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Amnesties as a means of encouraging transition and strengthening the application of IHL in Colombia: The case of the Special Jurisdiction for Peace

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Abstract

Bearing in mind that the peace process between the Colombian government and the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) has been an important milestone for transitional justice, this article aims to share some of the good practices and achievements of this process, as well as the setbacks and

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challenges that could be avoided in future peace processes. The article will highlight relevant contributions from the Chamber for Amnesty or Pardon (CAP) such as impacting the resocialization of former FARC-EP members and developing international humanitarian law discussions in relation to war crimes and less serious crimes. Additionally, it will describe some of the main challenges faced by the CAP, such as the high number of applications for transitional benefits that it receives, the high number of proceedings that it supervises, and the security concerns arising from implementing a peace agreement in a country still in conflict.

Keywords: Colombia, international humanitarian law, non-international armed conflict, amnesties, Special Jurisdiction for Peace, war crimes, transitional justice, Comprehensive System for Peace.

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Introduction

This article aims to present an overview of the recent development and evolution of amnesties within the Special Jurisdiction for Peace (SJP) in Colombia. It will explain the procedure for granting amnesties, especially the requirements that need to be met (fulfilling personal, temporal and material scopes of application), how many have been granted, and the effects of such amnesties. It will also refer to some good practices and achievements, specifically the procedures at the Chamber for Amnesty or Pardon (CAP) that impact the resocialization of former members and collaborators of the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP), like granting conditional release and amnesties and adding people to the list of ex-guerrillas accredited by the national government, thereby giving access to reincorporation programmes. Likewise, the article will show how the CAP has contributed through its case law to some international humanitarian law (IHL) discussions regarding war crimes, landmines, terrorism and rebellion. Finally, the article will highlight the importance of territorial presence as a means of strengthening the SJP and its processes.

As with every process, the Colombian peace process has also had setbacks and challenges. These include receiving a great number of applications from people who cannot fulfil the requirement to appear before the SJP, and having to supervise many other proceedings in addition to granting conditional releases and amnesties. There is also a need to better communicate the benefits granted by the government at the beginning of the implementation of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Peace Agreement) since many beneficiaries are unaware of them, and to enlarge the possible paths to entering reintegration programmes for former FARC-EP members. Furthermore, implementing a peace agreement in a country still in conflict presents several difficulties in terms of security, guarantees of non-repetition, and the reconstruction of the truth.

The contribution of this piece will be to present the lessons learned from the interaction between what was expected by those negotiating the Peace Agreement

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and those creating the legal framework, on the one hand, and the experiences that its development has left to us as judicial operators of the system, on the other. This will provide the reader with a unique perspective on amnesties as a means of ending a non-international armed conflict (NIAC) using the Colombian case. The purpose of sharing this experience is to enlighten other peace initiatives so that they can avoid or tackle the challenges in a better way and adopt the good practices that, in my view, have positively contributed to the implementation of the Peace Agreement.

The legal framework for granting amnesties and results

A short background of the legal framework and the creation of the Comprehensive System for Peace

Colombia has had many armed conflicts during recent decades. This reality, unfortunately, has encouraged over the years the creation of transitional justice mechanisms in order to find a lasting solution to ending war.[1] In 2012 a provision was included in the Political Constitution indicating the exceptional nature of transitional justice's instruments, stating that their "predominant purpose [is] facilitating the end of the internal armed conflict and the achievement of stable and lasting peace, with guarantees of non-repetition and security for all Colombians", and that they "will guarantee, at the highest possible level, the rights of victims to truth, justice and reparation".[2] The provision also states that within the framework of a peace agreement, a statutory law may authorize that "differentiated treatment be given to the different illegal armed groups that have been part of the internal armed conflict and also to State agents, in relation to with their participation in it".[3]

Four years later, in 2016, the Colombian State and the FARC-EP signed the Peace Agreement,[4] and in 2019 the Statutory Law of the Administration of Justice in the Special Jurisdiction for Peace was finally issued.[5] Among the compromises made in the Peace Agreement was the creation of the Comprehensive System for Truth, Justice, Reparation and Non-Repetition, nowadays also known as the Comprehensive System for Peace. In 2017, the Colombian Congress incorporated the System into the Colombian Constitution.[6]

The Comprehensive System for Peace is composed of three mechanisms: the Commission for the Clarification of the Truth, Coexistence and Non-

1 See for example the multiple transitional justice initiatives described in Constitutional Court of Colombia, Judgment C-579/13, 28 August 2013 (Judgment C-579/13), Section 6.2, "Evolution of Exceptional Measures for Peace in Colombia".
2 Congress of Colombia, Legislative Act No. 01, 31 July 2012, Art. 1 (author's translation).
3 *Ibid.*
4 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016 (Peace Agreement), available at: https://bapp.com.co/archivos/Final-Agreement-to-End-the-Armed-Conflict-and-Build-a-Stable-and-Lasting-Peace.pdf (all internet references were accessed in June 2024).
5 Congress of Colombia, Statutory Law No. 1957, 6 June 2019 (Statutory Law No. 1957).
6 Congress of Colombia, Legislative Act No. 01, 4 April 2017 (Legislative Act No. 01 of 2017), Art. 1.

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Repetition, the Search Unit for Missing Persons in the Context of and Due to the Armed Conflict, and the SJP.[7] In addition, the System includes comprehensive reparation measures for peacebuilding and guarantees of non-repetition.[8]

The SJP is the only judicial component of the System. It is a temporary institution that takes priority over all other jurisdictions with regard to conducts committed during the NIAC with the FARC-EP.[9] It is composed of three judicial chambers: the Chamber for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (CATR), the CAP, and the Chamber for the Determination of Legal Situations. It also has a Tribunal for Peace with four Sections: two First Instance Sections, one for Cases of Acknowledgement of Truth and Responsibility and another for Cases of Absence of Acknowledgement of Truth and Responsibility (SAA); a Review Section; and an Appeals Section. Moreover, the SJP includes a Registry and an Investigation and Prosecution Unit (IPU).[10]

The Amnesty Law and the pursuit of the broadest possible amnesty

The SJP aims to balance the centrality of victims and their rights with the need to provide legal certainty to those who participated in the armed conflict.[11] In so doing, it is tasked with investigating, clarifying, prosecuting and judging the most serious crimes committed in the context of the NIAC between the FARC-EP and the Colombian State, and granting the broadest possible amnesty for the less serious crimes. Amnesties are

> a legal instrument that is used so that those who have committed criminal conducts are not tried for them, or so that those who have already been convicted are not subject to the respective sanction and are exonerated from any type of criminal responsibility.[12]

7 *Ibid.* See the respective websites of the SJP, available at: www.jep.gov.co/Paginas/Inicio.aspx; the Commission for the Clarification of the Truth, Coexistence and Non-Repetition, available at: www.comisiondelaverdad.co/; and the Search Unit for Missing Persons in the Context of and Due to the Armed Conflict, available at: https://unidadbusqueda.gov.co/.

8 Peace Agreement, above note 4, pp. 9, 138, 139.

9 Legislative Act No. 01 of 2017, above note 6, Art. 5; Peace Agreement, above note 4, p. 138.

10 Legislative Act No. 01 of 2017, above note 6, Art. 7; Statutory Law No. 1957, above note 5, Art. 72.

11 Legislative Act No. 01 of 2017, above note 6, Art. 12; Statutory Law No. 1957, above note 5, Arts 13, 20; Peace Agreement, above note 4, pp. 74–75.

12 CAP, Judicial Decision No. SAI-SUBA-AOI-D-030-2023, 3 October 2023; No. SAI-SUBA-AOI-D-033-2023, 12 October 2023; and No. SAI-SUBA-AOI-D-018-2023, 21 July 2023 (author's translation). In relation with situations were IHL is applicable, see also transitory Article 30 of the Colombian Political Constitution, added in 1992, which refers to the granting of amnesties to former guerrillas: "The national government is authorized to grant pardons or amnesties for political and related crimes, committed prior to the promulgation of this Constituent Act, to members of guerrilla groups that rejoin civilian life under the terms of the reconciliation policy. For this purpose, the national government will issue the corresponding regulations. This benefit cannot be extended to atrocious crimes or homicides committed out of combat or taking advantage of the state of helplessness of the victim" (author's translation). See also Article 150.17 regulating the granting of amnesties for political crimes by the national congress. Other laws were subsequently approved to expressly prohibit the granting of these types of benefits. Law No. 40 of 1993, "[b]y which the national statute against

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This last task is overseen by the CAP. For this, it applies Law 1820 of 2016, also known as the Amnesty Law, the main legal framework by which Colombia developed, in the peace process, the mandate of Article 6(5) of Additional Protocol II to the four Geneva Conventions (AP II):

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[13]

When the Constitutional Court of Colombia reviewed the constitutionality of the Amnesty Law, it stated that the Law "is an essential piece in the implementation of the Peace Agreement, since amnesties, pardons and special criminal treatments represent one of the main mechanisms for reconciliation, at the end of the armed conflict."[14]

The Amnesty Law is a very comprehensive framework for the CAP. As will be further described, it establishes to whom the benefit of amnesty may be applied, and for what kind of conducts. It also gives certain criteria for understanding that a crime can be amnestied and some criteria for the exclusion of the benefit. It is a legislative effort to honour the granting of the broadest possible amnesty and to fulfil Colombia's international obligations under the American Convention on Human Rights and the Rome Statute of the International Criminal Court to investigate, prosecute and punish grave crimes such as war crimes, crimes against humanity and genocide.

