

Shredded

Colombia's Special Jurisdiction for Peace in an Increasingly Illiberal Context of Misinformation and Backlash

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Abstract

From 2012 to 2016, the Colombian Government and the FARC-EP guerilla group sought to end the region's longest non-international armed conflict. Under the auspices of the international community, this process drew from a complex series of practices and knowledge often known as 'transitional justice'. Indeed, international expertise — in law and other fields — was also actively mobilized by both parties, as well as civil society and the anti-peace opposition, to contest the meaning of these terms. On paper, the peace agreement adopted a cutting-edge and comprehensive system aimed at delivering truth, justice, reparation, and non-repetition (the SIVJRNR), including both judicial and extra-judicial mechanisms following international standards and best practices. Yet in practice, the situation became increasingly dire after the peace agreement was narrowly voted down in October 2016. Two years later, having entered government, the former populist opposition proudly announced its plan to shred the peace accord and the SIVJRNR (including its crown jewel: the Special Jurisdiction for Peace or JEP). In this context,

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this article seeks to identify and understand the strategies which might be adopted by transitional justice institutions to prevail against waves of populist misinformation and backlash. The Colombian experiment can offer important insights on how humanitarian actors can generate public narratives of reconciliation in our current dire times of mistrust.

We can thus see how and why the field of memory was initially understood as a battlefield between antagonistic accounts. In Colombia, memory often acted as a space for unarmed confrontation that prolonged the war by other means.¹

The attention economy takes heed of the information (and visual) age in which we live, and transforms attention into a commodity: attention is regarded as a scarce resource for which there is continuous competition.²

1. Introduction: Misinformation and Backlash against International Legal Expertise in an Increasingly Illiberal World

According to a BBC poll, 62% percent of Colombians abstained from voting in one of the most important political referendums ever held in this Latin American republic.³ On 2 October 2016, a very slim majority of voters (50.21% versus 49.78%) responded negatively to the question ‘do you support the final agreement to end the conflict and build stable and long-lasting peace?’⁴ Why would a polity vote against an agreement that promised the end of a half-century long civil war? This stunning result (which defied all polls and the opinions of experts) has puzzled social scientists in, and beyond, Colombia.⁵ If anything seems clear, it is that the ‘no’ camp — and especially, the *Centro Democrático Party* created around former President Álvaro Uribe Vélez (2002–2010) — had managed to craft a powerful affective message among voters.⁶ Indeed, as the former campaign manager of the ‘no’ camp Juan Carlos Vélez proudly announced in the press four days after their victory, their deceptively simple strategy had been to make people ‘to go out to vote

1 M. Freeman and I. Orozco Abad, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond* (Cambridge University Press (CUP), 2020), at 115.

2 C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (CUP, 2021), at 17.

3 ‘Qué dice de Colombia que haya habido 62% de abstención en el histórico plebiscito por el proceso de paz’, *BBC New Mundo*, 3 October 2016, available online at <https://www.bbc.com/mundo/noticias-america-latina-37539590> (unless noted otherwise, all online sources were last visited on 29 October 2021).

4 A. Gomez-Suarez, ‘Peace Process Pedagogy: Lessons from the No-Vote Victory in the Colombian Peace Referendum’, 53 *Comparative Education* (2017) 462.

5 R. Branton et al., ‘Violence, Voting & Peace: Explaining Public Support for the Peace Referendum in Colombia’, 61 *Electoral Studies* (2019) 1.

6 E. Dávalos et al., ‘Opposition Support and the Experience of Violence Explain Colombian Peace Referendum Results’, 10 *Journal of Politics in Latin America* (2018) 99.

motivated by anger' (*estábamos buscando que la gente saliera a votar verraca*).⁷ In contrast, the pro-peace Government and the 'yes' camp opted instead for a 'technical approach' to persuade voters to support the peace agreement.⁸ Then-president Juan Manuel Santos Calderon (2012–2016) had surrounded himself with technocrats (or 'organizational shamans'⁹) to convince voters that the agreement reflected the latest best practices and was compliant with all sorts of international standards — in law and other fields. They simply dismissed 'irrational positions' that stemmed mostly from 'misinformation'.¹⁰ For that reason, the 'yes' camp was, by and large, unable to contest some of the affectively charged misinformation produced by the 'no' camp. Perhaps the most salient example was the time when the Uribe-aligned camp 'discovered the power of social networks' by sharing a picture of former president Santos smiling with former FARC guerrilla leader 'Timochenko'.¹¹ The caption noted that the pro-peace Government had forgotten the plight of everyday Colombians, as it was giving away free money to the rebels (instead of law-abiding citizens) in the midst of a terrible economic crisis.

As that meme travelled seamlessly through Whatsapp groups and Facebook chats,¹² complex questions of international criminal justice and international human rights law were reduced to catchphrases. This is not to say that the discourses and practices related to international law were (or are) irrelevant in Colombia's complex transition. On the contrary, as we explore further below, international legal norms and standards were actively mobilized by all sorts of actors to legitimize, contest, or reform the legal institutions created around the peace agreement. At the same time, it seems clear that legal expertise alone is itself insufficient to settle any complex political debate. In hindsight, it was a mistake to presume that simply trying to educate voters in matters of criminal justice would be enough to make them vote 'yes' (as some technocrats in this camp genuinely believed). Not only is expertise malleable (to the extent that it may be contested by some), but an emotionally charged framing can obscure the limits imposed by legal standards.¹³

- 7 'Estábamos buscando que la gente saliera a votar verraca', *El Colombiano*, 6 October 2016, available online at <https://www.elcolombiano.com/colombia/acuerdos-de-gobierno-y-farc/entrevista-a-juan-carlos-velez-sobre-la-estrategia-de-la-campana-del-no-en-el-plebiscito-CE5116400>.
- 8 J. Gallego et al., 'Tweeting for Peace: Experimental Evidence from the 2016 Colombian Plebiscite', 62 *Electoral Studies* (2019) 2.
- 9 M. Escobar-Sierra and F. Calderón-Valencia, 'Transforming Weaknesses into Strengths through Organisational Shamans: The Case of Colombian Peace Commissioner that Signed the Final Agreement', 24 *International Journal of Business Innovation and Research* (2021) 76.
- 10 H. Kline, *Between the Sword and the Wall: The Santos Peace Negotiations with the Revolutionary Armed Forces of Colombia* (University of Alabama Press, 2020), at 103.
- 11 FARC is the acronym for *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia). See 'Estábamos buscando que la gente saliera a votar verraca', *El Espectador*, 6 October 2016, available online at <https://www.elespectador.com/opinion/columnistas/carolina-botero-cabrera/estabamos-buscando-que-la-gente-saliera-a-votar-verraca-column-658987/>.
- 12 J. Amaral, "'Spoiling" in the Public Sphere: Political Opposition to Peace Negotiations and the Referendum Campaign in Colombia', 26 *International Negotiation* (2021) 453.
- 13 M. Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law', 28 *Leiden Journal of International Law (LJIL)*(2015) 743.

The events of July 2008 provided a powerful example of this fact. Back then, Colombia's armed forces struck one of their most notable blows to the guerrilla group FARC-EP, which was both celebrated and condemned by different groups: the so-called *Operación Jaque* (or 'Check' in English, after the chess move).¹⁴ The Colombian authorities had sought to rescue 15 high profile hostages, including the former presidential candidate Ingrid Betancourt — and, perhaps most importantly, three United States military contractors. While this operation was widely acclaimed (including by the UN Secretary-General, US presidential candidates Barack Obama and John McCain, and politicians in Colombia), humanitarian actors were more skeptical.¹⁵ Not because they did not celebrate the rescuing of the hostages, but rather because it became clear that the Colombian forces had deliberately attempted to disguise their combat units as civilians — including, ironically, the use of Che Guevara t-shirts.¹⁶ What is more, at least one combatant wore an emblem of the Red Cross with the French words 'Comité International Genève'. Unsurprisingly, the International Committee of the Red Cross (ICRC) itself sought to remind Colombian authorities of the perils of an 'improper use of the red cross emblems'. To this day, its casebook uses the incident as a salient example of abuse.¹⁷ But, overall, the negative consequences of the incident seemed limited. Then-president Álvaro Uribe initially denied any use of such emblems, but only to admit as much later.¹⁸ The soldier who had donned the Red Cross emblem, at any rate, was not sanctioned. Accusations of war crimes or violations of international humanitarian law (IHL) were dismissed or downplayed. In this light, it is not surprising that a scholarly commentator observed from the USA that this was a case of largely 'permissible perfidy', at least from one perspective.¹⁹

By highlighting this event, we do not wish to argue that IHL (or the laws of war more broadly understood) have been irrelevant in the Colombian context. On the contrary, the years after 2008 marked the high tide of the 'legalization' of Colombia's complex processes of war and peace.²⁰ In fact, it was in 2008–2009 that the Colombian police and military forces issued guidelines and an operations manual that relied on IHL as a legal foundation.²¹ Rather, we use *Operación Jaque* as a vantage point to reflect on the tense relationship between

14 See generally, D. Porch and J. Delgado, "'Masters of Today': Military Intelligence and Counterinsurgency in Colombia, 1990–2009', 21 *Small Wars & Insurgencies* (2010) 277.

15 J. Dehn, 'Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction', 6 *Journal of International Criminal Justice (JICJ)* (2008) 627. 16 *Ibid.*, at 630.

17 ICRC, *Colombia: ICRC Deplores Improper Use of Red Cross Emblem*, 8 June 2008; Case No. 247, Colombia, Misuse of the Emblem, available online at <https://casebook.icrc.org/case-study/colombia-misuse-emblem>.

18 Dehn, *supra* note 15, at 631.

19 *Ibid.*, at 653.

20 See generally, P. Kalmanovitz, 'Entre el deber de protección y la necesidad militar: oscilaciones del discurso humanitario en Colombia, 1991-2016', 1 *Latin American Law Review* (2018) 33. See also A. Clapham, *War* (Oxford University Press (OUP), 2021), at 25 (concerning the use of the term 'laws of war').

