
Beyond the 'shadow' of the ICC

Struggles over control of the conflict narrative in Colombia

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[Paths to international justice] can be the production not only of justice itself but of the indirect and direct control of the terms by which decisions are made, naturalized, and controlled.¹

Introduction

This chapter considers how the International Criminal Court (ICC) and Colombia employ international criminal justice towards different political and normative objectives. It attempts to show how Colombia has adopted and 'vernacularised' international justice to assert control over the terms by which the Colombian conflict is understood and represented.² I argue that this process, in turn, seeks to entrench the Colombian government's power domestically and internationally.

Colombia has been in the midst of an ongoing conflict between paramilitary groups, guerrilla groups and the national army for over fifty years. The conflict has been marked by extreme violence, including massacres, torture, forced disappearance, forced displacement, sexual violence and other war crimes and crimes against humanity. Colombia signed the Rome Statute in December 1998 and deposited its instrument of ratification in August 2002. The state has been under preliminary examination by the Office of the Prosecutor (OTP) since June 2004, which makes it the oldest situation classified as such. Since then, the Colombian government has developed a new approach to the conflict,

¹ K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009), 146.

² On the idea of the 'vernacular' in relation to accountability projects, see P. Levitt and S. Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States', *Global Networks*, 9 (2009), 441, 444.

adopting the normative frameworks of international criminal law and transitional justice, actively cooperating with the ICC in developing legislation, and conducting national trials for war crimes, crimes against humanity and genocide.

It has been argued that the best way of achieving the primary goal of the ICC – fostering accountability for serious international crimes – is through 'positive complementarity', whereby the Court encourages or assists national prosecutions.³ This has been a cornerstone of the ICC's approach in Colombia.⁴ The OTP has been active in consultations with Colombian actors and has followed the domestic legislative progress, which has had an impact on the development of the country's transitional justice legal framework. It has also influenced the evolving narrative of the conflict itself.

There is a growing body of literature analysing the influence of the ICC in situation countries and its impact on domestic procedures and conceptions of justice.⁵ However, most literature regarding the ICC's work in Colombia focuses on issues of compliance and complementarity. Little has been written about the broader effects of ICC involvement in Colombia, including its normative, expressive and discursive dimensions. This chapter explores the 'vernacularisation', or uptake, of international justice norms in Colombia and the expressivist goals of criminal justice in that context. In particular, it will explore how the ICC and the Colombian government take different approaches to theories of justice, which in turn have had an impact on the government's conflict narrative. An important distinction exists between narratives created out of popular memory and those created out of representations of the past adopted by state institutions.⁶ This chapter posits that the narrative being asserted by

³ W. Burke-White and S. Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation', *Journal of International Criminal Justice*, 7 (2009) 257; W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome Statute', *Harvard Journal of International Law*, 49 (2008), 53.

⁴ 'Report on Preliminary Examination Activities 2013', Office of the Prosecutor, International Criminal Court (November 2013), para. 131 ('OTP 2013 Report').

⁵ See, e.g., S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (New York: Cambridge University Press, 2013); Clarke, *Fictions of Justice*.

⁶ See, e.g., R. Nets-Zehngut, 'Israeli Memory of the Palestinian Refugee Problem', *Peace Review*, 24 (2012), 187; P. Riaño-Alcalá and E. Baines, 'The Archive in the Witness: Documentation in Settings of Chronic Insecurity', *International Journal of Transitional Justice*, 5 (2011), 412; C. McGrattana, 'Explaining Northern Ireland? The limitations of the ethnic conflict model', *National Identities*, 12 (2010), 181.

the Colombian government seeks to entrench state power using the terms of international justice; in so doing, it threatens to reproduce historic societal inequalities.

‘Vernacularisation’ and customisation

Social scientists have explored how ‘international’ ideas are disseminated in domestic contexts. Finnemore and Sikkink, for example, focus on the important role of transnational advocacy networks in what they call a ‘justice cascade’.⁷ Others have focused on the idea of the ‘diffusion’ of international concepts to domestic levels, explaining a ‘top-down’ transfer from the international to the national.⁸ These theories focus on the adoption of legal norms.

Looking beyond the strictly ‘legal’, Peggy Levitt and Sally Merry describe the process of local interpretation and adoption of international ideas as ‘vernacularisation’.⁹ They argue,

[As international ideas] connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation. . . . Vernacularizers take the ideas and practices of one group and present them in terms that another group will accept. This is not the work of a single person. Chains of actors stretch from the sites of the global production of human rights documents and ideas (in New York, Geneva and Vienna) to localities where ordinary people around the world adopt them.¹⁰

The process of vernacularisation depends on a number of factors, including the position of ‘vernacularisers’ within hierarchies of power and institutional positions. In Colombia, transitional justice norms have been invoked by various actors, including victims, as well as armed groups such as the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*), also known as FARC.¹¹ The focus here, however, is primarily on ‘elite actors’ – the Colombian government and the ICC – as opposed to what Levitt and Merry call

⁷ M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization*, 52 (1998), 887, 895.

⁸ T. Ginsburg, S. Chernykh, and Z. Elkins, ‘Commitment and Diffusion: Why Constitutions Incorporate International Law’, *University of Illinois Law Review* (2008), 201; Levitt and Merry, *Vernacularization*, 441, 444.

⁹ *Ibid.*, 446. ¹⁰ *Ibid.*, 446–447.