Behaviours aimed at facilitating, supporting, financing or hiding the development of the rebellion are examples of those that can be amnestied. Although the legal framework and the case law give direction, however, in many cases interpreting the criteria is challenging. What does it mean to support the development of the rebellion, and when does a conduct exceed the threshold so as to become a violation of IHL? How can we determine the gravity of a violation so as to identify if it is a war crime or a crime that can be amnestied? Some of these questions can seem easy to answer for the reader, but for the judicial operators faced with the applicable law, the real facts, the judicial file, the context and the evidence collected, it is not always a straightforward matter.

The CAP has to grant the broadest possible amnesty for crimes which can receive that benefit and refuse amnesty for those which are grave enough to be

kidnapping is adopted and other provisions are issued", prohibits the granting of this type of benefit when people have been convicted of kidnapping and denies the relationship between that conduct and the political crime. Also, Law No. 589 of 2000 prohibits the granting of amnesties or pardons for conduct related to genocide, forced disappearance, forced displacement or torture.

13 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6.5. Reference to this mandate is also found in Congress of Colombia, Law No. 1820, 30 December 2016 (Law No. 1820), Arts 8, 21; Statutory Law No. 1957, above note 5, Art. 40.

14 Constitutional Court of Colombia, Judgment C-007/18, 1 March 2018 (Judgment C-007/18), Section IV(A)(1) (author's translation).

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considered, for example, war crimes, or those which do not have any relationship to the armed conflict and were, for example, motivated by a desire to obtain personal benefit. This mandate will be further explained in the following sections.

Amnesties granted as a result of the Peace Agreement

Since the CAP started its operation at the beginning of 2018, it has granted 728 amnesties to former members or collaborators of the FARC-EP.[15] Though there is a common misconception otherwise,[16] these are not the only amnesties granted as a result of the Peace Agreement; in fact, thousands of them were given before that date. In 2017, the government issued nine presidential decrees granting so-called "administrative amnesties" to 9,600 former FARC-EP members who did not have any pending legal procedures in the ordinary justice system – i.e., who were not investigated, prosecuted or condemned for any crimes other than that of being part of an illegal group, which according to the Colombian criminal regime is a crime in itself.[17] Additionally, between 2016, when the Amnesty Law was issued, and 2018, when the CAP started working, the ordinary justice system applied the Amnesty Law and granted around 1,460 "*de jure* amnesties"[18] to those former FARC-EP members who had either been investigated or condemned for political crimes, like rebellion, occurring before 1 December 2016, or had been investigated or condemned for crimes related to political crimes before the said date (so-called "related crimes").

In Colombia, a political crime is understood as a conduct directed against the State that aims to undermine the constitutional and legal regime and which is executed without personal gain, but has its origin in an altruistic motive seeking social improvement that is "inspired by an ideal of justice".[19] The Constitutional Court has indicated that

15 SJP, *SJP in Numbers*, updated 17 May 2024, p. 1.

16 Camilo Fagua, "The Renewal of Colombia's Peace Bonds", *El Espectador*, 24 October 2023, available at: www.elespectador.com/colombia-20/analistas/la-renovacion-de-las-obligaciones-por-la-paz-de-colombia-camilo-fagua/; Colombian Commission of Jurists, *Bulletin of the Observatory on the SJP*, No. 10, 26 March 2020, available at: www.coljuristas.org/observatorio_jep/documentos/documento.php?id=144; Yesid Reyes Alvarado, "The Indignation of the SJP", *El Espectador*, 23 October 2023, available at: www.elespectador.com/opinion/columnistas/yesid-reyes-alvarado/la-indignacion-de-la-jep/.

17 President of Colombia, Presidential Decree No. 1033, 12 June 2017; Presidential Decree No. 1096, 27 June 2017; Presidential Decree No. 1165, 10 July 2017; Presidential Decree No. 1565, 25 September 2017; Presidential Decree No. 731, 27 April 2018; Presidential Decree No. 1311, 27 July 2018; Presidential Decree No. 1312, 27 July 2018; Presidential Decree No. 1339, 27 July 2018; and Presidential Decree No. 1340, 27 July 2018. The "ordinary justice system" refers to all those components of the national judicial system that existed before the Peace Agreement, are not part of the transitional justice process, and do not have prevailing jurisdiction over the crimes covered by the SJP.

18 According to figures provided on 4 December 2023 by the Presidency of the CAP.

19 Constitutional Court of Colombia, Judgment No. C-009/95, 17 January 1995 (author's translation). See also Law No. 1820, above note 13, Arts 8, 15. Rebellion is a crime committed by "those who, through the use of weapons, seek to overthrow the national government, or suppress or modify the current constitutional or legal regime": Congress of Colombia, Law No. 599 "Criminal Code", 24 June 2000 (Colombian Criminal Code), Art. 467 (author's translation).

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> [t]he usefulness of the concept of political crime in the framework of the strategy to achieve peace is derived from the symbolic force of the moral and political recognition of the enemy in arms, which implies for the State that an armed group, despite having committed in the context of the conflict, serious criminal conduct, maintains a moral dignity that justifies the government being able to advance political negotiations with them.[20]

Above all, the key element is that a dialogue is facilitated by the fact that members of the armed group have acquired a different label than that of the ordinary criminal, since they have a dual armed and political nature.[21]

Related crimes, on the other hand, are those that "in isolation would be common crimes, but that due to their relationship acquire the status of related crimes, and receive, or may receive, the favourable treatment reserved for political crimes".[22] Such crimes include:

> seizure of aircrafts, ships or means of collective transportation when there is no concurrence with kidnapping; coercion to commit a crime; trespassing; unlawful violation of communications; offering, sale or purchase of an instrument capable of intercepting private communication between persons; unlawful violation of official communications or correspondence; unlawful use of communications networks; violation of freedom of labor; libel; slander; indirect libel and slander; damage to another's property; impersonation; material falsehood of a private individual in a public document; obtaining a false public document; conspiracy to commit a crime; illegal use of uniforms and insignia; threats; instigation to commit a crime; arson; disturbance of public or official transportation service; possession and manufacture of dangerous substances or objects; manufacture, carrying or possession of firearms, accessories, parts or ammunition; manufacture, carrying or possession of arms, restricted use ammunition, ammunition for the exclusive use of the armed forces or explosives; disturbance of a democratic contest; voter coercion; voter fraud; voter registration fraud; voter corruption; fraudulent voting; contract without compliance with legal requirements; violence against a public servant; escape; and espionage.[23]

Thus, two main conclusions can be drawn. Firstly, the cases studied by the CAP are the remaining ones that did not receive the aforementioned benefits of administrative amnesties and *de jure* amnesties. These are cases where the crimes were not easily identified as political or related to political crime, and a deeper analysis was required to determine if the conduct could be amnestied. Secondly, the Comprehensive System for Peace did not grant amnesties only through the

20 Constitutional Court of Colombia, Judgment No. C-577/14, 6 August 2014, Section VII(6), "Concept and Scope of Application of Political Crime in the Framework of Political Participation" (author's translation).
21 *Ibid.*
22 Constitutional Court of Colombia, Judgment No. C-456-1997, 23 September 1997, Section II(6); CAP, above note 12 (author's translation).
23 Law No. 1820, above note 13, Art. 16.

