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Reconciliando medidas de tratamiento especial con el deber de investigar y enjuiciar las violaciones graves de derechos humanos en el proceso de justicia transicional en Colombia


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# Reconciling special treatment with the duty to prosecute serious human rights violations in Colombian transitional justice

## Reconciliando medidas de tratamiento especial con el deber de investigar y enjuiciar las violaciones graves de derechos humanos en el proceso de justicia transicional en Colombia

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**Abstract:** On 24 November 2016, the Colombian government and FARC-EP signed a historic peace agreement, establishing the Comprehensive System for Truth, Justice, Reparation, and Non-Recurrence. Central to this system is the Special Jurisdiction for Peace (SJP), which combines restorative justice mechanisms with judicial oversight. This article analyses whether the special treatment measures under the SJP —such as special and alternative sanctions, amnesties, and pardons— comply with Colombia's obligations under the American Convention on Human Rights and the International Covenant on Civil and Political Rights to investigate and punish serious human rights violations. It examines the proportionality and enforceability of these measures, highlighting their potential to conflict with international duties if

not properly implemented. While the SJP's approach may facilitate peace, it must ensure that the System's sanctions align with the gravity of crimes committed. This study underscores the need for Colombia's transitional justice framework to uphold victims' rights while adhering to international standards.

**Keywords:** Colombian peace agreement, Special Jurisdiction for Peace, transitional justice, serious human rights violations, proportionality of sanctions.

**Resumen:** El 24 de noviembre de 2016, el gobierno de Colombia y las FARC-EP firmaron un histórico acuerdo de paz que estableció el Sistema Integral de Verdad, Justicia, Reparación y No Repetición. En el centro de este sistema se encuentra la Jurisdicción Especial para la Paz (JEP), que combina mecanismos de justicia restaurativa con supervisión judicial. Este artículo analiza si las medidas de tratamiento especial bajo la JEP —como sanciones propias y alternativas, amnistías e indultos— cumplen con las obligaciones de Colombia, según la Convención Americana sobre Derechos Humanos y el Pacto Internacional de Derechos Civiles y Políticos, de investigar y enjuiciar graves violaciones de derechos humanos. Examina la proporcionalidad y aplicabilidad de dichas medidas, destacando su posible conflicto con obligaciones internacionales si no se implementan adecuadamente. Aunque el enfoque de la JEP podría facilitar la paz, debe garantizar que las sanciones que aplica sean proporcionales a la gravedad de los delitos.

**Palabras clave:** acuerdo de paz colombiano, Jurisdicción Especial para la Paz, justicia transicional, violaciones graves de derechos humanos, proporcionalidad de sanciones.

## Introduction

On 24 November 2016, the Colombian government and the opposition armed group FARC-EP concluded an agreement aimed at permanently ending the armed conflict between them.[1] This Agreement holds the potential to mark a significant milestone in Colombia's history, provided it effectively leads to a stable and enduring peace. The importance of such an outcome cannot be overstated, given the protracted nature of the conflict spanning over five decades,[2] the extensive and severe human rights violations perpetrated throughout this period,[3] the staggering number of victims affected (Oficina del Alto Comisionado para la Paz s/d), and the continued existence of other armed conflicts within the country.[4]

In contrast to previous peace agreements in Colombia,[5] the Agreement introduces a novel approach by establishing a framework to uphold the rights of victims to truth, reparations, and non-repetition. Known as the Comprehensive System for Truth, Justice, Reparation, and Non-Recurrence,[6] this system emphasises restorative and reparative measures over retributive sanctions.[7] It integrates a judicial mechanism, the Special Jurisdiction for Peace (SJP) (Valencia and Francés 2018), with two extrajudicial mechanisms —a truth commission (Pantoja and Lucero 2020) and a unit tasked with locating individuals who went missing during the armed conflict.[8] Within the Comprehensive System, individuals under the jurisdiction of the SJP are

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[1] Final Agreement to End the Armed Conflict and Build a Stable and Long Lasting Peace. For an unofficial version of the Agreement in the English language see http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf.

[2] Agreement, at 5.

[3] See for example the four reports prepared by the Inter-American Commission of Human Rights in 1981, 1993, 1999, and 2014, respectively: www.oas.org/es/cidh/informes/pais.asp.

[4] Four of such conflicts oppose government forces to rebel groups, whereas the other opposes two rebel groups (ICRC 2019). It is also worth recalling the participation of paramilitary groups in the conflict at large and that members of such groups are allegedly responsible for the commission of crimes under international law (Office of the Prosecutor, International Criminal Court 2018a).

[5] Cf. the agreement concluded between the Colombian government and Movimiento 19 de Abril (M-19) on 30 March 1990: http://pdba.georgetown.edu/CLAS%20RESEARCH/Library%20and%20Documents/Peace%20Processes/1990-1994/1990%20Mar_M19_Acuerdo.pdf.

[6] Agreement, Chapter 5. See generally Olásolo and Ramírez (2017).

[7] Agreement, at 136.

[8] Agreement, at 132 et seq.

eligible for special treatment measures, including amnesty or sentence pardons, under specific conditions.[9]

Colombia submitted its instrument of ratification of the Rome Statute of the International Criminal Court on 5 August 2002.[10] In June 2004, the Office of the Prosecutor (OTP) of the International Criminal Court launched a preliminary examination of the situation in Colombia. This examination concerned crimes against humanity and war crimes committed in the context of an internal armed conflict (OTP, International Criminal Court 2020). However, in October 2021, the OTP concluded the preliminary examination with a decision not to proceed with an investigation. This decision was based on the OTP's admissibility assessment (OTP, International Criminal Court 2023),[11] which determined that the government of Colombia was neither inactive, unwilling, nor unable to genuinely investigate or prosecute the aforementioned crimes.[12] Nonetheless, questions about the adequacy of penalties imposed by the SJP —particularly their alignment with the principles of retribution, rehabilitation, restoration, and deterrence— remain under evaluation in light of the Constitutional Court of Colombia's principles in Sentencia C-674/17.[13]

As a State party to the American Convention on Human Rights (ACHR)[14] and the International Covenant on Civil and Political Rights (ICCPR),[15] Colombia is obligated to investigate serious violations of

[9] For the full range of available measures and the significance of the conditionality regime in the context of the Comprehensive System see Corte Constitucional, Sentencia C-080/18, 2018-08-15, at 171-200. For the relationship between the punishment negotiated in the Agreement and the Colombian government's trying to come to terms with atrocities committed in the internal armed conflict, see generally Rueda and Holà (2019). On the political challenges faced by the SJP see Ramírez and Quiroga (2022).

