilitary armed groups and drug cartels led by urban mafias with notable influence in national politics.

During the 1980s and 1990s, Colombia experienced years of rural and urban warfare. The state was incapable of controlling the entire territory and the institutional and economic crisis worsened. Numerous violent events marked Colombian history at this time; the war against drug trafficking, terrorist attacks and massacres by guerrillas and paramilitaries, and unthinkable events such as the 1985 'Palace of Justice siege'[27] in Bogotá – a building which is seat of the Supreme Court of Justice -, an attack carried out by the M-19 guerrilla group with the intention to conduct a political trial against President Belisario Betancur. The retaking of the palace by the national army caused material and civil losses in a two-day urban battle that resulted in the death of numerous justices of the Supreme Court and the near-total destruction of the building.

It was indispensable to think about peace. In 1990 the M-19 guerrilla demobilized and its members reintegrated into society, with many of them starting their life in national politics. Nevertheless, the war against the other actors in the armed conflict did not cease. In 1991 a new liberal constitution entered into force and produced great changes in the political and legal system of the Colombian state. Though, the FARC and ELN guerrillas became stronger towards the end of the decade, causing numerous attacks on rural and urban populations, carrying out numerous kidnappings of civilians and expanding their military influence in most of the territory.

In 2002, Álvaro Uribe Vélez became president. A politician who, despite having liberal roots, won the campaign representing a different party from the traditional ones. His speech was to strengthen the armed forces and national security, to put an end to the guerrillas by means of

[26] Ibid, 96.
[27] Ibid, 97.

war and to regain control of the nation at any cost. In 2006, Álvaro Uribe was re-elected president for four more years and continued his policy of ‘democratic security’. In 2010, Juan Manuel Santos, Álvaro Uribe's former defense minister, was elected president.

Juan Manuel Santos began peace negotiations with FARC in 2012 and in 2014 he was re-elected for four more years. Reacting to this, Álvaro Uribe and his political movement labeled the peace process and the policies of Juan Manuel Santos as a betrayal of 'democratic security'. The peace agreements were signed by the Colombian government and the FARC leaders in 2016.[28] In said document the guerrilla group committed to end the conflict, hand over its weapons and demobilize (DDR process). In addition to this, the parties designated a series of stages of transitional justice in order to build the path to a stable and lasting peace, including the creation of the SJP court (Special Jurisdiction for Peace). The extreme violence briefly ceased in the country.

In the 2018 elections, Iván Duque Márquez, a member of Álvaro Uribe's party and a devoted adversary of the peace process, won the presidency. The conflict became intense again, FARC accused the government party of failing to comply with the peace agreements and ELN - who was also under peace negotiations - decided to repudiate the ceasefire. During the period of Iván Duque’s presidency (2018-2022), violence and institutional lack of control became increasingly evident. Protests along the whole territory, the ongoing assassination of social leaders and human rights activists, various public corruption scandals and political polarization between supporters of the political wings - right, center, and left - caused an aura of hopelessness and antipathy toward the state.

In June 2022, Gustavo Petro Urrego - a former member of the M-19 guerrilla and presidential candidate for the social democratic political party 'Colombia Humana' - won the presidential elections and became the first left-wing president in the history of Colombia for the period 2022-2026. His campaign promises included special human rights protections, an end to war on all fronts and a progressive climate agenda, among others.

[28] In 2016 Juan Manuel Santos was awarded the Nobel Peace Prize ‘for his resolute efforts to bring the country's more than 50-year-long civil war to an end’. https://www.nobelprize.org/prizes/peace/2016/summary/

Since the presidential inauguration of August 7, 2022, Gustavo Petro has confirmed full support for the operation of the SJP and the efforts of the peace process done with the FARC. He has also shown his interest in starting peace negotiations with the ELN and the extreme right-wing paramilitary groups.

3.1.2 Specific human rights violations

The modern Colombian armed conflict has lasted more than five decades, in which numerous human rights violations have been evidenced. All the actors in the conflict have been perpetrators of serious crimes, both the state (Military Forces) and the illegal armed groups (guerrillas, paramilitaries and drug cartels).

The SJP has opened - so far - seven macro cases on the armed conflict;[29] some of them prioritizing the commission of crimes in certain areas of the country (Case 02: Nariño, Case 04: Cauca and Valle del Cauca, Case 05: Antioquia-Urabá) and other cases prioritizing specific human rights violations throughout the territory:

- Case 01: Illegal retention of people by the FARC.
- Case 03: Deaths unlawfully presented as casualties in combat by state agents: This is one of the cases that has received the most attention among the population and media because it shows direct violations committed by the state. Between 1988 and 2014 the Colombian army executed innocent civilians who had no connection to illegal armed groups and were presented as combat casualties (false positives). There was a significant increase of these casualties between 2002 and 2008, a period in which Álvaro Uribe exercised his presidential policy of 'democratic security'.
- Case 06: Victimization of members of the Patriotic Union (Unión Patriótica): The Patriotic Union is a political party that was created by some members of the FARC who laid down their arms in 1985. For years, the party's militants were persecuted, attacked and many of them were killed by various perpetrators that could include military forces or armed civilians.
- Case 07: Recruitment and use of children in the armed conflict.

[29] Special Jurisdiction for Peace. Los grandes casos de la JEP [The big cases of SJP]. Available at: https://www.jep.gov.co/especiales1/macrocasos/index.html

3.2 Political and legal background

The understanding of the Colombian background cannot be limited to Colombian history, facts and human rights violations. There is also a need to make a brief description of the political and legal structure of Colombia; how the state is founded, what is the regulatory framework of Colombian justice and of course, the new court SJP.

3.2.1 Political structure of the Colombian state

Colombian Republic is organized under a 'social state under the rule of law'[30] [31] and it is divided into thirty-two departments (administrative territorial entities). On the other hand, its institutional structure is divided into three specific branches; the executive branch, the legislative branch, and the judicial branch.

The executive branch is headed by the President of the Republic, who is the highest political and institutional leader of the Colombian state.[32] The President symbolizes national unity and acts as Head of State, Head of Government and Supreme Administrative Authority of the nation, including full military authority.[33] The executive branch at the regional level extends into the departmental (governors) and municipal (mayors) administrations.

The power of Colombia is highly concentrated in the presidential function. The Colombian government usually makes the most important decisions of the nation with regular autonomy. The concentration of power is such that since the 1953 coup, no president of Colombia has left power for administrative or judicial reasons, even in the most controversial moments of modern Colombian history.

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[30] Also known as 'social state of rights'. Michael LaRosa and Germán Mejía. *Colombia. A Concise Contemporary History*. (London: Rowman & Lilttlefield, 2017), 55.

[31] Political Constitution of Colombia. Republic of Colombia. (4 July 1991), Article 1. Available at: https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en

[32] Ibid, Articles 188-189.

[33] The Colombian Public Forces are mainly divided into the National Police and the Armed Forces (which are also divided into the Army, Air Force and Navy). The president is the commander-in-chief of the Armed Forces. The divisions depend hierarchically on the decisions of the government. Administratively, the highest command after the president is the Minister of Defense, head of national security.

The legislative branch is organized by the Congress, which in turn is divided into the Senate and the Chamber of Representatives. The former has a national constituency, the latter a regional constituency (by departments), its members are elected for four years in public elections. The Congress has two main functions: first, to design the laws of Colombia, with the authority to modify the constitution, and second, to exercise political and judicial control over the national government (executive branch). This means that the president and the ministers are politically judged by specific commissions from Congress (accusation commissions).

The judicial branch is the head of the Colombian high courts:

- Constitutional Court:[34] Highest authority in constitutional actions and legality control of the 1991 constitution.
- Supreme Court of Justice: Highest authority in civil, labor and criminal cases (ordinary jurisdiction).
- Council of State: Highest authority in administrative actions and trials where the state is a party.
- Superior Council of the Judiciary: Disciplinary authority for the exercise of justice in Colombia and administration of the judicial branch.

The judicial branch extends to the regional level through district courts, courts of second and first instance, as well as small mixed and small-case courts, depending on the case and the territorial location. The Attorney General's Office is also part of the judicial branch. It is the public institution in charge of carrying out the investigation and prosecution in criminal matters, which will present evidence of the different cases that constitute crimes to the judges of criminal courts for their respective procedure.

There are other autonomous institutions which are technically outside the three branches of public power. The Office of the Inspector General (Public Ministry) and the Office of the Comptroller General of the Republic are the two main autonomous bodies of Colombia, their activities are summarized in disciplinary control of state officials and fiscal control of the Republic.

[34] Court created by the 1991 Constitution. In the past, constitutional control was exercised by the Supreme Court of Justice.

3.2.2 General normative framework of Colombia and the SJP

Colombia is a state governed by rules of law. The political constitution is the rule that structures the state and describes the rights and duties of citizens. The 1991 constitution replaced the conservative constitution of 1886 that governed for more than a hundred years but was contrary to the social reality of the end of the 20th century.[35] Hierarchically, it is considered that the constitutional norms have a higher rank in the Colombian legal framework, below them there are various norms of different ranks, some of them of a general national scope and others of a regional, departmental or municipal type.

As mentioned above, the Congress has mainly the legislative function in the Colombian state, ordinary laws are the general rule, but there are other types of norms created by the Congress with unique characteristics that have special legislative procedures, for example; statutory laws or legislative acts, which have a higher rank than ordinary laws.

International dispositions also integrate the regulatory framework applicable to the Colombian state. The international treaties ratified by Colombia are part of the regulations and are mandatory to comply with. In this sense, it is important to mention that Colombian jurisprudence and doctrine have accepted in their normative system the theory of the 'block of constitutionality', a term adopted from the French law doctrine of *'Bloc de constitutionnalité'*,[36] which refers to norms that have constitutional status along with the text of the constitution.

Making a list of the norms that are incorporated in the block has been a part of numerous legal debates in Colombia. However, Uprimny expresses that in the strict sense and according to Sentence C-582 of 1999 of the Colombian Constitutional Court;[37] the block is made up of the constitution (1991), international treaties on territorial borders, humanitarian law treaties, treaties that recognize intangible rights, human rights treaties, international human rights juris-

[35] Michael LaRosa and Germán Mejía. *Colombia. A Concise Contemporary History*. (London: Rowman & Lilttlefield, 2017), XV.

[36] Rodrigo Uprimny. *The block of constitutionality in Colombia: jurisprudential analysis and a trial of the doctrinal systematization*. Dejusticia. (12 December 2005). 8. Available at: https://www.dejusticia.org/en/the-block-of-constitutionality-in-colombia-jurisprudential-analysis-and-a-trial-of-the-doctrinal-systematization/

[37] Ibid, 34.

prudence, International Labour Organization conventions, and even, in the broad sense, the content of some statutory and organic laws.

Colombia is part of the Organization of American States (OAS) and has ratified the American Convention on Human Rights of 1969. This means that Colombia is part of the Inter-American System for the protection of human rights, therefore, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have jurisdiction over the Colombian state.

The Rome Statute of 1998, as stated by the Colombian Constitutional Court,[38] is only part of the block of constitutionality to some extent. Only the following provisions are considered a parameter of constitutionality in the Colombian regulatory framework; the preamble, article 6 (crime of genocide), article 7 (crimes against humanity), article 8 (war crimes) and articles 19§3, 20 (*ne bis in idem*), 65§4, 68, 75 and 82§4.

The Special Jurisdiction for Peace (SJP) was born from the 2016 peace agreements but is legally integrated into the Colombian system based on a run of specific regulations that regulate its structure and operation. Legislative Act 01 of 2017 created the Comprehensive System of Truth, Justice, Reparation and Non-Repetition *(Sistema Integral de Verdad, Justicia, Reparación y No Repetición)*, structured the SJP and generally described substantial and procedural aspects of the operation of the new court (who should be tried, what crimes will be tried, which are the objectives of the judgment, jurisdiction, sanctions, etc.)