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procedures before the CAP. It started honouring the obligation to grant the broadest amnesty through previous means such as Presidential Decrees and the application of the Amnesty Law by the ordinary justice system.[24]

Scopes of application

There are three requirements that need to be met to receive the benefits of conditional release and amnesty. The conduct needs to be within the material scope of application of the SJP, it needs to have taken place within the SJP's temporary competence, and it needs to have been committed by someone within the SJP's personal jurisdiction.[25]

Since the SJP is concerned with conducts during the conflict with the FARC-EP, and this NIAC ended with the Peace Agreement, the conducts that can be evaluated by the SJP are those committed prior to 1 December 2016,[26] the date on which the Agreement entered into force. The only exceptions are conducts closely linked to the process of laying down weapons,[27] which started on 1 December 2016 and ended on 15 August 2017, when the United Nations concluded the arms removal process.[28] The Constitutional Court indicated that this exception "refer[red] only to events that occur[red] while [the process of laying down weapons was] culminating, such as the illegal carrying of weapons or the use of military clothing".[29]

The scope of personal application refers to the people over whom the SJP is competent. Regarding former guerrillas, it is limited to both national and foreign people who meet at least one of the following requirements: (i) they were convicted, prosecuted or investigated because of their membership of or collaboration with the FARC-EP; (ii) they were certified by the government as former guerrillas; (iii) their conviction mentioned their membership, and the crime committed relates to political crime, and (iv) they were investigated, prosecuted or convicted for political and related crimes and it can be deduced from the investigations, judicial rulings or other evidence that they were investigated or prosecuted for their alleged membership or collaboration with the FARC-EP.[30]

Finally, the material scope of application refers to conducts within the jurisdiction of the CAP. This implies a twofold analysis. The first level, "which coincides with a jurisdictional criterion of the [SJP], is that it must be established whether the conduct under study was committed, caused by, on occasion of, or in

24 See above note 17.
25 Legislative Act No. 01 of 2017, above note 6, Art. 5; Law No. 1820, above note 13, Arts 17, 22.
26 Legislative Act No. 01 of 2017, above note 6, Art. 5; Law No. 1820, above note 13, Art. 3.
27 Law No. 1820, above note 13, Art. 18.
28 Marcela Giraldo Muñoz, "An Approach to the Development of the Amnesty Benefit in the Special Jurisdiction for Peace", in Danilo Rojas Betancourth (ed.), *The SJP as Seen by Its Judges*, SJP, 2020, pp. 325–364, available at: www.jep.gov.co/Documents/LA%20JEP%20VISTA%20POR%20SUS%20JUEVES.pdf; United Nations, "UN Observers Conclude FARC-EP Arms Removal Process in Colombia", *UN News*, 16 August 2017, available at: https://news.un.org/en/story/2017/08/563392.
29 Judgment C-007/18, above note 14, Section IV(E)(559) (author's translation).
30 Law No. 1820, above note 13, Arts 17, 22.

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direct or indirect relation to the NIAC".[31] Once that is established, the second level calls for "establishing whether the conduct carried out would potentially be an object of amnesty".[32]

For finding the nexus between the conduct and the NIAC, the Appeals Section of the Tribunal for Peace has indicated that two criteria need to be evaluated: the causality element and the subjective element. The first refers to whether the NIAC "was the direct or indirect cause of the crime", while the second refers to whether the NIAC "influenced the author, participant or cover-up of the punishable conduct committed by cause of, on occasion of or in direct or indirect relationship with the conflict".[33] In practice, in CAP decisions, the analysis assesses whether the conduct occurred amidst the conflict and because of the conflict, and if it had a relationship with the conflict, but it is rarely specified whether the conduct was caused by, on occasion of, or in direct or indirect relation to the NIAC.

The Amnesty Law also establishes connection criteria for determining whether the conduct was connected to a political crime – in other words, whether the conduct was committed in support of the rebellion. A crime that meets any of the following criteria is related to a political crime: (i) those specifically related to the development of the rebellion committed on occasion of the NIAC, such as deaths in combat compatible with IHL and the apprehension of members of the armed forces carried out in military operations; (ii) crimes against the State and its constitutional regime, and (iii) behaviours aimed at facilitating, supporting, financing or hiding the development of the rebellion.[34]

There are, nonetheless, certain conducts that cannot receive amnesty. The Amnesty Law lays down clear limits to the competence of the CAP. It forbids the granting of amnesties to two groups of conducts: (i) war crimes, crimes against humanity and genocide, among others, and (ii) common crimes that have not been committed because of the rebellion or were motivated to obtain personal benefit or for the benefit of a third party.[35]

If it is included in the first set of conducts, a crime is still within the competence of the SJP. In those cases, the procedure is to redirect it to another Chamber so that it can continue its course within the SJP. Most of the cases – 845[36] – have been sent to the CATR, which now has eleven macro-cases where it has been studying the most serious crimes committed during the NIAC.[37]

31 CAP, Judicial Decision No. SAI-AOI-SUBB-D-021-2021, 23 June 2021 (author's translation).
32 *Ibid.*
33 *Ibid.*
34 Law No. 1820, above note 13, Art. 23.
35 *Ibid.*; Marcela Giraldo Muñoz and Jose Serralvo, "International Humanitarian Law in Colombia: Going a Step Beyond", *International Review of the Red Cross*, Vol. 101, No. 912, 2019. See also Judgment C-579/13, above note 1, Section 8.1.3.2.2, "Crimes that Typify Serious Violations of Human Rights and Serious Infractions of International Humanitarian Law", and 8.2.4. "Crimes against Humanity, Genocide and War Crimes".
36 According to figures provided on 21 May 2024 by the Presidency of the CAP.
37 Statutory Law No. 1957, above note 5, Art. 81(2); SJP, Appeals Section, Interpretative Judgment No. TP-SA-SENIT 2, 9 October 2019 (Interpretative Judgment No. TP-SA-SENIT 2); SJP, "Cases at the SJP", available at: www.jep.gov.co/Paginas/casos.aspx.

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The effects of granting an amnesty

The Amnesty Law established that the granting of an amnesty has several legal effects. The ordinary justice system applies these legal effects, since it is the one that oversees the criminal file to which the benefits apply.[38]

The amnesty extinguishes either the criminal action in cases where the person is being investigated, or the main and accessory criminal sanctions in cases where he or she has already been convicted. In cases where the person is a public officer, it also ends "the action for compensation for damages derived from the punishable conduct, and the responsibility derived from the action of repetition".[39] Likewise, the amnesty erases any investigations or disciplinary/tax sanctions that may have been produced by the amnestied conducts.[40] Granting an amnesty also implies immediate freedom of the beneficiary when he or she is deprived of it.[41]

Good practices and achievements

Implementing a peace process such as Colombia's is not an easy task. It involves many fronts: it demands that those who used to be enemies sit down and negotiate a peace agreement, and it then requires that those in Congress issue the norms and regulations that will bring that agreement into reality. Afterwards, those who work at the old and new public institutions must develop the necessary legal framework, interpreting it and filling its gaps.

A peace process cannot and should not exist without giving victims a voice in its construction; they are expecting justice, truth and reparation, and even if some may not believe in the process, it is necessary to consider all their different perspectives and expectations. It also requires the participation of civil society even if some of its members do not support the proposed peace process, because democratic debates are nourished from diverse currents. This is key, since – as I have witnessed in some transitions, such as those in the Balkans and Guatemala – struggles and polarization persist in local social interactions regarding the effectiveness of reparations, the recognition of responsibility and the process of seeking the truth. Likewise, a peace process needs the support of the international community and organizations in part – or even a large part – of the implementation process. The sum of all these factors is the way to rebuild a fractured society and strengthen guarantees of non-repetition.

Although it has not been an untroubled process, there have been some good practices and achievements in the Colombian peace process throughout the work of the SJP and, specifically, the CAP. The following are three which could illuminate

38 Law No. 1820, above note 13, Art. 25.
39 *Ibid.*, Art. 41 (author's translation).
40 *Ibid.*
41 *Ibid.*, Art. 34.

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other peace initiatives: (i) giving a second chance and encouraging reintegration into society of those members of armed groups who have laid down their weapons; (ii) developing IHL discussions regarding the use of landmines as a war crime and the power to adjust the legal qualification of the conduct taking into account all sources of law available to the SJP; and (iii) having territorial presence, which has a positive impact on the SJP's credibility among former FARC-EP members, ethnic groups, and victims.

Impacting the resocialization of former FARC-EP members and collaborators

By 14 March 2023, the Colombian Office of the High Commissioner for Peace (OHCP) had accredited 13,615 people as former FARC-EP members,[42] 2,531 of which had appeared before the SJP and 2,178 particularly before the CAP.[43] Receiving this certification by the OHCP impacts these individuals in different ways – for example, by proving to the SJP that they were part of the guerrilla group and are therefore within the SJP's personal competence for defining their legal situation and getting access to the reintegration and normalization programme offered by the Agency for Reintegration and Normalization (ARN).[44]

There are many ways in which a society can give second chances to those who have broken the law. Some of them involve legal paths, and others are of a social, psychological or even economic nature. The sum of them can have a real impact on those who have decided to lay down their weapons and stop fighting against the State. The following are two approaches in which the procedure at the CAP, in coordination with other public institutions, can impact positively in the reintegration processes of ex-guerrillas.