[10] See United Nations Treaty Collection: www.treaties.un.org.

[11] For an analysis of the Cooperation Agreement between the Office of the Prosecutor and Colombia that closed the preliminary examination see Gutiérrez Rodríguez (2023).

[12] Office of the Prosecutor, International Criminal Court (2023), para. 65.

[13] Office of the Prosecutor, International Criminal Court (2023), para. 45. Cf. Office of the Prosecutor, International Criminal Court (2018b).

[14] Colombia signed the Convention on 22 November 1969 and deposited the instrument of ratification on 31 July 1973. On 21 June 1985, Colombia accepted the competence of the Inter-American Commission of Human Rights to receive and examine communications in which a State party alleges that a State party has violated a right under the Convention. On the same date, it also accepted the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the ACHR. See www.oas.org.

[15] Colombia signed the International Covenant on 21 December 1966 and deposited the instrument of ratification on 29 October 1969.


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human rights under these treaties, as explained further in Section 2.[16] However, while the establishment of the SPJ likely facilitated the Agreement's conclusion (Section 3), certain aspects of the special treatment regime may pose legal challenges by conflicting with Colombia's duty to investigate such violations. Failure to fulfill this duty may result in the responsibility of Colombia under these treaties (Section 4) (Bertoni 2023).

## 1. **Duty to prosecute serious violations of the ACHR and the ICCPR**

The concept of certain human rights violations being more severe than others traces back to 1967, when the UN Commission on Human Rights sought authorization from the UN Economic and Social Council (ECOSOC) to investigate "gross violations of human rights and fundamental freedoms", exemplified by apartheid in South Africa.[17] While the term "gross violations" lacks explicit definition in the Resolution, it likely denotes flagrant and systematic breaches, as implied by the Resolution's title (Study and Investigation of Situations Which Reveal a Consistent Pattern of Violations of Human Rights' and the ordinary meaning of the term).[18] ECOSOC reiterated this terminology in Resolution 1235,[19] as well as in Resolution 1503 establishing a procedure to examine communications indicating consistent patterns of severe human rights violations.[20]

The ACHR and the ICCPR do not explicitly define "serious" or "grave" violations, but the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and the Human Rights Committee (HRC) are instrumental in shaping the contours of these terms.[21] The precise delineation of serious breaches

[16] On Colombia's multifaceted approach to international criminal justice frameworks see Tamayo (2024).

[17] Resolution 8 (XXIII) of 16 March 1967, Commission on Human Rights, Report on the Twenty-Third Session, ESCOR, Supp. (No. 6), at 131-2, operative paragraph 4, UN Doc. E/4322 (1967).

[18] According to Lexico Dictionary, the first meaning of gross is "(especially of wrongdoing) very obvious and unacceptable." See www.lexico.com.

[19] ECOSOC Resolution 1235 (XLII), 42 UN ESCOR Supp. (No. 1), at 17, operative paragraph 2, UN Doc. E/4393 (1967).

[20] ECOSOS Resolution 1503 (XLVIII), 48 UN ESCOR (No. 1A), at 8, operative paragraph 5, UN Doc. E/4832/Add.1(1970).

[21] ACHR, Art. 33. ICCPR, Arts. 28-45.

under these conventions is of paramount importance for State parties, as their occurrence can entail specific legal ramifications (Sections 2.1-2.3).

### 1.1. *Serious breaches of the ACHR*[22]

The IACtHR defines extrajudicial, summary, or arbitrary executions as grave violations of the ACHR, emphasising the fundamental nature of the right to life as a prerequisite for the exercise of other protected rights.[23] While a multiple breach of the right to life will necessarily constitute a serious breach of the ACHR —the case being considered by the IACtHR concerned multiple unlawful executions— it is not clear whether a single violation of the right to life will also qualify as a serious breach of the ACHR.

Moreover, the IACtHR links the seriousness of violations to the non-derogable nature of the human rights involved. Torture, enforced disappearances, and arbitrary executions are deemed grave violations due to the non-derogable status of the rights they infringe upon.[24] Consequently, any violation of non-derogable rights outlined in the ACHR constitutes a serious breach.[25] While a multiple breach of a non-derogable right under the ACHR would necessarily entail a serious violation of this international treaty —the case being considered by the IACtHR concerned multiple breaches of such rights— it is again unclear whether a single breach of a non-derogable right would qualify as a serious violation.

A serious violation becomes "particularly serious" when part of a systematic pattern or practice tolerated by the State.[26] For instance, enforced disappearances were deemed especially serious when occurring within a systematic practice of inter-State-sponsored terrorism.[27] Similarly, violations such as the destruction of villagers' property in

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[22] On the relationship between restorative justice and the Inter-American system of human rights see generally Méndez and Hernández Jiménez (2019).

[23] *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006 (Merits, Reparations, and Costs), Series C, No. 140, para. 143.

[24] *Case of the Rochela Massacre v. Colombia*, Judgment of 11 May 2007 (Merits, Reparations, and Costs), Series C, No. 163, para. 294.

[25] The non-derogable rights are specified in Article 27, paragraph 2 of the ACHR. They include those related to juridical personality (Article 3), human treatment (Article 5), freedom from slavery (Article 6), and others (Arts. 9, 12, 17-20, and 23).