21 Kalmanovitz, *ibid.*, at 49. See also Freeman and Orozco Abad, *supra* note 1, at 68 (on the police and army, respectively); C. Sánchez León (ed.), *Justicia Transicional En Pugna: El Rol Del Derecho en la Construcción de Paz en Colombia* (Universidad Nacional de Colombia, 2019).

seemingly illiberal political *ends* and apparently liberal legalist *means*.²² As one of us has argued more extensively elsewhere, our dire times of far-right populist backlash and revolt require critical scholars not only to consider the 'dark sides of virtue',²³ but also the ways in which seemingly progressive and humanitarian legal discourses and practices can be actively used by illiberal actors.²⁴ In this way, we wish to step out of the — in our view unhelpful — binary that has structured the debate regarding international law and the far-right, in which a group of 'us' (law-abiding, progressive, and internationalist cosmopolitan community committed to expertise) is pitted against a 'them' (parochial, nationalistic, ignorant and narrow-minded local actors revolting against a rules-based order).²⁵ Instead, we want to see how (international) legal expertise can be deployed by different political actors to prolong war 'by other means'.²⁶ But this does not mean that legal discourses and practices can be simply reduced to politics *tout court* (sadly, a frequent claim raised against contemporary critical legal perspectives).²⁷ Instead, as Kennedy reminds us, declaring that law is the continuation of war or politics *by other means* is understood as an invitation to take those *means* seriously.²⁸

In this piece, our study of *means* revolves around Colombia's Special Jurisdiction for Peace (JEP), created in the framework of the recent peace agreement between the FARC-EP and the Santos pro-peace government.²⁹ As one of us has analyzed in detail elsewhere, expertise related to international law in general (and IHL in particular) played a fundamental role in the way the negotiations and the structural outputs of this process were forged by the warring parties in Bogotá, La Habana, and

- 22 W. Benjamin, 'Critique of Violence', in M. Bullock and M. Jennings (eds), *Selected Writings - Volume 1: 1913 - 1926* (Belknap, 1996) 236, at 247. See further S. Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux, 2021). We use 'liberal legalism' as a category following H. Alviar García and I.C. Jaramillo Sierra, *Feminismo y Crítica Jurídica: El Análisis Distributivo Como Alternativa Crítica al Legalismo Liberal* (Ediciones Uniandes, 2012).
- 23 D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2005); D. Kennedy, *Of War and Law* (Princeton University Press, 2006).
- 24 D.R. Quiroga-Villamarín, 'From Speaking Truth to Power to Speaking Power's Truth: Transnational Judicial Activism in an Increasingly Illiberal World', in L. Riemer et al. (eds), *Cynical International Law? Abuse and Circumvention in Public International and European Law* (Springer, 2020) 111.
- 25 For an overview, see C. Schwöbel-Patel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering', in J. Nijman and W. Werner (eds), *Netherlands Yearbook of International Law 2018* (TMC Asser Press, 2019).
- 26 Kennedy (2006), *supra* note 23, at 13 and 163.
- 27 A. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law?' 14 *LJIL* (2001) 727.
- 28 D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850 - 2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP, 2006) 19, at 72-73.
- 29 For an overview of the process, see Freeman and Orozco Abad, *supra* note 1. For more detail about the structure of the JEP, see M. Valiñas, 'The Colombian Special Jurisdiction for Peace', 18 *JICJ* (2020) 449, at 452-453. See also H. Olasolo and J. Ramirez Mendoza, 'The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition', 15 *JICJ* (2017) 1011.

beyond.³⁰ Landau aptly suggests that it might be better to think of this process as judicialized rather than merely legalized, as it was clear from the outset that its agenda, debates, and institutional outcomes would be closely scrutinized by a plethora of courts — from the domestic judiciary and its towering Constitutional Court to the ever-present spectres of the Inter-American Court of Human Rights and the International Criminal Court (ICC). In fact, as we were finishing the last revisions to this article, the ICC Prosecutor decided to close his preliminary examination of the Colombian situation and signed a cooperation agreement with the Colombian state to ensure the advance of transitional justice.³¹

Alas, for Colombia's JEP, we no longer live — if we ever did — in times in which legal expertise is synonymous with political legitimacy. While the end of the Cold War gave way to a period in which international law's 'cosmopolitan dream' promised the end of history,³² the rise of far-right populist movements in both the North Atlantic core and its peripheries has reminded us that technical expertise is not a trump card (no pun intended) in political strife. Indeed, if (international) courts have always been suspect of democratic illegitimacy,³³ their situation grows increasingly more dire as populist leaders ground their claims to executive rule in an 'imagined community' of people, with which judicial actors are often accused to be out of touch.³⁴ In particular, in this piece we engage with a salient feature of our illiberal times: the prominence of misinformation ('fake news') as a tactic of political engagement

- 30 C. Ramírez Gutiérrez, 'Una Visión Sociojurídica del Derecho Internacional Humanitario en el Marco del Proceso de Paz en Colombia', in C. Sánchez León (ed.), *Justicia Transicional En Pugna: El Rol Del Derecho En Laconstrucción de Paz En Colombia* (Universidad Nacional de Colombia, 2019) 122, at 122–168. See generally J.L. Fabra Zamora, A. Molina-Ochoa and N. Doubleday (eds), *The Colombian Peace Agreement: A Multidisciplinary Assessment* (Routledge, 2021).
- 31 D. Landau, 'The Causes and Consequences of a Judicialized Peace Process in Colombia', 18 *International Journal of Constitutional Law* (2020) 1303. See also L. Betancur, 'The Legal Status of the Colombian Peace Agreement', 110 *AJIL Unbound* (2016) 188; N. Sanchez Leon, 'Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?' 110 *AJIL Unbound* (2016) 172; R. Urueña, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017', 111 *American Journal of International Law* (2017) 104; A. Rincón, C. Sánchez Bautista and J. Pugh, 'Transnational Governance and Peace Processes: The Case of the UN and ICC in Colombia,' in A. Kulnazarova and V. Popovski (eds), *The Palgrave Handbook of Global Approaches to Peace* (Springer International Publishing, 2019); M. Giraldo Munoz and J. Serralvo, 'International Humanitarian Law in Colombia: Going a Step beyond The Law', 101 *International Review of the Red Cross* (2019) 1117; S. Müller, 'The Role of Law in Enforcing Peace Agreements: Lessons Learned from Colombia', 26 *Journal of Conflict and Security Law* (2021) 117. See also ICC, *Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government Of Colombia*, 28 October 2021, available online at <https://www.icc-cpi.int/itemsDocuments/20211028-OTIP-COL-Cooperation-Agreement-ENG.pdf>.
- 32 D. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', 31 *N.Y.U. Review of Law & Social Change* (2006) 641; Quiroga-Villamarín, *supra* note 24.
- 33 E. Benvenisti and G.W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (CUP, 2017).
- 34 E. Voeten, 'Populism and Backlashes against International Courts', 18 *Perspectives on Politics* (2020) 407. On imagined communities, see B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso, 2016).

against (international) courts and tribunals.³⁵ We follow the growing scholarship on the critique of expertise in international law to argue it would be short-sighted to simply dismiss the far-right revolt due to its technical ignorance. Instead, we engage with the ways in which the *means* of liberal legal humanitarianism can be deployed by different actors as they navigate between the Scylla of technocratic allure and the Charybdis of democratic legitimacy.³⁶ To do so, in what follows, we first offer an overview of the conflict(s) in Colombia, contextualizing the ways in which the battles for peace and justice have been waged since the last century. We focus on the interactions between the last peace processes and activities of (mis)information in Colombia's 'forgotten peaces',³⁷ and place the 'Peace and Justice' process of 2005 in conversation with the contemporary Habana agreement.³⁸ We then offer a similar overview of the same struggles related to misinformation and the JEP in and after the Habana process. We will pay special heed to the role of international experts in struggles over the content of both the adjective 'transitional' and the noun 'justice.'³⁹ Finally, we close with some concluding remarks on the political uses of international law in contexts of social upheaval—like those that are occurring right now in Colombia as we are writing (mid-2021).

2. The Long Wars, the Long Peaces: Media, Truth, and Violence in Colombia

In these dire times of 'fake news in social media,' it is easy to exaggerate the novelty of the challenges we face.⁴⁰ However, a closer historical look would reveal that the intimate connection between media, violence, and the politics of truth has a long history in, and beyond, Colombia. Indeed, in his timely contribution, Baade notes that the problem of 'distorted information' and its relationship to 'peace and war' has been haunting international law since at least the first decades of the last century.⁴¹ The international historian Biloft

35 B. Baade, 'Fake News and International Law', 29 *European Journal of International Law (EJIL)* (2018) 1357–1376.

36 D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016); R. Urueña, 'International Law as Expert Knowledge', in J. d'Aspremont and others (eds), *International Law as a Profession* (CUP, 2017); A. Bianchi, 'The Unbearable Lightness of International Law', 6 *London Review of International Law* (2018) 335.

37 P. Wesche, 'Business Actors, Paramilitaries and Transitional Criminal Justice in Colombia', 13 *International Journal of Transitional Justice* (2019) 478.

38 For an overview, see C. Nasi and A. Rettberg, 'Colombia's Farewell to Civil War', in I.W. Zartman (ed.), *How Negotiations End* (CUP, 2019) 62, at 62–82.

39 D.R. Quiroga-Villamarín, 'Historia Conceptual de la Justicia Transicional: Contextualizando el Caso Colombiano', 3 *Asociación Cavalier Del Derecho* (2018) 44.

40 B. Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law', 32 *EJIL* (2021) 159–193; M. Bloch, *The Historian's Craft* (Manchester University Press, 1992), at 47.

