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The concept of most responsible in international criminal law and its problematic reception in the Special Jurisdiction for Peace in Colombia

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This perspective article critically explores the concept of “most responsible” within international criminal jurisprudence and its reception by the Special Jurisdiction for Peace (JEP) in Colombia. In the context of Colombia’s transitional justice process, the definitions of “most responsible” and “determining participants” play a pivotal role in deciding who should face prosecution and sanctions of effective restriction of liberty for war crimes and crimes against humanity. The article argues that the current conceptual ambiguity within the JEP’s legal framework risks conflating accomplices with principal offenders, which could undermine the selective justice model designed to focus on high-level perpetrators. Through a comparative analysis of international criminal tribunals, including the ICTY, ICTR, ICC, and SCSL, the article highlights the importance of clear definitions to avoid excessive judicialization and to align the process with the goals of peace, reconciliation, and restorative justice. This perspective concludes that the lack of precise legal definitions in the JEP could hinder its ability to fulfill its mandate effectively.

KEYWORDS

peace process, peacebuilding, post-armed conflict, transitional justice, international criminal law, restorative justice, JEP

1 Introduction: the Colombian peace process and the role of the special jurisdiction for peace

The Colombian peace process with the guerrilla Revolutionary Armed Forces of Colombia (FARC-EP) represents one of the most significant efforts in contemporary history to bring an end to a decade-long internal armed conflict. For over 50 years, the Colombian government and the FARC-EP engaged in a violent struggle that resulted in widespread human rights violations, including massacres, kidnappings, forced displacements, and other atrocities. The conflict, which began in the 1960s, left a profound impact on the civilian population, with millions of people affected by its brutality. In particular, [Colombia’s Victims Unit \(2024\)](#) has 9,845,286 people registered as victims of the general armed conflict in the country, while the Final Report of the [Commission for the Clarification of the Truth \(2022\)](#) estimates that at least “450,664 people lost their lives due to armed conflict between 1985 and 2018” (p. 49).

Efforts to negotiate peace were long sought after, but it wasn't until the signing of the 2016 Final Peace Agreement between the Colombian government and the FARC-EP that marked a historic milestone in efforts to end the armed conflict. This Peace Agreement was subject to a democratic vote by plebiscite held on October 2, 2016, to legitimize the agreement through public approval, but “against almost all expectations, 50.2% of voters rejected the agreement” (Branton et al., 2019). This outcome revealed deep societal divisions and highlighted the political polarization surrounding the peace process (Branton et al., 2019; Muñoz and Pachón, 2021; Charry Joya and García Ramírez, 2022; Ramírez-Gutiérrez and Quiroga-Villamarín, 2022). The plebiscite's failure forced renegotiations, eventually leading to a new agreement ratification by Congress (Bohigues et al., 2022).

At the heart of the Colombian transitional justice model is the Special Jurisdiction for Peace (JEP), a judicial body created to investigate, prosecute, and sanction those responsible for the most serious crimes committed during the armed conflict. The JEP forms a central component of the Integrated System of Truth, Justice, Reparation, and Non-Repetition (now called “Comprehensive Peace System”), designed to ensure that justice is achieved without sacrificing the goals of peace and reintegration. Established through a constitutional amendment (Republic of Colombia, 2017, Acto Legislativo 01 de 2017), the JEP operates as a transitional justice mechanism with a mandate to focus on both the victims' rights and the accountability of perpetrators, while simultaneously encouraging the reintegration of ex-combatants into society. Its primary focus, according to the Transitory Article 66 of Colombia's Constitution (Republic of Colombia, 1991), is the selective prosecution of those deemed to be the “most responsible” for all grave crimes committed before December of 2016 that acquire “the connotation of crimes against humanity, genocide, or war crimes committed in a systematic manner.” The JEP has jurisdiction to prosecute former members of the FARC guerrilla and the state's military personnel, but it can also have competence of cases of civilian third parties involved in the illegal economy of the armed conflict and other state agents who voluntarily change their cases from the ordinary jurisdiction to the transitional justice model.