[26] *Case of Contreras and Others v. El Salvador*, Judgment of 31 August 2011 (Merits, Reparations, and Costs), Series C, No. 232, para. 83.

[27] *Case Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Series C, No. 221, para. 99.


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Colombia, perpetrated with State complicity, are considered particularly serious due to their impact on livelihoods and displacement.[28]

Furthermore, violations involving vulnerable groups, such as children, are considered especially grave, warranting special protective measures mandated by international treaties.[29] This rationale should therefore extend to any human rights breach affecting vulnerable groups, emphasising the duty to provide assistance and protection to marginalised populations.

### 1.2. *Serious breaches of the ICCPR*

A study (Geneva Academy of International Humanitarian Law and Human Rights 2014) indicates that, according to the HRC, the following acts may constitute serious violations of the ICCPR: arbitrary detention arrest of journalists, attacks on civilian population, destruction of property[30], detention in degrading conditions, direct targeting of civilians,[31] disappearances,[32] excessive use of force by security forces,[33] extrajudicial executions,[34] firing live bullets during demonstrations,[35] forced displacement,[36] murder,[37] rape,[38] recruitment

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[28] *Case of the Ituango Massacres v. Colombia*, Judgment of 1 July 2006 (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 148, paras. 178, 181-3.

[29] See for example: *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Series C, No. para. 146; and *Case of Bulacio v. Argentina*, Judgment of 18 September 2003, Series C. No. 100, paras. 133, 162.

[30] *Concluding Observations: Ethiopia,* UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

[31] *Concluding Observations: Israel*, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

[32] *Concluding Observations: Ethiopia,* UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

[33] *Concluding Observations: Cameroon*, UN doc. CCCPR/C/CMR/CO/4, 4 August 2010, para. 18.

[34] *Concluding Observations, Colombia*, UN doc. CCPR/C/COL/CO/6, 4 August 2010, para. 14.

[35] *Concluding Observations: Israel*, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

[36] *Concluding Observations: Ethiopia,* UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

[37] *Concluding Observations: Brazil*, UN doc. CCPR/C/BRA/CO/2, 1 December 2005, para. 9.

[38] *Concluding Observations: Ethiopia*, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

of children for armed conflict,[39] refusal to evacuate the wounded,[40] removal of children from their parents for illegal adoption or trafficking,[41] sexual violence,[42] summary trials, torture and ill-treatment,[43] and the use of civilians as human shields.[44] While the HRC does not always explicitly articulate the criteria for classifying these violations as serious, in some instances, it cites their "widespread",[45] "widespread and systematic"[46] or "indiscriminate"[47] nature as grounds for their gravity.

In summary, both the IACtHR and the HRC consider a human rights violation serious when it forms part of a systematic or widespread pattern of abuses. While the IACtHR also encompasses violations of the right to life, of non-derogable rights, and those affecting vulnerable groups, the HRC extends its definition to violations of an indiscriminate nature. In any event, the precise determination of what constitutes a serious violation of human rights holds significance due to the legal ramifications associated with this classification.

### 1.3. *Legal consequences of the qualification of serious human rights violations*

States have a duty to criminalise serious international human rights violations,[48] as well as to investigate then and bring those responsible

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[39] *Concluding Observations, Colombia*, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12.

[40] *Concluding Observations: Israel*, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

[41] *Concluding Observations: Argentina*, UN doc. CCPR/CO/70/ARG, 15 November 2000, para. 5.

[42] *Concluding Observations: Peru*, UN doc. CCPR/C/PER/CO/5, 29 April 2013, para. 11.

[43] *Concluding Observations: Cameroon*, UN doc. CCCPR/C/CMR/CO/4, 4 August 2010, para. 18.

[44] *Concluding Observations: Israel*, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

[45] *Concluding Observations: Thailand*, UN doc. CCPR/CO/84/THA, 8 July 2005, para. 10

[46] *Concluding Observations: Sudan*, UN doc. CCPR/C/SDN/CO/3, 29 August 2007, para. 9.

[47] *Concluding Observations: Russia*, UN doc. CCPR/C/RUS/CO/6, 24 November 2013, para. 9.

[48] HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, para. 18. The obligation flows not only from the ICCPR, but also from other international treaties. See for example: Convention against Torture and Other Cruel, Inhuman or Degrading


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to justice.[49] Moreover, they must restore violated rights whenever feasible and provide reparations to victims to ensure the unimpeded exercise of the affected rights.[50] Consequently, a State fails fulfil its international obligations if it conducts investigations without prosecuting those allegedly responsible for the violations.

Investigations must adhere to principles of independence, impartiality, promptness, thoroughness, effectiveness, and credibility.[51] They should be conducted diligently to uncover the facts surrounding serious rights violations and facilitate the apprehension, prosecution, and punishment of perpetrators.[52] It is imperative that investigations into such violations be initiated ex officio,[53] independent of victims' or their relatives' actions,[54] to ensure the protection of violated rights.[55] This obligation persists even during internal armed conflicts,[56] irrespective of the suspect's status as a State official.[57] While truth commissions or similar mechanisms may aid in implementing the right to truth in transitional justice contexts, they alone are insufficient to safeguard victims' rights; criminal investigations remain indispensable for holding accountable those responsible.[58]

Regarding the obligation to punish serious human rights violations, penalties must align with the severity of the offence and the level of

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Treatment or Punishment, Art. 4; International Convention for the Protection of All Persons from Enforced Disappearance, Art. 4.

[49] HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, para. 18. *Case of Arrum Suhurt et al. v. Paraguay*, Merits, Judgment of 13 May 2019, Series C, No. 377, para. 136.

[50] *Case of Gelman v. Uruguay,* Merits and Reparations, Judgment of 24 February 2011, IACtHR, Series C, No. 221, paras. 190-191. Footnotes omitted.

