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ABC OF THE OBJECTIONS TO THE SJP STATUTORY BILL

Bogota, 11 March 2019

In summary

After a careful analysis, the President of the Republic has decided to object some provisions of the statutory bill of the Special Jurisdiction for Peace (SJP, or JEP in Spanish).

These objections are partial, that is, they do not refer to the bill as a whole, but only to six of its 159 articles.

The objections raised refer only to the lack of convenience. The government considers that several articles of the statutory bill are inconvenient for the country, insofar as they can either lead to situations of impunity or to abuses or distortions of the benefits provided for in the Final Agreement, hindering its implementation.

The objections do not refer to articles already declared unconstitutional by the Constitutional Court. They refer to articles that are still in the bill and that would become legislation if the President signs it off without modifications.

In compliance with the Constitution, the draft will now return to Congress, which must consider the objections and make a final decision in this regard, acting with total autonomy. The government trusts that the Senate and the House of Representatives will seriously appraise the objections and come to the decisions that best contribute to the country's high interests.

While the Congress undertakes this task, the SJP will continue functioning as it has done so far. **It is not true that the SJP will be paralyzed or that it will stop working because of the objections.**

It is also not true that objecting a limited number of articles of the bill entails a clash with the Judiciary. The President has the greatest respect for the decisions of the Constitutional Court, which is the guardian of the Constitution and a body that has the final say on all constitutional matters.

The objections raised on inconvenience grounds do not seek to paralyze the SJP nor hinder its operation. They seek to ensure that the governing norm of the SJP is compatible with human rights treaties, which prevail in the national legal system.

In particular, several objections seek to avoid situations of impunity, which, as the Attorney General has warned, could open the door for an action by the International Criminal Court for crimes committed in Colombia.

Each of the objections seeks to improve and correct the transitional justice system agreed upon in the Final Agreement. The country should not fear an open debate on the proposed changes, in a constructive way and without any intention of polarizing.

Ultimately, what motivates the Government is to prevent the consolidation of norms and procedures that affect the right of victims to truth, justice, reparation and non-repetition, which is the axis of the SJP, of any transitional justice mechanism and of the Final Agreement itself.

Scope of the Presidential Powers to Object Draft Legislation

There can be no doubt that the President has the power to object a statutory bill. In this regard, the jurisprudence of the Constitutional Court is very clear (Judgment C-011 of 1994).

This is because a fundamental principle of the rule of law in Colombia is the separation and harmonious collaboration of the branches of power. By partially objecting to this bill, the President is exercising a power provided for in the Constitution and is contributing to a process of normative construction in which all three branches have participated: the Executive, when drafting the original text; the Congress, when approving it and introducing the adjustments it considered necessary; and the Constitutional Court, when reviewing it to verify its compatibility with the Constitution and modulating some of its provisions.

In the case of statutory bills, the Constitution provides that the analysis of constitutionality must be done before the draft is sent to the President for signing it off. Evidently, the drafters of the Constitution considered that a statutory bill already approved by Congress and declared constitutional by the Court, could still be inconvenient for the country and that the President would be the only competent authority to undertake such an assessment. This is precisely the current situation with respect to the statutory bill of the SJP.

Rationale of the Objections

The President carefully considered, among others, the concerns raised by the Attorney General with regard to the bill, as well as the analyses made by various political parties and groups of interested citizens who submitted documents to the government.

After a detailed examination of these observations and contributions, the President of the Republic concluded that if he signed off the bill as was submitted for his consideration, he would be acting irresponsibly towards the country as a whole, Colombian society and, in particular, the victims.

Specifically, the President concluded that under that version of the bill, several possible scenarios of impunity would arise, which in turn would entail the breach of international obligations of the Colombian State derived from human rights treaties and, in particular, the Rome Statute of the International Criminal Court (ICC).

It should also be recalled that according to Article 93 of the Political Constitution human rights treaties prevail in the national legal order. The issue is, therefore, of the utmost importance in a system that, like the Colombian, is governed by the Rule of Law.

Scope of the Objections

The objections are grounded on lack of convenience and refer to specific provisions in the bill which may produce effects such as:

- * Create situations of impunity;
- * Allow abuses of the benefits provided for in the Final Agreement;
- * Hinder judicial cooperation with other States;
- * Hinder future peace negotiations;
- * Hinder the payment of reparations to the victims.

In simple terms, the six objections for inconvenience cover the following aspects:

Comprehensive Reparation to Victims (Article 7)

Article 7 of the bill regulates matters relating to “comprehensive reparation to victims”. It is an inconvenient provision because it does not establish clearly the main obligation of the perpetrators to fully compensate the victims. We Colombians must be absolutely clear about the importance of specifying that perpetrators must advance a material reparation with their assets in order to satisfy the victims’ rights. Indeed, the constitutional jurisprudence (Judgment C-071 of 2018) expressly states that “...even in the context of transitional justice, the first one called to contribute to the reparation of the victims is the perpetrator itself, both the illegal group – collectively – and the individual victimizer, with its own assets, for being the one who caused the damage.”

Individuals Most Responsible for International Crimes (Article 19, paragraph 2)

Under the Final Agreement, war crimes and crimes against humanity are not susceptible of amnesty under any circumstance, as required by international law. This implies that those suspects of having committed such crimes must be judged by the SJP, regardless of their position in the structure of the guerrilla organization. To this end, the statutory bill should have stated expressly that there could be no waiver of criminal action for these crimes.