41 Baade, *supra* note 35, at 1365–1369. See also J. Blitz, 'Lies, Line Drawing, and Deep Fake News Symposium: Falsehoods, Fake News, and the First Amendment: Panel 1: Falsehoods and the First Amendment', 71 *Oklahoma Law Review* (2018) 59.

has taken this point further in *A Violent Peace*, showing how disputes around the management of information systems was a crucial concern for the League of Nations and its enemies in the emerging fascisms of the inter-war period.⁴² Even before social media, as Parker shows in his study of radio in Rwanda, mass media played a crucial role in the legitimation or condemnation of mass violence.⁴³ These insights are especially important in Colombia, a country that has a long (and, as Karl argues, often forgotten) history of war-making and peace-breaking.⁴⁴ For that reason, in what follows, we provide a snapshot of two very different peace processes: the 2005 ‘Justice & Peace’ framework adopted to deal with the right-wing paramilitaries and the more recent 2012–2016 Habana conversations with the FARC. We highlight the role and importance of mass media, the so-called international community, and international law in these processes. Due to limitations of space, we are not reviewing other relevant precedents in peace-making, including the very pertinent ‘Caguán’ process of 1999–2002.⁴⁵

A. Peace among Friends: the ‘Justice and Peace’ Process

Under the framework of Law 975 of 25 July 2005, the Colombian state underwent what was then called the ‘Justice and Peace’ process of demobilizing irregular armed groups. This law, in fact, created a sort of a special jurisdiction inside the regular domestic judicial system. This ‘Justice and Peace’ jurisdiction was tasked with processing different armed groups and individuals who participated in the hostilities. Its objective was ‘to disarm, demobilize and reintegrate irregular armed groups’ and ‘groups operating outside the law’, and thus ‘[w]hile the earlier peace processes only targeted “left-wing” insurgents, Law 975 also, or even predominantly, dealt with “right-wing” paramilitary groups’.⁴⁶ Although that system is remembered as the process for ‘paramilitaries’ (as most of those who surrendered their arms were part of a group called AUC [*Autodefensas Unidas de Colombia*, which stands for United Self-Defence Groups of Colombia]), it is worth noting that some guerrillas also

42 C.N. Biloft, *A Violent Peace: Media, Truth, and Power at the League of Nations* (University of Chicago Press, 2021).

43 J.E.K. Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (OUP, 2015).

44 R.A. Karl, *Forgotten Peace: Reform, Violence, and the Making of Contemporary Colombia* (University of California Press, 2017); R.A. Karl, ‘Colombia’s History with “Genocide”’, 21 *Journal of Genocide Research* (2019) 255. See also F. Benavides Vanegas, ‘Colombia’s Elusive Peace: Perspectives for a Peace Process in Colombia’, 4 *Criterios* (2019) 199; M. Palacios, *Between Legitimacy and Violence: A History of Colombia, 1875–2002* (Duke University Press, 2006); L. Van Isschot, *The Social Origins of Human Rights: Protesting Political Violence in Colombia’s Oil Capital, 1919–2010* (University of Wisconsin Press, 2015). See also W. Heinz, ‘Guerrillas, Political Violence, and the Peace Process in Colombia’, 24 *Latin American Research Review* (1989) 249.

45 See further H.F. Kline, *Chronicle of a Failure Foretold: The Peace Process of Colombian President Andrés Pastrana* (University of Alabama, 2007).

46 K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-Based Approach* (Springer, 2010), at 3.

laid down their arms. In general, '[t]he basic rules of [this process] were the following: the paramilitaries could be assisted by a lawyer, but instead of typical adversarial setting of formal justice, it operated on the basis of confessions and acceptance of deeds by accused in exchange for radically reduced sentences. If they failed to provide the truth, they could be expelled from [justice and peace system] and lose out on its benefits.'⁴⁷ In this context, some actors had played an important role to promote the acceptance and public understanding of this process. Chief among them were the press and mass media, which had close ties to the government of the time.⁴⁸ Thus, press coverage largely aligned with the political goals of the ruling parties.⁴⁹ Concretely, the government pushed for changes in the public opinion of domestic voters and international funders with regard to the situation of violence and conflict, following the doctrine of 'democratic security.'⁵⁰ This term makes reference to a strategy of managing the conflict through which Uribe's government 'used different actions to push for a military, political and judicial offensive against the guerrillas that had not allowed the development of the economy and society'.⁵¹

Back then, the Uribe government mobilized the idiom of terrorism to engage with the civilian population and to stigmatize any potential action by the guerrillas. Uribe's populist right-wing political platform sought to portray the civilian population as under an unrelenting siege from the guerilla threat.⁵² By contrast, for the government, paramilitarism and far-right violence were not too concerning—and the leaders of these non-state armed actors were glorified in the press. Carlos Castaño, former commander of the AUC, was portrayed as a modern 'Robin Hood,' a muscular protector of the civilian population from the guerillas' constant menace.⁵³ In this way, the press had a special role in the local, national, and even international justification of paramilitarism.⁵⁴ Carlos Castaño appeared on national television in 2000, when he still was an insurgent,⁵⁵ and his subsequent autobiography *My Confession* was published with a prologue from

47 F. Gutiérrez, *Clientelistic Warfare: Paramilitaries and the State in Colombia (1982-2007)* (Peter Lang, 2019), at 3.

48 C. Rodríguez, *Citizens' Media against Armed Conflict: Disrupting Violence in Colombia* (University of Minnesota Press, 2011).

49 Y. Serrano, 'Naming the Combatants of the Colombian Armed Conflict in News Broadcasts: The Discursive Positioning of Journalists', 19 *Palabra Clave* (2016) 57.

50 See generally J.A. Echavarría, *In/Writing Political Identities in the Democratic Security Policy* (Manchester University Press, 2014).

51 Grupo de Memoria Histórica, *¡Basta Ya! Colombia: Memorias de Guerra y Dignidad*, Informe General 430 (2013), at 179.

52 *Ibid.*, at 179. See also F. Díaz Pabón, 'Right-Wing Populism and the Mainstreaming of Protests: The Case of Colombia', 29 *Revista Española de Sociología* (2020) 169, at 173–175.

53 R. Zelik, *Paramilitarismo: Violencia y Transformación Social. Política y Económica en Colombia* (VFS, 2015), at 108–109. See also T. Jäger et al., *Die Tragödie Kolumbiens: Staatszerfall, Gewaltmärkte und Drogenökonomie* (VS Verlag Für Sozialwissenschaften, 2007), at 46 (note 81).

54 E. Nussio, 'How Ex-Combatants Talk about Personal Security: Narratives of Former Paramilitaries in Colombia', 11 *Conflict, Security & Development* (2011) 579.

55 Gutiérrez, *supra* note 47, at 159.

an important far-right Francoist Spanish journalist who wrote for widely-read newspapers 'El Tiempo' and 'El Mundo'.⁵⁶

Politicians and social actors also played an important role in justifying the peace process for the paramilitaries. Unlike the guerrilla groups, the paramilitaries were seen differently by the traditional political parties—especially those that are against the current peace process. Moreover, in Colombia, there are substantive differences between the opinion (and media engagement) of those based in cities compared to those in the countryside. For that reason, there are contrasting approaches to the issue of the armed conflict. And even in certain specific sectors of the urban populations there was support for the use of force against guerrilla combatants and those suspected of collaborating with them.⁵⁷ Unsurprisingly, these sectors of the population tended to be lenient with the illegal activities undertaken by the paramilitaries to reestablish the territorial control of the regional aristocracies.⁵⁸ Instead, the principal difference of opinion in this constituency was whether paramilitarism should be read merely as a *reactive* strategy of self-defense, instead of a wide-reaching *reactionary* project of counter-reform in socio-economic terms.⁵⁹ Consequently, 'there has been an extensive debate on the role of war economies . . . and obstacles to transition that those who financed the hostilities (motivating or instigating others to engage in violence), may raise in the so-called post conflict phase',⁶⁰ as we will see later in the discussion of 'third party' non-combatants.

While the relationship between local war economies and paramilitary activities has been somewhat explored in the literature,⁶¹ few have studied the relationship between these groups and the press.⁶² Koessler, for instance, concluded that the press was an important institution in the agenda of ruling elites, as mass media is often controlled by a few families. For example, the journal 'El Colombiano' — which is the second best-selling newspaper in the country — is owned by a close circle of 'paisa' elites (high class families from the region of Antioquia and the city of Medellín), and has often been quite

56 Zelik, *supra* note 53, at 110.

57 M.T. Ronderos, *Guerras Recicladadas: Una Historia Periodística Del Paramilitarismo en Colombia* (Aguilar, 2014); S. Darcy, *To Serve the Enemy: Informers, Collaborators, and the Laws of Armed Conflict* (OUP, 2017), at 191.

58 M. Koessler, *Violencia y Habitus: Paramilitarismo En Colombia* (Siglo del Hombre, 2014), at 193-194.

59 S. Coronado, 'Rights in the Time of Populism: Land and Institutional Change Amid the Reemergence of Right-Wing Authoritarianism in Colombia', 8 *Land* (2019) 119. See also T. Ballvé, 'Grassroots Masquerades: Development, Paramilitaries, and Land Laundering in Colombia', 50 *Geoforum* (2013) 62.

60 Wesche, *supra* note 37, at 478.

61 A. Rettberg et al. (eds), *¿Diferentes Recursos, Conflictos Distintos? La Economía Política Regional Del Conflicto Armado y La Criminalidad En Colombia* (Ediciones Uniandes, 2018); A. Rettberg, 'Colombia in 2019: The Paradox of Plenty', 40 *Revista de Ciencia Política (Santiago)* (2020) 235.

62 See J.D. Villa et al., 'The Role of Mass Media in the Fabrication of Memories, Emotions, and Beliefs about the Enemy, Which Make Political Polarization Easy and Legitimize Violence', 20 *El Ágora USB* (2019) 18.

tolerant (if not outright supportive) of paramilitarism.⁶³ As a socio-linguistic study on the representation of violence in national mass media noted in 2013 noted, 'El Colombiano' had consistently adopted the term *autodefensas* (self-defence forces) instead of paramilitaries, which 'denotes legality ... and an inalienable right'.⁶⁴ While other mass media outlets varied in their stance, in general newspapers tended to report the violent activities of the guerrillas with harsher language and in greater detail, reserving a softer and ambiguous tone for the paramilitaries.⁶⁵ What is more, some members of the political establishment even wrote in the press in favor of the AUC, for example when former vice-president of Colombia Francisco Santos praised the 'counterinsurgency project' in Colombia.⁶⁶ As Fattal has argued, marketing and political economy were no strangers to Colombia's war — the government and its elites actively deployed mass media to 'demobilize' rebel combatants into civilians, consumers, and entrepreneurs, while at the same glorifying counterinsurgent 'freedom fighters'.⁶⁷

Another important factor was the relationship between politicians, political parties and paramilitaries. The phenomenon of so-called 'para-politics'⁶⁸ entailed that many Congress people pushed for lenient pardons, blanket amnesties, and widespread silence. Despite that, some investigations or prosecutions took place, mostly due to the pressure exerted by civil society activism in very hostile contexts and the boldness of certain judicial actors.⁶⁹ One last element worth noting was the highly technical nature — and overall hyperregulation — of the mechanism to transit from the war to peace, especially after its revision by the Colombian Constitutional Court, the international community and domestic social movements. As the central concession to irregular groups, Law 975 allowed for the imposition of a co-called 'alternative punishment': a minimum of five and maximum of eight years of prison time for crimes committed during the time of membership in the irregular group. There is little doubt that many crimes committed in those contexts were war crimes, and certainly these conducts under ordinary domestic criminal law could normally be punished with 50 or 60 years of prison. Punishment was not the central concern of the 'justice and peace process', however, as the Uribe government's main priority was to convince the paramilitaries to lay down their weapons. In fact, the rights of victims did not even appear in the first legal discussions and

63 Koessl, *supra* note 58, at 194. See also R. Rozema, 'Urban DDR-Processes: Paramilitaries and Criminal Networks in Medellín, Colombia', 40 *Journal of Latin American Studies* (2008) 423.