[51] HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, para. 15; and *General Comment No. 36*, 30 October 2018, para. 28.

[52] *Case of Arrum Suhurt et al. v. Paraguay*, Merits, Judgment of 13 May 2019, Series C, No. 377, para. 142.

[53] Ibid., para. 138.

[54] *Case of Omeara Carrascal et al. v. Colombia*, Merits, Reparations and Costs, Judgment of 21 November 2018, IACtHR, Series C, No. 368, para. 212.

[55] *Case of Kawas Fernández v. Honduras,* Merits, Reparations and Costs, Judgment of 3 April 2009, IACtHR, Series C, No. 196, para. 75.

[56] *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, IACtHR, Series S, No. 134, para. 238.

[57] *Case of Kawas Fernández v. Honduras,* Merits, Reparations and Costs, Judgment of 3 April 2009, IACtHR, Series C, No. 196, para. 74.

[58] *Case of La Cantuta v. Peru,* Merits, Reparations and Costs, Judgment of 29 November 2006, IACtHR, Series C. No. 162, para. 224. Cf. Méndez Romero and Castillo Jiménez 2019.

the offender's criminal involvement, avoiding any form of impunity. Moreover, granting undue benefits during the enforcement of a sentence may also constitute impunity.[59] Even if mitigating factors, like confession or cooperation with the prosecutor, are permissible in sentencing individuals accountable for serious human rights violations, their acknowledgment should not result in impunity.[60]

Additionally, States are prohibited from granting amnesties or imposing unjustifiably brief statutes of limitations or grounds for excluding criminal liability to impede or obstruct the investigation, prosecution, or punishment of individuals accountable for serious human rights violations.[61]

Lastly, it is crucial to emphasise that the prohibition of amnesties for serious human rights violations unequivocally extends to "self-amnesties", which refer to an amnesty granted by a government in favor of its own agents.[62] This holds significance within the legal framework of the SJP since, amnesties and pardons are among the special treatment measures outlined in the Comprehensive System, and State agents may seek immunity from criminal action.

However, before delving into the compatibility of the special treatment regime with the ACHR and the ICCPR, it is imperative to first delineate the jurisdiction of the SJP.

## 2. **Jurisdiction of the SJP**

The jurisdiction of the SJP is delineated by the pertinent provisions of the Agreement[63] and the implementing legislation, notably the Law on Administration of Justice by the SJP (Law No. 1957). It is constrained to offences perpetrated within the context of the armed conflict, during a defined timeframe, and by specified categories of individuals.

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[59] *Case of Barrios Altos v. Peru,* Monitoring Compliance with Judgment, Order of the IACtHR of 7 September 2012, paras. 54 and 55.

[60] *Case of Barrios Altos v. Peru,* Monitoring Compliance with Judgment, Order of the IACtHR of 7 September 2012, para. 57.

[61] HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, para. 18.

[62] *Case of Barrios Altos v. Peru*, Merits, Judgment, 14 March 2001, paras. 41-44.

[63] Agreement, at 145, para. 9.


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### 2.1. *Subject-matter and temporal jurisdictions*

The jurisdiction of the SJP extends solely to crimes committed as a result of or in connection with the conflict,[64] particularly serious violations of international humanitarian law or human rights.[65] Hence, in principle, Colombia may fulfil its obligation to investigate serious human rights violations of the ACHR or the ICCPR. This would involve the SJPR exercising its jurisdiction to investigate and adjudicating such breaches (Andrey 2019).

A crime is considered to have been committed by reason of, or in direct or indirect relation to the armed conflict if the conflict was the root cause or a substantial motive for the commission of the crime. The SJP has already rejected a number of voluntary submissions for that reason. As an example, on 19 June 2020, the SJP rejected the submission made by Samuel Moreno Rojas (former Mayor of Bogota), his brother Néstor Iván Moreno Rojas (former senator) and María Eugenia Rojas de Moreno (his mother). According to the SJP, the corruption crimes for which the applicants were convicted were not related to or committed in the context of the internal armed conflict, did not contribute to the war efforts of any illegal armed group, or aimed to obtain any military advantage for any such group.[66]

Concerning members of the armed forces or the national police, their crimes are deemed related to the conflict not only if perpetrated against FARC-EP members but also against any illegal armed group, such as a paramilitary group, even if such groups have not become parties to the Agreement.[67] The inclusion of crimes committed by members of the public forces against any illegal armed group within the subject-matter jurisdiction of the SJP, as long as they are related to the conflict, while crimes by FARC-EP members against any illegal group are not, aligns with the principle of differentiated treatment for State agents outlined in Article 5 of Legislative Act No. 01 and is therefore constitutional.[68] However, it should be noted that the SJP may employ criteria beyond those specified in the implementing

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[64] Law No. 1957, Art. 62.

[65] Legislative Act No. 01 of 4 April 2017, Transitory Art. 5. On the investigation of sexual crimes see Valiñas (2020).

[66] See SJP, 'Comunicado 085', www.jep.gov.co/Sala-de-Prensa/Paginas/La-JEP-rechazó-el-sometimiento-de-Samuel-Moreno-Rojas,-Iván-Moreno-Rojas-y-de-Mar%C3%ADa-Eugenia-Rojas.aspx. Text of the decision not been published yet.

[67] Legislative Act No. 01 of 4 April 2017, Transitory Art. 5.