Adding names of people to the list of former FARC-EP members accredited by the national government

As mentioned above, a person may prove his/her status as a former member of the FARC-EP, among other ways, through a certification given by the State through a process that consists of two phases: a list of former FARC-EP members constructed by the FARC-EP and presented to and verified by the national government, and, as a result, a list of persons accredited by the OHCP as former guerrillas.[45]

The law states that "[t]he national government received the lists of the members of the FARC-EP until 15 August 2017".[46] Based on the lists presented

42 According to figures provided by the SJP Registry on 15 December 2023.
43 *Ibid.*
44 CAP, Judicial Decision No. SAI-AOI-D-MGM-503-2023, 20 October 2023 (Judicial Decision No. SAI-AOI-D-MGM-503-2023), para. 21; President of Colombia, Decree-Law No. 899, 29 May 2017 (Decree-Law No. 899 of 2017), Art. 2.
45 Judicial Decision No. SAI-AOI-D-MGM-503-2023, above note 44, para. 14 (author's translation).
46 Statutory Law No. 1957, above note 5, Art. 63 (author's translation).

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by the FARC-EP, the national government had to issue the final accreditation list of those who, "for all legal purposes, will be considered the only demobilized people from the FARC-EP".[47] The law attributed to the CAP the exceptional power of adding names of people to the list of former FARC-EP members accredited by the national government: "The [CAP] may exceptionally study and incorporate the names of people who, for reasons of *force majeure*, were not included in the list of those accredited by the national government."[48]

Up until today, the CAP has ordered thirty-three inclusions into the list of former FARC-EP members accredited by the OHCP.[49] Hence, through this procedure, that amount of people have been able to prove that for reasons of *force majeure* they were not enlisted but were indeed ex-guerrillas who had the right – and also the duty – to reintegrate into society as a guarantee of non-repetition.

As indicated, acquiring accreditation by the OHCP offers the opportunity to participate in the reintegration and normalization programme of the ARN. This programme grants a series of socio-economic benefits that are fundamental for a satisfactory transition to civil life for those committed to the peace process, among which are:[50]

- A single normalization allocation amounting to 2 million Colombian pesos (COP) (approximately $677 in 2017).[51]
- Basic income, delivered for twenty-four months for a value equivalent to 90% of the minimum wage for those who do not have their own source of income.[52]
- Financial support worth 8 million COP (approximately $2,710 in 2017) to undertake a collective productive project or an individual housing project.[53]
- Payment of contributions to the General Health and Social Security System for twenty-four months.[54]
- Social and psychosocial programmes, which include issuing ID and a military card for males.[55]

Many former FARC-EP members did not get on the lists for several reasons. Talking to some of them through years in different official settings has shed light on how the lists were construed. This was an armed group with thousands of members who operated largely in rural areas. It was a challenge getting straight who had to be on the lists, delivering the names on time, and cross-checking the information. Although the lists were built and delivered by the FARC-EP, many former members alleged that some commanders did not fulfil this task well. For instance, some commanders did not inform their subordinates of the importance of the

47 *Ibid.*
48 *Ibid.*; Judicial Decision No. SAI-AOI-D-MGM-503-2023, above note 44, paras 15, 16 (author's translation).
49 According to figures provided on 21 May 2024 by the Presidency of the CAP.
50 Judicial Decision No. SAI-AOI-D-MGM-503-2023, above note 44, para. 31.
51 Decree-Law No. 899 of 2017, above note 44, Art. 7.
52 *Ibid.*, Art. 8.
53 *Ibid.*, Art. 11.
54 *Ibid.*, Art. 9.
55 *Ibid.*, Art. 17.

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procedure, or removed people from the lists for personal reasons. Some of them even added individuals for personal reasons or handed the lists in late to the representatives, which prevented former members from being included in the lists given to the OHCP for its verification.

Though the law only allows the CAP to add people who were not included for reasons of *force majeure*, having this faculty has had a positive impact in giving those former members the chance of being part of the reincorporation program offered by the State. And also, it could enhance the confidence of many, as those receiving this benefit, on the Peace Agreement implementation and the credibility of the processes within the SJP.

On the other hand, the Appeals Section has started offering some hope for people who have not been accredited by the OHCP as former members of the FARC-EP and are

> i) subject to the [SJP]; ii) recognized as a former member of the FARC-EP by virtue of a decision of the ordinary justice system or a firm decision of the CAP; iii) demobilized from the guerrilla organization prior to the signing of the Final Peace Agreement and in impossibility of accessing a route of reintegration into civilian life for reasons beyond their control; iv) receiving the transitional benefits of *de iure* amnesty and conditional release; and v) complying with his/her obligations under the conditionality regime.[56]

Regarding such people, the CAP has to send their cases to the ARN for it to determine the corresponding route for their reintegration into civil life.[57] It remains to be seen how this will develop.

To guarantee the right to social reincorporation to those who are appearing in front of the SJP is a cornerstone for the usefulness of the transitional justice procedures. Granting an amnesty at the end of hostilities gives those who benefit from it a real second chance to be part of civil society. However, having access to reintegration programmes dramatically improves their chances for a long-lasting return to society.

Granting conditional release and amnesties to former FARC-EP members appearing before the SJP

A person who fulfils the personal and temporal scopes of application and whose crime(s) has a nexus to the NIAC can benefit from a conditional release from jail.[58] Once it is further proven that the conduct also has a connection to a political crime, he or she can also receive the transitional benefit of an amnesty. As stated above, one of the ways of proving a person's former membership of the FARC-EP is to be accredited by the OHCP.

However, there are many cases where the person does not have this accreditation but can prove his/her membership by one of the other three ways

56 SJP, Appeals Section, Judgment No. TP-SA-385, 20 December 2023, para. 39.
57 *Ibid.*
58 Law No. 1820, above note 13, Art. 35.

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given by the Amnesty Law.[59] In those cases, if the other requirements are met, the person can receive the transitional benefits of conditional release and amnesty as well. This impacts positively the lives of those who regain their freedom and receive a second chance. They contribute to the reconstruction of the truth, and their resocialization is precisely part of the guarantees of non-repetition.

Over my years as a justice at the CAP, I have seen how many former guerrillas have started new life projects. They have become parents, have gone back to farming or have pursued academic study. Having children has increased their empathy for those who were their victims, making them understand the dimension of the pain inflicted and the fact that the wounds remain open. On some occasions I have witnessed how they ask sincerely for forgiveness because they cannot imagine what they would feel if someone did to their children what they have done to the victim's children.[60] Or, they have a special interest in providing truth and recognizing responsibility because in many cases they knew the victims or their families, or were part of the same community, as former neighbours or acquaintances.[61] I have also seen how they have cultivated the land or have embarked on other jobs, giving them a sense of being part of a society to which they did not think they could ever belong.[62] Moreover, some former FARC-EP members have been granted scholarships to study medicine in Cuba and have been able to take advantage of that opportunity thanks to the permissions given by the CAP to leave the country temporarily.[63]

Developing IHL discussions

The CAP has dealt with numerous significant discussions concerning IHL as an integral aspect of its work. Among those discussions, some pertain to war crimes and the determination of whether specific criminal conducts amount to such offences. As the law prohibits the granting of amnesty for war crimes, this is not a minor discussion. The following are two examples of these debates.

59 *Ibid*., Arts 17, 22.

60 Said by one of the former FARC-EP commanders in the voluntary version of the FARC-EP Central Joint Command in Macro Case 01, "Hostage-Taking, Serious Deprivation of Liberty and Other Concurrent Crimes Committed by the FARC-EP", held in Ibagué in July 2021.

61 A former FARC-EP member, who was part of the Kankuamo indigenous people in the north of Colombia, confessed the truth about crimes committed during the armed conflict with the FARC-EP against people within his own indigenous community. He knew some of the victims and grew up with them, and during the hearing he called one of them by the nickname that the victim used to go by within the community. The former guerrilla asked for forgiveness and expressed his intention to have a meeting with the victim's family. Interview conducted by the judicial office of Justice Giraldo Muñoz on 8 March 2024, Court File No. 9002474-47.2018.0.00.000.