¹¹ ‘Transitional Justice and Colombia’s Peace Talks’, International Crisis Group (29 August 2013), 6, 9–10 (International Crisis Group, ‘Transitional Justice’).

'marginal actors'.¹² According to Levitt and Merry, elite actors are more likely to adopt international ideas early on, making them culturally legitimate through customisation.¹³ The uptake and vernacularisation of international norms, especially through state administrative functions, can be a mechanism through which states seek to entrench state power.¹⁴

In Colombia, the government drew ideas and practices from the field of international justice and presented them in terms that elite networks in Colombia would accept. The government has thus vernacularised these norms in ways that ensure it can control the conflict narrative while purportedly working on behalf of conflict-affected victim communities. However, as I discuss below, this customisation has also produced contestation with the ICC, has served as a mechanism to entrench state power, and has perpetuated political inequalities in Colombian society.

The ICC and its complementarity regime heavily influence the terms through which the conflict is addressed in Colombia. Under the Rome Statute's legal framework, national courts are ostensibly allowed to pursue a case before the ICC can act. However, the ICC, particularly through the OTP, retains influence over the domestic process through its ability to monitor, evaluate and, ultimately, judge what it deems the correctness or appropriateness of the Colombian government's investigatory and prosecutorial approach.¹⁵ To that end, the OTP has adopted the practice of opening 'preliminary examinations' before deciding whether to open an investigation.¹⁶ The OTP also influences the process of vernacularisation

¹² Levitt and Merry, *Vernacularization*, 446. ¹³ *Ibid.*, 444.

¹⁴ Specifically, 'symbolic' state power. 'Symbolic' power is constitutive of the power of the state to naturalise and depoliticise issues that are the product of historical struggle. M. Loveman, 'The Modern State and the Primitive Accumulation of Symbolic Power', *American Journal of Sociology*, 110 (2005), 1651, 1655. Loveman argues that 'to begin to accumulate symbolic power, the state must carve out a new domain of social life to administer, co-opt the administrative practices of others, or wrestle existing administrative functions away from their traditional executors, imbuing them with new meanings in the process'. *Ibid.*, 1657–1658. For a discussion of how Argentina adopted human rights discourse and norms to entrench its symbolic power, see M.F. Carmody, 'Never Again! Human Rights and the Construction of Stable Post-Authoritarian States', presented at ISA Human Rights Joint Conference 2014 (17 June 2014, Istanbul, Turkey) (on-file).

¹⁵ See, e.g., 'Policy Paper on Preliminary Examinations', OTP, ICC (November 2013), 7 ('OTP Policy Paper'). The Policy Paper notes that, 'The ability of national and international courts to define their own jurisdiction within statutory parameters – *compétence de la compétence* – is well established . . . it is the ICC that ultimately determines when and where the Court should intervene in accordance with the statutory criteria, which are the essence of the Office's preliminary examination process'.

¹⁶ See generally, ICC website on situations and cases, www.icc-cpi.int/Menus/ICC/Situations+and+Cases/.

through its positive complementarity policy, by which it seeks to promote national proceedings through capacity building, sharing information and promoting support for accountability efforts with international donors.¹⁷ As argued here, the interpretation of prosecutorial strategy has been one site of vernacularisation and customisation.

Another way in which international legal discourse and its attendant norms have been taken up in Colombia is through the stated value of criminal prosecutions. The ICC and Colombia take two distinct approaches to the value of criminal prosecutions. The ICC focuses on the retributive value of trials; the Colombian government, on the other hand, focuses more on their expressive value. According to Mark Drumbl, 'expressivism ... transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public'.¹⁸ As discussed below, the Colombian government has repeatedly emphasised the value of trials for providing truth to victims, but seems to specifically avoid punitive rhetoric.

Ultimately, atrocity crimes trials produce sites of contestation in addition to expressing messages about political power. These messages arise out of the manner in which trials are designed, implemented and defended or attacked. In the Colombian context, these contestations over narratives reflect power differentials between the domestic and the international. Also, and perhaps more importantly, they reflect uneven power relations between members of Colombian society – in particular, the frequently invoked but historically disenfranchised 'victim' of atrocity. As the following section shows, recourse to the framework of international criminal law and its discourse of accountability narrows the narrative of Colombia's conflict history.

A brief history of Colombia's conflict

The modern Colombian conflict emerged from an ideological battle dating back to *La Violencia*, a violent struggle between liberals and conservatives between 1948 and 1957. A power-sharing agreement called the National Front attempted to resolve that conflict. After the National Front was established in 1958, far-left groups who had been excluded

¹⁷ 'Prosecutorial Strategy 2009–2012', OTP, ICC (February 2010), 5.