In this context, this article seeks to critically examine the concept of “most responsible” within the context of international criminal jurisprudence and its reception by the JEP in Colombia. Furthermore, it explores the associated category of “determining participants” in these crimes and the worrisome conceptual indeterminacy alongside the category of “most responsible” to highlight the legal and practical challenges faced by the JEP in defining and applying these terms. The importance of clear definitions for these concepts is paramount, as they determine who is subject to prosecution and who may benefit from alternative measures, instead of sanctions of effective restriction of liberty.

In particular, we will argue that the indeterminacy of the above concepts may lead to consider a basic “accomplice,” whose participation is not fundamental, nor that control the facts of the crime, being considered “most responsible.” This might become an obstacle to the efforts of peacebuilding in Colombia as it prevents the fulfillment of the purpose of granting the highest possible amnesties and alternative sanctions, and condemns the process

to over-judicialization, instead of focusing its objectives on truth, reparation and non-repetition.

We employed a documentary legal methodology, reviewing secondary sources (constitutional rulings, statutes, academic articles, chapters and books, and tribunal decisions) on “most responsible” in Colombia and comparable cases (ICTY, ICTR, ICC, SCSL). We focused on how each defines or applies the concepts of “most responsible,” comparing both the volume and nature of the documents across jurisdictions. We then analyzed and categorized recurring themes—such as leadership roles, policy formulation, and participation levels—to ensure coherence and facilitate cross-case comparisons, thereby enabling a structured analysis of how these concepts evolve within different legal systems and historical moments. A limitation of this paper is that it will primarily involve a normative approach, without yet being able to assess how the broad scope of the category of most responsible has influenced the slow pace and still limited results of the JEP, so validation of our findings is still limited.

2 The critical role of defining responsibility in transitional justice and the evolution of the JEP

Having a selectivity strategy is key to ensuring successful prosecution in the post-conflict period, as the [Office of the United Nations High Commissioner for Human Rights \(2006\)](#) has argued: “When thousands of people have participated in the systematic commission of crimes, it is impossible to prosecute all of them” (p. 7). In this direction, the selective prosecution model established in the JEP forms the backbone of Colombia's transitional justice system. The JEP is tasked with investigating and prosecuting crimes that are ineligible for amnesty or pardons, such as war crimes and crimes against humanity (Republic of Colombia, 2019, Law 1957 of 2019, art. 82, par. 2). This selective approach not only applies to the type of crimes but also to the individuals involved. Not every participant in these crimes will be prosecuted; instead, according to the Law on the Administration of Justice in the JEP -Law 1957 of 2019-, the focus is on those who had a “determining participation” (art. 79, lit. i) or were deemed “most responsible” for “the most serious cases and the most representative behaviors or practices” (art. 79, lit. m).

The terms “most responsible” and “determining participants” serve as critical criteria for the JEP to focus its efforts on those whose actions had the greatest impact. The JEP's mandate is to selectively prosecute only the most serious offenders to balance justice and reconciliation. Selectivity, then, according to the [Institute for Integrated Transitions \(2021\)](#), “is based on the premise that it is not feasible, within a reasonable period of time, to investigate and assign responsibility to all those responsible for all the events” (p. 7). As highlighted in the [Constitutional Court of Colombia \(2017\)](#) ruling C-647/17, the JEP is designed to investigate, prosecute and punish those most responsible for crimes against humanity, genocide, and war crimes ([Constitutional Court of Colombia, 2017](#), Sentencia C-647/17, par. 6.5.3.). This selective focus is described in Article 66 of the Transitory Articles of the Colombian Constitution, which prioritizes investigating and

prosecuting those at the top of the chain of responsibility, “to avoid congestion in the JEP and ensure its concentration on those most responsible for the most serious and representative patterns” (Institute for Integrated Transitions, 2021; p. 16).