[68] Corte Constitucional, Sentencia C-080/18, 2018-15-08, at 505.

legislation to determine the connection between a crime and the armed conflict.[69]

A crime committed by reason of or in relation to the armed conflict, but whose sole or main purpose was to obtain unlawful personal enrichment, does not fall within the jurisdiction of the SJP.[70] Consequently, the war crime of pillaging falls within the subject-matter jurisdiction of the SJP, provided that its sole or main purpose was not obtaining unlawful personal enrichment. Similarly, the crime of extortion[71] also falls within the jurisdiction of the SJP, provided that it was committed by reason of or in relation to the armed conflict and its sole or main purpose was not obtaining unlawful personal enrichment. The SJP also has the power to declare the extinction of criminal liability or the cessation of penalties concerning certain offences perpetrated during internal disturbances or social protests, such as violations of the freedom of assembly and association, violence against public servants, and obstruction of public ways.[72] Since such offences do not in principle constitute violations of human rights,[73] the potential extinction of criminal liability or the cessation of penalties in their regard would not jeopardize the duty to investigate serious human rights violations of the ACHR or the ICCPR.

The temporal jurisdiction covers crimes committed before the entry into force of the Agreement, which was on 1 December 2016.[74] However, concerning FARC-EP members, the subject-matter jurisdiction also extends to crimes committed during the period between 1 December 2016, and the culmination of the disarmament process,[75] provided that the crime in question was directly related to the process. Crimes such as aggravated murder, forced disappearance, kidnapping, torture, forcible transfer of population, child recruitment, blackmail, unlawful enrichment, and drug trafficking committed by

[69] Corte Constitucional, Sentencia C-080/18, 2018-15-08, at 504.

[70] Law No. 1957, Art. 62.

[71] Cf. Penal Code of Colombia, Art. 244, www.oas.org/dil/esp/Codigo_Penal_Colombia.pdf.

[72] Law No. 1957, Art. 62, para. 1.

[73] Under customary international law, there is an internationally wrongful act of a State when conducts is attributable to the State under international law and constitutes a breach of an international obligation of the State. The general rule is that the only conduct attributed to the State at the international level is that of its governmental organs, or of others who have acted under the direction, instigation, or control of those organs (see generally International Law Commission, Draft Article of Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, A/56/10).

[74] Legislative Act No. 1 of 4 April 2017, Transitory Art. 5; Law No. 1957, Art. 65.

[75] The process culminated on June 20, 2017. See UN News (2017).


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FARC-EP members during that period are not considered closely related to the conflict. Consequently, they do not fall within the jurisdiction of the SJP but under the jurisdiction of the ordinary courts of the land.[76]

As far as drug-related crimes are concerned, they fall within the jurisdiction of the SJP only if they were committed before 1 December 2016 by FARC-EP members and the crime was perpetrated to fund the activities of the group.[77]

### 2.2. *Personal jurisdiction*

Based on the Agreement and its implementing legislation, the jurisdiction of the SJP extends to four categories of individuals:[78] (i) members of FARC-EP involved in the crime of rebellion or other conflict-related offences, irrespective of their inclusion in FARC-EP's lists prepared for the Agreement's purposes; (ii) State agents;[79] (iii) individuals financing or collaborating with paramilitary groups or other conflict parties (referred to as "civilian third-parties") (Michalovski et al. 2020); and (iv) individuals engaged in acts of social protest or public disturbances.[80] Several noteworthy observations arise concerning these groups.

Firstly, it is notable that while the notions of direct or indirect participation in the internal armed conflict are pivotal for determining the jurisdiction of the SJP, neither the Agreement nor the implementing legislation provide explicit definitions for these terms.[81] Consequently, their interpretation falls within the purview of the SJP, which may articulate them through case law.[82] In this regard, the

[76] Law No. 1957, Art. 62.

[77] Legislative Act No. 1 of 4 April 2017, Transitory Art. 5; Law No. 1957, Art. 62.

[78] Agreement, at 158-160, paras. 32-35; Legislative Act No. 01 of 4 April 2016, Arts. 5, 16, 17; Ley No. 1957, Art. 63. See also En el Asunto de Jorge Luis Navarro Hernández, SDSJ-504/2018, Jurisdicción Especial para la Paz, Sala de Definición de Situaciones Jurídicas, Resolución, Rechaza por Falta de Competencia Solicitud de Sometimiento, 2018-06-14.

[79] 'State agent' refers to individuals who, at the time of the alleged commission of the crime, were employees of the Colombian government or its decentralized entities, or who were members of the armed forces or the national police. See Law No. 1957, Art. 63, para. 2.

[80] See for instance En el Asunto de Jorge Iván Correa, TP-SA-103 of 2019, Jurisdicción Especial para la Paz, Tribunal para la Paz, Sección de Apelación, Auto, Solicitud de Sometimiento, 2019-01-17.

[81] Law No. 1957, Art. 63.

[82] Art. 25 Law No. 1957, entitled *Doctrina Probable* ("probable doctrine") stipulates that the ultimate power of interpreting the applicable law of the SJP lies with

Appeals Section of the SJP expanded the criteria outlined in Transitory Article 23 of Legislative Act No. 01, which pertains to determining whether the conduct of armed forces or national police members is indirectly related to the armed conflict. This expansion was applied to the conduct of civilian third-parties or State agents, based on a systematic interpretation of the legislation.[83] Additionally, the Appeals Section incorporated the concepts of direct and indirect participation in hostilities, drawing from an ICRC study and ICTY case law,[84] to ascertain the direct or indirect connection of conduct to the armed conflict. As a result, the Appeals Section determined that a member of Congress, who purportedly advocated for the interests of the paramilitary group Autodefensas Unidas de Colombia within Congress and appeared before the SJP as both a civilian third-party and State agent, fell under its jurisdiction due to involvement in the crime of conspiracy with an unlawful armed group, constituting conduct indirectly related to the conflict.[85]

Secondly, it is noteworthy that the jurisdiction of civilian third-parties or State agents, who were not part of the armed forces or national police, is contingent upon their prior consent. Moreover, they must fulfill certain obligations, including truthfulness regarding their actions, providing reparations, and offering assurances of non-repetition.[86]

Thirdly, it is important to note that the SJP lacks jurisdiction over individuals who were under the age of 18 at the time of the purported commission of the crime.[87] This is particularly significant given that both parties involved in the conflict utilised child soldiers (Human Rights Watch 1998), and some of these minors may have been involved in activities falling under the jurisdiction of the SJP.[88] In

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the Appeals Section. Three uniform legal findings made by the Appeals Section shall constitute probable doctrine, which can be applied by the other chambers and sections of the SJP in analogous cases. The doctrine shall be consistent with the applicable law. The Appeals Section has the power to revise the doctrine if it considers it erroneous.