¹⁸ M. Drumbl, *Atrocity and Punishment, and International Law* (New York: Cambridge University Press, 2007), 173.

from the political process formed small armies of guerrilla soldiers in the vast remote regions of the country. The FARC and the National Liberation Army (*Ejército de Liberación Nacional*, or ELN) were among the largest of these groups.¹⁹ In the 1970s, wealthy landowners and drug lords formed their own private armies with the assistance of the government and military, to protect their interests from expropriation by the guerrillas.²⁰ These paramilitary groups eventually joined forces under an umbrella organisation, the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia*, or AUC).²¹

Despite its origins in ideological differences between paramilitary groups and the government, the current conflict is based on battles for land, money and control over drug routes. It has been well established that the guerrillas, paramilitaries and the government have all committed gross human rights abuses throughout the country. The state and paramilitary forces have worked together closely, with the paramilitary forces responsible for a large majority of human rights abuses. These abuses include massacring villages, torture, extrajudicial killings, kidnapping and forced displacement, amongst others. The government has adopted a variety of policies – inconsistently fluctuating between amnesty and military power – to fight the leftist guerrillas, with limited success.²²

Exclusion and inequality have also pervaded the Colombian conflict, sustained by the absence of the state in many parts of the country and its inability to effectively govern in areas where it is present.²³ In remote areas, which make up the large majority of the state, the judiciary is weak. (It is, for instance, often unwilling or unable to enforce or impartially

¹⁹ D. Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (Berkeley: University of California Press, 1993), 201–248.

²⁰ W. Tate, 'Paramilitaries in Colombia', *Brown Journal of World Affairs*, 8 (Winter/Spring 2001), 163, 165; W. Avilés, 'Paramilitarism and Colombia's Low-Intensity Democracy', *Journal of Latin American Studies*, 28 (2006), 379, 394.

²¹ *Informe sobre el Proceso de Desmovilización en Colombia*, Comisión Interamericana de Derechos Humanos, OEA/Ser.L/V/II.120 Doc. 60 (13 December 2004), para. 42.

²² J.L. Esquirol, 'Can International Law Help? An Analysis of the Colombian Peace Process', *Connecticut Journal of International Law*, 16 (Fall 2000), 23, 28; N. Springer, 'Colombia: Internal Displacement – Policies and Problems', Writenet Report (June 2006), 1; C. Diaz, 'Colombia's Bid for Justice and Peace', International Center for Transitional Justice (May 2007), 2.

²³ Historically, the state has been absent from these regions, including a lack of public works, teachers, police and a diffuse judicial order. 'Callejon sin Salida', Programa de las Naciones Unidas para el Desarrollo Informe Nacional de Desarrollo Humano Colombia (2003), 28, 44. Even where local residents did not support guerrilla groups' political views, often these groups provided more support and services than distant government officials. Bushnell, *The Making of Modern Colombia*, 244.

interpret contracts.) This lack of connection between the state and the everyday lives of citizens enhances the social and legal exclusion experienced by many Colombians.²⁴

Developing a shared notion of justice and an authoritative narrative of the Colombian conflict is a process that challenges deeply entrenched understandings of the conflict. Communism, drugs, state power and terrorism have all been considered causes of the conflict; indeed, the very notion of conflict itself has been contested. The Colombian government previously denied the existence of an armed conflict, instead treating it as a state of emergency or as a series of terrorist attacks.²⁵ 'Solutions' to the conflict have included numerous attempts at negotiations with the various armed groups and have generally included amnesties. Under the 'shadow' of the ICC, however, that has evolved into a narrative that readily acknowledges violence as a product of internal armed conflict, that focuses on victims and victims' rights to the truth and that moves away from total amnesties to a sense that at least a limited form of accountability is necessary.

ICC involvement in Colombia

The ICC has been involved in Colombia for over a decade. Since March 2005, after the then-ICC prosecutor Luis Moreno-Ocampo informed the Colombian government that he had received information about alleged international crimes committed in the country, the OTP has requested and received information from the Colombian government about crimes within the jurisdiction of the Court and the status of national proceedings. The OTP claims that it has taken a very active role in communicating with Colombian authorities about their domestic proceedings. Moreno-Ocampo visited Colombia on missions in October 2007 and August 2008, and other senior OTP staff members have conducted separate trips. The OTP has also maintained ongoing communication with Colombian judicial authorities and civil society groups.²⁶

The OTP has taken a generally supportive stance toward Colombian domestic prosecutions, but has consistently intervened with its views on

²⁴ J.M.J. Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court', *Washington University Global Studies Law Review*, 3 (2004), 529, 541.

²⁵ See, e.g., 'State of commotion', *The Economist*, 15 August 2002.

²⁶ OTP 2012 Report, paras. 27–28.

how those prosecutions should be carried out.²⁷ In 2005, the OTP told the Colombian government that it had already concluded that crimes against humanity had been committed in the country, and that the only things preventing it from opening an investigation were national proceedings.²⁸ As early as 2007, Moreno-Ocampo said that he needed to see rapid progress in the prosecution of paramilitary leaders. He repeated this message in late 2008.²⁹

The OTP has suggested through its preliminary examination reports of Colombia that it would focus primarily on government and military leaders.³⁰ With respect to prosecutions, the OTP would realistically only open a case in Colombia if it were reasonably certain that the case would be admissible. Under Article 17 of the Rome Statute, to preclude admissibility, Colombia would need to pursue charges against the same accused, and for 'substantially the same' conduct, as the ICC had brought in its arrest warrant. If it has, the Court must then determine whether the prosecution is 'genuine' in order to ensure that it is not being undertaken to shield the individual from prosecution, amongst other reasons.

As the ICC has worked through its analysis of these tests, Colombia has continued its domestic prosecution efforts. A dynamic relationship has thus emerged between the OTP and the Colombian government. For the OTP, this relationship is the cornerstone of its 'positive complementarity' strategy and a way to help mould national prosecutions according to its retributive approach to justice. For Colombia, crafting this relationship and adopting the ICC's forms of justice represents a way for the government to further entrench its sovereignty and power. The following section describes how Colombia has customised international justice norms for this purpose.