64 A. García-Marrugo, 'What's in a Name? The Representation of Illegal Actors in the Internal Conflict in the Colombian Press', 24 *Discourse & Society* (2013) 421, at 429.

65 *Ibid.*, at 440.

66 'El bloque de las Auc que enreda a Francisco Santos', *Verdad Abierta.com*, 29 July 2016, available online at <https://verdadabierta.com/el-bloque-de-las-auc-que-enreda-a-francisco-santos/>.

67 A.L. Fattal, *Guerrilla Marketing: Counterinsurgency and Capitalism in Colombia* (University of Chicago Press, 2018).

68 A. Idler, 'Colombia: Organised Crime, Politics, and Convenience', in F. Allum and S. Gilmour, *Handbook of Organised Crime and Politics* (Edward Elgar Publishing, 2019) 258–274.

69 Wesche, *supra* note 37, at 490.

the government seemed to have no problem in principle in giving blanket amnesties or wide-reaching pardons for former *paras*.⁷⁰ Indeed, as the Colombian government was well aware, the only punishment that the paramilitaries really feared was extradition to face US courts.⁷¹ For many far-right counterinsurgents, local prison was more of a business opportunity than a punishment — a fact that is clearly reflected in the dismally low reintegration of former *paras* to civilian life.⁷²

Initially, the government wanted to provide a blanket amnesty to all members of the *paras*. However, it quickly became clear that this option wasn't feasible due to the opposition of certain Congress people and civil society activists. For those reasons, the government eventually adopted the formula of law 975, which was later reviewed and amended by the Constitutional Court in its judgment C-370 of 2006.⁷³ The final legal instrument was approved, but important modifications were imposed by the tribunal. The final version of the law 'provides for a reduced sentence (misleadingly described as an *alternative sentence*) and the conditional suspension of the remainder of the ordinary sentence 'for demobilized members of illegal groups who cooperate fully in clarifying crimes, handing over illegally seized property for the purpose of contributing to reparations policies and clearly contributing to dismantle illegal structures'.⁷⁴ After this constitutional revision, the peace process with the paramilitaries went ahead. Some of the former armed actors felt betrayed, perceiving a measure of 'duplicity because they had surrendered under the [justice and peace] law as it was passed, but the Constitutional Court later made the conditions more inflexible'.⁷⁵ Yet even after the constitutional revision, some concerns raised by victims and human rights organizations (especially those raised in the language of international law) were never truly addressed.⁷⁶ In this process, the international community also played a role, at least to the extent that international actors may grant some degree of legitimacy to local norms by reviewing them and apparently acquiescing. That said, a few international actors did voice some

70 In 2005, a national human rights NGO asked whether 'Justice and Peace was a new mechanism for impunity?': Comisión Intereclesial de Justicia y Paz, 'El Nuevo Mecanismo de la Impunidad, la ley de 'justicia y paz'', 26 June 2005, available online at <https://www.justiciaypazcolombia.com/el-nuevo-mecanismo-de-la-impunidad-la-ley-de-justicia-y-paz/>.

71 M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (CUP, 2009), at 119.

72 L. Ariza and M. Iturralde, 'You Don't Respect Me, but I'm Worthy of Respect': Paramilitaries' Prison Experience and Conflict Transformation in Colombia', 21 *Punishment & Society* (2018) 596; J. Hristov, *Blood and Capital: The Paramilitarization of Colombia* (Ohio University Press, 2009); E. Nussio, 'Learning from Shortcomings: The Demobilisation of Paramilitaries in Colombia', 6 *Journal of Peacebuilding & Development* (2011) 88.

73 Some key sections of this ruling are available in English in M.J. Cepeda Espinosa and D.E. Landau, *Colombian Constitutional Law: Leading Cases* (OUP, 2017) 218–226.

74 Freeman, *supra* note 71.

75 H.F. Kline, *Fighting Monsters in the Abyss: The Second Administration of Colombian President Álvaro Uribe Vélez, 2006–2010* (University of Alabama Press, 2015), at 140.

76 *Verdad abierta.com*, 'Está fracasando la Ley de Justicia y Paz', 20 October 2008, available online at <https://verdadabierta.com/iesta-fracasando-la-ley-de-justicia-y-paz/>. See also J. García-Godos and K. Lid, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia', 42 *Journal of Latin American Studies* (2010) 487.

criticism. For example, the International Crisis Group noted that the negotiation was not between *adversaries*, but *friends* — and consequently some civilians were scared of demanding accountability from social and political actors linked to the paramilitaries or the para-politicians due to potential threat of retribution from the state itself.⁷⁷ These concerns neither affected the peace process nor made the government hesitate. Despite potential similarities with aspects of the current peace process, it is evident that the mass media and traditional political parties approached the crimes of (right-wing) paramilitaries with leniency. As such, demands for accountability or reparation were often lost in the torrent of news related to the gallant activities of the counterinsurgency.⁷⁸ However, the tables were turned, as we will see now, when it came to (left-wing) insurgents and rebels laying down their arms. If the 'peace between friends' of the Uribe Administration had required the vilification of the guerrillas to justify the conduct of the paramilitaries, now — as if in an 'inverted mirror' — the 'peace among enemies' saw mass media demand tough punishment of the guerrillas.⁷⁹ But at Habana, a decade later, the explosive emergence of social networking services would add a new layer to the question of mass media and the politics of (mis)information.

B. Peace Among Enemies: From 'Justice and Peace' to 'either Justice or Peace' at Habana

As a result of the negotiations between the former guerrilla FARC and the Colombian government (2012–2016), questions of justice and the rights of victims to reparation, truth, non-repetition and justice took centre stage.⁸⁰ In contrast to the 2005 peace process, this included the question of compliance with international standards, and certainly this deal was informed by 'best practices' drawn from other peace processes in, and beyond, Colombia.⁸¹ For that reason, technical expertise in the laws of war and peace was the bread and butter of the negotiations. IHL served as a yardstick upon which the legality of the past, present and future of the war could be measured.⁸² If we are to follow Skaar and Wiebelhaus,⁸³ who proposed to assess transitional

77 Ronderos, *supra* note 57, at 154.

78 Freeman and Orozco Abad, *supra* note 1, at 96.

79 *Ibid.*, at 98.

80 Oficina del Alto Comisionado para la Paz de Colombia, *La Discusión Del Punto 5. Acuerdo Sobre Las Víctimas de Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', Incluyendo La Jurisdicción Especial Para La Paz y El Compromiso Sobre Derechos Humanos., y de Las Medidas de Construcción de Confianza. 17 Mayo 2014 al 15 Diciembre 2015.*, Tomo V (2018). See also C. Sandoval, 'International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict' in C. Correa, S. Furuya and C. Sandoval (eds), *Reparation for Victims of Armed Conflict* (CUP, 2020) 179–264.

81 Quiroga-Villamarín, *supra* note 39.

82 Ramírez Gutiérrez, *supra* note 30, at 123.

83 E. Skaar and E. Wilbelhaus-Branm, 'The Drivers of Transitional Justice: An Analytical Framework for Assessing the Role of Actors', 31 *Nordic Journal of Human Rights* (2013) 127.

justice through the role played by each actor, we would see a quite colourful picture in the Habana negotiations. While the 2005 framework was negotiated behind closed doors — often between paramilitaries and para-politicians themselves — the Habana peace process saw the participation of an enormous variety of actors. This included government agents, former guerrilla delegates, victims, international supervisors and different groups of domestic civil society.⁸⁴ And because of this context of heightened competition, all of the different actors sought to use expertise to ground their proposal over those of their adversaries. Unsurprisingly, given the prevailing circumstances, the most influential actors were those who could engage effectively with the technical discourse of international law.⁸⁵ In this light, the Constitutional Court assumed one of the most important positions.⁸⁶

The Habana process, as part of the negotiation related to the general theme of ‘The Victims’, established the necessity to create three components or institutions: the Truth Commission, the Special Jurisdiction for Peace and the Special Unit for Finding Missing Persons.⁸⁷ Accordingly, Legislative Act 01 set up an ‘Integrated System of Truth, Justice, Reparation and Non-Repetition’.⁸⁸ ‘The Integrated System created a regime of alternative penalties to imprisonment, including mandatory community work and restrictions prohibiting movement outside a specified geographical area for a period of time between five to eight years.’⁸⁹ Although this system was seen as technically sound and legitimate by certain international actors and experts, the government decided to put the agreement to a vote in a plebiscite to guarantee popular acceptance.⁹⁰ The agreement was, however, rejected by a slim majority of voters, at least ‘partly due to the influence of Uribe, who mobilized his Democratic Center party against the agreement, ultimately quashing a referendum to ratify it’.⁹¹ In fact, Uribe (who had previously been the architect of the ‘Peace & Justice’ regime for the right-wing paramilitaries) now demanded a more strict position of *either* Peace or Justice for the left-wing guerrillas.⁹² In

84 Freeman and Orozco Abad, *supra* note 1, at 74–104.

85 Ramírez Gutiérrez, *supra* note 30, at 161 (note 19).

86 M. Tushnet and B. Botero Arcila, ‘Conceptualizing the Role of Courts in Peace Processes’, 18 *International Journal of Constitutional Law* (2021) 1290–1302. See also Landau, *supra* note 31.