[83] En el Asunto del Caso de David Char Navas, TP-SA-19 de 2018, Jurisdicción Especial para la Paz, Tribunal para la Paz, Sección de Apelación, Auto, Solicitud de Sometimiento, 2018-08-21, para. 11.19.

[84] Ibid., paras. 11.20-11.26.

[85] Ibid., paras. 11.43-11.44.

[86] Law No. 1957, Art. 63, para. 4.

[87] Law No. 1957, Art. 64.

[88] See Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de Hechos y Conductas, Auto No. 029/19, Reclutamiento y Utilización de Niños y Niñas en el Conflicto Armado, Caso No. 007, 2019-03-01.


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Colombia, individuals under the age of 18 at the time of the offence are subject to a special penal regime.[89]

Finally, it is worth noting that a former or incumbent head of State is not subject to the jurisdiction of the SJP.[90] However, they may face impeachment proceedings in the Senate. If the charges brought before the Senate are criminal in nature, the Senate has the authority to decide whether to refer the accused to the Supreme Court for further criminal proceedings.[91]

After outlining the jurisdiction of the SJP, the next step is to similarly analyse the special treatment measures outlined in the Comprehensive System, focusing specifically on those measures that could potentially undermine Colombia's duty to investigate and prosecute serious violations of the ACHR and the ICCPR.

## 3. **Special treatment**

As previously mentioned, individuals under the jurisdiction of the SJP have the possibility of receiving special treatment. Such treatment may encompass various forms, including amnesty or pardon of sentence, waiver of criminal action, special penal treatment, special penitentiary treatment, extinction of disciplinary and administrative responsibility, waiver of monetary compensation as a form of reparation, non-extradition guarantee, or special treatment related to political participation[92] However, the receipt and retention of special treatment are contingent upon meeting the conditions established by the SJP within a framework termed the "conditionality regime".[93]

Concerns have been raised[94] regarding the potential violation of Colombia's duty to investigate and prosecute serious human rights violations depending on the specific nature of the measures

[89] Penal Code of Colombia, Art. 33. See also Juvenile Code (Law No. 1098 of 2006). For an overview of the Colombian juvenile penal system see the website of the Instituto Colombiano de Bienestar Familiar: www.icbf.gov.co/bienestar/proteccion/responsabilidad-penal.

[90] Legislative Act No. 01, Transitory Art. 5.

[91] Political Constitution of Colombia, Arts. 174 and 175.

[92] See Corte Constitucional, Sentencia C-080/18, 2018-15-08, at 171-200.

[93] The conditions include, but are not limited to, telling the truth, making reparations to the victims, and providing assurances of non-repetition. Additional conditions can be imposed by the SJP. See Law No. 1957, Art. 20. See generally Rondón (2023).

[94] See for example, Amnesty International (2018, 8-9).

implemented and the circumstances surrounding the case. This pertains particularly to measures such as amnesty, pardons, and waivers of criminal action (Section 4.1), as well as special penal treatment (Section 4.2).

### 3.1. *Amnesty, pardons, and waiver of criminal action*

One of the distinctive aspects of the restorative justice system overseen by the SJP is the option to grant amnesties or pardons to FARC-EP members or individuals accused or convicted of political offences or offences related to political activities.[95] In the Colombian legal framework, a political offence is defined by four key characteristics: it is committed by a group seeking to alter the constitutional order through armed means, it generally has an altruistic motive, it targets the State, and it may result in civilian casualties.[96]

An amnesty extinguishes not only the penal action but also the civil action for compensation, whereas pardons of sentence terminate the penalty and its associated components.[97] In Colombia, principal penalties include imprisonment, fines, and the deprivation of specific rights as stipulated in the Penal Code's special provisions.[98] The associated penalties may entail restrictions such as the prohibition of holding public office, termination of public employment or function, and restrictions on residency or movement to certain areas.[99] However, given that amnesties and pardons of sentences function within a restorative justice system, they do not negate the beneficiary's obligation to contribute to uncovering the truth and the victims' entitlement to reparations under the Comprehensive System.[100]

According to the Agreement and the original text of Amnesty Law No. 1820, amnesties and pardons of sentence would not apply to crimes against humanity, genocide, "serious war crimes", hostage-taking, or any other serious violation of liberty, including torture, extrajudicial executions, forced disappearances, rape, sexual violence, child abduction, unlawful displacement of civilians, and the recruitment

[95] Law No. 1957, Art. 40.
[96] Corte Constitucional, Sentencia C-080/18, 2018-15-8, at. 217.
[97] Law No. 1957, Art. 41.
[98] Penal Code of Colombia, Art. 35.
[99] Penal Code of Colombia, Arts. 43 and 52.
[100] Law No. 1957, Art. 40 (2).


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or enlistment of children as soldiers.[101] Although the Agreement does not define the concept of "serious war crime", the original text of Amnesty Law No. 1820 did so, defining it as any systematic breach of humanitarian law.[102] The inclusion of the term "serious" in Article 23(a) of Law No. 1820 proved controversial because humanitarian law and international criminal law do not distinguish between serious and non-serious war crimes, and the SJP is bound to apply the rules of these two branches of international law. The differentiation between serious and non-serious war crimes was criticised by NGOs[103] and the Office of the Prosecutor of the International Criminal Court.[104] Ultimately, the Constitutional Court of Colombia resolved this issue through its power of constitutional review by declaring the term "serious" unenforceable.[105] Consequently, the amnesty and pardons regime does not cover any war crime (in addition to the other crimes indicated above), as now reflected in the law governing the administration of justice by the SJP.[106]

In the case of State agents, they are eligible for differentiated special treatment, which may include the option of a waiver of penal action if they are convicted, accused, or suspected of involvement in a crime committed due to or in connection with the armed conflict, whether directly or indirectly.[107] The waiver of penal action results in the termination of the criminal proceedings, criminal responsibility, and the penalty, except for crimes ineligible for amnesty or pardon of sentence, or any offence under the Military Penal Code of Colombia.[108]

Given this context, it is reasonable to argue that the granting of an amnesty, pardon, or waiver of criminal action would not contravene the duty to investigate serious violations of the ACHR and the ICCPR, as these measures cannot be granted in instances of such violations.