62 A former FARC-EP member now produces eggs from hens purchased with money obtained from his reincorporation process: interview conducted by the judicial office of Justice Giraldo Muñoz on 12 December 2023, Court File No. 1502134-46.2022.0.00.0001. A former FARC-EP member is currently part of a productive fish farming project: interview conducted by the judicial office of Justice Giraldo Muñoz on 25 January 2022, Court File No. 1501119-76.2021.0.00.0001. A former member of the FARC-EP is now one of the owners of La Casa Alternativa in Bogotá, a brewery run by former members of the armed group. Court File No. 9001762-57.2018.0.00.0001.

63 Three former FARC-EP members are currently in their final years of medical school in Cuba. Court File Nos 9005318-33.2019.0.00.0001, 9004895-73.2019.0.00.0001 and 9004770-08.2019.0.00.0001.

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Firstly, it is important to explain the power given to the SJP by its legal framework to establish what is called "a legal qualification of the System".[64] Since the SJP has at its disposal the direct application of domestic and international law as a source of law, the re-qualification exercise implies the possibility of modifying the legal qualification given by the ordinary justice system in favour of one that better suits the facts under study.[65]

Since the benefit of judicial amnesty is granted over conducts of interest for criminal prosecution and not over a person, the CAP performs a case-by-case analysis rather than identifying macro-criminal patterns.[66] Therefore, its conclusions may vary depending on the specific facts, and their scope is limited to the case under study. For example, a former member of the FARC-EP can bear the greatest responsibility in Macro Case 01, "Hostage-Taking, Serious Deprivation of Liberty and Other Concurrent Crimes Committed by the FARC-EP", but also receive an amnesty in front of the CAP over an investigation or condemnation for rebellion or for drug trafficking for the purpose of financing the armed group.

The use of landmines as a war crime

In 2019, the CAP faced a case involving the use of landmines. By applying the rules of treaty interpretation established in the Vienna Convention on the Law of Treaties, it concluded that the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) is binding not only on Colombia as a State party to the treaty but also on the FARC-EP as an organized armed group operating in that State.[67] It then applied the *Tadić* test[68] for identifying whether a criminal conduct

64 Legislative Act No. 01 of 2017, above note 6, Art. 5.

65 Law No. 1957, above note 5, Art. 23.

66 Law No. 1820, above note 13, Arts 15 ("Amnesty is granted for political crimes"), 17, 22 ("Amnesty will be applicable from the day of entry into force of [Law 1820], as long as the crimes had been committed before the entry into force of the Final Peace Agreement. It will apply to the following people, both Colombian nationals and foreigners, who are or have been authors or participants in the crimes"), 23 ("The [CAP] will grant amnesties for political or related crimes)" (author's translation).

67 Congress of Colombia, Law No. 759, 14 January 2000; Constitutional Court of Colombia, Judgment C-991-00, 2 August 2000.

68 "The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met …; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46, para. 1 of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995.

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amounts to a war crime and concluded that the Ottawa Convention, as a source of IHL, was infringed, that the infraction was severe, and that it entailed the personal criminal responsibility of the author under the national criminal code. The CAP concluded that the conduct could amount to a war crime leading to the denial of amnesty.[69] The decision was not appealed.

Following this decision, there have been many others redirecting cases related to the use of landmines – a means of war widely used in Colombia – to the CATR.[70] Although it can be seen as innovative to study these cases under that interpretation of international law in relation to crimes committed in the midst of a NIAC, such an approach has not been free from criticism.[71]

Conversely, there was a case where some guerrillas were captured *in flagrante* having in their backpacks, *inter alia*, "an orange cylinder …, apparently an anti-personnel mine". These individuals were convicted for two crimes, one of which was the use, production, marketing and storage of anti-personnel mines. The CAP considered that the conviction was based on something which apparently was an anti-personnel mine "but without making reference to expert reports or investigations that provide certainty about the type of the explosive artifact".[72] Thus, it was concluded that

> a simple evidentiary analysis shows that although the conduct carried out by those appearing was qualified in the ordinary justice as possession of anti-personnel mines, since there is no certainty about the type of device that was seized from them, their conduct can also be classified as the crime of manufacture, trafficking and carrying of weapons, ammunition of restricted use or exclusive use of armed forces or explosives according to Article 366 of the Colombian Criminal Code.[73]

Therefore, the decision was to legally re-qualify the crime related to anti-personnel mines as the crime of manufacture, trafficking and carrying of weapons, ammunition of restricted use or exclusive use of armed forces, or explosives, which better fitted the legal analysis of the facts, and a *de jure* amnesty was granted.

Terrorism as rebellion or as a war crime

Regarding terrorism, there are two main crimes within the Colombian Criminal Code: "acts of terrorism" and "terrorism".[74] The former is under the title of crimes against

69 CAP, Judicial Decision No. SAI-AOI-010-2019, 14 August 2019; M. Giraldo Muñoz and J. Serralvo, above note 35, pp. 1145–1146.

70 CAP, Judicial Decision Nos SAI-SUBA-AOI-009-2019, 29 April 2019, and SAI-AOI-SUBA-D-022-2019, 12 May 2019.

71 Emiliano J. Buis, "The Risks of a Humanitarian Hermeneutics: Anti-Personnel Mines, Non-State Actors and Legal Interpretation in Resolution SAI-AOI-010-2019", in Emiliano J. Buis and Camilo Ramírez Gutiérez (eds), *International Humanitarian Law in the Special Jurisdiction for Peace,* Tirant Lo Blanch, Bogotá, 2022.

72 CAP, Judicial decision No. SAI-AOI-D-MGM-460-2021, 4 April 2022, para. 25 (author's translation).

73 *Ibid.*, para. 26.

74 Colombian Criminal Code, above note 19, Arts 144, 343.

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persons and objects protected by IHL of the Code and includes a contextual element requiring that the offence occurred within the NIAC, whereas the latter does not and is within the chapter of crimes against public safety. Although the ordinary criminal system has done an enormous job in investigating, prosecuting and judging all crimes related to the NIAC and outside of it, in many of the cases now studied at the CAP, it has been noted that on several occasions the legal qualification of "terrorism" or "acts of terrorism" does not actually represent the facts under scrutiny. On the contrary, it is concluded that the acts were in fact those of rebellion – i.e., actions related to the use of weapons in seeking to overthrow the current constitutional or legal regime – and therefore are granted a *de jure* amnesty.

For example, a former guerrilla was being investigated for allegedly participating in an attack perpetrated by the FARC-EP against members of the Army. At that stage of the procedure, there was not yet any legal qualification, but the prosecutor in the ordinary justice system was investigating to identify those who participated "in the performance of the terrorist act".[75] The CAP's decision concluded that the Prosecutor's Office did not collect any evidence that would allow it to infer the participation of this man in the event. Exercising its power to acquire further information, the CAP conducted interviews, analyzed the context at the time of the facts and determined that he did not participate in the attack, but that his crime was to have been part of the guerrilla organization. Thus, a *de jure* amnesty was granted to him for the crime of rebellion.[76]

Likewise, in another case the CAP re-qualified the crimes of terrorism and attempted terrorism to the crime of rebellion and granted a *de jure* amnesty. In the count of terrorism, the Chamber concluded that the principles of the use of force in the conduct of hostilities had been respected in an attack perpetrated against a bridge. In the count of attempted terrorism, the conviction stated that the decision of conviction had "demonstrated the existence of a plan to develop terrorist activities intended to explode devices against road infrastructure (bridges) and against military units". The CAP concluded that "the events … involved military activities of the FARC-EP that, although they were never consummated, were aimed at fulfilling the rebel objectives of said guerrilla group".[77]

On the other hand, there have been cases where the legal re-qualification has concluded that the crime of terrorism amounts to a war crime and should be redirected to the CATR[78] – for example, an attack that involved detonating an explosive device inside a motor vehicle owned by a commercial company which by its nature, location, purpose or use was not making an effective contribution to military action. The CAP indicated that the elements of the war crime of "intentionally directing attacks against the civilian population as such or against civilians who do not directly participate in hostilities" were met.[79]

75 CAP, Judicial Decision No. SAI-AOI-DAI-MGM-059-2023, 10 February 2023, para. 4.
76 *Ibid.*
77 CAP, Judicial Decision No. SAI-AOI-006-2019, 4 February 2019, paras 250–253 (author's translation).
78 CAP, Judicial Decision No. SAI-SUBB-AOI-D-030-2019, 9 October 2019, paras 101–107; CAP, Judicial Decision No. SAI-AOI-RC-DLC-MGM-286-2022, 30 June 2023.
79 See the references cited in above note 78.