²⁷ P.F. Seils, 'Making Complementarity Work: Maximizing the Limited Role of the Prosecutor', in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (New York: Cambridge University Press, 2011), 1010–1011.

²⁸ In order to open an investigation, Article 53 of the Rome Statute states that the prosecutor must consider whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, whether the case is admissible and whether there are substantial reasons to believe that an investigation would not serve the interests of justice. In its reports on Colombia, the OTP stated that there is a reasonable basis to believe state and non-state actors have committed crimes against humanity and war crimes within the ICC's jurisdiction. Therefore, the key issue at stake is whether a case would be admissible under Article 17 of the Rome Statute. If the OTP determines a case would be admissible, it would then formally open an investigation.

²⁹ Seils, *Making Complementarity Work*, 1009. ³⁰ OTP 2013 Report, para. 120.

Colombia's vernacularisation of international justice norms

Many sectors of Colombian society have adopted and translated the language and norms of transitional justice and international criminal law to characterise the conflict. The government, in particular, has vernacularised international justice norms as victim-oriented, broader than criminal trials and part of an expressive 'transitional justice' that will help establish the 'truth' about the conflict. Through importing international legal discourse into the Colombian political context, the government has crafted a narrative that depicts non-state perpetrators as the main actors that abuse the rights of otherwise passive victims. At the same time, this detracts from instances of state violence and avoids punitive discourse.

The adoption of such a framework is not surprising in a state with a deep tradition of legalism.³¹ Historically, judicial formalities and language have had a strong impact on social interactions among Colombians.³² Legalism has been used as an ideological pretext for exclusion and impunity, and to derail social movements and reduce their potential transformative value.³³ The law has also influenced how the conflict in Colombia was fought. Armed groups adjusted their tactics away from large massacres to selective and smaller acts to make legal investigations within the framework of international humanitarian law and human rights more difficult.³⁴ Colombia has continued to adapt this legalist tradition to the language of international justice by passing numerous laws and decrees – which can be referred to collectively as Colombia's 'international justice framework' – after the government signed the Rome Statute. The following section outlines the main contours of this framework.

³¹ L.E. Nagle, 'Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?', *University of Pittsburgh Law Review*, 61 (2000), 881, 895. Although many laws are not applied, they reinforce a culture of legalism in Colombia. For a discussion of how this is representative of Latin America in general, see J.A. Couso, 'The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity', in R. Gargarella, P. Domingo, and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hampshire/Burlington: Ashgate, 2006), 62.

³² 'Basta Ya! Colombia: Memorias de Guerra y Dignidad', Grupo de Memoria Histórica (2013), 197.

³³ *Ibid.*, 197; Cepeda-Espinosa, 'Judicial Activism', 529, 541; Nagle, 'Colombia's Faceless Justice', 893–894.

³⁴ Grupo de Memoria Histórica, *Basta Ya!*, 199.

Colombia's Justice and Peace Law

In 2003, after a number of failed peace agreements, the Colombian government and the paramilitary groups reached a peace agreement known as the Ralito Accord.³⁵ In 2005, after extensive debate with the paramilitary groups, the government passed the Justice and Peace Law (JPL) in an attempt to provide accountability for crimes committed by the leaders of the paramilitary groups.³⁶

The JPL resembles a quasi-amnesty for crimes including genocide, crimes against humanity or war crimes committed by members of armed paramilitary groups. It provides significantly reduced sentences to combatants that demobilise and confess to their crimes.³⁷ Procedure under the JPL differs from normal criminal proceedings in Colombia, as it employs an inquisitorial model and relies on the confession of an accused.³⁸ Combatants who participate in the JPL and are found guilty receive full sentences, which are then suspended and substituted with reduced conditional sentences of between five and eight years.³⁹ By contrast, 'normal' sentences for similar crimes run from fifty to sixty years of imprisonment.⁴⁰

This lowered sentence is possible for all participants, regardless of the gravity, context, quantity or scale of crimes committed, and regardless of the rank or role of the participant in the paramilitary group.⁴¹ Although there is a large disparity between sentences under the JPL and the normal criminal justice system, the Colombian Constitutional Court has held that this does not violate the right to justice, and is not considered an amnesty or pardon because the normal sentences are only 'suspended' under the JPL; they are not replaced.⁴² The Court noted that although the

³⁵ J. Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study', *Arizona Journal of International and Comparative Law*, 26 (2009), 49, 71–72.

³⁶ Ley 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace], Diario Oficial [D.O.] 45.980 (25 July, 2005) (Colom.); Easterday, 'Deciding the Fate of Complementarity', 75–76. Law 782/2002 and Regulatory Decree 128/03 are also part of the JPL legal framework.

³⁷ Artículo 17, Ley 975 de 2005 (full and truthful confessions).

³⁸ Easterday, 'Deciding the Fate of Complementarity', 77–79.

³⁹ Artículo 29, Ley 975 de 2005.

⁴⁰ K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Heidelberg: Springer, 2010), 4.

⁴¹ *Ibid.*

⁴² Corte Constitucional [C.C.], *Gustavo Gallón Giraldo y Otros v. Colombia*, Sentencia No. C-370/2006, May 18, 2006, VI.3.3.3; Ambos, *The Colombian Peace Process*, 72–73.