Law 1922 of 2018 specified the guiding principles of the SJP and general rules of action of the court (parts of the litigation). Meanwhile, Statutory Law 1957 of 2019 meant a big step towards achieving the true functioning of the SJP. This norm specifically describes the protocols, principles and procedures for the administration of justice that the SJP must follow. This includes the legal nature of the court, the structure of the court's chambers, criminal treatment of state agents, jurisdiction, administration of the court (disciplinary aspects, budget and employment contracts), among other issues of procedural operation of the SJP.

[38] Constitutional Court of Colombia. Decision C-290/2012 (File D-8776. Review of constitutionality of article 1 of Law 1426 of 2010). Magistrate-Rapporteur: Humberto Antonio Sierra Porto. (18 April 2012), 28. Available at: https://www.corteconstitucional.gov.co/relatoria/2012/C-290-12.htm

According to the Statutory Law 1957 of 2019, the SJP is divided into the following chambers:[39]

a) The Chamber for the recognition of truth, responsibility and determination of the facts and conduct,
b) The Tribunal for Peace,
c) The Amnesty or Pardon Chamber,
d) The Chamber for the definition of legal situations, and
e) The Investigation and Accusation Unit.

These regulations ensure that it is a well-structured court with all the characteristics to respect due process and defense principles. The first years of operation of the court have not been easy; the political instability of the country has increased even after the signing of the peace agreements and the administration of justice has also suffered breakdowns that prevented trials from being conducted in a constant and calm manner.[40]

Thus, once reviewed the historical and legal background of Colombia, I will proceed in the following chapters to conduct an analysis of the concept of 'interests of justice' and how could the ICC intervene in the cases where the SJP is not judging state agents not members of the armed forces during Colombian armed conflict.

4 The International Criminal Court and the 'Interests of Justice'

4.1 International criminal justice and the ICC

4.1.1 Background and nature

Before the formal construction of the Rome Statute of 1998 and the International Criminal Court, a circumstantial and progressive development of the concept of international criminal justice had already been going on for a long time. It was circumstantial because it was defined

[39] Law 1957 of 2019. Article 62.

[40] The norms that regulate the SJP took a long time to be approved by the Congress and other instances. For instance, the Statutory Act 1957 of 2019 was adopted almost three years after the signing of the peace agreements. This caused delays in the initiation of proceedings because the court had a budget and active staff but the jurisdiction itself did not have a clear procedural or legal framework for start its mandate.

from specific historical moments, and it was progressive because the growth of a universal concept of international criminal justice was designed from the learning of each event in time.

The closest modern antecedents date back to the results – considered unsuccessful by some[41] – left by the bloody First World War; the victorious nations configured in 1919 the famous Treaty of Versailles to end hostilities and in turn establish reparations and consequences for the defeated parties. Beyond the territorial, political and economic sanctions, there was the need to identify and charge individual responsibility to those who, in the opinion of the victorious nations, would have committed an illegal act, in this case the German Kaiser Wilhelm II:

> The Allied and Associated Powers publicly root for William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.[42]

As would be expected in an era of – still – recalcitrant authoritarianism, the prosecution and trial of the Kaiser never occurred; the Netherlands refused to extradite him because the crimes he was accused of were not contemplated in the Dutch constitution,[43] even so, it constitutes a crucial antecedent in individual international justice.

Naturally, the sanctions and economic isolation imposed by the victors on Germany in the Treaty of Versailles caused reactions of disapproval, resentment and reproach that fostered the birth of Nazism and Hitler's rise to power. As is known, the Second World War was a period of multiple human rights violations perpetrated by both sides, terrifying attacks on the human race in proportions that had not been witnessed before. Once again the victors imposed their

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[41] Christopher Gevers. "Africa and International Criminal Law." In *The Oxford Handbook of International Criminal Law*, ed. Kevin Heller et. al. (Oxford: Oxford Handbooks, 2020). 156.

[42] Treaty of Versailles, article 227.

[43] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*. (Oxford: Oxford University Press, 2013), 254.

conditions on the defeated and the Nuremberg and Tokyo tribunals were created, intended to judge military commanders and state agents responsible for violations committed during the war, including war crimes, against humanity and peace.[44]

The first question regarding international criminal trials is precisely the legitimacy of a type of justice carried out by a judge who is not the natural of the accused. Why not let Germany and Japan try their war criminals? The reasons are multiple and not simple, but a great justification is the impossibility, inability and unwillingness[45] that the defeated nations would have to carry out fair and transparent trials of their own commanders.

The great step taken by these courts is undoubtedly the configuration of an "impartial" justice system that prosecuted and sentenced not only military commanders but also state agents who were not members of the military forces. It was the first time in history that civilians from the highest state spheres were individually convicted of criminal conduct against humanity.

During the 1990s it was necessary to once again implement *ad hoc* tribunals to individually try those accused of international crimes. The courts of Yugoslavia and Rwanda in 1993 and 1994 respectively were created to judge mainly war crimes, crimes against humanity, genocide and violations of different provisions of the Geneva Conventions and international customs.[46]

Already then, different spheres of the international community considered the urgent need to create a permanent court that would have a defined statute destined for the investigation and trial of individuals who committed crimes so serious that they could alter the international order and the human essence. It is the main particularity of international criminal law and what differentiates it from other fields such as international human rights law or international humanitarian law;[47] the sensitivity and gravity of attributing responsibility to a certain character for his conduct and not for his state.

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[44] Ibid, 257.

[45] Ibid, 256.

[46] Ibid, 259.

[47] Roger O'Keefe, *International Criminal Law.* (Oxford: Oxford International Law Library, 2015), 254.

4.1.2 The Rome Statute

In July 1998, the Statute of the International Criminal Court was adopted in Rome and in 2002, the treaty entered into force. Although it is true that three world powers are not currently part of the treaty (China never signed, the USA and Russia signed, but later withdrew their signature), the permanent court became the largest international criminal justice institution.

The objective of the Statute, as explained in the preamble - and of the ICC - is to seek global peace and security by judging individuals who have committed atrocious conduct that endangers the stability of the international community. The ICC is complementary to domestic justice, it is not a tribunal of first instance or a direct replacement for national courts. On the contrary, it is an institution that not only performs functions of prosecution and judgment, but also cooperates with the local justice of the states.

Despite its slow development and difficult beginning, finding an end to impunity and avoiding the repeat of new atrocities is the greatest task - and perhaps the greatest achievement - of the court[48] and for the same reason, the statute recognizes the importance of international cooperation in its various procedures. The autonomy of the ICC is crucial:[49] it is a permanent court of an independent nature, linked to the United Nations system, but not dependent on it in its entirety nor is it a body of it.

The ICC, based in The Hague, has jurisdiction over four international crimes expressly defined in the Statute. These are:

- Genocide (article 6)
- Crimes against humanity (article 7)
- War crimes (article 8) and
- Crime of aggression (article 8 *bis*)

[48] Linus Nnamuike Malu. *The International Criminal Court and Peace Processes: Côte d'Ivoire, Kenya and Uganda*. (Cham, Switzerland: Palgrave Mcmillan, 2019.) 11. DOI: https://doi.org/10.1007/978-3-030-19905-0

[49] Sarah Babaian. *The International Criminal Court – An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Cham, Switzerland: Springer, 2018). 16. DOI: https://doi.org/10.1007/978-3-319-78015-3

Decades of development in international criminal matters are collected here for the first time on a permanent and imprescriptible basis. The above crimes are described in detail in the Statute and are made up of conduct so serious that have been the result of the disruption of entire nations for centuries. To guide its trials, the ICC models its procedure on general principles of criminal law; the principle of legality (*nullum crime sine lege, nullum poena sine lege*), principle of non-retroactivity *ratione personae*, the principle of individual criminal responsibility, the responsibility of commanders and other superiors, among others, most of them described by part III of the Statute.

The jurisdiction of the ICC extends only to the crimes described above, in the countries that are part of the Statute and for crimes committed after July 1, 2002.

Regarding the composition of the ICC, it is a macro-institution of justice that brings together four large bodies; the Presidency; the Appeals Division, Trial Division and Pre-Trial Division; the Office of the Prosecutor and the Registry. This means that the investigation and prosecution belong to different bodies that belong to the same institution of international justice.

The importance of the Statute and the ICC is hence universal. Its detractors have accused for years that international criminal justice is an attack on the sovereignty of states, a valid and consistent argument. However, it is reaffirmed that the ICC is a complementary instance, a model of special justice – but not temporary – that exists precisely to protect humanity and, as certain domestic courts have stated, *'to reaffirm the power to exercise the ius puniendi*' of states,[50] which is an attribute of sovereignty. The ICC is an institution that will only exercise its jurisdiction when states fail to comply with their duty to administer justice.

Now, in the following section I will explain the concept of 'interests of justice', a term 'discreetly' used in the Rome Statute, which is a fundamental part of this study, as it is essential in the admissibility analysis of the hypothetical intervention of the ICC in the Colombian case.

[50] Constitutional Court of Colombia. Decision C-578/2002 (File LAT-223. Review of constitutionality of Law 742 of 2002). Magistrate-Rapporteur: Manuel José Cepeda Espinosa. 30 July 2002. Available at: https://www.corteconstitucional.gov.co/relatoria/2002/C-578-02.htm

4.2 The concept of ‘interests of justice’ according to the Rome Statute of the ICC

4.2.1 Article 53 of the Rome Statute

The 'cautious' concept of the 'interests of justice' is subtly mentioned in the Rome Statute only a handful of times, yet the relevance of this notion to ICC judicial procedure is not small. When initiating the investigation the ICC Prosecutor must assess a number of conditions to determine whether there is a reasonable basis to proceed with the case. As stated by Arcarazo et al;[51] Article 53 of the Statute is a ‘second step that comes after the test of complementarity has determined jurisdiction’. The three conditions are expressed in article 53 (1) of the Statute as follows:

> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
> (b) The case is or would be admissible under article 17; and
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The first condition starts from the international crimes described in the statute (articles 5, 6, 7 and 8), the second condition refers to pure questions of admissibility of the case (jurisdiction, gravity of the case, principles of international criminal law, capacity of the domestic justice). The third condition is somewhat more diffuse; the prosecutor will not initiate an investigation if, after analyzing the gravity of the conduct and the interests of the victims, the opening of the case would not be in harmony with the 'interests of justice'.

4.2.2 Scope of the concept

At first, the terms of article 53(1) may seem clear and direct but the meaning and scope of the 'interests of justice' have been the subject of debate among legal scholars for some time now.

[51] Diego Acosta Arcarazo et al. “Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law.” *Criminal Law Forum* 26, (2015): 310. DOI: https://doi.org/10.1007/s10609-015-9248-1

The problem is that, as Cassese says,[52] the parameters of the preliminary examination are ‘vaguely defined', not surprisingly. In 2007, the ICC Prosecutor's Office published a policy paper where it tried to define the concept of the 'interests of justice', indicating that ending impunity for serious crimes against humanity and contributing to their prevention is a point of reference to define the concept.[53] Even so, the document is rather short on definitions and leaves many doubts and interpretations.

The 2013 ICC Prosecutor's Office policy paper on preliminary examinations somewhat clears the scope of the concept of 'interests of justice' under provisions (1)(c) and (2)(c) of Article 53;[54] The Prosecutor explains conclusively that the 'interests of justice' will only be considered when jurisdiction and admissibility are met, they are positive conditions. The third condition, on the other hand, means that the Prosecutor will proceed unless there are specific situations to believe that the investigation would not serve the 'interests of justice'. Of course the decision not to proceed for reasons of ‘interests of justice’ is ‘highly exceptional’ as the 2013 policy paper points out.[55] As explained by Kaushik when quoting Gawronski; ‘The interests of justice criterion is, therefore, a countervailing consideration that ‘may give a reason not to proceed, rather than an active assessment’.[56]

The fact that it is an exceptional matter is supported by some academics such as David Luban, who mentions that, what is coherent is that the investigation is conducted with the intention of putting an end to impunity for international crimes.[57] However, the wording of the Statute can give an opposite or contradictory meaning to the preamble of the Statute, leaving the possibility open that the Prosecutor at his discretion considers what serves or does not serve the 'interests of justice'. The autonomy of the Prosecutor to consider what is or is not in the ‘interests

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[52] Cassese and Gaeta, *Cassese's International Criminal Law*, 366.