### 3.2. *Special penal treatment*

Within the framework of the Comprehensive System, individuals under the jurisdiction of the SJP who are ineligible for amnesty or

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[101] Agreement, at 136, para. 40; Amnesty Law No. 1820, Art. 23(a).

[102] Amnesty Law No. 1820, Art. 23(b).

[103] See for example Human Rights Watch (2016).

[104] Escrito de Amicus Curiae de la Fiscal de la Corte Penal Internacional sobre la Jurisdicción Especial para la Paz, 19 October 2007, paras. 29-39.

[105] Corte Constitucional, Sentencia C-007/18, 2018-03-01.

[106] Corte Constitucional, Sentencia C-007/18, 2018-03-01, Art. 42.

[107] Corte Constitucional, Sentencia C-007/18, 2018-03-01, Art. 44.

[108] Corte Constitucional, Sentencia C-007/18, 2018-03-01, Art. 45.

waiver of penal action may face sanctions. As outlined in the Agreement, these sanctions aim to serve the rights of victims and foster sustainable peace through restorative and reparative means.[109] Their specific scope will be determined based on factors such as the level of truth and responsibility admitted before the SJP, the timeliness of acknowledgment (earlier acknowledgments being more favorable for the offender), the gravity of the offence, the extent of involvement in the criminal conduct, and the commitments made by the offender regarding victim reparations and non-repetition.[110] These sanctions come in three categories: special sanctions *(sanciones propias)*, which are applicable to individuals providing exhaustive, comprehensive, and detailed truth before the Judicial Panel for Acknowledgment of Truth and Responsibility *(Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas)* (Section 4.2.1);[111] alternative sanctions *(sanciones alternativas)*, applicable to individuals admitting truth and responsibility for the first time during adversarial proceedings before the First Instance Chamber of the Tribunal for Peace *(Sección para Casos de Reconocimiento de Verdad y Responsabilidad de Primera Instancia, del Tribunal para la Paz)* before judgment is delivered (Section 4.2.2); and ordinary sanctions *(sanciones ordinarias)*, which apply to individuals who do not admit truth and responsibility during adversarial proceedings before said chamber and are subsequently found guilty (Section 4.2.3).[112]

### 3.2.1. Special sanctions

The special sanctions within the Comprehensive System are designed for individuals who have fully and comprehensively admitted to their involvement in very serious crimes falling under the jurisdiction of the SJP. These sanctions range from a minimum of five years to a maximum of eight years.[113] However, in cases where offenders did not play a crucial role in the most serious and emblematic offences, the

[109] Agreement, para. 60, at 174.

[110] Agreement, para. 60, at 174. See also Law No. 1957, Art. 125.

[111] For a discussion on the potential problems in the dialogical process between the Panel and appearing individuals, which may affect victims' rights, see Castañeda (2024).

[112] See Agreement, at 182-185; Law No. 1957, Art. 125. On the tensions between retributive and restorative sanctions in the Colombian model of transitional justice see generally Calle and Rodríguez Castillo (2022).

[113] Law No. 1957, Arts. 126, 127.


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duration of these sanctions will be reduced to between two to five years, even in instances of multiple offences.[114]

It should be noted that the special sanctions are aimed at effectively restricting certain freedoms and rights, such as the freedom of residence and movement, while also serving as a deterrent against future violations. These sanctions do not involve imprisonment or any other form of detention.[115] Instead, the restrictions are enforced within specific territorial zones and time frames determined by the SJP in its sentence. During this period, the offender is prohibited from leaving the designated territorial zone without prior authorisation from the SJP, which also specifies the offender's place of residence.[116] While Law No. 1957 does not explicitly address whether the offender can reside outside the designated territorial zone, article 64 of the Rules of Procedure of the SJP suggests that this might be possible. According to this provision, the sentence imposing a special sanction must determine the compatibility of the sanction with the offender's movements and other activities. Therefore, if deemed compatible by the SJP, the offender could reside outside the designated territorial zone during the enforcement of the sanction. Importantly, the imposition of a special sanction does not preclude the individual from holding elective public offices,[117] such as a member of parliament.

For members of the armed forces or the national police, the restrictions are implemented within military or police units, respectively, rather than specific territorial zones. These individuals are required to reside either within these units or in close proximity to them. Additionally, offenders who belong to indigenous communities may be permitted to reside in their ancestral territories.[118]

The imposition of a special sanction may entail the offender's participation in various projects,[119] such as infrastructure construction or repair in urban or rural areas, environmental protection efforts, or the clearance of explosive devices.[120] However, a pertinent question

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[114] Law No. 1957, Arts. 129. For the interpretation of what constitutes a crucial participation by the SJP see Jurisdicción Especial para la Paz, Tribunal para la Paz, Sección de Apelación, Sentencia TP-SA-RPP No. 230 de 2021; and Jurisdicción Especial para la Paz, Tribunal para la Paz, Sección de Apelación, Sentencia Interpretativa TP-SA Senit 5 de 2023.

[115] Law No. 1957, Art. 127.

[116] Law No. 1957, Art. 127.

[117] Law No. 1957, Art. 31(1).

[118] Law No. 1957, Art. 127 paras. 1 and 2 respectively.