Despite the fundamental role these concepts play, the lack of a clear and unequivocal definition in both the Colombian Constitution and the statutory laws governing the JEP has been a significant challenge. Michalowsky et al. (2020) argues that the indeterminacy surrounding these terms creates practical difficulties for the JEP, particularly in deciding who should be prosecuted. As the Constitutional Court of Colombia (2013) itself admitted in *Sentencia C-579/13*, there is a recognized need to ensure that “those who played a key role in the commission of systematic crimes” are held accountable. Yet, neither “most responsible” nor “determining participation” has been operationally defined, leaving the JEP to interpret these terms case by case. As said by Michalowsky et al. (2020):

It is impossible to find a definitive, clear, and delimited use of the concepts of maximum responsibility and determining participation in the rulings of the Constitutional Court. The only certainty is that before the Final Peace Agreement (AFP), only the maximum responsibility was spoken of (evident in the pronouncements of the time), while the concept of determining participation begins its journey with the AFP and with its normative implementation (p. 64).

Perhaps the first strong conceptual development in Colombia of the term “most responsible” comes from the aforementioned ruling C-647 of 2017 where the Constitutional Court of Colombia (2017) said that “most responsible” is not limited to those who devised or structured the criminal plan, nor to those who hold the highest position within the criminal organization, “but extends to all those who played an essential or determining role in the execution of the crimes, and this role could even coincide with that of the material perpetrator.” However, the Constitutional Court’s ruling raises more questions than answers, as it fails to provide clear criteria for determining whether someone played an “essential or determining role” in the execution of crimes, leaving ambiguity about the application of this concept in cases of international and non-amnestiable crimes.

Nevertheless, in the posterior ruling C-080 of 2018, the Constitutional Court of Colombia (2018) seems to change the concept stating even someone who had not played “an active or determining participation” might be understood as a most responsible. In that ruling, the Constitutional Court seems to distinguish three concepts, without actually defining them precisely: active participation, determining participation, and most responsible. This resonates with the critique of Michalowsky et al. (2020) on the difficulty of finding clear definitions and concepts.

In practice, the JEP’s selective justice model hinges on properly distinguishing between different levels of responsibility. The prosecution of high-ranking FARC-EP leaders and military officials, such as those prosecuted under Case 001 for hostage-taking and other serious crimes, serves as a key example. The *Auto 19 de 2021* of the Special Jurisdiction for Peace (2021a) was one of the first decisions to develop and explain the concept of *most responsible* inside the JEP, understood as “the ones who issue the policies, both explicit and implicit, that guide the actions of the

armed organization, and it is their orders, along with the control they have over the armed organization, that form the basis of their individual responsibility” (p. 81).

However, the real issue is that the *Auto 019/21* does not clarify the distinction between “most responsible” individuals and “determining participants,” leaving it unclear whether these categories are synonymous or conceptually different. This issue was only addressed later in the ruling TP-SA-RPP No. 230 de 2021 (Special Jurisdiction for Peace, 2021b). In that case, the Special Jurisdiction for Peace (JEP) deliberated on an appeal regarding the denial of criminal prosecution waiver for a military officer convicted as an *accomplice* in a homicide. The defense of the officer was that, as he was convicted as an accomplice, he could not have the status of the person most responsible or a determining participant.

Nonetheless, despite being convicted as an accomplice, the JEP did not waive prosecution by procedural arguments, stating that the category of accomplice was not relevant to the initial selection of cases, but rather the crimes committed. In other words, according to the Colombian Commission of Jurists (2021) “Being an accomplice to a crime does not exempt a defendant from being considered most responsible” (p. 7). This decision was subject to criticism, as it may ignore the criteria for the selection of cases and become “a rule that unjustifiably expands the range of punishability and leads to the collapse of a system focused on those most responsible, which could also lead to unequal treatment among those appearing before the court who participated in non-amnestiable crimes in a non-determinant manner” (Michalowski and Cruz Rodríguez, 2021, p. 17).

In synthesis, the concepts of “most responsible” and “determining participants” although fundamental to the JEP’s mission, have had conceptual inconveniences and practical criticisms. In this sense, some definitions and interpretations of the JEP have ended up being able to expand “the range of punishability instead of restricting it to those most responsible for the macrocriminal phenomenon” (Michalowski and Cruz Rodríguez, 2021, p. 10). The lack of precise definitions of these terms poses significant challenges as said by Sandoval et al. (2022): “there is no legal certainty in relation to who would be classified as most responsible in a macro-case” (p. 7). Then, addressing this indeterminacy is critical to ensuring that the JEP can fulfill its mandate while respecting the principles of transitional justice.