[53] International Criminal Court-Office of The Prosecutor, “Policy Paper on the Interests of Justice”, September 2007, pp. 4. Available at: https://www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf.

[54] International Criminal Court-Office of The Prosecutor, “Policy Paper on Preliminary Examinations”, November 2013, pp. 16. Available at: https://www.icc-cpi.int/news/policy-paper-preliminary-examinations

[55] Ibid, 17.

[56] Parv Kaushik, “Judicial Review under Article 15 of the Rome Statute and the ‘Interests of Justice’: Towards a Renewed Understanding”, *Journal of International Criminal Justice* 18, Issue 5, (2020), 1162, DOI: https://doi.org/10.1093/jicj/mqab012

[57] David Luban. “The “Interests of Justice” at the ICC: A Continuing Mystery.” Just Security, March 17, 2020. Available at: https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/.

of justice' means that he must 'navigate under considerable pressure', being criticized 'no matter how he or she selects cases',[58] as stated by Professor Jo Martin Stigen.

4.2.3 Approaching a definition

Arcarazo et al expresses that due to the 'vagueness' of the Rome Statute in the definition of the factors taken into account in article 53 (1)(c), the 'interests of justice' can be interpreted in two ways; one expansive and other restrictive.[59] The first extends to political factors on whether or not to initiate a formal investigation. The second restricts the factors to those of the case and nothing else, that is, an exegetic interpretation that does not give the Prosecutor freedom to interpret the 'interests of justice' beyond the parties and the criminal conduct. The authors advocate the restrictive thesis[60] in the sense that the Prosecutor should not display his influence in arguments in the political sphere.

In this sense, Đukić wonders[61] if the concept of 'the interests of justice' refers only to a retributive sense of justice - to the criminal scope of the case - or if the debate goes further (expansive sense) and 'the interests of justice' seek to take into account even more complex issues on a socio-legal level, such as amnesties or truth commissions in the development of peace negotiations/processes. Should the prosecutor adjust his criteria according to these scenarios? Could he be able to not initiate an investigation thinking that this would affect a domestic situation completely, regardless of the uniqueness of the case?

The answer is not simple. It is a dilemma that - as stated by Varaki - provoked a debate between 'scholars and practitioners' through three positions on the controversial concept;[62] those who celebrated the pluralistic dynamic of the 'interests of justice', those who only acknowl-

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[58] Jo Martin Stigen. *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, (Leiden: Martinus Nijhoff Publishers, 2008), 345. DOI: https://doi.org/10.1163/ej.9789004169098.i-536

[59] Arcarazo et al. "Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law." 309.

[60] Ibid, 311.

[61] Dražan Đukić. "Transitional Justice and the International Criminal Court – in 'the Interests of Justice'?" *International Review of the Red Cross* 89, no. 867 (2007): 696-697. DOI: https://doi.org/10.1017/S1816383107001233

[62] Maria Varaki, "Revisiting the 'Interests of Justice' Policy Paper", *Journal of International Criminal Justice*, Volume 15, Issue 3, (2017): 461, DOI: https://doi.org/10.1093/jicj/mqx036

edged the existence of the Prosecutor's discretion, subjected to *mandatory judicial review* and those who opposed the application of the provision by the Prosecutor, (as Varaki said, mainly composed by human rights NGO's) considering it detrimental to the legitimacy of the court overall.

Professor Talita De Souza Dias has tried to explain the meaning and the exceptional scope[63] of "the interests of justice" on numerous occasions. Along with Dapo Akande, they recognize a certain importance of the expansive sense of 'the interests of justice' when they stated that 'the consideration of peace negotiations as part of a decision not to initiate an investigation or prosecution in the interests of justice would prevent or alleviate, at Least in part, some of the current challenges that the ICC has faced in terms of state cooperation, budgetary restrictions and length or complexity of criminal proceedings'.[64]

In the opinion of Professor De Souza Dias,[65]

> Article 53(1)(c) may be interpreted as allowing, among other things, that the interests of victims, matters of peace and security, and non-procedural measures be considered as "interests of justice" in a court case. Balancing operation against the seriousness of the situation. crime and other possible circumstances that weigh in favor of initiating an investigation.

Certainly, it is a conciliatory opinion that gives more meaning to the notion of 'interests of justice' by affirming the importance of the restrictive sense but recognizing that some external circumstances could have an influence on the decision to initiate or not an investigation. In the end, each case will be different and the Prosecutor must try in the most effective way to

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[63] Talita De Souza Dias. "The application of the 'interests of justice' during the preliminary examinations stage", CEPAZ: Centro de Justicia y Paz, October 10, 2019. Available at: https://cepaz.org/articulos/the-application-of-the-interests-of-justice-during-the-preliminary-examinations-stage/#:~:text=As%20the%20Prosecutor's%20Policy%20Papers,in%20favour%20of%20an%20investigation.

[64] Talita De Souza Dias and Dapo Akande. "When should the ICC prosecutor defer investigations or prosecutions in situations of active armed conflict in favor of peace negotiations?" IOW; Policy Briefs 30, (2019): 13. Permanent link: http://hdl.handle.net/1814/63568

[65] Talita De Souza Dias. "'Interests of Justice': Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court." *Leiden Journal of International Law* 30, no. 3 (2017): 21. DOI:10.1017/S092215651700022X.

follow what is said in the Preamble of the Statute; putting an end to impunity and prevent the repetition of serious crimes that affect humanity as a whole.

It is clearly a work of cooperation and division of institutional responsibilities. Article 53 (2)(c) dictates that in case the Prosecutor does not initiate an investigation as provided in article 53(1)(c), he must notify his conclusion to Pre-Trial Chamber, the State making a referral or the Security Council, as the case may be. The Pre-Trial Chamber will review the prosecutor's decision and may request that the decision be reconsidered.

4.2.4 The duty to clarify the concept

For Human Rights Watch there is no consensus on the meaning that the Rome statute gives to the concept of the 'interests of justice'. The well-known NGO believes that the Prosecutor should adopt a *'narrow reading of the phrase "interests of justice" that precludes practices that could lead to impunity for some of the worst crimes under the pretext of preserving peace and security*.'[66] It also proposes detailed regulations for a clear and transparent use of Article 53 (1) and (2) by the Prosecutor and the Pre-Trial Chamber:[67]

> 1. In making a determination of "the interests of justice" under Article 53(1)(c), the factors to be considered are:
>
> a. the gravity of the crime, (…)
>
> b. the interests of victims, namely, those interests of victims that directly pertain to justice interests, such as the needs of victims. (…)
>
> 2. In making a determination of "the interests of justice" under Article 53(2)(c), the factors to be considered are:
>
> a. the gravity of the crime;
>
> b. the role played in the crime by the alleged perpetrator, (…)
>
> c. the interests of victims;
>
> d. the personal circumstances of the accused, such as age and health, (…)
>
> e. additional factors of the same type, (…)

[66] Human Rights Watch Policy Paper. "The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute" Human Rights Watch, June 1, 2005. Available at: https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute

[67] Ibid.

3. A decision whether or not to initiate an investigation or proceed to trial must not be influenced by:

a. possible political advantage or disadvantage to the government or any political party, group or individual;

b. possible media or community reaction to the decision.

Perhaps a specific definition of the 'interests of justice' will not be found at present until the ICC indicates these parameters in detail. Right now the Prosecutor and the Pre-Trial Chamber can ‘play’ with the interpretation of the concept, which can become a double-edged sword in the sense that freedom of action can cause controversial reactions in the international community. Such as in the case of Afghanistan scenario, when in April 2019 the Pre-Trial Chamber II dismissed the Prosecutor's decision to initiate an investigation in that country, deciding that the investigation at that stage would not serve the 'interests of justice', mainly arguing that an investigation in Afghanistan would consume resources that could be used for *justice* in other cases.[68]

It is worth asking at this time if it would matter to initiate an investigation in the Colombian scenario and if in the case of the prosecution of state agents not members of the military forces - agents who will not be prosecuted by the SJP - could the Prosecutor consider that under article 53 (1), not only does it meet conditions (a) and (b) but it is also in order with the third condition (c), considering that it is not conceivable to affirm that the investigation would not serve the 'interests of justice'.

This assessment relates to the answer to the research questions and will be conducted in the following chapters.

5 The Special Jurisdiction for Peace difficulties

This chapter will discuss the problems of the SJP regarding the prosecution of state agents who are not members of the military forces and will present answers to the research questions

[68] International Criminal Court-Pre-Trial Chamber II, “Situation in the Islamic Republic of Afghanistan”: Decision Pursuant to Article 15 of the Rome Statute on the authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan. April 2013, 30§95. Available at: https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF

as well. First, I will briefly examine three jurisdiction schemes (domestic, regional, and universal) for a hypothetical indictment of these subjects. Later, I will describe the results of the interview conducted with the group of victims of the Colombian armed conflict, Mothers of False Positives of Colombia (MAFAPO).

Then, I will outline solutions to the problem of the SJP, where I will answer the research questions as an analysis of the case under the ICC scheme.

5.1 Jurisdiction

5.1.1 Domestic

Traditionally, the structures of sovereignty, independence and territorial integrity dictate that individuals should first be investigated and charged under national jurisdiction.[69] Each nation has the authority to impart its own justice in its territories before resorting to or accepting an intervention from a foreign or supranational court. The Colombian armed conflict has produced thousands of violations against humanity, a certain number has been clarified and those responsible have been brought to justice. The SJP was an institutional solution created to bring many of them to justice. However, as I have explained in previous chapters, there are still gaps that are not covered by the SJP.

The key problem that I identified is that the domestic jurisdiction will not be enough, the judgment is not happening since a certain case of unwillingness can be identified; the Colombian authorities have not wanted or have not been able to judge the criminal conduct that [supposedly] have been committed by some high-ranking state agents non-members of military forces.[70] Consequently, if the national courts do not do so, another type of jurisdiction other than the domestic one must be activated.

5.1.2 Regional

[69] Simona Ţuţuianu. *Towards Global Justice: Sovereignty in an Interdependent World* (The Hague, Netherlands: T.M.C. Asser Press, 2013) 96, DOI: https://doi.org/10.1007/978-90-6704-891-0

[70] The aforementioned Law 1957 of 2019 textually mentions that said civilians are not subject to mandatory prosecution by the SJP.

A regional jurisdiction could deal with those responsible that the domestic jurisdiction does not investigate. As I explained in chapter 3, Colombia is part of the Organization of American States (OAS) and therefore is fully adhered to the Inter-American system for the protection of human rights.

The problem here is that both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights investigate and judge just states, not people. The Inter-American Court has condemned the State of Colombia on numerous occasions for human rights violations committed during the armed conflict (e.g. Case of Villamizar Durán et al. v. Colombia).[71] These sanctions have been directed at the state figure and not at individuals; former presidents and defense ministers have not had regional convictions and under the current inter-American system it is not possible to prosecute individuals.

In any case, the regional jurisdiction should not be excluded, it is important that the states are sentenced as well. The Inter-American Court can judge the Colombian state for violations committed by its military or civilian agents, and simultaneously, these agents can be individually sentenced through another type of jurisdiction.