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Territorial presence

One of the main responsibilities of a transitional justice mechanism is to have a territorial presence. The NIAC with the FARC-EP lasted many decades and affected thousands of people all over the Colombian territory, and in the centralized State of Colombia, it can happen that decisions are made in Bogotá, the capital, impacting other parts of the territory but ignoring their specific characteristics or cultural, geographical and social needs. Over the years, the SJP has made a great effort to open offices and to hold hearings, meetings, workshops and conversations around the country. It "covers the national territory from its headquarters in Bogotá with 25 territorial teams in 25 cities or municipalities, [and] 12 of the teams have a permanent presence of the territorial groups of the IPU".[80]

Likewise, since 2022 the magistrates of the CAP and their legal teams, along with others from the Registry and the IPU, have conducted *in loco* visits to the Former Territorial Training and Reintegration Spaces (FTTRSs), places where hundreds of former guerrillas are now living and are developing some of their productive projects.

To date, the CAP has visited six FTTRSs: "Los Pondores" in La Guajira, "La Fila" and "El Oso" in Tolima, "Llano Grande" in Antioquia, "Las Colinas" in Guaviare, and "Miravalle" in San Vicente del Caguán. It will continue visiting other FTTRSs in order to explain CAP procedures and address doubts about them, to get to know the spaces and the projects, and to obtain a better idea of the living conditions, expectations, worries and hopes of those who are still committed to the Peace Agreement.

Many of the CAP hearings are conducted online or in the headquarters in Bogotá. However, some of them have been conducted in the FTTRSs or in different cities or towns of Colombia. This has strengthened the working relationship between the SJP and other authorities at the regional and municipal levels and with universities that have offered places to conduct the hearings.

An important example of the SJP's territorial presence arises from its implementation of the ethnically differential approach.[81] This approach "imposes an obligation on State authorities to take into consideration the particular social, cultural, and economic circumstances of ethnic groups when considering the adoption or implementation of measures that can infringe their rights in a particular way".[82] The SJP has established an Ethnic Commission to apply this approach and to promote coordination between the Jurisdiction and the different

80 SJP, above note 15, p. 3 (author's translation).

81 Peace Agreement, above note 4, Chap. 6.2; SJP, Agreement ASP No. 001 of 2020, 2 March 2020 (SJP Internal Regulations), Art. 100(a); Congress of Colombia, Law No. 1922, 18 July 2018 (Law No. 1922), Art. 1(c).

82 Xiomara Cecilia Balanta Moreno and Yuri Alexander Romaña-Rivas, "The Rights of Afro-Colombian Communities in the Final Agreement and Its Mechanisms of Implementation", in Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa and Nancy C. Doubleday (eds), *The Colombian Peace Agreement: A Multidisciplinary Assessment*, 1st ed, Routledge, London, 2021, p. 7.

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ethnic justice systems and their traditional authorities;[83] thus, other divisions of the SJP can request their advice, for example, on how to reach the ethnic authorities, build trust and dialogue, organize a hearing, or prepare information to be shared with the communities in order to explain judicial decisions.

The CAP complies with this mandate by, *inter alia*, notifying judicial decisions with ethnic relevance when the cases involve either victims or former guerrillas from ethnic communities.[84] For example, I participated in a hearing where the three Chambers of the SJP notified three different decisions where the victims were from the Kankuamo people in the northeast of Colombia. As an opening, there was first a traditional ceremony, and then the Jurisdiction explained the decisions adopted and their implications. The hearing was an exercise of coordination with the Kankuamo's authorities and a dialogue with members of the community. It was the first time a High Court of Colombia had celebrated a hearing in that territory, and from there onwards the coordination has been permanent.

Promoting and guaranteeing territorial presence in studying whether to grant an amnesty has a twofold impact. On the one hand, it provides a more suitable perspective of the dynamics of the conflict since it allows the judicial operators to interact with and interview local people. Knowing the context is key for better analyzing the situation and, if appropriate, for granting the benefit – for example, understanding how strong the presence of the FARC-EP was in a certain area at a certain moment can make a significant difference when granting an amnesty. On the other hand, territorial presence has an impact on the legitimacy of the CAP and the SJP, making them more approachable and facilitating the pedagogy around them.

Setbacks and challenges

Although much important work has been done so far, the Colombian peace process has not been exempt from setbacks and challenges. As the implementation of the Peace Agreement between the State of Colombia and the FARC-EP is and will be seen by others who are trying or will try to implement their own transitional justice proceedings, it is useful to show some of the specific situations that have been faced within this process, specifically by the CAP while performing its duties.

Receiving a high number of applications from people who do not fulfil the requirements to appear before the SJP

Table 1 shows the total number of transitional benefits granted by the CAP as of 17 May 2024. These numbers could easily lead to a wrong conclusion, which is that the CAP does not pursue the broadest possible amnesty. However, there is an explanation for this result: most of the amnesty requests before the CAP do not fulfil the requirements,[85]

83 SJP Internal Regulations, above note 81, Art. 100; Ethnic Commission, Protocol 001 of 2019, 5 June 2019.
84 SJP Internal Regulations, above note 81, Art. 100(c).
85 Law No. 1820, above note 13, Arts 17, 22, 23.

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Table 1. *Transitional benefits granted by the CAP as of 17 May 2024*

Benefit	Granted	Not granted
Conditional releases	484	2,085
Amnesties	728	3,997

Source: SJP, *SJP in Numbers*, updated 17 May 2024, p. 2.

and this increases the likelihood of amnesty rejection. Most of the cases have been rejected because membership was not proven, while others were rejected because the nexus between the conduct and the NIAC was not found, and a minority because the conduct was committed outside the temporal scope of application.[86]

As explained above, there are four different legal ways for proving that someone was a member or a collaborator of the FARC-EP.[87] Three of them depend on information from the ordinary justice system, while the other one relies on a certification issued by the OHCP accrediting that the person was a FARC-EP member or by a special government committee[88] indicating that the person who demobilized individually, before the Peace Agreement, was a FARC-EP member.[89]

This presents a threefold challenge. First, requests for benefits do not have legal requirements. Consequently, in the name of guaranteeing the broadest access to justice, a higher threshold of minimum information to activate the competence of the CAP has been sacrificed. A person can ask for benefits without needing to provide the CAP with information about his/her convictions or investigations, or about his/her life in the guerrilla group. This is a very exhausting exercise for the SJP since it implies the need to fill those gaps in order to find out whether it has competence over the person and over his/her conducts.

Second, the duration of the CAP should have been shorter. It will last for the same duration as the SJP: fifteen years that can be prolonged for five more.[90] Seven years after the Peace Agreement, all those who were from the FARC-EP and could have been granted conditional release or amnesty should by now be known to the CAP. Keeping the door open for as long as the duration of the SJP has meant that the flow of requests has continued. It is certain that we are still receiving some requests that could lead to amnesties; however, many of the current requests are from people who have already asked for benefits and have received a negative response but who continue to request them without giving the CAP new evidence on which to re-evaluate its previous decision.[91]

Lastly, the need for information from the ordinary justice system implies that without it, the CAP cannot know whether or not it is competent to study a given case.

86 Unfortunately, the SJP does not currently have statistics to identify the different unfulfilled requirements. However, the CAP is currently making efforts to identify and unify these statistics.
87 Law No. 1820, above note 13, Arts. 17 and 22.
88 The Operational Committee for the Laying Down of Arms.
89 SJP, Appeals Section, Judicial Decision Nos TP-SA-123, 6 November 2019, and TP-SA-693, 14 January 2021.
90 Legislative Act No. 01 of 2017, above note 6, Art. 15.
91 According to the Presidency of the CAP almost 100 cases are coincident with these characteristics.

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This entails a challenge in a country like Colombia, where many areas do not have digital legal files or the resources to send the physical ones by mail to Bogotá. Hence, the CAP orders the local authority to send the files or orders the IPU to bring them, but in most cases that order needs to be repeated at least once as it is not complied with in a timely fashion. On some occasions where this has taken a very long time or there is an urgent need to make a decision, members of the CAP have travelled to collect the files. A way to improve this situation could be that requests for benefits are sent with a copy of the main pieces of the ordinary justice file, and/or that the IPU could review its internal process and try to find out where and why these delays occur and how can it improve the response times.

Once the information arrives, the CAP needs to evaluate it in order to determine (i) the date of the facts, to prove whether the case fits within the Chamber's temporary scope of application; (ii) whether the judicial decision or the file provides the required information about the person having been a member or collaborator of the FARC-EP, in cases where he or she does not have accreditation by the OHCP; (iii) whether the facts are related to the NIAC with the FARC-EP; and (iv) which additional information is needed for the decision, such as an interview with the solicitor or a context report of the area at the time of the events.