3 International jurisprudence: comparative analysis

One of the key insights from international criminal tribunals is the way responsibility is defined and applied, especially in cases of large-scale violations. Going back to the *Auto 19 de 2021* of the JEP-SRVR, the concept of most responsible was understood as the ones who issue the policies, guide the actions, its orders, along with the control over the armed organization. This reasoning, in our criterion, is not objectionable; on the contrary, it finds support in the earliest precedents of international criminal law.

For instance, the Statute of the International Military Tribunal of Nuremberg (United Nations, 1945) stated in the final paragraph

of its Article 6 that accountable are “those who lead, organize, incite, or participate in the formulation of a common plan or conspiracy for the execution of the aforementioned crimes.” Moreover, the concept of “joint criminal enterprise,” commonly used by *ad hoc* tribunals, assigns responsibility based on the involvement of individuals who enabled material perpetrators to commit crimes, even without an explicit agreement (International Criminal Tribunal for the former Yugoslavia, 1999) and being sufficient, in order to attribute responsibility that a common plan or purpose is noted (International Criminal Tribunal for the former Yugoslavia, 2007), so the definition of the JEP that “most responsible” are those who played a leading role in shaping policies or plans, aligns with developments in international criminal law.

Historically, the concept of “most responsible” was not initially part of the international criminal justice lexicon. A strong root emerged in the context of international tribunals like the ICTY after the United Nations Security Council (2003) recalled and reaffirmed that this tribunal needed to concentrate “on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction” (Resolutions 1503 of 2003), which was later insisted in Resolution 1534 of 2004 (United Nations Security Council, 2004a). Similarly, when the JEP was established through a constitutional amendment - Acto Legislativo 01 de 2017 – it was commanded to focus on those at the highest levels of responsibility for the most severe crimes committed during the Colombian conflict.

In this context, Resolutions 1503 and 1534 prompted the ICTY to modify its rules of procedure and evidence to include the gravity of the crimes and the degree of responsibility of the accused as criteria for determining whether the call made by the UN Security Council had been met. This, in turn, prompted the ICTY to adopt a closure strategy with a view to winding down its work, focusing on senior leaders and referring cases against mid-level or intermediate defendants to national courts. It is important to clarify that the changes adopted by the ICTY following the Security Council Resolutions are not interpreted as a shift in the tribunal’s fundamental role. As noted in *Prosecutor v. Stankovic*, “it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region” (International Criminal Tribunal for the former Yugoslavia, 2005, par. 14).

Similarly, in the “Completion Strategy of the International Criminal Tribunal for Rwanda” (United Nations Security Council, 2004b) it is highlighted that the prosecutor needs to prioritize the prosecution of individuals who held leadership positions and those deemed the principal perpetrators of the genocide (Dondé Matute and Muñoz García, 2018). Precisely, it is said that “[t]his concentration on the most senior leaders suspected of being most responsible for crimes committed within the jurisdiction of the International Criminal Tribunal for Rwanda is in conformity with Security Council resolution 1534” (Special Court for Sierra Leone, 2004).

Likewise, the Special Court for Sierra Leone (2012) focused on individuals in leadership positions, as highlighted in the case of *Prosecutor v. Charles Taylor*, the former president of Liberia, who was convicted as an aider or abettor of crimes. The Taylor case illustrates the complexity of distinguishing between complicity and primary responsibility in international

law. Although Taylor was not directly responsible for ordering the atrocities, his significant support for rebel groups committing these crimes positioned him as a “most responsible” person under the SCSL’s jurisdiction. This interpretation, however, raises concerns about the conflation of different levels of criminal participation, which the JEP should carefully consider. It seems that the JEP might be confusing the national criminal law doctrine for an “accomplice”¹ with the international understanding of how an aider/abettor of a crime might become most responsible.

