Colombia´s Special Jurisdiction for Peace, use of Case concept within their decisions and harm to procedural guarantees.[1]

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Abstract

Transitional Justice should provide war victims with tools that attain their dignity and lead to acknowledgement of the violations occurred, so to prevent further perpetrations of human rights. Installment of the Special Jurisdiction for Peace (SJP)[4] was made in March of year 2018 and the first judgements lead to question the accuracy of their interpretation and application of concepts in their court decisions, i.e. *Case*. This paper aims to criticize the submission of the term, to make visible the harm being made because of wrongful application and breach of the procedural guarantees from international standards of judgement.

Keywords: Case, International Criminal Law, Nexus, Special Jurisdiction for Peace, Transitional Justice

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Jurisdicción Especial para la Paz de Colombia, uso del concepto de caso en sus decisiones y daño a las garantías procesales

Resumen

La Justicia Transicional ha de entenderse como el medio para que a una víctima de la guerra se le reconozca la dignidad humana; a la vez que se declaren las violaciones perpetradas so pena de prevenir repeticiones. Tras el primer año de ejercicio de la Jurisdicción Especial para la Paz (JEP), sus sentencias dan una aplicación errónea de los conceptos con lo que se ven vulneradas las garantías procesales para las víctimas, así como los estándares internacionales de juzgamiento. La presente investigación hace una crítica a la aplicación del concepto de Caso, pretendiendo con ello visibilizar los posibles daños cometidos.

Palabras Clave: Caso, Derecho Penal Internacional, Nexo, Jurisdicción Especial para la Paz, Justicia Transicional

INTRODUCTION

The first decisions from the transitional court have been made, and the application of international law norms is not clearly presented in the judgements. E.g.,"Nexus", "Case" and "Situation" have been unequally applied throughout the decisions, representing a lack of procedural guarantees for the victims, which translates into the emergence of a new set of defilements for the people. A profound preoccupation is what drives the authors of the present paper, who in an attempt to prevent further breaches will demonstrate how the decisions openly take distance from what has been previously decided in international criminal courts. Earlier studies have focused in criticizing the way special courts prefer to give a precise application of International Law parameters, rather than to learn from previous mistakes made by other jurisdictions and in such a way give tailored responses to the situations which arise within each specific context. Focus should be set on assuring wellbeing for the people, instead of in working by the rule without further human related considerations.

The authors, aware of the difficulty in interpreting the norms included in the peace agreement, aim not only to criticize the previous sentences but also to illustrate both academic community and judicial operators of the SJP into the appropriate applicability of the aforementioned concepts with the purpose of guaranteeing international standards of judgement within the development of SJP. The intention is to answer if the application of

certain criminal concepts, contrary to those established by international criminal law within the SJP, generate a violation of procedural guarantees. A document-based analysis was pursued from the qualitative, descriptive and critical point of view, attending the released jurisprudence, international organizations, national and international laws, as well as previous related academic researches.

It is noteworthy to point out that given the resurgence of international criminal law in recent decades, its courts have become authorities who consistently construct the historical narratives of reality (Sander, 2018) becoming main actors in the peace building process. Therefore, the concern when nowadays it is still questioned if the special courts from Yugoslavia made a contribution to achieve a long-term reconciliation in the Balkans (Swart, 2012) or not. Or if when focusing on the reestablishment of justice and the rule of law in times of war, the long-term abuses that derive and are committed are overlooked (Starr, 2007) and forgotten. Likewise, it is still discussed if the procedures through which these jurisdictions are applied, ensure a fair, equitable and expeditious treatment of the parties (Hassan-Morlai, 2009). Moreover, some other scenarios have been tainted by controversies about how the participation of witnesses in this type of proceedings, can lead to manipulated sentences (Cryer, 2014) or whether the presence of defendants in trials related to international criminal law is necessary (Wheeler, 2017).The importance that lies beneath the present document, is that of preventing and teaching while there is still time to make better procedures without forgetting that the country is going through a historic moment of high complexity after decades of violence, inequality and war actions related to over 1,755 guerrilla takes, millions of victims and perpetrators in a 50-year period, institutional mistrust and inequity at all levels (Navas-Camargo & Cubides Cárdenas, 2018). It is now the right opportunity to learn from the past and make better decisions for the future.

1. *THE "CASE" CONCEPT IN ACCORDANCE WITH THE INTERNATIONAL CRIMINAL COURT AND WITHIN THE SJP. UNDERSTANDING THE PROCEDURE.*

According to the International Criminal Court (hereinafter,ICC) development of the concept of *Case*, it addresses a precise and unequivocal meaning of a certain procedural stage. It is then necessary to understand the procedure by which a decision is made. The transmission of information by various sources to the public prosecutor of the ICC (as ordered by Article 13 of the Rome Statute) is what triggers the beginning of the process. A stage known as "Preliminary Examination" is advanced by those who may exercise jurisdiction based on the analysis made on the transmitted information.