5.1.3 Universal

The principle of universal jurisdiction is defined by Xavier Phillipe as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[72] However, thinking about a trial of Colombian civil agents by a foreign court invoking the principle of universal jurisdiction seems a – fairly - distant scenario. There are no clear nor direct precedents in the Colombian judicial record that indicate the slightest possibility of this happening,

[71] Decision of November 20, 2018, Inter-American Court of Human Rights, Case Villamizar Durán and Others, the Colombian State is condemned for the execution of civilians by the military between 1995 and 1997 to show them as casualties in combat

[72] Xavier Philippe. The principles of universal jurisdiction and complementarity: how do the two principles intermesh? *International Review of The Red Cross*, Volume 88, no. 862, June (2006): 377, Available at: https://international-review.icrc.org/articles/principles-universal-jurisdiction-and-complementarity-how-do-two-principles-intermesh

as it did – e.g., - with the arrest of the Chilean dictator Augusto Pinochet in London in 1998,[73] and right now no other state has even implicitly declared activating universal jurisdiction to investigate crimes of the Colombian armed conflict and then prosecute civilian state agents.

My position is that if the gaps of the SJP do not allow the described civilians to be tried, and if domestic, regional or universal jurisdiction cannot be activated, it is the duty of the ICC - recognizing the principle of complementarity - to initiate an investigation into these cases.

5.2 Dialogue: Madres de los Falsos Positivos de Colombia - MAFAPO[74]

The organization *Madres de los Falsos Positivos de Colombia*[75] (MAFAPO) was created in 2010 by relatives of the victims of extrajudicial executions publicly called 'false positives', case 03 of the SJP, in which at least 6,402[76] cases of 'murders and forced disappearances presented as casualties in combat by state agents' are investigated.

During the research stage, I conducted an interview with the MAFAPO organization where, beyond talking about the details of the cases and the investigations, I asked about the concepts of justice, truth and reparation that the Colombian victims of state crimes have. The position of the victims in relation to the SJP and a hypothetical trial of state agents not members of the military forces by the ICC was also examined.

The results were far from unexpected. The organization states that alternative penalties for lower-ranking soldiers and military leaders can function as reparation tools. However, they firmly believe that those most responsible – those who ordered the murders or were aware of their commission – must be investigated and fully tried. Their belief is clear and unmistakable: imprisonment for high-ranking military and civilian state agents. There is no distinction if

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[73] Máximo Langer. Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction, *Journal of International Criminal Justice*, Volume 13, Issue 2, May (2015): 246, DOI: https://doi.org/10.1093/jicj/mqv009

[74] Full transcript of the interview can be found in the appendix to this thesis. The interview was conducted in Spanish and later translated into English.

[75] Mothers of False Positives of Colombia.

[76] Data confirmed by the SJP in Auto [Judicial edict] 033 of 2021. These four digits became a symbol of the fight of the victims of crimes committed by the state. The number transcended beyond the cases of 'false positives' and is currently a direct social accusation of impunity in Colombia's armed conflict.

that sentence falls on a military commander, a former president or defense minister, the organization advocates retributive justice for those responsible for the murders.

Regarding the SJP, they recognize that the new court has been important for the building of the truth about what happened in the armed conflict. The SJP gave victims a new voice and let them clarify the circumstances of many of the murders and crimes committed by the state, paramilitaries and/or state agents; something that had not been achieved in ordinary justice. Nevertheless, they affirm that the role of the new court has been very limited and leaves many gaps. At first, MAFAPO was against the creation of the SJP because they affirm that they are not part of the armed conflict, their victims were not part of any group in combat, on the contrary, they were innocent civilians who were killed by the Colombian Army.

MAFAPO says that 'much truth' is still missing and they affirm that many members of the army are being manipulated during the hearings, perhaps – as they affirm - to protect those truly responsible. They also accuse the lack of diligence in opening cases, leaving many crimes with pending investigations.

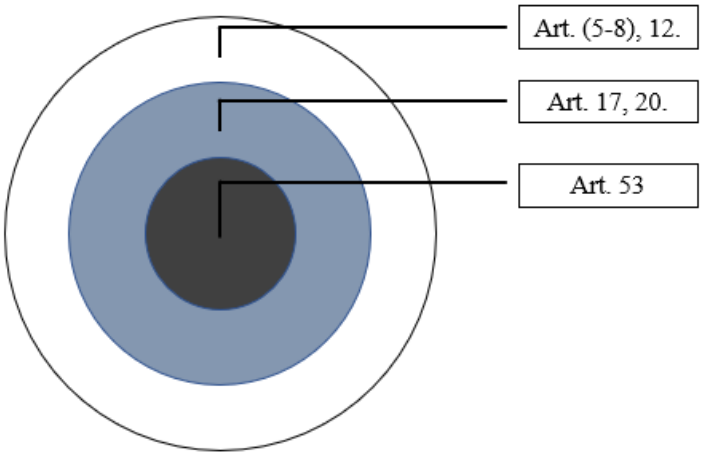
Regarding a hypothetical intervention of the ICC in the Colombian scenario, the organization fully supports the activation of this international jurisdiction. MAFAPO affirms that they do not believe in the criminal justice system in Colombia because they consider that there is a lot of complicity between the judicial agents of the state. They believe that Álvaro Uribe, former president during 2002-2010 - the period when the largest cases of 'false positives' were registered - will not voluntarily submit his case to the SJP. For this reason, they strongly support the ICC investigating the Colombian armed conflict and prosecuting those responsible, since domestic justice has failed in said mission.[77]

In this case, the view of the victims is clear; if the 'interests of justice' are consistent with the gravity of the facts and the 'interests of the victims', it is needed to question if there is actual legitimacy to request the intervention of the ICC in the Colombian scenario to judge the state agents that the SJP will not take charge of.

[77] Colombian justice has not proven to be one hundred percent impartial or effective when judging state agents. The MAFAPO organization states that the SJP has many pending tasks in many regions that are not feasible, which is why there is a hint of impunity in several cases.

5.3 Solutions: intervention of ICC

The possibilities of a domestic solution of not prosecuting high-ranking state agents in the Colombian armed conflict have been exhausted. Thus, it is time to conduct an admissibility analysis under the ICC scheme according to specific provisions of the Rome Statute. Three of the sub-research questions shown in Chapter 2 will be answered according to these provisions.



[78]

5.3.1 Have state agents who are not members of the public force committed crimes under ICC jurisdiction?

The jurisdiction of the ICC is limited to specific crimes affecting the international community. It is needed to examine if, among the cases that the SJP is investigating, one or several crimes that fall within the crimes of article 5 are presented; these are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Various circumstances result in actions that describe at least one of the crimes mentioned above. I have ruled out genocide, war crimes and the crime of aggression for the time being. I will focus specifically on the study of crimes against humanity, clearly identifiable in the Colombian scenario.

[78] To consider a potential investigation, the Prosecutor must go through numerous filters. First, the identification of an international crime (first ring), then an admissibility study (second ring) and finally the study of the case according to the 'interests of justice' (core).

The Rome Statute explains crimes against humanity (article 7) as ‘attacks committed on a large scale or systematically against any civilian population, with knowledge of the attack’. They include murder, extermination, enslavement, forced deportation, imprisonment in violation of fundamental rights of international law, torture, sexual violence, persecution of a group or collective due to race, political ideology, nationality, ethnicity, culture, gender, forced disappearance, apartheid, other 'inhuman' acts with the intention of causing suffering or harming physical or mental integrity.

If we analyze two specific cases of the SJP; case 06 (the massacre of members of the Patriotic Union political party -UP) and case 03 (extrajudicial killings known as 'false positives'), it is possible to recognize that in both cases there were murders of civilians, attempted extermination, and persecution of a group due to political ideology, forced disappearance. These cases were committed systematically and on a large scale. In case 03, the extrajudicial homicides were committed throughout the territory for a prolonged period. The number of victims and disappearances is more than six thousand.

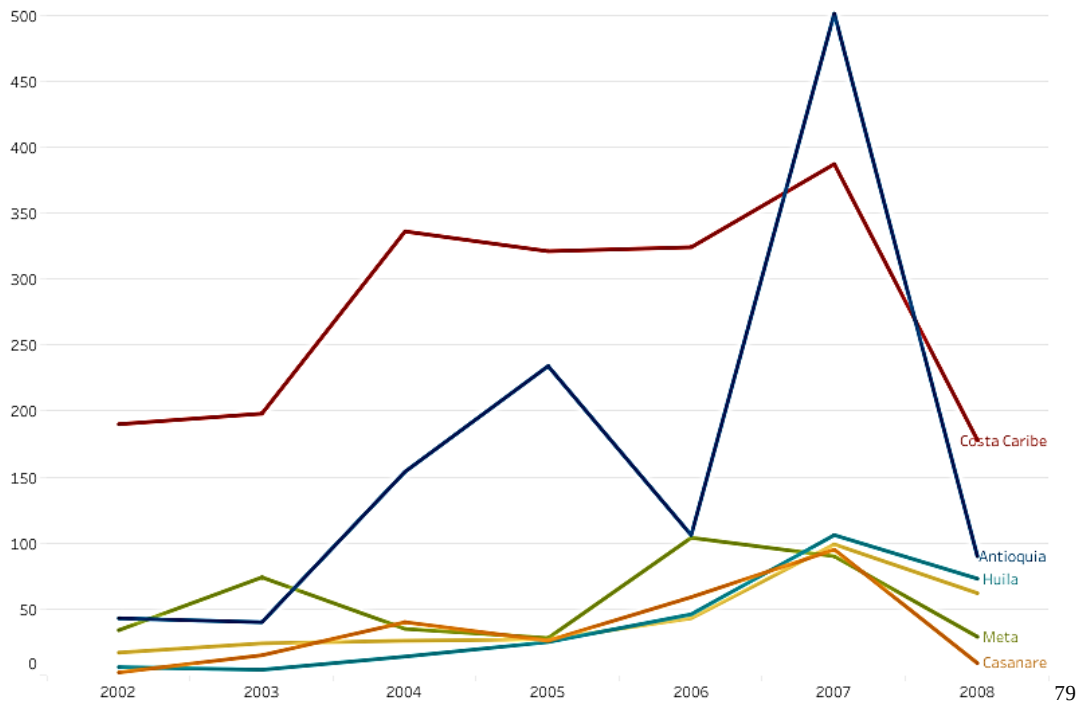


Figure 1: Case 03, SJP: Extrajudicial executions presented as casualties in combat in the Caribbean Coast, Antioquia, Huila, Meta and Casanare, period 2002-2008.[80]

[79] The cases increase from 2002. The peak take place between 2006 and 2008, the final years of the administration of Álvaro Uribe.

The preceding shows that there were human rights violations that correspond to the conducts described by the Rome Statute in article 5. Crimes against humanity (article 7) were indeed committed in the Colombian case.

Now it is time to analyze whether there are preconditions for the Court's exercise of jurisdiction. According to article 12, the first precondition refers to the fact that the state that becomes part of the Rome Statute accepts – automatically – the jurisdiction of the Court with respect to the crimes of article 5, for the case of study, crimes against humanity.

There is no need to study the second and third preconditions in the Colombian case because the first precondition of article 12 is easily identified, considering that Colombia is part of the Rome Statute.

Regarding article 13, the Court will exercise jurisdiction in respect to article 5 crime if (1) a situation where one or more crimes have been committed is referred to the Prosecutor by a State Party under article 14 (referral of a situation by State Party), (2) a situation where one or more crimes have been committed has been referred to the Prosecutor by the Security Council under Chapter VII of the Charter of the United Nations, (3) a situation in which the prosecutor has initiated an investigation of a crime according to article 15 (powers of the Prosecutor). The third condition is the one that applies in this case: A *proprio motu* investigation by the ICC Prosecutor.[81]

So far it has been reviewed that the ICC can exercise jurisdiction in the present case because Colombia is a state party and certain facts that constitute crimes against humanity can be identified. Therefore, the answer to point 4.3.1 is yes, state agents who are not members of the public force have committed crimes identifiable in those of article 5 of the Rome Statute and are therefore subject to investigation by the ICC.