JPL gives 'less rigorous' sentences, it requires cooperation with the justice system and with the victims, which makes the sentences conditional.⁴³

The JPL also regulates the investigation and prosecution procedures for these crimes. Under its legal framework, investigations and prosecutions should focus on crime patterns in the context of alleged war crimes and crimes against humanity, the structural and organisational aspects of armed groups and external support given to the paramilitaries. A 2012 directive from the attorney general ordered all of its units to prioritise investigations of crimes committed by large criminal organisations and those most responsible for these crimes.⁴⁴ This was further reflected in a December 2012 legislative reform to the JPL,⁴⁵ which has led to investigations of paramilitary group leaders.⁴⁶ The December reform also limited the ability for demobilised paramilitaries to be released from jail. Under its terms, if the state determines that an individual had not told the full truth, collaborated with the justice system or compensated their victims by 2014, their case will be transferred to regular courts. There, the conditional sentence suspension could be lifted. This reform also ended the victim's reparations program under the JPL.⁴⁷

There have been significant problems with the execution of the JPL. In 2014, some 400 former paramilitaries were released from detention without a sentence because the process had taken so long that they had already been detained for the maximum eight-year sentence.⁴⁸ Another serious problem arose when the Colombian authorities extradited twenty-nine high-level paramilitary leaders to the United States, ostensibly on drug-related charges, between September 2008 and March 2009.⁴⁹ Their extradition came just as

⁴³ Corte Constitucional [C.C.], *Gustavo Gallón Giraldo y Otros v. Colombia*, Sentencia No. C-370/2006, May 18, 2006, VI.3.3.3.

⁴⁴ Attorney General of Colombia, Directiva No. 0001, 4 October 2012; available at www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%B0-0001-del-4-de-octubre-de-2012.pdf; on how 'most responsible' is defined and applied by international courts, see X. Agirre Aranburu, 'Gravity of Crimes and Responsibility of the Suspect', in M. Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Oslo: Torkel Opsahl Academic EPublisher, 2010), 223; S. SáCouto and K. Cleary, 'The Gravity Threshold of the International Criminal Court', *American University International Law Review*, 23 (2008), 807, 813.

⁴⁵ Artículo 16A, Ley 1592 de 2012, D.O. 48.633, 3 December 2012.

⁴⁶ OTP 2012 Report, para. 145. ⁴⁷ International Crisis Group, *Transitional Justice*, 5.

⁴⁸ "Estamos intentando desatascar los procesos": Hinestrosa, *VerdadAbierta.com*, 31 January 2014.

⁴⁹ 'Truth Behind Bars', International Human Rights Law Clinic (February 2010), 1 (International Human Rights Law Clinic, 'Truth Behind Bars'); '14 Members of Colombian Paramilitary Group Extradited to the United States to Face U.S. Drug

they had started to divulge close links between the paramilitaries and the Colombian government and elected officials, and before prosecutors and victims could interrogate them about their crimes.⁵⁰ Although officially these individuals can still participate in the JPL, in practice their participation has been limited and is now controlled by the US government.⁵¹

The JPL process has also been plagued by a critical congestion and backlog of cases.⁵² Collective confession hearings have alleviated some of these concerns, but the procedural framework could be more streamlined to improve the speed and efficiency of the process.⁵³ Victims have had limited access to the hearings, which are held in locations and cities far from where the crimes were committed, and have difficulty participating in the process.⁵⁴

Given these difficulties, some have questioned whether the JPL constitutes a genuine willingness of the Colombian state to prosecute Rome Statute crimes.⁵⁵ The process has additionally demonstrated implementation challenges and shows how, in practice, the government attempts to maintain control over the portrayal of the conflict. This can be seen, for example, by the inquisitorial structure of trials, reliance on confessions, limited victim participation and the silencing of controversial voices through extradition.

Other domestic trials and transitional justice reforms

In addition to the JPL, other accountability measures also represent opportunities for the Colombian government to shape the portrayal of

Charges', *United States Drug Enforcement Administration*, 13 May 2008, available at www.justice.gov/dea/pubs/states/newsrel/mia051308.html.

⁵⁰ International Human Rights Law Clinic, 'Truth Behind Bars', 5. This report notes that 'most Defendants avoided testifying about certain categories of crimes, such as forced recruitment of child combatants, forced displacement, sexual violence, kidnapping, torture, voter intimidation, and smuggling'. *Ibid.*, citing 'Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia', Human Rights Watch (2008), 37–39.

⁵¹ International Human Rights Law Clinic, 'Truth Behind Bars', 3.

⁵² 'Unidad Nacional de Justicia y Paz: arduo trabajo en un país en conflicto', *Fiscalía General de la Nación*, 3 October 2011.

⁵³ K. Ambos and F. Huber, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?', Extended version of the Statement in the 'Thematic Session: Colombia', ICC OTP – NGO roundtable, 19–20 October 2010 (The Hague, January 2011), 8.

⁵⁴ *Ibid.*, 9.

⁵⁵ See Easterday, 'Deciding the Fate of Complementarity'; Ambos and Huber, 'Thematic Session: Colombia', 6.

the conflict. Trials taking place before the Colombian Supreme Court are investigating links between the government and paramilitaries. Paramilitary leaders divulged these links during their JPL confessions. Known as ‘parapolitics’, this scandal implicated congressmen, public officials, military, police and private entities.⁵⁶ The Supreme Court, empowered to investigate public officials, opened investigations of members of Colombia’s Congress. They are generally charged with *concierto para delinquir*, or agreeing to commit criminal activities with other persons. A small number of public officials have also been convicted on charges of committing violent crimes such as murder, enforced disappearances, kidnapping and torture.