After the study is conducted – i.e., after the CAP has used its resources and time acquiring the information and examining it – the CAP can come to various different conclusions that are encompassed in the above-mentioned categories of "granted" and "not granted" (see Table 1).

Cases in which the files need to be rejected and returned to the ordinary justice system:

- The conduct under analysis was committed after the duration of competence of the SJP.
- The conduct was committed within the time limit but by someone who has not proven that he or she was a member of the FARC-EP or who has been proven to belong to another armed group or to be a common criminal.
- The conduct was committed within the time limit by someone who has proven that he or she was a member of the FARC-EP, but the conduct had nothing to do with the NIAC, e.g. rape of a relative or murder of someone for personal reasons, illegal activities conducted for personal gain.

Cases in which the files remain in the SJP, but the CAP is not competent to decide over them since it cannot grant an amnesty over the conducts; however, as the benefit application proceeds, prior to sending the file to the relevant competence within the SJP, the CAP must grant a conditional release:

- The conduct was committed within the time limit by someone who was a member of the FARC-EP, but even if the conduct is related to the NIAC, it is one of those conducts over which Law 1820 of 2016 forbids the granting of an amnesty.[92]

92 According to figures provided on 21 May 2024 by the Presidency of the CAP, 845 cases have been referred to the CATR and 205 have been referred to the Chamber for the Determination of Legal Situations.

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Cases in which the CAP grants amnesties:

- The conduct was committed within the time limit by someone who has proven that he or she was a member of the FARC-EP, and it is related to the NIAC and political crimes, and it is not excluded by law from the benefit.

Consequently, three recommendations for other peace initiatives involving the granting of amnesties are:

1. Determine the minimum facts, information and documents that need to be handed over with the request of benefits to trigger the competence of the judicial body. This can speed up procedures because it will allow the judicial body to focus on persons who are indeed part of its competence and easily exclude those who are not.
2. Establish a time limit for the body in charge of granting amnesty. This will allow it to focus its efforts and will reduce the chances of receiving requests that exceed its competence or do not fall within it.
3. Bearing in mind the practical challenges faced by the country, its resources, and the capacity of its judicial system, having to rely on files from the ordinary justice system to determine whether the SJP has competence over a person or conduct has slowed down the procedures at the CAP. The files often take too long to arrive, in many cases months, or in certain cases acquiring the files involves CAP staff having to travel to different areas to collect them. This requires significant resources, logistics and time.

All of this being said, I am not suggesting that a transitional body should disregard the advances made by the ordinary justice system; rather, efforts should continue to be made to tackle the difficulties of getting the information and accessing it in a more expedited way.

The CAP supervises many other proceedings in addition to granting conditional releases and amnesties

The CAP is focused on receiving requests for transitional benefits, studying them, acquiring information to make a decision, and then discussing and making the respective decision: granting the benefit, rejecting the case,[93] or referring the case to other judicial chambers within the SJP.[94] However, it is important to consider that the CAP has many other tasks, and these consume a significant part of its time and resources. This impacts not only the swiftness of the procedures but also public perception of the CAP's effectiveness.

The granting of benefits is not unconditional; receiving a transitional benefit implies complying with a set of obligations to keep those benefits and to have the opportunity to receive more. These obligations are known as the

93 Interpretative Judgment No. TP-SA-SENIT 2, above note 37; SJP, Appeals Section, Judicial Decision Nos TP-SA-073, 13 December 2018, and TP-SA-199, 11 June 2019.

94 Interpretative Judgment No. TP-SA-SENIT 2, above note 37.

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"conditionality regime", and they include, among others, the obligations of guaranteeing the abandonment of arms, not committing other intentional crimes, and appearing before the SJP whenever the individual's contribution is required in judicial proceedings.[95] The CAP oversees possible breaches of this regime, and if found, it decides on the seriousness and consequences of the breach.[96]

Although criminal conducts committed beyond the temporal scope of the SJP are within the competence of the ordinary justice system, engaging in one of them can trigger the competence of the CAP. In some cases, the person is unreachable at the time but is later found and is given a warning.[97] In others, the person has joined a new armed group and has blatantly indicated his/her will to leave the peace agreement and rejoin the conflict; in those cases, that individual is expelled from the Comprehensive System for Peace.[98]

The CAP also studies requests for permission to leave the country from those former FARC-EP members that have restrictions on travel.[99] Furthermore, as explained above, it is in charge of defining the extraordinary inclusions on the list of people accredited by the government as ex-FARC-EP.[100]

Additionally, the CAP acts as a defendant to writs of *tutela* (*amparo*) and of *habeas corpus*, answers petitions, and must oversee other administrative procedures such as security checks, reports of statistics, and other information to other organs within the SJP such as the Jurisdiction's Rapporteur, the Communications Office, the Registry and the Review Section.[101]

The need for a better communication of the benefits granted

Although the government has granted administrative amnesty to thousands of former guerrillas, there is a significant percentage of these people who are unaware of having this transitional benefit. As a result, many of them have the misconception that they are still pending to receive a benefit that was promised to them in the Peace Agreement and, consequently, have unnecessarily submitted applications for amnesty to the CAP, which have ended in rejection decisions or inhibitions to make a ruling.

Thus, new peace initiatives that encompass the granting of amnesty to thousands of people should enhance their mechanisms for communicating and

95 Law No. 1922, above note 81, Arts 67–69; Statutory Law No. 1957, above note 5, Art. 20; CAP, above note 12; SJP, Appeals Section, Interpretative Judgment No. TP-SA-SENIT 4, 26 April 2023, and Judicial Decision Nos TP-SA-288, 13 September 2019, and TP-SA-289, 13 September 2019.

96 *Ibid.*

97 CAP, Judicial Decision No. SAI-SUBA-IC-D-011-2022, 4 April 2022.

98 SJP, Appeals Section, Judicial Decision No.TP-SA-289, 13 September 2019, para. 20.

99 President of Colombia, Regulatory Decree No. 2125, 18 December 2017; Presidency of the SJP, Resolution 011, 20 April 2018.

100 Statutory Law No. 1957, above note 5, Art. 63, para. 8; SJP, Appeals Section, Judgment No. TP-SA-144, 20 December 2019, and Judicial Decision Nos TP-SA-605, 16 September 2020, and TP-SA 1008, 15 December 2021.

101 The *tutela* is a mechanism of protection, more expeditious than an ordinary proceeding, which allows any person to resort to the judicial authorities to obtain immediate protection of their fundamental rights when these are violated or threatened by the action or omission of any public authority or private individual. Political Constitution of Colombia, 1991, Art. 86.

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explaining these decisions to their beneficiaries, so that they can properly understand the benefit granted and its scope. This would reduce requests for benefits and could positively impact the credibility of the process.

As an example, on 21 February 2024, the SJP, in alliance with the OHCP, ARN and the United Nations Development Programme, launched a digital tool through which former FARC-EP members can verify whether they are beneficiaries of the administrative amnesty.[102] In addition, and aware of the difficulties faced by former members in terms of connectivity and access to technology, the physical delivery of these certificates is being implemented through the ARN and the CAP, in the framework of the visits made by the latter to the FTTRSs.[103]

Having accreditation as a former member of the FARC-EP by the OHCP is currently the only way to enter into the reintegration and normalization programme of the ARN

As indicated above, accreditation by the OHCP is a requirement for having access to the reincorporation programmes offered by the ARN. However, this entails important challenges. For example, there are many people who the CAP has found were members of the FARC-EP –because of the information provided in the file from the ordinary justice system – but who were not accredited as such by the government. Although these people – around 400[104] – have judicial rulings stating their former membership of the armed group, are contributing to the reconstruction of the truth and can receive transitional benefits from the SJP, they are not part of the reincorporation programmes since they are lacking the said accreditation – unless a judicial procedure is carried out in which it is demonstrated that they were not included in the list because of *force majeure*.

If the CAP had already concluded that these individuals were ex-FARC-EP, it should have been foreseen an easier way to give them access to the reintegration programmes, instead of having to activate another judicial procedure with a high threshold for so doing. This has a significant impact for the CAP, since, despite its limited resources and strict temporality to fulfil its main function, it is increasingly concentrating its capacity on carrying out this type of exceptional procedure.

Implementing a peace agreement in a country still in conflict

The International Committee of the Red Cross (ICRC) has recently indicated that there are eight ongoing NIACs in Colombia.[105] This public order situation

102 According to statistics from the information technology team at the SJP, as of 15 March 2024, 680 certificates had been downloaded.