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[80] Special Jurisdiction for Peace. *Caso 03: Asesinatos y desapariciones forzadas presentados como bajas en combate por agentes del Estado* [Case 03: Murders and forced disappearances presented as casualties in combat by State agents]. Chamber for the recognition of truth, responsibility, determination of facts and conducts ruling no. 033 of 2021. Available at: https://www.jep.gov.co/especiales1/macrocasos/03.html

[81] The other two conditions are not believed [realistically] feasible, no State Party will refer the situation to the Prosecutor nor will the Security Council of the United Nations

5.3.2 Are there cases against state agents who are not members of the public force that would be admissible under ICC jurisdiction?

Law 1957 of 2019[82] describes extensively the personal jurisdiction of the SJP. The people who will be mainly declared responsible are; combatants from illegal armed groups, members of the public force and civilians who took part in the armed conflict. As I explained in chapter 2, the jurisdiction of the SJP - technically - does include state agents who are not members of the public force, but the jurisdiction is only activated by the voluntary agreement of those specific agents. It is a situation that - realistically - will not happen, considering that many of the agents have denied their direct participation in the events. Possible

In any case, article 17 of the Rome Statute explains the main issues of admissibility of a case before the ICC.

1. The ICC will determine whether a case is inadmissible if:

Provision	Colombian case
a) the case is being investigated or prosecuted by a State over which the ICC has jurisdiction, unless the State is unwilling or unable to carry out the investigation or prosecution.	In these cases, the specific Colombian case of this study has not been tried nor is it being tried by any state, there has never been any trial of Colombian state agents who are not members of the military forces in any other state - for crimes within the jurisdiction of the ICC - and that the SJP is judging at the moment.
b) that the case has been investigated by a State over which has jurisdiction over it and the State has decided not to prosecute the person, unless the decision resulted from the State's unwillingness or inability to genuinely investi-gate.	
c) that the person concerned has been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 (*Ne bis in idem*).	
d) The case is not of sufficient gravity to justify further action by the Court.	When talking of crimes against humanity, it is assumed that the facts are grave enough to

[82] Article 63.

	justify the adoption of measures by the ICC.

2. To determine the unwillingness in a particular case, the ICC will consider (according the principles of international law):

Provision	Colombian case
a) that the trial has already been under way or that a domestic decision has been adopted with the purpose of shielding the person in concerned from criminal responsibility for crimes within the ICC's jurisdiction, according to article 5.	There has been no trial. There is a reluctance of the state to try these specific state agents.
b) unjustified delay in the trial, incompatible with the intention to make the person appear.	
c) No independence nor impartiality in the trial.	

3. To determine inability to investigate or prosecute in a case:

Provision	Colombian case
The ICC will examine whether the State, due to the total or substantial collapse or unavailability of its national judicial system, is unable to obtain the accused, necessary evidence, or testimony, or is unable to carry out any proceedings.	There is an ability to investigate. The Colombian administration of justice is indeed able to investigate these state agents. The creation of the SJP as a specific court to judge serious human rights violations during the period of the armed conflict had the goal of judging all those most responsible. However, specific state agents who had direct and complete control of the military forces, which committed numerous crimes against the civilian population, are basically left out of its jurisdiction.

Meanwhile, in relation to the principle of *Ne bis in idem* defined in article 20;

Provision	Colombian case
1. The ICC cannot try a person for the same conduct already tried by the ICC (either guilty or innocent).	In the case study, none of these situations occurred. Neither the ICC nor domestic courts have tried these subjects. (Precisely, the SJP will not do it and that is the core of this investigation)
2. In the same way, other courts cannot try a person already convicted by the ICC for the same facts.	
3. The ICC will not try anyone prosecuted by another court for facts relating to Article 5 crimes; unless the initial tribunal intended to shield the person concerned from criminal responsibility for crimes within the ICC's jurisdiction or was not an impartial/independent tribunal.	

For the above reasons, the answer to point 4.3.2 is affirmative as well; state agents not members of the military forces - not tried by the SJP - have not been prosecuted by the ICC or by domestic courts. In this sense, these cases would be admissible under the jurisdiction of the ICC.

5.3.3 Would the prosecution against state agents who are not members of the public force serve the 'interests of justice'?

The initiation of an investigation before the ICC depends largely on the judgment of the Prosecutor. In section 4.2 of chapter 4 of this study, it was explained that initiation is described in article 53 of the Rome Statute.

In short, the Prosecutor must make a comprehensive review of the situation; understanding that the facts could constitute a serious violation of international criminal law and could comprise crimes under article 5. He must also carry out an admissibility study according to article 17 and rule out that the investigation would not serve the 'interests of justice'.

I have affirmed and explained the reasons why the Colombian scenario meets the conditions of article 5 (especially article 7) and article 17. Well, taking into account - for example - the crimes of SJP's case 03, these were homicides committed against civilians, it would not be

reasonable to dismiss them as crimes against humanity. Those responsible are the high-ranking military and civilian commanders. The latter are, however, not being judged.

To open an investigation would indeed be in the 'interests of justice' because we are talking about not tens, but thousands of serious crimes committed systematically, in which there are victims who are interested in clarifying the facts and punishing the high commanders, civilians and non-civilians. The voice of the MAFAPO organization is a forceful example of the importance of prosecuting high-ranking civilians. It is a robust argument to believe it is not enough to only prosecute military personnel.

A comprehensive concept of justice must include, as far as possible, the prosecution of civilian commanders who may have knowledge of the facts, either by action or omission. The 'interests of justice' are not intended to *convict* those responsible - because the presumption of innocence[83] must be always respected - but to bring individuals to trial who, under certain conduct, may have committed crimes under the jurisdiction of the ICC.

The victims ask for that. That at least those presumed responsible for atrocious crimes be brought to trial and that an impartial judge of the highest quality be the one who decides, based on evidence collected by an equally impartial Prosecutor.

The logical point is to conclude that there are sufficient grounds to prosecute state agents who are not members of the military forces and declare how their participation was vital in the occurrence of the crime. I have determined that there is jurisdiction and that the case is admissible. As explained in Chapter 4, determining whether an investigation is in the 'interests of justice' answers to the prosecutorial discretion. In addition, Professor Jo Martin Stigen reflects that a broad discretion from the Prosecutor regarding the 'interests of justice' is needed so that the 'ICC can send clearer and more nuanced messages as to how states should perform in a spectre of situations'.[84]

[83] Article 66, Rome Statute.

[84] Jo Martin Stigen. *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, (Leiden: Martinus Nijhoff Publishers, 2008), 358. DOI: https://doi.org/10.1163/ej.9789004169098.i-536

In my opinion, the investigation of the Colombian scenario would serve the interests of justice and therefore the answer to point 4.2.3 is also affirmative, state agents who are not members of the military forces should be prosecuted.

In the next chapter, I will answer the last sub-research question as I analyze issues related to human rights in the intervention of the ICC in the Colombian SJP case, concerns arising from the research problem. A judgment about the main research question will also be presented.

6 Human rights implications

In this last section, I will observe the consequences of not prosecuting state agents who are not members of the military forces. Mainly, I am discussing about a serious impact to the right to truth and a significant increase in the levels of impunity in Colombia. Highlighting the importance of the human rights crisis in Colombia is decisive to consider any type of intervention by the ICC in the country.

6.1 Right to truth

In a country like Colombia, where thousands of violations of human rights and international criminal law took place – and continue to take place today – it is technically impossible to investigate each one of the cases. Bringing to justice the state agents who were at the head is a way that international criminal law uses to facilitate the purpose of achieving justice in macro cases where systematic violations have occurred.

Trials against the state agents conducted so far in Colombia, whether through ordinary justice or through the SJP, have been a monumental advance in clarifying the facts and human rights violations committed during the armed conflict. But any gap or judicial unwillingness-negligence provokes a new violation: affectation of the right to truth in its individual (immediate victims) and collective dimension (the right of society to know the truth about serious human rights violations).[85]

[85] Grażyna Baranowska and Aleksandra Gliszczyńska-Grabias, "«Right to Truth» and Memory Laws: General Rules and Practical Implications," *Polish Political Science Yearbook* 47, Issue 1, (2018), 98, DOI: dx.doi.org/10.15804/ppsy2018107

The right to truth derives from other rights. It is part of the right to reparation that victims of human rights violations have; to know what really happened, why it happened, when it happened and who caused it:

> This right entitles relatives to be informed about the fate and whereabouts of the victim(s), or their remains of her. It also encompasses access to factual and other relevant information concerning the violation, including archives.[86]

Colombian victims must know the place and fate of their relatives, to bury their bodies and officially close their wounds. But building historical memory has been a greater challenge in countries in conflict. Building peace depends on healing those kinds of wounds, tragedies are closed with truth.

On the other hand, the right to truth is also derived from the right to justice. Thus, the 1948 Universal Declaration of Human Rights states that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[87]

Meanwhile, the International Covenant on Civil and Political Rights recognizes justice as a right with all its guarantees.[88] Access to institutional truth depends intrinsically on access to efficient and reliable justice, as the UN Human Rights Council stated in 2012.[89] A judicial system is necessary for providing all the guarantees to the victims so that remedies reach an optimal reparation, to the greatest possible degree.

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[86] Ilias Bantekas and Lutz Oette, *International human rights law and practice*. (Cambridge: Cambridge University Press, 2013), 550.

[87] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 8. Available at: https://www.refworld.org/docid/3ae6b3712c.html

[88] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Preamble & Article 14, Available at: https://www.refworld.org/docid/3ae6b3aa0.html

[89] UN Human Rights Council, Right to the truth : resolution / adopted by the Human Rights Council, 10 October 2012, A/HRC/RES/21/7, p.2, Available at: https://www.refworld.org/docid/50ae27412.html

The International Convention for the Protection of All Persons from Enforced Disappearance expressly describes the right to the truth as the 'right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person',[90] establishing the responsibility of states to comply with it.

The Rome Statute does not specifically articulate the right to the truth, and it has been stated that the ICC should have a greater forum for the participation of victims,[91] which unfortunately does not happen at present. Even so, the right to the truth could be indeed, the core of the investigation. Klinkner and Davis quote Mettraux as follows; 'the primary, and perhaps most important, right of victims in the context of international criminal proceedings is their right to the truth'.[92] The UN Human Rights Commission has stated[93] that the right to truth is closely related to other human rights and announces that both truth commissions and international tribunals constitute important means to guarantee such right.

It is an argument I strongly support. The ICC must work more for the victims; the investigative power of the ICC cannot be consumed in a demonstration of retributive justice, the international jurisdiction must demand a more active role from the victims, who are the pillar of the procedure in these cases where gross violations of human rights have occurred.

The MAFAPO organization manifests it repeatedly. The victims want truth, and that truth is not limited only to the trial of the militaries. Many victims of the Colombian armed conflict try to understand what happened in their villages, how their relatives died and who ordered the crimes. It has been shown that in thousands of cases the state was to blame, but how far does the responsibility go? What is the threshold?

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[90] UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Preamble & Article 24, Available at: https://www.refworld.org/docid/47fdfaeb0.html

[91] Melanie Klinkner and Howard Davis. (2019). *The Right to The Truth in International Law: Victims' Rights in Human Rights and International Criminal Law.* (London: Routledge, 2019). 230-231. DOI: https://doi.org/10.4324/9781315659787

[92] Ibid, 200.