While the link between paramilitary groups and state officials has long been known, these cases present an opportunity to develop this aspect of the story through criminal trials. However, the Colombian government has also attempted to control these proceedings. Former president of Colombia, Alvaro Uribe, exerted pressure against the judiciary while he was in office. Uribe’s supporters were implicated in the parapolitics scandal and he proceeded to mount a campaign to delegitimise the judicial process. This prompted the Supreme Court to publish a communique denouncing the ‘recurrent, systematic and even orchestrated’ campaign of ‘malicious and deceptively perverse comments designed exclusively to delegitimise the judicial investigations or to undermine their credibility’.⁵⁷

Finally, in 2011, the Colombian government passed a law known as the ‘Victim’s Law and Property Restitution’. This law is a historic development for victims of the Colombian conflict, as it focuses on providing truth, justice and reparations for victims, and includes a guarantee of non-repetition.⁵⁸ The law treats victims broadly and provides benefits to victims of disappearances, murder, displacement and other human rights violations. They can receive damages, restitution, social services

⁵⁶ OTP 2012 Report, para. 175.

⁵⁷ ‘La Corte Suprema se pronuncia en pleno’, *Semana.com*, available at www.semana.com/on-line/corte-suprema-pronuncia-pleno/114499-3.aspx. The original text reads, ‘La Corte ve con preocupación cómo de manera recurrente, sistemática e inclusive, orquestada se deslizan malintencionada y engañosamente comentarios malsanos, orientados exclusivamente a deslegitimar las investigaciones de los servidores judiciales o a minar su credibilidad’ [author’s translation]. See also ‘Colombia: Proposal Threatens ‘Parapolitics’ Investigations, Proposed Constitutional Changes Harm Accountability, Favor Uribe Allies’, Human Rights Watch (4 August 2008); Ambos and Huber, ‘Thematic Session: Colombia’, 10.

⁵⁸ Law 1448 of 2011, Arts 1, 8.

and legal protection. The law also provides rights related to the victims' role in shaping the conflict narrative, including the creation of a national day of memory and the collection of victim testimonies.

Colombia has also taken steps to amend its constitution to include transitional justice provisions known as the 'Legal Framework for Peace'. Under this framework, prosecutors would prioritise investigations and prosecutions against those bearing the greatest responsibility for crimes against humanity and war crimes. Those cases not selected would be conditionally dropped. Some sentences could be suspended. The amendments passed in Congress, which still needs to pass implementing legislation at the time of writing. In August 2013, the Constitutional Court upheld the constitutionality of the amendments.⁵⁹ The Constitutional Court also set out parameters that the Colombian Congress must adhere to when it adopts implementing legislation. One of these stipulates that a completely suspended sentence cannot be applied to those who have been convicted as 'most responsible' for genocide, crimes against humanity or war crimes that were committed in a systematic manner.⁶⁰

Members of the Colombian military are also facing trial for crimes that fall within the ICC's jurisdiction. In particular, members of the military are being investigated for involvement in 'false positives' incidents, where members of the military killed civilians and counted them as combat deaths in exchange for rewards such as vacation time, medals and promotions.⁶¹ In December 2012, the Colombian Congress passed a bill amending three constitutional provisions to reform the military justice system.⁶² Known as the 'Military Justice Reform', the bill gave jurisdiction to military courts to investigate and prosecute military and police on active duty for crimes 'related to acts of military service'. All alleged violations of humanitarian law are to be tried in military courts, with the exception of a number of crimes that can only be tried in civilian courts: torture, extrajudicial killings, forced disappearance, sexual violence, crimes against humanity and enforced disappearance. In a contentious October 2013 decision, the Constitutional Court struck down the law on procedural grounds.⁶³

These additions to the Colombian legal framework reflect a clear adoption of international justice norms. The ICC has had significant input into this process and has helped to shape Colombia's justice project. Through its public and private reports, the ICC is helping to

⁵⁹ Corte Constitucional [C.C.], Sentencia C-579/13 (28 August, 2013).

⁶⁰ OTP 2013 Report, para. 133. ⁶¹ OTP 2012 Report, paras. 102, 180.

⁶² The bill amended articles 116, 152 and 221 of the Colombian Constitution.

⁶³ Corte Constitucional [C.C.], Sentencia C-740/13 (23 October 2013).

shape the terms of the conflict narrative and maintain authority over international crimes. As can be seen in the interactions between the Court and the Colombian government, however, there is a tension between the ICC's retributive approach and Colombia's transitional justice approach.

The influence of the law, and specifically international criminal law, on the conflict appears to be growing.⁶⁴ For example, in 2011, for the first time, the president publicly characterised it as an internal armed conflict, as opposed to a state of emergency. He specifically noted that Colombia was part of the ICC and therefore is obliged to recognise the laws and procedures of the Rome Statute, including those related to internal armed conflicts. However, he was careful to note that this recognition of an internal armed conflict in no way meant that the government was granting political or belligerent status to the armed groups, which he said were simply terrorists and drug traffickers.⁶⁵ This forms one example of how the state is adopting the language of international law, but translating it to meet its own objectives.