103 SJP, "Act of Communication of the De Jure Amnesty Decrees to Peace Signatories", 21 February 2024, available at: www.youtube.com/watch?v=aKFx1NGTG1w.

104 Unfortunately, the CAP does not have updated statistics on how many people have accredited their former affiliation to the FARC-EP only through the ordinary justice system.

105 ICRC, "Colombia: Humanitarian Balance 2024", April 2024, available at: www.icrc.org/es/document/colombia-balance-humanitario-2024.

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presents great difficulties in terms of security for victims and members of the FARC-EP who are appearing before the SJP. As detailed below, many victims have informed the SJP that they have been threatened for participating in the transitional justice process, and there are victims who are afraid of being recognized by those who harmed them, fearing retaliation.

On the other hand, in some hearings, ex-FARC-EP members have stated that they have been threatened by other non-State armed groups or, in some cases, even their former comrades in arms, now dissidents from the peace process. Some have been killed, while others have been kidnapped or forcedly displaced.[106] There are certain areas of the country where their security, or that of SJP staff, cannot be guaranteed, so it is not possible to access those places in order to carry out *in loco* visits, to search for the missing, or to talk to those living there in an effort to rebuild the truth of what happened during the NIAC with the FARC-EP. This unfortunate reality may impact or discourage the participation of victims and defendants in the proceedings at the SJP and the truth-seeking process currently taking place.

Both victims and defendants have asked the SJP to study their security situation and adopt protective measures for them.[107] The Unified Risk Monitoring Mechanism of the Comprehensive System for Peace, coordinated by the IPU of the SJP, has gathered information[108] on 301 death threats against leaders of social organizations that submitted reports to the CATR, and against ethnic groups accredited as victims by the SJP. It has received 1,040 requests for protection measures from victims accredited by the SJP, 535 of which have been implemented.

Since the signing of the Peace Agreement, there have been 408 murders of former FARC-EP members, 384 of which were appearing before the SJP; fifteen kidnappings; and death threats against 114 individuals appearing before the SJP. The IPU has received 298 requests for protection measures from former FARC-EP members, ninety-five of which have been implemented.[109] As a result of persistent threats, there have been massive forced displacements in the reincorporation spaces located in the municipalities of Ituango, La Macarena, Mesetas and La Uribe.

In parallel, in 2020 the SAA adopted provisional measures to protect signatories of the Peace Agreement and their families, considering the serious security conditions they are facing.[110] The SAA has issued 275 judicial decisions ordering State authorities involved in implementing the Peace Agreement to provide information about the situation and to implement protective measures.

106 *Ibid.*
107 *Ibid.* See also note 108 below.
108 According to figures provided on 14 December 2023 by the IPU of the SJP, which were based on the Unified Risk Monitoring Mechanism of the Comprehensive System for Peace, available at: www.jep.gov.co/uia/Paginas/mecanismo_monitoreo/index.aspx.
109 *Ibid.*
110 Statutory Law No. 1957, above note 5, Art. 93; SAA, Judicial Decision No. AT-057-2020, 29 April 2020.

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These decisions aim to strengthen the security of people appearing before the SJP, while also trying to determine the reasons for and patterns of the victimization.[111] The SAA has issued orders in 113 individual protection requests, aimed at guaranteeing the life and integrity of these people.

As a result, State institutions have designed an improvement plan to carry out risk studies and implement the protection measures that may apply.[112] They have also presented a Strategic Plan for Security and Protection, as well as the Public Policy for the Dismantling of Criminal Organizations, which aims to tackle successors of paramilitarism that attack human rights defenders and people who participate in the implementation of the Peace Agreement.[113]

The scope of the Peace Agreement

Finally, it is more than fair to say that the Peace Agreement is certainly not only the SJP or even the Comprehensive System for Peace – it goes far beyond that. The roots of the NIAC are diverse, and the Agreement purported to overcome these structural factors. In order to do so, its six chapters mostly address the need to develop, strengthen and apply measures of public policy across the territory in subjects such a land reform; political participation; ceasefire, disarmament, and reincorporation of ex-FARC-EP members; and the problem of illicit drugs. Thus, the majority of the Peace Agreement refers to public policies that need to be implemented by State authorities rather than by the mechanisms of the Comprehensive System for Peace.

Those mechanisms, notably the Search Unit for Missing Persons in the Context of and Due to the Armed Conflict and the SJP, are focused on their mandate, and so was the Commission for the Clarification of the Truth, Coexistence and Non-Repetition, which has already completed its mandate. However, authorities at the national and local levels need to fully fulfil their obligations laid out in the rest of the Agreement, for example in relation to land, the solution to the problem of illicit drugs, and disarmament. Without de-escalation of the conflicts currently active in Colombia, it is very difficult to find background solutions for the security concerns expressed by victims and former guerrillas who are still committed to the peace process.

In conclusion, the Comprehensive System for Peace has been functioning and delivering results to the extent of its capabilities, but for the Peace Agreement to be respected and implemented, it is also fundamental that the State fully honours the rest of the obligations laid down in the Agreement.

111 According to figures provided on 15 December 2023 by the SAA. See also SJP; "SJP Orders State Authorities to Design a Comprehensive Security Plan for Peace Accords Signatories in New Reincorporation Areas", 25 August 2021, available at: https://tinyurl.com/52c6fxeu.

112 Presidency of Colombia, Agreement Implementation Unit, "Policy for Dismantling Criminal Organizations Approved", 7 September 2023, available at: https://portalparalapaz.gov.co/aprobada-politica-de-desmantelamiento-de-organizaciones-criminales/08/.

113 According to figures provided on 15 December 2023 by the SAA.

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Conclusion

As peace is an elusive but a desired end for many in this world, this article has intended to contribute to current discussions on peace initiatives involving the granting of amnesties. Nowadays the world is moving away from the idea that broad or blanket amnesties or amnesties for war crimes or crimes against humanity could lead to peace and stability, and has acknowledged the fact that in most cases such amnesties entail impunity.[114]

Nevertheless, amnesties are a means for supporting reconciliation in the aftermath of a NIAC, and States are encouraged to grant them – but granting them with a higher threshold is not an easy task. The key factor is to understand that for them to be successful measures of Colombia's transitional justice process, amnesties are linked to the need to comply with obligations in order to keep them – for example, to contribute to clarifying the truth and to upholding the rights of victims, because the truth-seeking process is paramount for the success of a peace process and for having a high regard for the centrality of victims as stated in the Peace Agreement.

Nowadays amnesties are not a stamp that is put on paper, nor are they some measure that erases all crimes committed. The process for issuing them is open to the possibility of victims' participation. Neither are they a permanent benefit, since the person can be expelled from the Comprehensive System for Peace if, for example, they join a new armed group. Currently, therefore, amnesties are a more complex means, and that complexity helps to guarantee their existence and to ensure that they can give security to former members of the FARC-EP and really contribute to their reintegration while respecting the rights of the victims and the obligations of the Colombian State. This reality might shed some light on how the CAP has understood its mandate and has given the broadest amnesty possible. For some it is not as broad as it should have been, and for others it might be too broad. There is a great responsibility in interpreting the Amnesty Law and defining what can be exonerated from criminal responsibility at the end of the NIAC with the FARC-EP, and in deciding who should receive the benefit of conditional release from prison, and for what conducts. These challenges will be faced by any judicial body that, in future transitional processes from NIAC to peace, has to fulfil the IHL mandate to grant the broadest amnesty to, as Article 6(5) of Additional Protocol II indicates, "persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

Thus, this piece has aimed to share some of the CAP's path and work – namely, how the idea of honouring the mandate of granting the broadest possible amnesty has been put into place in the peace process. The article has

114 See, for example, Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Surrounding Areas v. El Salvador*, Judgment (Merits, Reparations and Costs), Series C, No. 252, 25 October 2012, paras 283, 291.

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also highlighted the steps taken over the years to make this process a reality: signing the Peace Agreement, developing its legal framework, interpreting it, facing the challenges that establishing a new institution entails, and trying to be as efficient as possible in a process with a ticking clock and decades of NIAC to overcome.

This article has addressed several issues that have arisen in the peace process. Some of them are practices that should be encouraged in other peace initiatives, such as making contributions to IHL discussions, being present in places where the conflict has had an impact, giving former guerrillas a second chance in exchange for their disarmament, and, above all, remembering that no party to the conflict won the war, but that both parties negotiated an agreement to end it.

Other practices could be improved, and hopefully through this piece they can be noted and considered for other processes. This includes enhancing access to reincorporation processes and security for those who keep their commitment to the peace process, as well as improving ways of providing the judicial body with the information needed to focus on those who signed the agreement and to decide in a timely fashion.

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