However, in the bill prevails an interpretation according to which it can be understood that those who, despite having committed these crimes, are not considered “the most responsible individuals” would be exempt from criminal responsibility. In this context, if the facts are not established with due diligence and if criminal responsibility is not attributed within a reasonable time, this waiver of criminal action could lead to impunity for these individuals, which would create the conditions for the International Criminal Court to act in relation to these crimes, under the principle of complementarity.

In simple terms, the Government considers it unacceptable that a person guilty of a heinous crime of international significance cannot be prosecuted by the SJP, only on the grounds that he or she cannot be considered a “most responsible individual”.

Safeguard of the Executive Powers on Future Peace Negotiations (Article 63, paragraph 8)

Article 63, paragraph 8 is inconvenient because it does not determine the scope of the power attributed to the High Commissioner for Peace to verify the list of those who are recognized as members of an organized armed group which enters into a peace process.

The task of verifying who can participate in a peace process must remain within the exclusive power of the High Commissioner for Peace, as a direct representative of the President of the Republic. It is not convenient to weaken an attribution that the High Commissioner has had for over two decades and that has been the legal framework for various peace processes with armed organizations,¹ to prevent criminals from hiding and obtaining benefits and impunity.

Paralysis of the Ordinary Justice (Article 79, literal J, paragraph 3)

Another objection that seeks to remedy a possible path towards a situation of impunity refers to the lack of continuity in investigations of heinous crimes.

One of the essential components of the transitional justice system contained in the Final Agreement is the idea that, until the SJP is fully seized of the cases under its jurisdiction, there should be no interruption in the investigation and prosecution of serious crimes which may have been committed in Colombia. To that end, it is essential to ensure that the process undertaken by the ordinary justice system (investigation, prosecution, trial and conviction) continues functioning effectively in relation to these crimes, until the orderly and definitive transfer of powers and proceedings to the SJP.

However, the final version of the statutory bill removes the possibility that during such transition ordinary judicial authorities collect evidence and conduct judicial proceedings, which are essential for criminal processes to succeed. The Government considers that this leads in practice to the fact that during the transition period in which a case moves from the ordinary justice to the SJP, the action of justice is paralyzed, negatively affecting the rights of the victims.

¹It is Law 418 of 1997, which has been extended seven times, and which grants the exclusive mandate to the President of the Republic to advance dialogues, negotiations and sign peace agreements.

Obstacles to Extradition (Article 150 and Article 153)

Two of the objections relate to extradition, a mechanism of international judicial cooperation that has been very useful in the fight against organized crime. One refers to extradition for crimes committed after the signature of the Final Agreement, and the other refers to the extradition of those who are offering truth to the transitional justice system.

Specifically, Article 150 of the statutory bill is inconvenient because it does not specify what is established in the SJP Procedural Law (Law 1922 of 2018), when it states that **the Review Section of the Peace Tribunal cannot collect evidence**. Omitting this precision would seriously affect Colombia's judicial cooperation with other countries.

As for Article 153, it is similarly inconvenient because the extradition of certain offenders is subjected to them offering to tell the truth, but no term or timing for doing so is provided for. This produces a perverse incentive for third parties to seek to enter the SJP under the guise of alleged offers of truth, with the real objective of eluding responsibilities before the courts in other countries.

Draft Reform to the SJP

From the detailed examination of the statutory bill and the observations made by the Attorney General, political parties and interested citizen groups, other concerns arise which cannot be adequately addressed through the mechanism of objections of inconvenience to the bill.

The foregoing has led the government to conclude that there are several structural aspects of the SJP that must be modified.

To this end, and completely apart from the process of the statutory bill in question, a draft constitutional reform is being prepared and will be submitted to Congress, referring to three aspects:

* Exclusion from the transitional justice of sexual crimes committed against children and adolescents. Nothing, no ideology, justifies aberrant aggression against the most vulnerable in society.

* Absolute clarity in that those who relapse in criminal activities will lose all the benefits.

* Absolute clarity in that all criminal conduct that began before December 1, 2016 (the date the Final Agreement was signed) and continued to be carried out after that date will fall under the jurisdiction of ordinary courts, to ensure the principles of justice and non-repetition.

Corollary

The government of President Iván Duque is unquestionably committed with the implementation of the Final Agreement for the Termination of the Conflict, signed in December 2016 with the FARC, within the framework of a broader policy of territorial stabilization and the consolidation of peaceful coexistence. This has been reaffirmed in different scenarios and is reflected in public policy measures and specific actions aimed at that purpose, adopted since August 2018.

The objections raised to the statutory bill of the SJP are aimed at strengthening that commitment within the framework of the strictest respect for constitutional procedures, the rule of law, and the democratic order; and seek to strengthen transitional justice, by definitely resolving some issues and gaps that could affect both its effectiveness and its legitimacy, as well as compliance with Colombian obligations under international law. By doing so, the SJP will be provided with a more solid legal framework, which will generate greater legal security for all involved, and especially for those who have acquired a genuine commitment to reincorporation into society.

As already indicated, the raising of objections on a small number of articles of the statutory bill does not constitute a clash with the Judiciary. This has been clearly stated by the Constitutional Court: “The objections are conceived as an expression of the principle of harmonious collaboration between the different branches of public power (Article 113 of the Constitution) and not as veto power (...). **In this sense, it is important to highlight that the Congress of the Republic, as a forum for democratic deliberation, has the final say regarding objections on grounds of inconvenience (...)**”. (Judgment C-633 of 2016).

While the corresponding process is in place, the SJP will not stop functioning. To the contrary, it will continue to operate in accordance with its constitutional mandate and will have the full support of the National Government for such purposes.