The Preliminary Examination can be understood as a stage of investigation prior to the formal opening of an investigation, ordered by the Pre-Trial Chamber of the ICC, with respect to a case constituted and exclusively under the jurisdiction of the ICC Prosecutor. This examination does not constitute per se a stage of investigation but of analysis of information gathered by different sources at the request of the Office of the Prosecutor and that would account for the possible commission of infractions that have been committed in the territory of a State Party or by a national of the same and that would have relation with the material competence (ratione materiae) of the Court. The task required of the Office of the Prosecutor is to carry out an analysis of the information in its possession and to determine if there is a reasonable basis (understood as a rational or reasonable justification to believe that a crime relieving the jurisdiction of the Court has been or is in the process of being committed) (CPI ICC-01/09-19-Corr-Tfra, par.35), which justifies the opening of an investigation in accordance with the requirements of article 15, numeral 3, of the Rome Statute (hereinafter, RS).

Once the Office of the Public Prosecutor defines the beginning of a preliminary examination, it is understood that said analysis tasks will be carried out in relation to a situation in general regarding one of the States Parties. In other words, when referring to a "situation", all facts which refer to the commission of serious international crimes in the territory of a State Party or made by a national of that State Party, regardless of the group of people who may have committed them (State Agents, Para-state Agents, or Non-Sate Agents). This is the reason why the word "situation" in the lingo of the ICC is always accompanied by the name of the respective State.

When referring to the word Case, it must be understood that there was previously a request to open an investigation by the Office of the Prosecutor before the Pre-Trial Chamber

of the ICC, and that the latter has authorized it. A Case implies facts that are materially and temporally determined and one, or some, possible determined authors. This is the reason why it is mentioned as the Case of the Prosecutor's Office versus a specific person.

The foregoing has been developed by the judges of the ICC against the situation in the Democratic Republic of the Congo, namely:

> The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceeding, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings, that take place after the issuance of a warrant of arrest or a summons to appear (CPI ICC-01/04-101-corr. Par. 65).

The main objective of the Preliminary Examination is that of constituting one or several particular cases from some precise facts and presumably responsible determinable, so that the judges grant the authorization of an investigation. The conformation of a "Case" with respect to particular facts does not mean a priori that the preliminary examination disappears; because the latter remains in time waiting to gather the necessary information, compared to other facts and responsible parties, to constitute a reasonable basis for ordering the constitution of new cases.

In light of the requirements of article 53-1 of the RS, literal a) to c), which establish the legal framework for preliminary examination in order to determine whether there is a reasonable basis to open an investigation into the situation, it is required to the Office of the Public Prosecutor examine at this stage the temporal, material and place or personal competence (ratione temporis, ratione materiae and ratione loci or ratione personae

respectively), the admissibility (complementarity and gravity) and finally the interests of justice (Prosecutor ICC, rapport 2013, for 3). The foregoing has been interpreted by the Office of the Prosecutor as the four phases of the preliminary examination, namely: valuation of information gathered, study of jurisdiction, admissibility and seriousness, and finally, interest of the Justice (Prosecutor ICC, 2014, rapport, par.15).

The first phase refers to analyzing the received information so to make a distinction between the related crimes that would be subject to the ICC jurisdiction and those whose object would not be relevant to continue. The second phase is considered punctually the official start of the preliminary examination when requiring the study of the competition. That is, to determine whether a crime that is the subject of the jurisdiction of the ICC has been committed or is in the process of being committed. That is why it becomes primary in this instance to examine i) the competence ratione temporis developed in article 126-2 of the RS, or the date set forth in the resubmission by the UN Security Council provided in article 13b of the RS (Hereinafter, Council) or in the deposited statement in light of Article 12-3 of the RS; ii) the ratione loci or ratione personae competence, which considers that a crime has been or is in the process of being committed on the territory or by a national of a State Party, as provided for in article 12-2 (a) (b)) of the RS, or of a non-party State that has deposited a declaration accepting the jurisdiction of the Court according to Article 12-3 of the RS, or has been committed in a situation referred by the Council; and iii) competition ratione materiae related in article 5 of the RS (commission of crimes of genocide, lese humanity, war and aggression) (Prosecutor ICC rapport 2016, Par.4). The third phase requires an analysis of the admissibility of possible cases regarding complementarity and severity. Finally, the fourth phase examines the interests of justice that will allow defining whether or not there is a reasonable basis to open an investigation (Prosecutor ICC, rapport 2014, par.15).