87 Oficina del Alto Comisionado para la Paz de Colombia, *supra* note 80. For an overview of the process, see Kline, *supra* note 10, at 93–107.

88 A.L. 01/17, abril 4, 2917, Diario Oficial [D.O.] 50196, Art. 5 (Colom.) (hereinafter ‘AL01/17’) ‘Jurisdicción Especial para la Paz’ [Special Jurisdiction for Peace]. In Colombian law, a legislative act is a congressional act that has the scope of a constitutional reform. See generally D. González, ‘Explaining the Institutional Role of the Colombian Constitutional Court’, in T. Ginsburg and A. Z. Huq (eds), *From Parchment to Practice* (CUP, 2020) 187–207.

89 Olasolo and Ramírez Mendoza, *supra* note 29, at 1014.

90 Freeman and Orozco Abad, *supra* note 1, at 103.

91 A. Ehasz, ‘Political Reincorporation of Female FARC-EP Ex-Combatants: The Creation of Victims, Heroes, and Threats’, 13 *Cornell International Affairs Review* (2020) 4, at 13.

92 A. Pechenkina and L. Gamboa, ‘Who Undermines the Peace at the Ballot Box? The Case of Colombia’, *Terrorism and Political Violence* (2019) 1.

his view, guerrillas either had to submit to judicial punishment or military defeat. If Uribe and his associates were accused of promoting impunity for the paramilitaries in 2005, now they were the ones to point the finger against the pro-peace government.⁹³ In their quest to mobilize voters against the peace agreement, they relied on a series of misinformation tropes related to questions of gender or social redistribution.⁹⁴ Voters, afraid that the peace process would 'surrender the country to the guerrillas' or 'turn their children gay', ended up voting against the peace agreement, which led to a process of renegotiation that didn't change too much of the justice system's substance but left its flank open to backlash and misinformation.⁹⁵ We turn to this now.

3. After the Deluge: the JEP in a Context of Backlash and Misinformation

International justice can be pursued by many avenues. Chief among them is the permanent ICC, established by states through the Rome Statute.⁹⁶ However, in our age of 'uneven judicialization of the global order',⁹⁷ there may be other judicial fora that range from the purely domestic to the hybrid or the fully international.⁹⁸ The JEP is a domestic jurisdiction that is internationalized because its legal source material encompasses both international and domestic law.⁹⁹ In particular, 'the JEP's application of international law in prosecuting crimes committed during the Colombian Armed Conflict flows from two sources. First, the Constitutional Block ... addresses the application of IHL and IHRL [international human rights law]. Second, some norms explicitly compel and authorize the JEP to apply international law.'¹⁰⁰ Indeed,

93 H. Alviar García and K.L. Engle, 'The Distributive Politics of Impunity and Anti-Impunity: Lessons from Four Decades of Colombian Peace Negotiations', in K. L. Engle, Z. Miller and D. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP, 2016) 216–254.

94 J. Lemaitre, 'Transitional Justice and the Challenges of a Feminist Peace', 18 *International Journal of Constitutional Law* (2020) 455; A. Gomez-Suarez, 'A Short History of Anti-Communist Violence in Colombia (1930–2018): Rupture with the Past or Rebranding?' in C. Gerlach and C. Six (eds), *The Palgrave Handbook of Anti-Communist Persecutions* (Springer, 2020) 383–403.

95 Freeman and Orozco Abad, *supra* note 1, at 103–104. See also Martinez, 'Remodifying Colombian Peace Process: A Critical Perspective and a Demand for Justice Notes', 20 *Cardozo Journal of Conflict Resolution* (2018) 617.

96 D.L. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP, 2014).

97 B. Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP, 2012) 203–227.

98 C. Stahn, *A Critical Introduction to International Criminal Law* (CUP, 2019), at 184–206.

99 AL01/17, *supra* note 88; Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction for Peace], Acuerdo No. 001 de 2018, marzo 9, 2018, art. trans. 43 (Colom.).

100 C. Ramirez Gutierrez and A.S. Saavedra Eslava, 'Protection of the Natural Environment under International Humanitarian Law and International Criminal Law: The Case of the Special Jurisdiction for Peace in Colombia', 25 *UCLA Journal of International Law and Foreign Affairs* (2020) 123, at 134.

Colombian constitutional law allows for an expansive incorporation of international law under the notion of the ‘Constitutional Block’, which was initially inspired by French constitutional practice but has since taken a life of its own.¹⁰¹ While all judges in Colombia are bound to follow this block, the JEP has an extensive mandate that allows its judgments to refer directly to both domestic criminal law norms and international standards, depending on the specific context of the grave atrocity at hand.¹⁰²

Due to its international links, the JEP has faced similar critiques as previous experiments in international(ized) criminal justice.¹⁰³ Like the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, some commentators have said that the war continued both inside and outside the courtroom through mass media or legal discourse.¹⁰⁴ Yet from a liberal and technocratic perspective, an international jurisdiction (even an *ad hoc* one) may be more legitimate than a domestic system, not least since it is endowed with international support — or a veneer of it.¹⁰⁵ The Habana negotiators were well aware of this, and thus both sides actively engaged and deployed foreign experts to back their own positions.¹⁰⁶ Even the FARC — which, since the fall of the Soviet Union and the crumbling of the pink tide in Latin America, has often been portrayed as internationally ostracized — relied extensively on the counsel of Spanish international lawyer Santiago Enrique Romero.¹⁰⁷ In fact, he was one of the three-FARC nominated experts in the six person (all-male) ‘commission of judicial experts’ that negotiated the fine details of the drafts on the judicial settlement of the peace process.¹⁰⁸ This shows that the Habana process found itself in the midst of very different competing ‘internationalisms’ which aimed to influence in domestic politics in diverging ways. Indeed, it would be a mistake to think about the discussions surrounding the JEP (and the justice component of the agreement in general) without accounting for the towering shadow of the ICC.¹⁰⁹ But, at the same time, the Habana

101 Cepeda Espinosa and Landau *supra* note 73, at 42–58; Landau, *supra* note 31, at 1307 (note 20).

102 Special Jurisdiction for Peace, *Resolution SAI-SUBA-AOI-D-075-2020*, 2 October 2019, § 25. See further C. Rojas-Orozco, *International Law and Transition to Peace in Colombia: Assessing Jus Post Bellum in Practice* (Brill, 2021), at 52–123.

103 L. May and S. Fyfe, *International Criminal Tribunals: A Normative Defense* (CUP, 2017).

104 Pavlaković, ‘Croatia, the International Criminal Tribunal for the Former Yugoslavia, and General Gotovina as a Political Symbol’, 62 *Europe-Asia Studies* (2010) 1707.

105 In these contexts, ‘legitimacy in nongovernmental [or governmental] institutions such as international [or internationalized] tribunals concerns the right to issue binding “rulings”’. See May and Fyfe, *supra* note 103, at 12.

106 A. Ucrós, ‘What is the Colombian Peace Process Teaching the World?’ 29 *New England Journal of Public Policy* (2017), § 1.3.

107 Freeman and Orozco Abad, *supra* note 1, at 147.

108 Kline, *supra* note 10, at 84.

109 Leon, *supra* note 31; Rincón, Sánchez Bautista and Pugh, *supra* note 31; Urueña, *supra* note 31.

delegates knew that eventually other international institutions (such as the Inter-American Court of Human Rights) could also review their proposal, with different aims and standards than those of the ICC.¹¹⁰ Finally, the Habana process sought to ground its authority in international expertise precisely at a time when populist movements were revolting against the perceived tyranny of 'foreign of international courts or tribunals'.¹¹¹ Ironically, the fact that both the pro-peace government and former guerillas sought to justify their agreement with reference to international expertise may have made it easier for the anti-peace opposition (which became the ruling party in 2018) to justify its own position — as vindicating or reasserting the primacy of domestic (popular) politics over foreign impositions.¹¹²

Finally, another relevant element of the Habana peace process was its relation with the press and mass media. In our times, mass media has become an important tool to communicate the 'core message' of judicial decisions. For instance, the ICC has become increasingly aware of the importance of effective outreach and communications in an increasingly saturated global market.¹¹³ Similarly, in Colombia, the Constitutional Court has adopted a practice in which it releases time-sensitive short communiqués, for the purpose of public information, while the final judgments are finalized by clerks.¹¹⁴ In this sense, the Habana process was no exception. When an important decision was reached, the negotiators released a joint statement that was vetted and approved by both the guerrillas and government.¹¹⁵ While these documents were created to offer prompt updates regarding the complex negotiation process, they often served as a mine of misinformation when controversial sound bites were taken out of their contexts and replicated throughout mass media.

With this in mind, in the next sections, we will see how debates around truth and lies; international expertise and autochthonous needs; and law and politics, played an important role in the institutional design and *mise-en-scène* of the JEP in and after the Habana negotiations.

110 J. Acosta-López, 'The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity', 110 *AJIL Unbound* (2016) 178. See also J. Cavallaro et al., *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System* (OUP, 2019), at 415–449.

111 N. Krisch, 'The Backlash against International Courts' (16 December 2014), available online at <https://verfassungsblog.de/backlash-international-courts-2/>; L. Vinjamuri, 'Human Rights Backlash' in S. Hopgood, J. Snyder and L. Vinjamuri (eds), *Human Rights Futures* (CUP, 2017); R. Urueña, 'Double or Nothing: The Inter-American Court of Human Rights in an Increasingly Adverse Context', 35 *Wisconsin International Law Journal* (2018) 398.

112 Quiroga-Villamarín, *supra* note 24.

113 Schwöbel-Patel, *supra* note 2, at 181–212.

114 Available, in Spanish, at <https://www.corteconstitucional.gov.co/comunicados/>.

115 See, for instance, joint press release no. 82 on the adoption of a 'gender-sensitive approach' in the peace agreement, available online at <https://www.cancilleria.gov.co/sites/default/files/comunicadoconjunto82.pdf>.