[93] UN Commission on Human Rights, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006, E/CN.4/2006/91, p. 22-23 §55-61 Available at: https://www.refworld.org/docid/46822b6c2.html

The Colombian Truth Commission[94] published its final report in August 2022. In the document are presented a robust and detailed series of findings on the Colombian armed conflict, and the same time recommendations for the construction of a country in peace for many generations. According to the Commission, the right to truth is a key element in the peace building in Colombia,[95] and through it, the dignity of the victims of the conflict can be respected, avoiding the repetition of those crimes.[96]

If there are no adequate convictions for those who caused heavy damage, there is no justice. And if there is no justice there will be no truth. A culture of revictimization and impunity will be fostered if the military are the only ones convicted of serious human rights violations.

6.2 Impunity in Colombia

In my view, omitting the prosecution of state agents who are not members of the military forces would maintain high levels of impunity in Colombia. If those most likely to be responsible - former presidents, defense ministers, among other civil agents - are not brought to justice, then a culture of impunity is preserved. It maintains a nation where the 'almighty' state can get away with any misconduct or wrongful conduct, even if it is a grave human rights crisis.

With various conflicts still ongoing, Colombia's stability remains at constant danger. Judging civil state agents would not only be convenient for the protection of the right to the truth that the victims and society have, but it would also mean an important precedent for the future. I am talking about a precedent in which the high command of the state is also responsible for serious human rights violations, something that – surprisingly – has never happened in Colombia. The minimum is a trial, because procedural guarantees will not be ignored, but the popular mandate must also comprise the duty to respond to society, whether politically or judicially.

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[94] The Colombian Truth Commission is a great help for criminal justice procedures but this institution created in 2017 is not part of any court nor does it declare individual responsibility, it has no jurisdiction.

[95] Commission for the Clarification of Truth, Coexistence and Non-Repetition, *Hay futuro si hay verdad. Informe Final de la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*, Hallazgos y recomendaciones (Bogotá, Colombia, August 2022), 59. Available at: https://www.comisiondelaverdad.co/hay-futuro-si-hay-verdad

[96] Ibid, 649.

A strong argument against this dissertation would say that it is enough to judge the military to satisfy the desire for justice of a vulnerable society. But is it? The SJP has started to function, and many criminals are being judged. However, in a country with institutional fragility like Colombia, it is risky and - even - slightly naive to think that the solution lies in judging middle and replaceable commandants.

The Appeals Chamber of the Court of Sierra Leone has expressed itself on impunity in the trial against Charles Taylor, former president of Liberia:

> all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice‖ and thereby end ―the prevailing situation of impunity.[97]

Indeed, ending impunity must be a top priority in the duty of states to protect human rights and to prevent the repeat of serious violations. The *ad hoc* tribunal of the former Yugoslavia also brought top political figures to trial; in the case of Radovan Karadžić,[98] the courtroom explained the importance of judging a political leader of a civilian nature who had influence and power over different military groups, which they acted with total impunity during their mandate.[99]

On the other hand, the ICC has brought to trial and has proposed to bring to trial political leaders and not only strictly military commandants. One of the most emblematic cases is the one of the former president of Sudan; Omar al-Bashir, investigated for violations of articles 6, 7, 8 of the Rome Statute during the Darfur War.

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[97] Special Court for Sierra Leone. Appeal Judgment against Charles Ghankay Taylor. Case No. SCSL-03-01-A, Appeals Chamber. (26 September 2013) 153. Available at: http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf

[98] Karadžić was the president of Republika Srpska for over four years in which he fully controlled the army of that nation. He is a close antecedent of a non-military civilian agent subject to an international criminal tribunal. The court of the former Yugoslavia declared Karadžić's individual criminal responsibility for the commission of genocide, crimes against humanity, violation of customs of war, among others.

[99] Prosecutor v. Radovan Karadžić (public redacted version of judgement issued on 24 March 2016 Volume I of IV), IT-95-5/18-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (24 March 2016) 1969§4812. Available at: https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf

In the 2019 judgment, the ICC emphasizes acts to end impunity,[100] inviting the African Union to facilitate the work of the Prosecutor and the judges in the case of the former Sudanese ruler. Moreover, the ICC recalls the scope of the preamble of the Rome Statute to achieve the prevention of crimes and to avoid impunity,[101] the same that puts humanity at risk if potential criminals who have committed crimes under the jurisdiction of the ICC are not tried.

In October 2021, the Government of Colombia and the ICC Prosecutor signed a justice cooperation agreement that resulted in the closing of the preliminary examination in Colombia.[102] This was surprising considering the publicly known position of former President Iván Duque and his party about the peace process, of which they were always opposed.

Not a few analysts considered the Prosecutor's decision risky, which, according to Human Rights Watch analysts, Juan Pappier and Liz Evenson, was made 'without consulting the victims or civil society organizations'.[103] Additionally, without the observant eye of the ICC, domestic justice will not be committed to doing the 'minimum' to keep the ICC jurisdiction out of the Colombian scenario.[104] Nevertheless, article 6 of the cooperation agreement implies that the Prosecutor may reconsider the opening of the preliminary examination if the situation in Colombia does not evolve positively; which in my opinion should be done according to what I have defended throughout this study.

The previous paragraphs answer the last research sub-question and build the answer to the main question: under the concept of the 'interests of justice', the ICC should intervene and, consequently, investigate and accuse state agents who are not members of the military forces.

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[100] The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal), No. ICC-02/05-01/09 OA2, The Appeals Chamber, International Criminal Court, (6 May 2019) 22§3, Available at: https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-0

[101] Ibid, 61§121

[102] International Criminal Court-Office of The Prosecutor, "Cooperation agreement between the office of the Prosecutor of the International Criminal Court and the Government of Colombia", (October 28 2021) 3, Available at: https://www.icc-cpi.int/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf

[103] Pappier, Juan; Evenson, Liz. 'ICC Starts Next Chapter in Colombia, But Will It Lead to Justice?', EJIL: Talk! Blog of the European Journal of International Law (December 15 2021), Available: https://www.ejiltalk.org/icc-starts-next-chapter-in-colombia-but-will-it-lead-to-justice/

[104] Ibid.

My vision is clear, if domestic jurisdiction does not investigate non-military state agents, and the jurisdiction of the ICC is not activated, then the levels of impunity will be maintained in Colombia, also affecting the right to truth. Skaar and García-Godos explain policies that affect immunity and responsibility, the 'widespread official and public denial or justification of past atrocity'[105] have occurred for years in Colombia; for example, former President Álvaro Uribe has justified and misrepresented several times the facts of the crimes of SJP's Case 03,[106] publicly discerning against what the SJP or the Truth Commission has said.

In such a scenario, it will be very difficult for the victims to have respect for their relatives who fell in the war and impunity will be perpetuated, without knowing who is truly responsible. A violation does not end until justice is done, and in this case human rights continue to be harmed.

7 Conclusion

The intervention of the ICC in Colombia is a scenario that I have studied during the discussion of this dissertation. Neither the ordinary nor the special domestic jurisdiction have fully granted the protection of the right to the truth of the victims, causing a historical impunity to be perpetuated over time. The analysis of the research problem led me to analyze one by one the steps that the ICC Prosecutor must take to consider the initiation of an investigation of the Colombian case before the ICC. Once the jurisdiction and admissibility issues had been analyzed, the debate focused on the discretion of the Prosecutor to analyze whether the investigation of the case would serve the complex concept of 'interests of justice'.

The discretionary power of the Prosecutor means that there is no explicit or clear guideline as to what serves the 'interests of justice'. For this reason I built an argument based not only on the gravity of the crimes committed by non-member state agents of military forces, but also

[105] Skaar, Elin; García-Godos, Jemima; Collins, Cath. 2013. " From Impunity to Accountability for Human Rights Violations in Latin America: Towards an Analytical Framework." Paper presented at European Consortium for Political Research (ECPR), (Bordeaux, France, 5th-7th September, 2013), 25. Available at: https://open.cmi.no/cmi-xmlui/handle/11250/2474859

[106] Piñeros, Mateo. "«Falsos positivos parecieron estrategia para deshonrar la seguridad democrática: Álvaro Uribe»" Blu Radio, October 2, 2022. Available at: https://www.bluradio.com/nacion/falsos-positivos-parecieron-estrategia-para-deshonrar-la-seguridad-democratica-alvaro-uribe-rg10

on the voice and opinion of specific victims of the Colombian armed conflict. The opinion of the victims consulted is that the ICC should be the court that deals with the Colombian case, the latter considering the mistrust and vulnerability of domestic justice when prosecuting state agents.

Despite the scenarios of dialogue, encounters or alternative mechanisms between victims and alleged perpetrators; it has not been possible for justice to be complete. Several actors of the armed conflict have accepted the peace process as a tool for truth and progress, but the detractors - who have allegedly violated human rights - remain reluctant to collaborate with the SJP or the Truth Commission and at the same time are unaware of many facts of the conflict, re-victimizing many groups.

The activation of international jurisdiction to accuse Colombian individuals would mean that the ICC would invest significant resources – time, capital, personnel – when executing investigation and prosecution tasks in the Colombian scenario. Although the resources of the ICC are certainly limited, a trial in Colombia would also be an important effort to ensure that the principles of international law are respected, which is one of the many objectives of the Rome Statute.

It is impossible to investigate all serious crimes under international criminal law. Nevertheless, it is necessary for the court to work hard in prosecuting even more perpetrators in different parts of the world beyond Africa and Asia, where the attention of the ICC has been mainly focused. The hypothetical intervention in Colombia could help to prevent impunity in neighboring countries. An important precedent would be built in the region, just like the investigation initiated in Venezuela. This could result in the development of criminal and human rights legislation to protect victims, strengthen the right to truth and decrease levels of impunity, not only in Colombia but also in other nations that have suffered serious human rights violations committed by state agents.

The progress of nations should not only be considered under the economic development or wealth of the countries but also in the security of its inhabitants and their perception of justice. Seeking reparation and healthy democracy is what will ultimately serve the 'interests of justice'. A peaceful nation with low or no impunity will be able to live collectively in peace and avoid serious human rights violations in the future.

In several nations this perception of justice is related to the impunity resulting of the commission of these grave crimes. A genuine development will be achieved if - in certain cases - it is the international jurisdiction the one that helps to build the notions of justice and truth.

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Appendix

1. Interview[107] Madres de los Falsos Positivos de Colombia – MAFAPO[108]

1.1. English version.

1- How was MAFAPO born and what are its objectives?

Well, I must tell you that MAFAPO was born the moment I found out that my brother[109] was found [dead] in Ocaña (Norte de Santander) along with the young boys from Soacha as a guerrilla member killed in combat.

He disappeared on August 10, 2008 and was found dead on August 12, 2008. When I was looking for him, I saw the news of what had happened to the young boys of Soacha, but I never thought that my brother was part of this macabre act that was taking place. I went to Ocaña to recover his body, bring it to Bogotá and file the respective complaints. In November of that same year I went to look for the mothers of Soacha because what was happening seemed very serious to me, this could not go unpunished, it could not remain silent; it was something serious that the state had done and it had to be denounced.

I saw that these women are mostly families that have been displaced from their lands. These ladies did not even go to primary or secondary school, they were very vulnerable families. I knew that I had to pursue that war with them, look for them and fight with them and for my brother's situation to show that they were not guerrilla members. That is why in that November I went to Soacha, to look for these ladies, thanks to the help of the *personero*[110] of Soacha at the time.

He helped me to get the contacts of the ladies, we began to meet in the *personería* [his office]. He as a lawyer explained to us the paths that we needed to start walking, everything that we

[107] The dialogue was held with one of the founding leaders of the organization. The identity of the person is kept anonymous.

[108] Contact: https://mafapo.org/ and https://twitter.com/MAFAPOCOLOMBIA

[109] The person's name has been anonymized.

[110] public official in charge of monitoring human rights, guaranteeing the rights of citizens, among other duties.

were going to face. A couple of months ago I met him again and he told me, 'Do you remember that this was going to be a fifteen-year fight?' It has been fourteen years now and our fight at that time was to embark on this path in search of justice and truth, and we have been working on this for fourteen years, for justice and truth.