These predicable phases of the preliminary examination stage in the prosecution are necessary so that through the selection process (Prosecutor ICC, Document Politique, par. 6) it is viable to establish some facts and some possible responsible for them, in order to Choose a "Case" to be submitted to the Court and proceed with the opening of the investigation. In the absence of selection and therefore “Case”, the prosecution refers these

facts to the National Criminal Jurisdiction to exercise its primary function of investigating and punishing.

It should be remembered that with regard to the many information provided to the ICC´s Office of the Prosecutor regarding international crimes committed in the country, they are subject to a preliminary examination that began in 2012 and which until know is only known as Colombia situation, since the prosecution has not decided to select a specific case. (Prosecutor ICC, rapport 2017, par.122).

After having presented the preliminary stage phase developed by the ICC Prosecutor´s Office as well as the concept of situation and Case along with the procedural consequences of the use of such denomination, the SJP will now be analyzed.

2. THE SPECIAL JURISDICTION FOR PEACE OF COLOMBIA

The final peace agreement, creator of the SJP, develops in its regulations elements that conceive the application of a notion of "Case" close to that developed by the ICC, as will be showed below.

The procedure to be developed by the SJP included in the final agreement, provides in Article 48 of point 5, a mechanism by which the Chamber of Truth and Responsibility Recognition (hereinafter SRVR, for its wording in Spanish), exercises its investigative and analytical function from a series of information that will be sent by both certain State entities as per organizations. Subparagraph d) of said article is clear in specifying that the "reports will group the facts by presumed authors or convicted persons and group the similar conducts in the same category without legally qualifying them. The reports must be rigorous. The room may order that the reports be organized by more representative events."

This description allows to infer that the participants in the negotiating table in Havana, who were aware of the international experiences regarding the prosecution of the international crimes, were aware of the powers assigned to the SRVR in accordance with the

structure of the SJP, which they would be close (keeping proportions) to those assigned to the prosecution of the ICC.

The fact that the peace agreement does not require any State entity, the referral of the processes, but refers to information, investigations, judgements, resolutions, in light of Article 48b of point 5 of the peace agreement, and does not require to make any kind of legal qualification; allows inferring that the signers were aware that the function of analyzing, treating, contrasting such information and then, after an analysis of competence, decide on the establishment of a "Case" was a judicial power in charge of the SRVR. This power is also described in literal h of that article, when the agreement states "…in case of assessing that there are sufficient grounds to understand that the conduct existed, that the aforementioned person participated and that the conduct corresponds to non-amnestiable criminal offenses,…", which allows to clearly conclude that the SRVR is in charge of determining whether or not there is a "Case" in light of the SJP´s factors of competence, the selection criteria and the prioritization criteria established by the jurisdiction.

The tasks that the SRVR will develop with respect to the facts that are not subject to recognition by those mentioned in the reports, and in respect of which the room considers that there is a reasonable basis for having been committed by those mentioned in the reports, and in respect of which the chamber considers that there is a reasonable basis for having been committed by those mentioned; they may be subject to the constitution of a "Case", having approved the selection stage and will necessarily be submitted to the prioritization stage in which the gradual order of treatment is established.

The use of an indiscriminate and equivocal language of the word "Case", compared to the content of the reports sent to the SRVR, entails risks that can cause enormous problems in the fulfillment of the functions of the SRVR. Some of them can be stated as follows:

a) Considering the nature of the report, which at no time can be understood as a procedural figure of a complaint, complaint or claim and that does not constitute activation of jurisdiction before the SJP; the use of the word "Case" to refer to the

information included in the reports would automatically generate in the victims a false expectation in regards to the positive treatment that the SJP could give to the denounced facts. This situation is extremely delicate since the victims must understand from the beginning that the SJP has the obligation, according to the established selection and prioritization criteria, to treat the most relevant and serious cases. Additionally, to understand that the reports that contain "Cases" would imply an obligation of the SJP to assume automatically all the facts included therein and proceed to its judicialization. This diverges from the purpose granted to this jurisdiction and would invalidate the use of selection criteria.

b) Addressing the phenomenon of macro crime based on the investigation of criminal structures and apparatuses, requires an analysis of the context that can only be predicated when research methodologies are applied to the general information and not on particular cases already defined. To do otherwise would imply repeating the mistakes made in the process of justice and peace, as stated by the ICTJ (2017): "The institutional and national and international entities' balance sheets that formulated recommendations to achieve progress in the process coincided in that it was necessary to change the focus of applied research, for one that managed to face the phenomenon of mass and at the same time managed to unveil the phenomenon of paramilitarism in its multiple dimensions" (Pag, 3).

c) Referring to "Case" necessarily implies the guarantee by the jurisdiction of rights to due process and defense of the subject and equally guarantees to the right to participation, among other rights of the victims themselves. While this is an obligation of the SJP, this obligation must be implemented from the formation of a "Case" and not from the time of reporting. Understanding it in another way would make it impossible to fulfill the functions assigned to the SRVR and from the beginning it would generate a huge obstacle in the proper performance of the SJP.