A. Misinformation and the Debates Leading to the Design of the JEP

1. The Making of the JEP's Statutory Law

Like most international justice institutions, the JEP has faced increasing backlash.¹¹⁶ Using mass media, some commentators from the right-wing opposition to the former government quickly accused the system of promoting impunity, as it was based on 'restorative justice' and not on criminal sanctions.¹¹⁷ In their view, the fact that former guerrilla members would not spend jail time as ordinary criminals (even in the midst of a transitional process) promoted the idea that 'crime pays' for all Colombians.¹¹⁸ Moreover, they raised doubts about the system of selecting and prioritizing cases as it would only target those who were the most responsible of alleged atrocities.¹¹⁹ According to this rhetoric, unless all former guerilla members were punished (a near impossible demand given the scale of the conflict), the system would promote impunity instead of justice. Ironically, as Dancy noted, they found a 'strange bedfellow' in a few USA-based human rights NGOs, which also demanded hard sanctions for both guerrilla members and state agents under the banner of the struggle against impunity.¹²⁰ Of course, the right-wing used the language of impunity without disclosing that, in their view, the armed forces had to be protected from judicial prosecution (whether that can be understood as impunity or not). To be sure, one could always debate any particular aspect of the transitional justice system due to the inherent indeterminacy of international legal argument.¹²¹ But, at the same time, it is hard to deny that:

Colombia's transitional justice model stands out as the most planned and deliberated-upon one in the world. It incorporates all major transitional justice mechanisms in a conscious

116 K. Alter, J. Gathii and L. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *EJIL* (2016) 293.

117 'Impunidad para las Farc.' *El Espectador*, 1 October 2015, available online at <https://www.elespectador.com/opinion/columnistas/hernan-gonzalez-rodriguez/impunidad-para-las-farc-column-590137/>; '¿El Acuerdo sobre víctimas es un pacto de impunidad?' *El Colombiano*, 15 March 2016, available online at <https://www.elcolombiano.com/opinion/columnistas/el-acuerdo-sobre-victimas-es-un-pacto-de-impunidad-KX3752518>. See also Alviar García and Engle, *supra* note 93.

118 'El tema de la impunidad cobra importancia en el proceso de paz en Colombia', *InSightCrime*, 5 March 2015, available online at <https://es.insightcrime.org/noticias/analisis/tema-impunidad-cobra-importancia-proceso-paz-colombia/>.

119 See Tomo V, Parte Dos, La Discusión Del Punto 5, Acuerdo Sobre Víctimas de Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', Incluyendo La Jurisdicción Especial Para La Paz y El Compromiso Sobre Derechos Humanos y Las Medidas de Construcción de Confianza, 17 May 2014.

120 G. Dancy, 'Achieving an Unpopular Balance: Post-Conflict Justice and Amnesties in Comparative Perspective', in J.H.R. DeMeritt, J. Meernik and M. Uribe-López (eds), *As War Ends: What Colombia Can Tell Us About the Sustainability of Peace and Transitional Justice* (CUP, 2019) 326.

121 M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Reissue with a New Epilogue (CUP, 2005).

effort to be comprehensive and all-inclusive. It makes use of the global know-how of non-violent conflict resolution and transitional justice.¹²²

Be that as it may, the issue of impunity found a clear resonance in the mass media.¹²³ For instance, we highlight the protagonic role of two actors: Rafael Nieto Loaiza and Alfredo Rangel. Both were advisors to the Uribe government during the time of the law and justice demobilization, and the former was an international lawyer by training (he was, in fact, the son of a former *ad litem* judge of the ICTY). They used their social standing to publish widely read op-eds in leading newspapers against the Habana process and the JEP system.¹²⁴ One even argued that the justice component had barely any semblance of justice, little of truth, and nothing of reparation for victims.¹²⁵ Conversely, the Santos administration (especially through the institution of the High Commissioner for Peace) tried to explain that the peace agreement respected both constitutional and international standards on transitional justice. At the end, each citizen had a plethora of true, false, or partially fake information on which to reach his or her own conclusions. To be sure, our argument is not that only the far-right opposition published misleading information, as similar claims could be made about the pro-peace propaganda that was actively issued by the government. Yet, be that as it may, we highlight the tremendous role that misinformation played in the anti-peace mobilization in the referendum, especially against its gender-sensitive approach or because of the JEP's alleged promotion of impunity.¹²⁶

After the change of government in 2018, the justice component of the agreement found itself on even more precarious ground, as it was being actively denounced by the new administration and its party members in the congress. The clearest example was the government's resistance to signing the statutory law.¹²⁷ Under Colombian constitutional law, a statutory law is

122 O. Bakiner, 'The Comprehensive System of Truth, Justice, Reparation, and Non-Repetition: Precedents and Prospects', in DeMeritt et al. (eds), *supra* note 120, 231.

123 In different ways, the discourse of the political right focused on the struggle against 'impunity', without paying heed to how this contradicted their own stance, especially regarding the prosecution (or lack thereof) of the state forces. See 'Hay unos sapos que no nos podemos tragar: Iván Duque', *Semana*, 26 August 2016, available online at <https://www.semana.com/nacion/acuerdo-final-de-paz-con-las-farc-en-2016/articulo/ivan-duque-hay-unos-sapos-que-no-nos-podemos-tragar/491361/>.

124 A. Rangel, 'Es un acuerdo de impunidad, que ofende a las víctimas y elude la justicia', *La Tercera*, 25 September 2015, available online at <https://www.latercera.com/diario-impreso/alfredo-rangel-es-un-acuerdo-de-impunidad-que-ofende-a-las-victimas-y-elude-la-justicia/>.

125 'Poco de Justicia, algo de verdad y nada de reparación', *El Colombiano*, 12 February 2017, available online at <https://www.elcolombiano.com/opinion/columnistas/poca-justicia-algo-de-verdad-y-nada-de-reparacion-AL5915516>.

126 An NGO released a report surrounding the lies produced in the midst of the peace agreement and their relation to the results of the referendum. They argue that the notion of impunity was used to create misunderstandings regarding the mandate of the JEP: *Indepaz*, 29 August 2016, available online at <http://www.indepaz.org.co/las-mentiras-del-no-los-acuerdos-paz/>.

127 'Objeciones a la JEP en Colombia: la Corte Constitucional rechaza los reparos del presidente Duque a la Jurisdicción Especial para la Paz', *BBC News Mundo*, 30 May 2019, available online at <https://www.bbc.com/mundo/noticias-america-latina-48453600>.

a 'high-order' law that regulates aspects of a fundamental right and as such requires a stricter constitutional scrutiny. In this case, the Constitutional Court had reviewed this framework and concluded that, overall, it was compatible with the Constitution.¹²⁸ However, the right-wing President Duque (2018–2022) raised six objections to it, stalling the process. In the view of the populist government, the JEP was constitutionally inconvenient as it: (i) did not guarantee the reparation of victims (because it did not impose a duty to make reparations on the guerillas); (ii) placed state forces under its purview without the consent of the government's High Peace Commissioner; (iii) undermined the competence of the ordinary judiciary; (iv) promoted impunity for atrocity crimes; (v) blocked the state's capacity to extradite former guerrillas to the USA; and (vi) did not provide for the right to truth.¹²⁹

This led to a clear clash between the government and the Constitutional Court which had already cleared some questions of constitutionality in its judgment C-674 of 2017. In practice, this led to an institutional crisis, as the government refused to ratify the JEP law, in turn rendering it unable to carry out its everyday functions. After six months of pressure from civil society and international aid organizations, the Duque administration finally signed the statutory law of the JEP (act 1957 of 2019), which provided a general framework for its activities and a distribution of labour between its chambers.¹³⁰

2. Inclusion of Public Forces under the JEP's Mandate

The proposal to include state and intelligence forces within the jurisdiction of the JEP raised all sorts of debates in which misinformation was a constant. From the negotiation table in Habana to the Congress in Bogotá, the debate raged.¹³¹ The armed forces had always hesitated to accept non-state armed groups as 'equals' under the laws of war.¹³² For that reason, they were adamant that they did not want to appear before a court in the same way as their enemies in the insurgency may do. However, it is worth noting that the

128 Landau, *supra* note 31, at 14. In Decision C-674 of 2017, the Court reviewed yet another important amendment passed under the special procedure, which defined the characteristics of the Special Jurisdiction for Peace.

129 Presidencia de Colombia, 'Objeciones al proyecto de Ley Estatutaria de la JEP buscan que tengamos una justicia transicional que les dé confianza a los colombianos: Presidente Duque', 16 March 2019, available online at <https://id.presidencia.gov.co/Paginas/prensa/2019/190316-Objeciones-proyecto-Ley-Estatutaria-JEP-justicia-transicional-confianza-colombianos-Presidente-Duque.aspx>. Under Colombian Constitutional law, the President has the prerogative to object a 'constitutionally inconvenient' constitutional reform, which must be returned to Congress for re-evaluation. See further J. D. Argüello Rueda, 'La Objeción Presidencial a Actos Legislativos en Colombia', 17 *IUSTITIA* (2020) 61.