[119] Law No. 1957, Art. 127(e).

[120] Law No. 1957, Art. 141.

arises regarding whether a non-imprisonment sanction aligns with the obligation to address serious human rights violations. As previously discussed, fulfiling this duty requires ensuring that the punishment corresponds to the severity of the crime and the level of the offender's involvement, and that any benefits conferred during the enforcement period do not result in impunity.

The Constitutional Court of Colombia asserts that the special sanctions of the Comprehensive System serve both restorative and retributive purposes. For instance, offenders serving a special sanction may participate in restorative projects during specific hours and reside in designated territorial zones.[121]

In this context, the Judicial Panel for Acknowledgment of Truth and Responsibility has recommended several measures, so far. These include constructing a memorial park, creating plaques with the names of victims to be placed at the locations where they were arrested, killed, or disappeared, and establishing spaces where victims can gather and engage in activities of common interest, and producing a documentary film.[122] Other recommendations include participating in demining activities; these activities would occur at specific times and locations and be subject to movement restrictions determined by the Tribunal for Peace.[123]

Further measures include creating a museum with activities aimed at restoring the victims' good name and honour, conducting reforestation and watershed recovery projects, [124] re-establishing tertiary roads, developing education for peace programs, restoring the dignity of a cemetery where forcibly disappeared individuals were buried, and reconstructing seven bridges destroyed by security forces.[125]

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[121] Corte Constitucional, Sentencia C-080/18, 2018-15-08, at 249-250.

[122] Jurisdicción Especial para la Paz, Salas de Justicia, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Resolución No. 01 de 2022.

[123] Jurisdicción Especial para la Paz, Salas de Justicia, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Resolución No. 02 de 2022.

[124] Jurisdicción Especial para la Paz, Salas de Justicia, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Resolución No. 03 de 2022.

[125] Jurisdicción Especial para la Paz, Salas de Justicia, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Sub-Salas D y F, Resolución No. 04 de 2024.


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### 3.2.2. Alternative sanctions

Alternative sanctions are applicable to individuals found responsible for committing "very serious" offences who have admitted to the truth and taken responsibility before a verdict is reached by the SJP. In contrast to restorative measures, these sanctions are punitive in nature, typically involving a prison term ranging from five to eight years, even in cases involving multiple offenses.[126]

However, akin to the special sanctions outlined in the Comprehensive System, alternative sanctions may be reduced to a duration of two to five years if the offenders did not play a pivotal role in the most severe and prominent offenses.[127]

### 3.2.3. Ordinary sanctions

Finally, the ordinary sanctions within the Comprehensive System are applicable to individuals prosecuted by the SJP who have not admitted to the truth and taken responsibility prior to sentencing. These sanctions involve imprisonment terms ranging between 15 and 20 years for the most severe crimes, even in cases involving multiple offenses.[128]

Comparatively, under the Penal Code of Colombia, the imprisonment terms vary for different offences (Torres et al. 2021). For instance, the penalties for genocide range between 30 and 40 years, while murder of a person protected by humanitarian law carries a penalty of between 30 and 40 years. Aggravated murder results in imprisonment for between 25 and 40 years, enforced disappearance between 20 and 30 years, kidnapping with extortion between 18 and 28 years, terrorist acts between 15 and 25 years, and hostage-taking between 20 and 30 years.[129] The maximum term of imprisonment under the Penal Code of Colombia can reach up to 60 years.[130]

The ordinary sanctions within the Comprehensive System have sparked controversy. It is important to remember that to qualify for special treatment under this regime, individuals under the jurisdiction of the SJP must fulfill obligations outlined in their conditionality regime,

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126 Law No. 1957, Arts. 128, 130.
127 Law No. 1957, Arts. 129.
128 Law No. 1957, Arts. 130.
129 Penal Code of Colombia, Arts. 101, 104, 165, 169, 144 and 148 respectively.
130 Penal Code of Colombia, Art. 31.

which includes, among other things, truth-telling. Therefore, it seems illogical that individuals who fail to admit to the truth and accept responsibility during proceedings before the SJP would benefit from reduced prison terms. Granting such individuals leniency without meaningful contribution to the victims would seem unjust.

## Conclusion

The SJP holds significant potential in facilitating a stable and enduring peace in Colombia. With its jurisdictional authority and the wide array of special treatment measures it can administer, the SJP could play a pivotal role in this regard. The possibility of granting amnesties, pardons, and waivers of criminal actions is unlikely to violate the duty to investigate serious human rights violations, given that the implementing legislation explicitly prohibits such measures in cases involving such violations.

However, the compatibility of the special sanctions within the System with this duty hinges on several factors, including the specific nature and scope of the measures imposed in each sanction, their effective enforcement, and ensuring that participation in permissible activities like political engagement does not undermine the intended objectives of the sanctions.

It is imperative for the SJP to interpret the concept of serious offences in a way that includes serious human rights violations, especially crimes under international law. Failure to do so could result in the imposition of special or alternative sanctions, such as two to five years of restrictions on rights and freedoms or imprisonment, for serious human rights violations. Such punishments may run counter to the duty to adequately punish these violations, as they would likely not be commensurate with the gravity of the crimes committed.

Ordinary sanctions, while contentious due to their application to individuals who have not admitted truth and responsibility or provided reparations for their actions, may align with the obligation to address serious human rights violations. This is because a penalty of 15 to 20 years of imprisonment can still be considered proportional to the severity of the offence. Indeed, comparable sentences have been handed down by institutions like the International Criminal Court for offences such as war crimes and crimes against humanity.[131]

[131] See for instance the case against Germain Katanga, who was sentenced to 12 years of imprisonment, www.icc-cpi.int/CaseInformationSheets/katangaEng.pdf


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Ultimately, it falls upon the SJP to ensure that any special or alternative sanction is designed in a manner that upholds the obligation to address serious human rights violations.

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