The 'shadow' of the ICC

An examination of the Colombian framework, beyond its strictly legal components, shows ongoing power struggles over Colombia's sovereignty and its role in shaping the conflict narrative. Colombia's approach to the ICC has been relatively accommodating: it publicly acknowledges its relationship with the OTP and the importance of working together. The reach of this message of cooperation extends both externally and internally. Colombia's president has made a point of the state's cooperation with the ICC at the highest levels of international politics, including at the UN General Assembly.⁶⁶ Significantly, the government has acknowledged the Court's role in the historic peace agreements with the FARC.⁶⁷ Bringing the ICC into this delicate situation shows a deep level of engagement. By adopting and strategically employing the ICC's

⁶⁴ *Ibid.*, 226.

⁶⁵ Article 3, Law No. 1448; See Presidencia República de Colombia, 'Reconocer conflicto armado interno no les da estatutos político a los terroristas', 6 May 2011, available at http://wsp.presidencia.gov.co/Prensa/2011/Mayo/Paginas/20110506_10.aspx.

⁶⁶ Statement by the President of the Republic of Colombia, Juan Manuel Santos, Before the General Assembly of the United Nations in its Sixty-Eighth Session, 24 September 2013.

⁶⁷ 'Corte Penal Internacional, "aliada del proceso de paz": Santos', *Elespectador.com*, 24 September 2013 (unofficial translation).

normative framework, however, the Colombian government can further entrench its influence at the national level.

The Colombian government has largely taken up the ICC's terminology for framing crimes, but it has appropriated these terms in order to exert its own authority over the justice process and to reassert its sovereignty. This can be seen in Colombia's adoption of a similar prosecutorial strategy as the ICC. Faced with a burdened JPL process and a growing number of cases in the normal courts, as well as pressure from the ICC to investigate those 'most responsible', Colombia has adopted a prosecutorial strategy that prioritises the prosecution of leaders over the rank and file. The ICC has reacted negatively to this policy, and has suggested that, should Colombia fail to investigate lower-level perpetrators as well, it could violate its obligations under the Rome Statute. The Court thus appears to be pushing back against Colombia's assertion of sovereignty over its domestic proceedings, as is made particularly clear through the behaviour of the OTP vis-à-vis domestic initiatives.

It appears that the OTP is attempting to control the scope, content and goal of the prosecutions through evaluating the Colombian national proceedings and assessing whether its criminal justice framework fits within the normative vision of the ICC. The OTP has commented on nearly every piece of Colombian legislation dealing with atrocity crimes and has even been involved in discussions about the current peace talks with the FARC.⁶⁸ Members of its staff have conducted multiple trips to the region, holding public and private meetings with government officials.⁶⁹ The OTP has issued several press releases about Colombia and, exceptionally, released a report in 2012 on its activities there.⁷⁰ The report asserted that there were reasonable grounds to believe that both non-state and state actors had committed war crimes and crimes against humanity. It also stated that its priorities will be to focus on the continuation of national proceedings, particularly proceedings related to those 'most responsible' and to crimes including forced displacement, sexual crimes and the false positive cases.⁷¹

⁶⁸ OTP 2013 Report, paras. 131–2; see also 'Delegación de la CPI avaló proceso de paz', *Semana.com*, 15 April 2013; 'La CPI tiene interés en las ejecuciones extrajudiciales', *El Espectador*, 16 April 2013; 'Justicia transicional: la búsqueda de penas alternativas', *Semana*, 30 November 2013.

⁶⁹ OTP 2012 Report, para. 131; OTP 2013 Report, para. 147.

⁷⁰ The OTP explicitly recognised that the report was exceptional, produced 'in recognition of the high level of public interest generated by this examination'. OTP 2012 Report, para. 1.

⁷¹ *Ibid.*, paras. 22, 159.

The prosecutor's report reveals the way in which the ICC exercises various oversight practices over the Colombian process. The OTP evaluated the national proceedings, labelling the JPL a 'transitional justice mechanism' and noting that it was 'designed to encourage paramilitaries to demobilise and to confess their crimes in exchange for reduced sentences'.⁷² The report's language implies that how the OTP evaluates whether proceedings are genuine will involve analysing information about the specific crimes allegedly committed by each accused, so as to understand the operational behaviour of the leadership of each group. It also suggests that sentencing will inform its evaluation of genuineness. The report reiterated that Colombian trials should prioritise those most responsible, and stated that 'information and evidence concerning the origins, promotion, consolidation and expansion of paramilitary groups is spread out among courts and prosecutors in a way that may hamper the proper contextualisation of the crimes committed and a comprehensive understanding of the complexity of the phenomenon'.⁷³ This suggests that describing the context of the conflict is important to the ICC and that there exists a 'proper' way to do this, including by altering the local jurisdiction of the cases.

In addition to asserting oversight over the domestic process through public reports, the OTP has attempted to engage directly with actors in the domestic judiciary. In late 2013, Prosecutor Bensouda sent two letters to the Colombian Constitutional Court about the Legal Framework for Peace. The letters touched on two of the most controversial aspects of the legislation: alternative sentencing⁷⁴ and prosecutorial strategy.⁷⁵ One letter stated that a complete suspension of incarceration for those most responsible for atrocity crimes – even if they had been tried and convicted – would constitute a violation of international law and of Colombia's obligations under the Rome Statute.