2- What have been MAFAPO's main achievements?

I think that the greatest achievement we have had with MAFAPO was to have shown that this was a systematic practice and even more so 'when the SJP confirmed the number of cases; 6402[111], it was really demonstrated of the practice that had been happening, and now in April and May [2022]. The two hearings that were held where there were some of the soldiers who made this public acknowledgment, I think it has been one of the great achievements that MAFAPO has had. They publicly said that our relatives were not guerrillas, that they had been assassinated, that yes, there was pressure for those results that the state demanded of them.

[*About the political projects of the organization*]: There is an interest in continuing to fight, some preparation is lacking but it is important to reach the Congress at some point. There are many things that need to be fought for so many abuses that the country has experienced. I would consider that at some point we could get there to work.

3- Do you think that the role of the Special Jurisdiction for Peace (SJP) has been satisfactory so far?

I would think it has had an important role, really.

At the beginning, we were very opposed to these cases reaching the SJP, why? Because when this transitional justice system was created, we knew that the actors involved in the armed conflict were going to be investigated. We were aware that our relatives did not belong to any armed group, we were never at war with anyone, our relatives did not belong to any group, nor had they been fighting anywhere. So, we said 'how are they going to be involved in this if they were never fighting?'.

[111] 6402 confirmed cases of extrajudicial killings. Case 003 Colombian Special Jurisdiction for Peace.

After all, the macro case 003 was opened, I don't know how they made that decision even though there was a lot of rejection from our cases. But then we began to understand how important it was to know the truth, to understand a little why this had happened and, most importantly, for us to be able to get to know who had given the order to commit all these crimes. We knew that there was a guideline created by Álvaro Uribe[112] at that time. I remember that I saw it on television when he publicly announced that according to the results that the army had, they would give them those benefits such as promotions, medals, vacations, and money. We had fully identified the situation.

We began to understand a little how that had developed and the most important thing for us to begin to have those contacts [the militaries] in a somewhat different way with them, that they also felt it in a different way. It was the moment in which we wanted an exemplary conviction, a death sentence, because in the atrocious way things happened, one says 'it's what they deserve, right?'

But it was significant to be able to start interacting with them, to feel they would not feel worried to have a relatively long prison term and that they began to build the path of this truth. To be able to involve more people and to know where this case started [the truth about it]. At the end, these paths of encounters with them happened, but we know that ‘much truth’ is still missing. They arrived with documents in hand because on some occasion a soldier told us that they were still conditioned to how they should say things, how far they should say things and what they should say. They continued to be prepared that way, they were still being manipulated.

In the last hearings, in the last meetings that were made of the testimonies of the military that had already publicly acknowledged these facts, now they take a different attitude, now they say 'yes, I ordered, I was the one who did it', but they have not told us either ‘this was ordered to me, for example, by General Mario Montoya who was the major commander of the Armed Forces at that time'. But [they say] 'yes, I did it, I ordered it, I got it', they still have that limita-

[112] President of Colombia 2002-2006, 2006-2010. According to official statistics, cases of extrajudicial executions (false positives) increased during his terms.

tion, and it is what we have to continue working on because we know that this did not come from there, this came from much higher up [higher ranks].

4- What is MAFAPO's definition of justice?

Well, at this moment the definition of justice has changed a little compared to previous year. Back then we wanted these people who had been involved to pay for the acts committed, justice leads us to that, to pay for an error committed. Today I think we have a different view of this because in the end we are never going to achieve anything, having these people sentenced to thirty, forty or fifty years, because they are never going to bring our relatives back to life.
I would think that they don't either, being deprived of liberty would be their justice, but today I consider that the word 'justice' took another course and that is to lead us to know the truth, to know why all this happened but the most important thing is to be able to reach the creator, the person who ordered all these crimes to be committed and that the full weight of justice falls on that person.

5- Does the trial of those responsible necessarily include a custodial sentence, has an alternative sentence been considered?

In the work we did with the Truth Commission we had the opportunity to interact with them [militaries] face to face in a workshop and have them not in a space of hearings, lawyers, magistrates, but just them and us, being able to listen to them, being able to have future projects , understand how it would be interesting in some way to make reparation on their part, they and us can do work, obviously thinking about the next generations, in the future, in the peace that Colombia needs. To be able to say, 'yes we can forgive, we can have a moment of conciliation and work for a better future that this country needs'.

[*About the trial of state agents who are not members of the military forces*]: I would think - and we have discussed it with my partners- If we managed to reach to that person – the one we want to reach - , be it president, minister of justice or even the major commander who was Mario Montoya, he is the person who must pay for these acts committed. In addition, from there on down [lower ranks] we know from versions that most of them lived under pressure, so there should be justice with a custodial sentence for this real responsible subject. I would be very happy at some point, I don't know if life let us, as It happened, I think, in Chile, I don't know, in some country in South America, where there was a condemned president. That this person pays for all the acts committed in the country.

6- Do you think that justice would be achieved if all the military commanders who ordered the extrajudicial executions were tried?

Totally, I would think so, notice that in the public recognition hearings they only did it with professional soldiers, lieutenants, with colonels, but the general who was there, Paulino Coronado, the guy said that he accepted the cases [which he had been accused] by omission, but we know that the orders did come from the generals to the rest of the army personnel, so I would believe that they should be tried.

7- Is it important to try state agents who are not members of the military forces?

We have requested that *Medicina Legal*[113], CTI[114], to also be also investigated, we know that they are involved, we do not know how much. But we consider that they are directly involved. You know that the CTI is the Technical Investigation Corps and they are the ones who do the removal of the bodies, and it is unheard of to think that if they were called to do the removal and as in the reports they say that they had the boots backwards, that several of the uniforms did not had holes from the shots[115]. How is it that a person who has to be prepared for this mission has not reported that something strange was happening.

Why did *Medicina Legal* let such important things pass in the description of a body so that we could find it? In my brother's case, he had my mom's name here on one arm [tattoo]. And that is not described by *Medicina Legal* in Ocaña. When I filed a complaint with *Medicina Legal* in Bogotá, I said that my brother had a tattoo, if they don't report it for whatever reason, because I don't think a detail like that can be ignored so easily. I work as health personnel and those things cannot happen to us because we know they are very important details that have to be reported. So how involved are they? Then we would believe that not only the military forces should be involved, but rather all those who had to interact with these events.

[113] National Institute of Legal Medicine and Forensic Sciences, part of the Attorney General's Office, in charge of forensic activity in Colombia.

[114] Crime investigation division in Colombia, part of the Attorney General's Office.

[115] In the cases of the 'false positives', it was verified in many of them that the corpses had new boots, put on backwards, uniforms without bullet holes. This shows that whoever dressed the corpses with the intention of passing them off as guerrilla fighters did so carelessly.

I don't know if you saw it, but now we fully know that they had very clear links with the paramilitaries, this wasn't just the military doing it, it was a joint effort with the paramilitaries.

8- Does impunity exist if state agents who are not members of the military forces are not tried?

We are talking about impunity because finally, in the hearing that took place just now in Ocaña that discussed the Soacha cases, we obviously know that the work has been like a macro case and they closed the investigation in the Catatumbo region. Knowing that it was not only the boys from Soacha or those who showed up that were like eleven more cases in the Catatumbo region. We know that there were many more cases, they should have stopped as a first investigation, but then continue with others that will come out more and more.

In fact, during that time in May, I was contacted by a military man who had left the country 'quickly' when this whole situation was exposed. And the guy told me that he had been involved in eleven cases in La Guajira, they are cases that have not been known. So, they closed the investigation in the Catatumbo region, and then they went to other regions, Antioquia, Llanos Orientales, Huila region. And they enclose the investigation in those regions, but we know that there are many cases that have not been reported. They keep contacting me because I am the one who manages the social media [MAFAPO], soldiers call me, people who never reported the cases call me, there are many cases that not even the corpses have been found, so how are they going to say that the investigation is closed? I feel that we are not even in the middle of what happened. Yes, we are talking about impunity.

[*About the 6,402 confirmed cases*]: It is much more than double the number of cases. Much more.

9- What position would MAFAPO have if the trial of state agents who are not members of the military forces is carried out by the International Criminal Court and not by a domestic (Colombian) court?

I would believe that in these events it should be the International Criminal Court who would directly judge and convict these people who were [practically] directly involved in all these events.

I would not agree that it was a Colombian court, you knew that the military criminal justice conducted most of these cases but as we say, 'we Colombians cover ourselves with the same blanket'. I had the opportunity to read many interviews with the military where also at some point when Álvaro Uribe received us at the *Casa de Nariño*[116], I told him how it was possible for a military criminal judge who is supposed to be such a highly trained person, - because you as lawyers have specializations and 'blah blah blah', to become a magistrate or judge you don't earn the diploma in any easy way.

And reading the interviews I realized that there were many inconsistencies between the version of one, the version of the other and the version of another, how a military criminal judge was not going to realize that something strange was happening. Forgive me for the expression 'either they are fool or they are accomplices' and for me they were also accomplices, from the military criminal justice and obviously they are going to defend their military, they are not going to work in favor of the civilian population and they had to support their military. It was seen that way, so I really consider that this should not be brought before a Colombian court.
[*About the hypothetical trial of Álvaro Uribe by the ICC*] Totally, the organization would agree with it, it would be an achievement of the organization. I wish it could, it would be amazing.

[*About Álvaro Uribe's voluntary submission to the SJP]*: He is never going to submit his case to the SJP, we will die without that happening.

1.2. Muestra en español.

1-¿Cómo nace MAFAPO y cuáles son sus objetivos?
Bueno, yo tengo que decirte que MAFAPO nace en el momento que yo supe que mi hermano apareció en Ocaña Norte de Santander junto con los jóvenes de Soacha como guerrillero dado de baja en combate.

Cuando yo lo estaba buscando a él, él desapareció el 10 de agosto de 2008, y aparece muerto el 12 de agosto de 2008. Cuando yo lo estaba buscando yo vi la noticia de lo que había suce-

[116] President's palace.

dido con los jóvenes de Soacha, nunca pensé que mi hermano formaba parte de este acto tan macabro que se estaba viviendo, pero después que yo fui a Ocaña a recuperar el cuerpo de mi hermano y traerlo a Bogotá y hacer las respectivas denuncias, en noviembre de ese mismo año me fui a buscar a las madres de Soacha porque me pareció gravísimo lo que estaba sucediendo, esto no podía quedarse en l impunidad, no se podía quedar callado, era algo grave que había hecho el estado y había que denunciarlo.

Yo vi que estas señoras en su mayoría son familias que han sido desplazadas de sus tierras. Familias en su mayoría estas señoras ni siquiera tuvieron primaria o secundaria, eran familias muy vulnerables, yo sabía que tenía que dar esa guerra con ellas, buscarlas y luchar con ellas y por la situación de mi hermano para demostrar que ellos no eran ningunos guerrilleros. Por eso en noviembre de ese mismo año me fui para Soacha, busqué a estas señoras, con la ayuda del personero de ese municipio en ese tiempo.

El me ayudó a tener los contactos de las señoras, empezamos a reunirnos ahí en la personería, el como abogado nos indicó los caminos que necesitábamos arrancar a caminar, a todo lo que nos iba a enfrentar. Hace un par de meses me volví a ver con él y me dijo ¿recuerdas que esto iba a ser una lucha de quince años?, llevamos catorce años realmente y nuestra lucha en ese momento fue emprender este camino en busca de justicia y verdad, y en esto llevamos catorce años trabajando por la justicia y la verdad.

2-¿Cuáles han sido los principales logros de MAFAPO?