130 L. 1957/19, junio 6, 2019, Diario Oficial [D.O.] 50.976, (Colom.) (hereinafter, 'Statutory Law').

131 Ramírez Gutiérrez, *supra* note 30.

132 E. Pizarro Leongómez, *De la Guerra a la Paz: Fuerzas Militares, entre 1996 y 2018* (Planeta, 2018), at 399.

army and intelligence forces have a rather dark record in relation to violations of human rights for their direct actions, as well as collaboration with illegal groups, or culpable omission of their duties towards civilians.¹³³

Just as had occurred before with the paramilitaries, perspectives on the role and responsibility of the armed forces oscillated widely. As a compromise 'reduced to writing', the negotiators in the Habana had established that peace could only work if all actors could be compelled to appear before the JEP.¹³⁴ For that reason, the peace process institutions could call on state agents, former guerrilla rebels and even civilians that supported the war.¹³⁵ Accordingly, under law 1820 of 30 December 2017, the Colombian state defined the benefits and conditions both for insurgents and agents of the State such as police officers and soldiers.¹³⁶ This statutory law provided some guarantees for the appearance of members of the armed forces in judicial proceedings, following the principles of a special, symmetrical, and simultaneous treatment for state agents and former guerrilla rebels.¹³⁷

Needless to say, this accommodation was hotly contested by the right-wing new government, which attacked the JEP's competence over the armed forces as a biased attempt to judge the 'heroes of the fatherland'. However, a report argued that 'high percentages (87% for officers, 91.5% for non-commissioned officers and 95% for soldiers) of military personnel who opted in to participate in the JEP process [were] the product of near-unanimous desire among inmates to benefit from its guarantees and sentence reductions'.¹³⁸ Indeed, for those accused of human rights violations, the JEP offers a rather shorter and more lenient sentence. As such, attempts by the new government and its allies to carve out state agents from the JEP's competence (or to create a separate special chamber either in the ordinary Supreme Court or the Military Justice) have not found the needed majorities in congress.¹³⁹

3. *The Debate Regarding So-called 'Third-Party Civilians'*

One last thorny issue that emerged during the debates related to the compulsory inclusion of 'third-party civilians' in the JEP's purview. The original peace agreement contemplated the jurisdiction being empowered to request the appearance

133 Grupo de Memoria Histórica, *supra* note 51, at 343.

134 P. Allott, 'The Concept of International Law', 10 *EJIL* (1999) 31, at 43.

135 Oficina del Alto Comisionado para la Paz de Colombia, *supra* note 80; H. Olasolo and J. Cantor, 'The Treatment of Superior Responsibility in Colombia: Interpreting the Agreement Between the Colombian Government and the FARC', 30 *Criminal Law Forum* (2019) 61.

136 L. 1820/16, diciembre 30, 2016, Diario Oficial [D.O.] 50.102, art. 21 (Colom.) (hereinafter, 'Amnesty Law').

137 See Statutory Law, *supra* note 130, Arts 23, 44.

138 L. Sandoval Garrido, L. Riaño Bermúdez and A. Palencia Pérez, 'Perception of the Special Jurisdiction for Peace for Incarcerated Members of the Military in the Armed Conflict in Colombia', 38 *Cuadernos de Economía* (2019) 701, at 718.

139 'En vilo el proyecto de sala especial para militares en la JEP', *El Tiempo*, 19 October 2019, available online at <https://www.eltiempo.com/justicia/jep-colombia/en-vilo-el-proyecto-de-sala-especial-para-militares-en-la-jep-423070>.

not only of state or guerrilla forces but also so-called ‘third party civilians’ or ‘non-combatants’. This category refers to those civilians who — although not directly ‘participating in hostilities’ under IHL — were still involved in the political economy of the armed conflict, such as through financing violent actors or by profiting from their actions. Perhaps the most salient examples were those private companies or individuals who accumulated land after waves of violent dispossession,¹⁴⁰ but similar stories can be told for other extractive industries.¹⁴¹

Uribe and his political allies argued that the JEP’s competence over ‘third-party civilians’ meant that it would be used as a tool of the FARC’s ‘thirst for vengeance’ against honest Colombians who were victims of the conflict in the first place.¹⁴² After the debacle of the plebiscite, the far-right managed to change the original wording of the JEP’s regulatory framework so that third-party civilians *could* appear before the court but only on a purely voluntary basis. Local and international NGOs, on the other hand, retorted that this change promoted the impunity of said actors and undermined what was agreed at Habana.¹⁴³ In a rather surprising turn of events, the Colombian constitutional court emerged as a strange bedfellow of the Uribe camp.¹⁴⁴ In its landmark judgment C-674 of 2017, the Court decided that forcing such actors to appear before an extraordinary jurisdiction would entail a violation of the principle of the ‘natural judge’. This is ironic, since this doctrine had previously been mobilized mainly to limit the jurisdiction of military tribunals of 20th-century dictatorial regimes.¹⁴⁵

In sum, what seemed to some as one of the most progressive experiments in the struggle against impunity, appeared to others as a regressive throwback to the oft-criticized extraordinary military jurisdictions of yesteryear. Our point here is not to argue that either side is right, but rather to highlight that those debates about truth and misinformation were crucial to mobilize public opinion and public policy in support of both positions. And, moreover, that the alignment of the court with the far-right shows that (international) legal expertise can be deployed for many diverging purposes.¹⁴⁶

B. The JEP in the Heat of Battle: Misinformation as the Clock Ticks

As an extraordinary institution, the JEP has a limited time span. Pursuant to the Legislative Act 01 (through which this system was initially adopted), it

140 R. del Pilar Peña-Huertas et al., ‘Legal Dispossession and Civil War in Colombia’, 17 *Journal of Agrarian Change* (2017) 759, at 763–764.

141 S. Kurtenbach and A. Rettberg, *War Economies and Post-War Crime* (Routledge, 2019).

142 G. Gómez, ‘Las Disputas por la Jurisdicción Especial para la Paz (JEP): una Reflexión Crítica sobre su sentido Político y Jurídico’, 69 *Vniversitas* (2020) 1, at 6–7.

143 FIDH and CAJAR, *Colombia at Risk for Impunity: The Blind Spots in Transitional Justice and International Crimes under ICC Jurisdiction* (2020), at 15–19.

144 Tushnet and Botero Arcila, *supra* note 86, at 1294–1299.

145 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, at 6–16.

146 Quiroga-Villamarín, *supra* note 24.

only has a decade to fulfill its ambitious mandate.¹⁴⁷ While this mandate may be extended by an additional period of five years, the JEP is quite aware that it is facing a race against the clock. In practice, this means that the right-wing backlash has the benefit of time — any delay or misstep will end up diminishing the possibilities executing the gargantuan task of providing truth and justice to all victims. Hence, the following controversies must be read in this context: every lost second gives the far-right more ammunition in their argument that the peace process would entail impunity.

1. *Taking Hostages or Kidnapping? Misinformation in the JEP's First Case Against the FARC*

Under Colombian constitutional law, an *auto* (plural *autos*) is an administrative writ issued by a court in the framework of a judicial process that doesn't constitute a judgment. It was through an *auto* that the JEP issued one of its landmark criminal decisions: *auto* 019 of 2021 charged former high leaders of the FARC-EP with war crimes related to the taking of hostages in the context of a non-international armed conflict. This decision is special because it is the first charge against this group under the Habana system — and the first step to build the 'macro' case regarding war crimes and crimes against humanity.¹⁴⁸ The Chamber for Acknowledgement of Truth, Responsibility, and Determination of Facts and Conduct (SVRV in Spanish) assessed the conduct of the suspects in question, and not only indicted charges for taking civilians, police officers and soldiers as hostages, but also gender or sexual-related violence and even torture.¹⁴⁹

Despite that, certain sectors in Colombian public opinion have criticized the decision because they feel the label of *kidnapping* (as opposed to *taking of hostages*) should be used.¹⁵⁰ Twitter, for better or worse, has served as a battleground for this battle about labelling. Some leading figures of the right, for instance, have lamented that 'the press is busy [making] news, but they don't care that the JEP has changed the verb kidnapping for hostages'.¹⁵¹ In this same vein, a Senator from Uribe's party, Carlos Mejía, railed against the (mis)labelling allegedly committed by the JEP as an affront to the dignity of victims.¹⁵² The former campaign manager of the 'no' camp in the referendum,

147 Special Jurisdiction For Peace, Peace Tribunal, Appeals Section, Decision SENIT 1 (interpretative decision) of 3 April 2019.

148 Special Jurisdiction For Peace, Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct, *Case 001*, writ (auto) 019 of 26 January 2021.

149 *Ibid.*, at 317–320.

150 '¿Por qué la JEP denomina 'toma de rehenes' y no secuestro al caso 01 por el que se imputa a cúpula de las Farc?', *Semana*, 28 January 2021, available online at <https://www.semana.com/nacion/articulo/por-que-la-jep-denomina-toma-de-rehenes-y-no-secuestro-al-caso-01-por-el-que-se-imputa-a-cupula-de-las-farc/202137/>.

151 See Twitter, available online at <https://twitter.com/jllafaurie/status/1354963471419363330>.

152 See Twitter, available online at <https://twitter.com/CARLOSFMEJIA/status/1354768103213772804>.

Luis Carlos Vélez, attacked the judicial decision without fleshing out the details of his argument — he simply invoked the well-rehearsed trope of ‘impunity’.¹⁵³

This writ is also important because it opened the door for the prosecution of eight former guerilla leaders as indirect co-perpetrators, as well as under the doctrine of command responsibility.¹⁵⁴ This has been another highly contested issue as the Colombian Constitutional Court has adopted an approach which does not follow strictly the international standards on command responsibility.¹⁵⁵ Groups on the political right (chief among them, the association of retired officers ACORE) claimed that the interpretation adopted by the Colombian constitutional court would go against the rights enshrined under domestic constitutional rights to a fair trial — using the simile of the holy inquisition to tarnish the JEP.¹⁵⁶ On the other hand, human rights NGOs (Human Rights Watch perhaps is the most salient of them) have in turn criticized the Colombian interpretation of command responsibility as it is not stringent enough and distorts the jurisprudence of the ICC.¹⁵⁷

The thorny debate around command responsibility can be seen as another occasion in which populist right-wing actors (re)claim the mantle of ‘local’ politics and rights to question the pertinence of an ‘international’ standard — which they posit as too far removed from the needs of Colombian soldiers who defended the fatherland deep in their own country. Although Lauterpacht considered that, for international justice the ‘authority of legal rules is derived from the very nature of international society’,¹⁵⁸ in Colombia (and beyond) domestic constituencies are demanding that justice follows their own rules and categories. For this reason, certain political actors demand that the quest for accountability should follow the needs of local politics over the ‘high discourse’ of a foreign legal imagination.

Judicial institutions — and those related to transitional justice in particular — play a crucial role in creating narratives about the conflict and the possibilities of reconciliation. Even in the so-called post-conflict context,

153 See Twitter, available online at <https://twitter.com/lcvelez/status/1354803668617367559>.

154 Special Jurisdiction For Peace, Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct, *Case 001*, writ (auto) 019 of 26 January 2021 at 317–321.

155 Olasolo and Cantor, ‘The Treatment of Superior Responsibility in Colombia’, *supra* note 135. See also J. Ospina and J. Pappier ‘The ‘Command Responsibility’ Controversy in Colombia: A Follow-Up,’ *EJIL:Talk!*, 13 March 2019, available online at <https://www.ejiltalk.org/the-command-responsibility-controversy-in-colombia-a-follow-up/>. See further Ramírez Gutiérrez, *supra* note 30, at 134–145.