Unlike the statutes of *ad hoc* tribunals, the founding documents of hybrid tribunals include the principle of prosecuting the “most responsible” individuals as a jurisdictional condition. The Special Court for Sierra Leone (SCSL) Statute, in Article 1(1), grants the Court authority to prosecute those deemed most responsible for serious violations of international humanitarian law and national law. The SCSL interpreted this criterion to target individuals in leadership roles, emphasizing that neither the severity nor the scale of the crime is the primary focus. This approach is notably different from that of the Special Jurisdiction for Peace (JEP) in Colombia, which employs a broader, less leadership-focused standard of responsibility. This distinction was highlighted in the case of *Prosecutor v. Moinina Fofana* (Special Court for Sierra Leone, 2004), which highlights the SCSL’s focus on leadership and command responsibility rather than just the magnitude of the crime.

Finally, it is important to note that the International Criminal Court (ICC), while not exclusively limiting its jurisdiction to high-ranking leaders, has also grappled with the scope of responsibility, particularly in cases involving mid-level commanders or individuals with indirect involvement in crimes. For example, in the case against Bosco Ntaganda, the ICC’s Pre-Trial Chamber initially deemed that only those in high leadership roles could meet the threshold for the most responsible, a decision later overturned by the Appeals Chamber, which argued “individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes” (International Criminal Court Appeals Chamber, 2006, p. 20).

This experience of international tribunals offers valuable lessons for the JEP as it navigates the complex landscape of accountability in Colombia’s post-conflict context. As international jurisprudence shows, a failure to differentiate between various levels of responsibility can result in judicial overreach, excessive prosecutions, and a diversion of resources from the primary goals of truth and reconciliation. While international criminal tribunals have provided a useful framework for understanding responsibility in the context of serious crimes, their approaches are not without flaws. The JEP must ensure that it applies these lessons carefully, crafting precise definitions of “most responsible” and “determining

1 In Colombia, according to article 30 of the Penal Code, an accomplice is “Anyone who contributes to the commission of unlawful conduct or provides subsequent assistance, by prior or concomitant agreement with it”, but the main distinction between an accomplice and a direct author or coauthors is that the accomplice does not really controls the facts of the commission of the crime, so their participation is not essential (Republic of Colombia, 2000).

participants” that reflect the realities of the Colombian conflict and the goals of the national peace process.

4 Conclusion: toward a clearer framework for transitional justice

Throughout this article, we have explored the critical importance of defining “most responsible persons” and “determining participants” within the framework of the Special Jurisdiction for Peace (JEP) in Colombia. We have argued that the indeterminacy surrounding these legal categories presents significant challenges to the JEP’s ability to prosecute those most culpable for the atrocities committed during Colombia’s armed conflict. The risk of misclassifying accomplices as principal offenders could lead to over-prosecution and a diversion from the transitional justice system’s primary goals of truth, reparation, and reconciliation. This ambiguity in defining responsibility has led to concerns about the JEP’s ability to selectively prosecute those truly at the highest levels of responsibility for crimes committed during the armed conflict. For example, as of October 2024, the JEP has issued partial conclusive decisions for only three of 11 macro-cases ([Special Jurisdiction for Peace, 2024](#)), which raises significant concerns on the progress made by this jurisdiction.

By drawing on the lessons from international criminal tribunals, such as the ICTY, SCSL, ICTR, and ICC, the JEP could refine its approach to responsibility. Clearer distinctions between varying levels of culpability are necessary to ensure that transitional justice remains focused on those who played key roles in the systematic violations of human rights. The JEP must avoid the pitfalls of excessive prosecutions of lower-level participants and stay true to its mission of promoting peace and reconciliation. This effort is crucial as a recent survey conducted by the [United Nations Development Programme \(2024\)](#) showed that only 27.7% of people interviewed believed that the JEP and other national peace institutions contribute to victims’ rights. Continued research and legal refinement are essential to improve the effectiveness and legitimacy of the JEP to contribute to the global discourse on transitional justice and international criminal law.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

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JD-S: Conceptualization, Formal analysis, Funding acquisition, Investigation, Methodology, Resources, Writing – original draft. DB: Conceptualization, Formal analysis, Investigation, Methodology, Writing – original draft, Writing – review & editing.

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The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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