Yo pienso que el logro más grande que hemos tenido desde la lucha de MAFAPO fue haber demostrado que esto fue una práctica sistemática y más cuando la JEP dio esa cifra de esos 6402 se demostró realmente de la práctica que venía sucediendo y ahorita en abril y mayo, las dos audiencias que se hicieron donde hubo alguno de los militares que hicieron ese reconocimiento público, creo que ha sido uno de los grandes logros que ha tenido MAFAPO, ellos públicamente dijeron que nuestros familiares no eran guerrilleros, que sí los habían asesinado, que sí había presión pro esos resultados que les exigía el Estado.

[Acerca de los proyectos políticos de la organización]: Hay un interés de seguir luchando, falta algo de preparación, es importante llegar en algún momento al Congreso. Hay muchas cosas que se necesitan luchar por tantos atropellos que ha vivido el país. Sí consideraría que en algún momento pudiéramos llegar allá a trabajar.

3-¿Creen que el papel de la JEP ha sido satisfactorio hasta el momento?

Creería que ha sido un papel importante realmente. Nosotros en un comienzo estuvimos muy opuestas a que estos casos llegaran a la JEP, ¿por qué? Porque cuando esta justicia transicional fue creada sabíamos que iban a investigar a los actores involucrados en el conflicto armado. Nosotros éramos conscientes que nuestros familiares no pertenecían a ningún grupo armado, nosotros nunca estuvimos en guerra con nadie, nuestros familiares no pertenecían a ningún grupo ni habían estado combatiendo en ninguna parte. Entonces, decíamos 'cómo van a estar ellos involucrados en esto si ellos nunca estuvieron combatiendo'.

Finalmente se abrió el macro caso 003, no sé cómo tomaron esa decisión a pesar de que había mucho rechazo desde los casos de nosotras. Pero luego fuimos entendiendo la importancia que había de conocer la verdad, entender un poco por qué había sucedido esto y lo más importante para nosotros poder llegar a conocer quién había dado la orden de cometer todos estos crímenes. Nosotros sabíamos que había una directriz creada por Álvaro Uribe en ese momento, yo me acuerdo de que lo vi en televisión cuando él públicamente anunció que de acuerdo con los resultados que el ejercito diera les darían esos beneficios como eran ascensos, medallas, vacaciones y dinero. Teníamos plenamente identificada la situación.

Empezar a entender un poco cómo se había desarrollado eso y lo más importante para nosotros empezar a tener esos contactos de una forma algo distinta con ellos, que ellos también lo sintieran de una forma distinta. No era el momento en el que queríamos una condena ejemplar, una pena de muerte porque de la manera tan atroz como sucedieron las cosas pues uno dice 'es lo que merecen, ¿verdad?'

Pero, poder empezar a interactuar con ellos, que no se sintieran con la presión de tener una condena bastante grande y que ellos mismos empezaran a desarrollar el camino de esta verdad, de poder involucrar a más personas y saber desde dónde había llegado esta situación. Se dieron estos caminos de encuentros con ellos, sabemos que falta aun mucha verdad. Ellos llegaban con documentos en mano porque en alguna oportunidad un militar nos dijo que ellos aún seguían condicionados a cómo debían decir las cosas, hasta dónde debían decir las cosas y qué era lo que debían contar, ellos seguían siendo preparados de esa manera, los seguían manipulando.

En las últimas audiencias, en los últimos encuentros que se hicieron de versión de los militares que ya habían reconocido estos hechos públicamente ahora toman otra actitud, ahora dicen 'sí, yo ordenaba, yo era el que hacía', pero tampoco nos han dicho 'es que esto me lo ordenaba, por ejemplo, el general Mario Montoya que era el comandante mayor de las Fuerzas Militares en ese tiempo'. Sino 'sí, yo lo hacía, yo lo ordenaba, yo conseguía', siguen siendo con esa limitante y es lo que tenemos que seguir trabajando porque sabemos que esto no venía de ahí, esto venía de mucho más arriba.

4-¿Cuál es la definición de justicia que tiene MAFAPO?

Bueno, en este momento esa definición de justicia creería que nos cambió un poco en años anteriores porque en años anteriores queríamos que estas personas que habían estado involucradas pagaran por los hechos cometidos, la justicia nos lleva a eso, a pagar por un error cometido. Hoy creo que tenemos otra visión ante esto porque finalmente nunca vamos a lograr nada, tener a estas personas condenadas a treinta, cuarenta o cincuenta años, porque nunca nos van a devolver a nuestros familiares a la vida jamás.

Creería que ellos de una manera tampoco, estar privados de la libertad sería su justicia, pero hoy considero que la palabra 'justicia' tomó otro rumbo y es que nos lleve a conocer la verdad, a saber, por qué sucedió todo esto pero lo más importante es poder llegar a la persona creadora y la persona que ordenó cometer todos estos crímenes y que sobre esa persona sí caiga todo el peso de lo que es la justicia.

5-¿el juzgamiento de los responsables debe comprender pena privativa de la libertad necesariamente, se ha pensado en una pena alternativa?

En el trabajo que hicimos con la Comisión de la Verdad donde tuvimos la oportunidad de interactuar con ellos frente a frente en un taller y tenerlos no en un espacio de audiencia, abogado, magistrado sino ellos y nosotras, poderlos escuchar, poder tener proyectos a futuro, entender cómo sería interesante de alguna manera de reparación de parte de ellos se pueden hacer trabajos ellos y nosotros, obviamente pensando en las próximas generaciones, en el futuro, en la paz que necesita Colombia. Poder decir, sí podemos perdonar, podemos tener un momento de conciliación y trabajar por un mejor futuro que necesita este país.

[Acerca del juzgamiento de agentes estatales no miembros de fuerzas militares]: Yo creería, y lo hemos hablado con las compañeras. Si bien logramos a llegar a esa persona que es donde

queremos llegar, sea presidente, ministro de justicia o inclusive el comandante mayor que era Mario Montoya, es la persona que sí debe pagar por estos hechos cometidos. Además, que de ahí para abajo sabemos por versiones que en su mayoría todos vivían bajo presión, entonces sobre este verdadero responsable sí debería haber una justicia con pena privativa, yo sería muy feliz en algún momento, no sé si la vida nos dé, como sucedió creo que, en Chile, no sé, en algún país de Sudamérica, donde hubo un presidente condenado. Que esta persona pague por todos los hechos cometidos en el país.

6-¿Creen que se lograría justicia en caso de juzgar a todos los comandantes militares que ordenaron las ejecuciones extrajudiciales?

Totalmente, yo creería que sí, fíjate que en las audiencias de reconocimiento público lo hicieron solamente con soldados profesionales, tenientes, con coroneles, pero el general que estaba ahí, Paulino Coronado, el tipo decía que él aceptaba los casos por omisión, lo que se le había imputado, pero sabemos que las ordenes sí venían de los generales hacía el resto de personal del ejército entonces yo sí creería que ellos sí deberían ser juzgados.

7-¿Es importante juzgar a los agentes estatales no miembros de las fuerzas militares?

Nosotras hemos solicitado que también se investigue Medicina Legal, CTI, sabemos que están involucrados, no sabemos qué tanto. Pero consideramos que sí están involucrados directamente. Tu sabes que CTI es el Cuerpo Técnico de Investigación y son los que hacen el levantamiento de los cuerpos, y es inaudito pensar que si fueron llamados a hacer levantamiento y como en los informes dicen que tenían botas al revés, que varios de los uniformes no tenían agujeros de los tiros. Cómo es que una persona que tiene que estar preparada para esta misión no haya denunciado que algo raro estaba pasando.

¿Por qué desde Medicina Legal dejaron pasar cosas tan importantes en la descripción de un cuerpo para que nosotros pudiéramos encontrarlo? En el caso de mi hermano el tenía el nombre de mi mamá aquí en un brazo. Y eso no lo describe Medicina Legal en Ocaña. Cuando denuncié en Medicina Legal en Bogotá dije que mi hermano tenía un tatuaje, si ellos no lo informan por la razón que haya sido porque no creo que se le haya pasado, yo soy personal de la salud y esas cosas no se nos pueden pasar porque sabemos que son importantísimas. Entonces ¿qué tanto están involucrados ellos? Entonces creeríamos que sí se deben involucrar a las fuerzas militares sino a todos los que tenían que interactuar con estos hechos.

No sé si tu viste, pero ahora sabemos plenamente que ellos tenían nexos muy claros con los paramilitares, esto no lo hacían solamente los militares, era un trabajo mancomunado con paramilitares.

8-¿Existe impunidad si no se juzgan a los agentes estatales no miembros de las fuerzas militares?

Estamos hablando de impunidad porque finalmente, en la audiencia que hubo ahorita en Ocaña que se hablaron de los casos de Soacha, obviamente sabemos que el trabajo ha sido como macro caso y cerraron la investigación en la región del Catatumbo. Sabiendo que ahí no fueron solamente los muchachos de Soacha ni los que se presentaron que fueron como once más casos en la región del Catatumbo. Sabemos que fueron muchos más casos, ellos debieron haber dejado como una primera investigación, pero luego continuar con otras que vendrán saliendo más y más.

De hecho, durante ese tiempo en mayo me contactó un militar que había salido del país 'corriendito' cuando se destapó toda esta situación. Y el tipo me dijo que el había estado involucrado en once casos de La Guajira, son casos que no se han conocido. Entonces, si cierran la investigación en la región del Catatumbo, y luego se fueron a otras regiones, Antioquia, Llanos Orientales, región del Huila. Y encierran la investigación en eso, pero sabemos que hay muchos casos que no han sido denunciados. A mi me siguen contactando porque como soy yo la que manejo las redes, me llaman militares, me llaman personas que nunca denunciaron los casos, hay muchos casos que ni siquiera los jóvenes han sido encontrados entonces ¿cómo van a decir que se cierra la investigación? Yo siento que no vamos ni siquiera en la mitad de lo que sucedió. Sí estamos hablando de impunidad.

[Acerca de los 6402 casos confirmados]: Es mucho más del doble de casos. Mucho más.

9-¿Qué posición tendría MAFAPO si el juzgamiento de agentes estatales no miembros de las fuerzas militares lo realiza la Corte Penal Internacional y no una corte domestica (colombiana)?

Yo creería que en estos hechos directamente sería la Corte Penal Internacional quien entrar a juzgar y a condenar estas personas que fueron prácticamente los directos involucrados en todos estos hechos.

No estaría de acuerdo que fuera una corte colombiana, tu sabías que la mayoría de estos hechos los tenía la justicia penal militar pero como decimos nosotros 'los colombianos nos tapamos con la misma cobija'. Tuve la oportunidad de leer muchas entrevistas de los militares donde también en alguno momento cuando Álvaro Uribe nos recibió en la Casa de Nariño, se lo dije yo cómo era posible que un juez penal militar que se supone que es una persona tan sumamente preparada, porque ustedes como abogados tienen especializaciones y 'blablablá', para llegar a ser magistrado o juez no se ganan el diploma de cualquier manera.

Y leyendo las entrevistas me daba cuenta que habían muchas inconsistencias entre la versión del uno, la versión del otro y la versión de otro, cómo un juez penal militar no se iba a dar cuenta que algo raro estaba pasando. Perdóname la expresión 'o son brutos o son cómplices' y para mí también eran cómplices desde la justicia penal militar y obviamente ellos van a defender a sus militares, ellos no van a trabajar a favor de la población civil y ellos tenían que respaldar a sus militares. Eso se vio así, entonces yo realmente considero que esto no debería llevarlo una corte colombiana.

[Acerca del hipotético juzgamiento de Álvaro Uribe por la CPI]: Totalmente, la organización estaría de acuerdo con ello, sería un logro de la organización. Ojalá se lograra, sería algo fabuloso.

[Acerca del sometimiento voluntario de Álvaro Uribe a la JEP]: El no se va a someter nunca a la JEP, moriremos sin que eso ocurra.