156 J. Espejo Muñoz, ‘Sobre la responsabilidad del mando’, *ACORE*, 22 August 2017, available online at <https://www.acore.org.co/boletin-acore/la-responsabilidad-del-mando/>

157 J. Vivanco, ‘Letter on ‘Command Responsibility’ in the Implementing Legislation of the Peace Agreement’, *Human Rights Watch Americas*, 25 January 2017, available online at <https://www.hrw.org/news/2017/01/25/letter-command-responsibility-implementing-legislation-peace-agreement>

158 H. Lauterpacht, *The Function of Law in the International Community* (OUP, 2011 (first published 1933)), at 6.

the warring parties will attempt to use these mechanisms to consecrate their vision of truth: they deploy judicial means to come 'to terms with some of the darker moments of [the country's] recent past and [to challenge] the dominant narrative of the war'.¹⁵⁹ In conclusion, each of the JEP's decisions must struggle with the past, with the present, and with the future.¹⁶⁰

2. *How Many? Who Counts? The Politics of Basic Arithmetic*

Some of the most painful atrocities allegedly committed in the course of Colombia's armed conflict are euphemistically known as 'false positives'.¹⁶¹ During the Uribe era, the government wanted to show a high rate of effectiveness in its struggle against insurgents to impress voters in Colombia and funders in the USA. For that reason, it created a system of incentives in which military units were rewarded by the number of guerrilla combatants they defeated in combat.¹⁶² This prompted a systematic policy in which the state and security forces would execute young men from lower-income backgrounds or marginalized communities and then dress their corpses as guerrillas fighters, tallying up 'false' positives.¹⁶³ Eventually, this became a domestic and international scandal, prompting the creation of a civil society group called the *Madres de Soacha* which drew from the repertoire of activism associated with the Argentinean *Madres de la Plaza de Mayo* to make public the plight of the women whose offspring were executed as *falsos positivos*.¹⁶⁴

The JEP tackled this issue head on with its *Case 003*, which began formally on July 2018 through the execution of *auto 05* of 2018.¹⁶⁵ Since the occurrence of these incidents cannot be seriously denied (due to their widespread coverage in local and international press), the Colombian far-right has instead targeted the way in which the JEP determined the exact number of alleged victims in this case.¹⁶⁶ While initial estimations put forward by local NGOs or

159 Pavlaković, *supra* note 104, at 1708.

160 *Ibid.*, at 1716 (according to Carla Del Ponte and other ICTY officials, 'one of the goals of the ICTY was the establishment of a definitive account of the past').

161 C. Savonitto, *War and Peace in Colombia: A Legal Assessment under International Law* (Edizioni Nuova Cultura, 2018), at 55. For a longer history of the pervasive incentives of body counts, see Moyn, *supra* note 22, at 167.

162 E. Gordon, 'Crimes of the Powerful in Conflict-Affected Environments: False Positives, Transitional Justice and the Prospects for Peace in Colombia', 6 *State Crime Journal* (2017) 132.

163 D. Acemoglu et al., 'The Perils of High-Powered Incentives: Evidence from Colombia's False Positives', 12 *American Economic Journal: Economic Policy* (2020) 1.

164 Amnesty International, *Seeking Justice: The Mothers of Soacha* (2010).

165 Special Jurisdiction for Peace, Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct, *Case 03, Auto 05* of 18 July 2018.

166 The Colombian Transitional Justice system has issued two writs about alleged false positive cases in the Catatumbo and the Caribbean regions. According to the system, there is *prima facie* evidence about a specific *modus operandi* through which the state forces were pressured to commit extrajudicial killings to inflate their body count. Some armed actors have collaborated

international aid agencies amounted to around 3,500 victims,¹⁶⁷ the JEP concluded that at least 6,402 people were illegally presented as combat casualties — of which nearly 80% were executed during Uribe's terms in office.¹⁶⁸ In response, Uribe shared a public Google drive document in which he condemned the way in which the JEP (along with certain civil society organizations 'of a clear political orientation which were public enemies of my administration') attempted to tarnish his legacy.¹⁶⁹ In this public missive, he insisted that during his government the few 'rotten apples' that had committed illegal actions had been prosecuted, and that his government achieved the demobilization of a large number of paramilitaries and guerrilla fighters without 'the institutional cost or the total impunity of the current peace process'. Amidst the media and twitter crossfire, the JEP has attempted to deploy not only its traditional judicial toolkit but also social media interventions (including a minute and a half-long video) to attempt to convince the population of the seriousness of its investigation.¹⁷⁰

4. Concluding Remarks

Orozco reports that former president Santos used to say that drafting a peace agreement was like 'creating a work of art'.¹⁷¹ Although he used this to justify the secrecy of the interim negotiations (as the public should only be exposed to the work once it leaves the painter's studio), this metaphor has much more to it. In many ways, Santos and his advisors (along with their counterparts at the FARC) did see themselves as very sophisticated artists. They hoped they could create a masterpiece that relied on a modern and international style to dazzle audiences both at home and abroad. They expected their mastery of the technique to sway the masses into the sublime experience of pure art. It is no understatement to say that many in Colombia and beyond expected the peace

with the Transitional Justice system to acknowledge their conduct. See Special Jurisdiction For Peace, Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct, *Case 03*, Writ (Auto) 125 of 2 July 2021 and Writ (Auto) 128 of 7 July 2021.

167 J. Aranguren Romero, J. Cardona Santofimio and J. Agudelo Hernández, 'Inhabiting Mourning: Spectral Figures in Cases of Extrajudicial Executions (False Positives) in Colombia', 40 *Bulletin of Latin American Research* (2021) 6.

168 JEP, Press Release 019 of 2021, 7 June 2021, available online at <https://www.jep.gov.co/Sala-de-Prensa/Paginas/La-JEP-hace-pública-la-estrategia-de-priorización-dentro-del-Caso-03.-conocido-como-el-de-falsos-positivos.aspx>.

169 Á. Uribe-Velez, 'Al Comunicado de JEP', available online at https://docs.google.com/document/d/11kRj_GgK_drK9_EHPX-AUUqcdzANG5i68DseTpTKmbQ/edit (visited 7 June 2021).

170 JEP, 'El Caso 03 de la JEP investiga las muertes ilegítimamente presentadas como bajas en combate', *Youtube*, 15 April 2021, available online at <https://www.youtube.com/watch?v=gqFrDuRN5N8>.

171 Freeman and Orozco Abad, *supra* note 1, at 73. For an overview, see T. Ortiz, 'Political Leadership for Peace Processes: Juan Manuel Santos – Between Hawk and Dove', 17 *Leadership* (2021) 99.

process to create a new landmark in peace-making — an *avant-garde* milestone in the worldwide struggle against impunity.

But, as Benjamin noted with regret, our age of mass media and violence has little patience for the 'purity' of art.¹⁷² Indeed, one legacy of the 20th century has been the extreme politicization of the processes through which we create, critique, and judge the experiences we call art. If a peace agreement is a work of art, then we need to take seriously not only the artistic prowess of its maker(s) but also the political economy of its distribution, consumption and reproduction. One does not need to agree with Benjamin's controversial thesis on the disappearance of art's 'aura' under capitalism to see that the structures of the market have taken an increasingly important hold over our judgments of the good and the beautiful.¹⁷³ To *sell* a peace agreement (however, artistically innovative), one could profit from the support of mass media. And, by the same token, to bury a piece of art or otherwise cast it into oblivion, there is no better tool than misinformation.

Most importantly, art can quickly escape the hands of its creators and be used for all sorts of purposes — even those unimaginable for the artist. As we have shown in this piece, the same can be said of international law. A good example can be found in the debates around the social protests that unfolded in Colombia from May 2021. Duque and his far-right allies sparked a furore when they held a 9 May 2021 meeting of members of the Catholic church in the Colombian National Museum to condemn the nation-wide protests.¹⁷⁴ They did so in a hall that was created to hold Doris Salcedo's 'counter-monument' *Fragments, Espacio de Arte y Memoria* (Fragments, Space of Art and Memory). This piece of art had been commissioned by former president Santos and was forged by Salcedo (perhaps Colombia's leading contemporary artist) from the remains of 8,994 guns surrendered by former FARC guerillas in the framework of the Habana process. For Duque, it was not enough to shred the peace process — even art must be desecrated too. And the JEP and (international) law too, without doubt.

At the time of writing, Colombia was undergoing a turbulent period of social unrest and counterrevolutionary mobilization. Caught in the crossfire, the JEP and other institutions created in the framework of the Peace Agreement have continued their Sisyphean labors. On 12 June 2021, perhaps at the climax of unrest, former President Santos appeared before the 'Commission for the Clarification of Truth, Coexistence, and Non-repetition' to testify in relation to the thorny issue of the 'false positives'.¹⁷⁵ While half of the country celebrated what they saw as a bold attempt to contribute to truth and reconciliation, the other half saw it as an opportunistic way to cast shade on the Uribe-

172 W. Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in H. Arendt (ed.), *Illuminations: Essays and Reflections* (Schocken Books, 2019) 166, at 195.

173 *Ibid.*, at 182.

174 V. Di Liscia, 'Colombian Government Exploited Doris Salcedo's Art to Denounce Nationwide Protests', *Hyperallergic*, 11 May 2021, available online at <https://hyperallergic.com/645108/colombian-government-exploited-doris-salcedo-art-to-denounce-nationwide-protests/>.

175 'Falsos Positivos En Colombia: Juan Manuel Santos Pide Perdón a Las Víctimas Por Las Ejecuciones Extrajudiciales Durante El Gobierno de Álvaro Uribe', *BBC News Mundo*, 11 June 2021, available online at <https://www.bbc.com/mundo/noticias-america-latina-57450334>.

aligned Duque government — at a time when it was particularly weak due to the ongoing protests. In this article, we have not aimed to show which side is right, but rather to highlight that international (legal) expertise can be mobilized for either position and that, consequently, it is not enough to garner legitimacy for either side. No matter how beautiful or sophisticated the JEP's judgments may prove to be, technical prowess (whether in art or law) will never be enough in our illiberal times. Like Benjamin, we must respond by politicizing art.