For these reasons, the term “Case” must be residual and only applicable to those facts subject to the jurisdiction of the SJP and whose presumed persons already identified and who did not recognize responsibility, were subject to a selection process by the SRVR.

3. ASSIMILATION OF THE MEANING GIVEN BY THE ICC TO WORD “CASE” ON BEHALF OF THE SJP

Once exposed the connotation given to the word “Case” by the ICC and after having made an analysis of the configuration made by the agreement to the information that will be reported to the SRVR, according to their functions; it is necessary to establish the possibility of coining this same meaning and understand that it is in the presence of similar phenomena, whose treatment should be analogous.

For this purpose, it is important to make a simile by stating that the SRVR will develop a kind of "preliminary examination" in the performance of its functions. The above, is predicable from the inscribed in article 48 of point 5 of the agreement and will be exposed from the following statements, namely:

A) Subparagraph a) grants jurisdiction to the SRVR to decide whether the facts or conducts attributed to the different persons are the System's competence because they have been committed in direct or indirect relation to the internal armed conflict or on the occasion thereof. This means that the Chamber must initially carry out an analysis of temporal, material, territorial and/or personal competence, in accordance with the provisions of the peace agreement as it does in turn, the prosecution of the ICC.
B) Subparagraph h) imposes on the SRVR the function of comparing all the information included in the reports and deciding if there are sufficient grounds to understand that the conduct existed, that the aforementioned person participated and that the conduct corresponds to non-amnestiable criminal types. This means that the factors of seriousness and the interest of the jurisdiction to

advance the investigation must also be advanced by the Chamber; as it does, although in a differentiated way, the ICC prosecutor's office.

C) Subparagraph (s) assigns to the SRVR the authority to set priorities, and to adopt selection and decongestion criteria. This can be assimilated to the establishment of selection and prioritization criteria also established by the ICC prosecutor's office.

Based on the above, it can be said that there is a similar treatment against the information related to both jurisdictions (which would fall on the commission of serious international crimes), and against which the respective body carries out a similar analysis of the same attending to selection and prioritization parameters; It would therefore be logical to proceed with the use of the term “Case”, when referring to the set of materially and temporally determined facts and one or a few possible specific authors who will be subjected to a stage of investigation and eminent judicialization, defined from its referral to the investigation and prosecution unit. As of that moment, the denomination of “Case” is coherent, which would be applicable to the rest of procedure established for situations of non-recognition of truth that will be processed through the adversarial procedure before the court for peace.

It is necessary to emphasize that, taking into account the configuration acquired by the word "case" in international criminal jurisdictions, this relates to the start of an adversarial proceeding submitted before a jurisdiction, which must decide on the criminal liability under discussion. The foregoing, would lead to think that when applying this notion in the SJP procedure, it would be referring to the procedure foreseen for the SRVR around the non-recognition of truth and responsibility, developed by article 48, letter n) of the agreement, which it involves submitting a “Case" before the Investigation and Indictment Unit so that it in turn submits it to trial before the Trial Chamber of the Court.

The denomination that would acquire the remaining facts and conducts contained in the reports will have the characteristic of simple “information”, object of analysis on the part of the SRVR.

CONCLUSION

Through the comparative exercise carried out, clarity was made regarding the correct use of the notion "Case" in the midst of criminal procedures in charge of the investigation and prosecution of international crimes.

The incorrect use of this concept by the judicial operators can lead to great problems in regards to the SJP operations.

The meaning given by the ICC to the notion of "Case" is easily applicable to the procedure foreseen by the SJP, taking into account the object and dynamics shared between both jurisdictions.

The notion of "Case" within the SJP, should be understood as a set of facts materially and temporarily determined and one or a few possible specific authors who will be subjected to a stage of investigation and eminent judicialization, defined from its inclusion in a referral to the Investigation and Accusation Unit.

"Case" is not the only concept being wrongfully applied. Further research in regard to the application of the term "Nexus", is still to be published by the same authors.

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