The prosecutor also carved out specific roles for domestic courts and the ICC, qualifying her prosecutorial discretion to try only those 'most responsible' as something unique to the ICC. She clarified to the Colombian courts that, although her office focused on investigating and trying the 'most responsible', this should not be interpreted as a

⁷² *Ibid.*, para. 11. ⁷³ *Ibid.*, para. 210.

⁷⁴ Letter from ICC OTP to the President of the Colombian Constitutional Court, 26 July 2013, available at www.semana.com/upload/documentos/Documento_354581_20130817.pdf.

⁷⁵ Letter from ICC OTP to the President of the Colombian Constitutional Court, 7 August 2013, available at www.semana.com/upload/documentos/Documento_354436_20130817.pdf.

precedent that authorises states to follow the same strategy.⁷⁶ Rather, the OTP works with a focus on two levels of combating impunity, first by initiating processes against those most responsible for the crimes, and second by promoting domestic processes against those that have 'lesser responsibility'.⁷⁷ These letters appear to contradict the OTP's previous message to Colombia about focusing its proceedings on those who bear the greatest responsibility for the most serious crimes. Furthermore, while the OTP seeks to foster a kind of legal 'mimicry' by promoting its form of international criminal law, it discourages the independent exercise of a domestic prosecutorial strategy. As another example of the OTP's retributive focus, it requires Colombia to impose at least some term of imprisonment in order to comply with the Rome Statute.

The response to the OTP's efforts to exert influence was direct: Colombia's prosecutor general, Eduardo Montealegre, defended the state's position and challenged Bensouda's position. Montealegre maintained that the government's proposed policy adheres to the letter of the law and follows the most recent developments in international law; further, he claimed that international law has adapted itself to transitional justice. He also noted that the OTP's position followed retributive theories of criminal justice, which he distinguished from Colombia's transitional justice approach. Under a transitional justice theory, the state can try those 'most responsible' and also impose alternative sentences.⁷⁸

The message from The Hague thus appears to be mixed: on the one hand it supports the Colombian proceedings and the state's transitional justice initiatives, but on the other it signals to domestic authorities that the Court should maintain influence over domestic prosecutions. In particular, while stating that it was satisfied with Colombia's prioritisation of the prosecution of those 'most responsible', it continued to emphasise that the investigations needed to dig deeper. The ICC asserts this pressure through a call to broaden Colombia's conflict narrative – for instance, by highlighting connections between the state and paramilitaries that have historically been overlooked in the conflict. The Court also wants trials to focus on crimes against women and girls, including rape and forms of

⁷⁶ *Ibid.* ⁷⁷ *Ibid.*

⁷⁸ 'Fiscal rechaza críticas de la Corte Penal Internacional al proceso de paz', *Elespectador.com*, 23 October 2013.

sexual violence, which it views as a gap in the conflict narrative as revealed through domestic charging practices.⁷⁹

Expressivism, victims and the notion of 'truth'

While the ICC's approach has focused on punitive aspects of justice, the Colombian government's use of international justice discourse can be read through the optic of what some scholars have termed legal 'expressivism'; namely, that laws reflect and endorse certain values or messages.⁸⁰ Expressivist approaches to criminal law focus on trials and punishment as a vehicle to strengthen respect for the rule of law.⁸¹ In this light, it is evident that the Colombian state has sought to craft a historical narrative through a transitional justice legal framework: the government has sought to authenticate its depiction of the conflict through a victim-centred discourse focusing on the value of the 'truth'. The state has also embarked upon a pedagogical dissemination of international justice norms through public statements and by constitutionalising these norms within its domestic legal framework.

The Colombian government's narrative position, then, emphasises the recognition of crimes and discovery of the truth over trying individual cases. Some politicians have argued that the truth can serve as a form of justice.⁸² To be sure, there are multiple versions of the 'truth' of the conflict, and this is especially the case with regard to judicial truth. The fact that there are multiple versions of a conflict is not itself inherently problematic; however, there is a risk in Colombia that the state's 'official' narrative will reproduce structural inequalities and maintain historical silences around certain conflict-affected communities and individuals. Some have argued that conflict narratives that fail to adequately recognise victims of violence can detract from peace efforts and contribute to continued injustice.⁸³

⁷⁹ L. Chappell, R. Grey, and E. Waller, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia', *International Journal of Transitional Justice*, 7 (2013), 455.

⁸⁰ M.D. Rosen, 'Establishment, Expressivism, and Federalism', *Chicago-Kent Law Review*, 78 (2003), 669.

⁸¹ Drumbl, 'Atrocity and Punishment', 173.

⁸² 'La verdad puede ser una forma de justicia', *Semana.com*, 29 July 2013, available at: www.semana.com/nacion/articulo/la-verdad-puede-forma-justicia/352504-3.

⁸³ E. Stanley, 'Truth commissions and the Recognition of State Crime', *British Journal of Criminology*, 45 (2005), 582.

As previously noted, Colombia has a long legalist tradition and a history of using legal frameworks in response to conflict. One thing that has changed significantly is the role of victims in the Colombian legal vernacular. Previously, it was only either the government or the leaders of illegal armed groups that featured in the conflict.⁸⁴ The emergence of the figure of the victim has changed the conflict discourse and, for the first time, victims may feature more prominently as agents in its development.⁸⁵ Indeed, until recently, victim organisations have voluntarily excluded themselves from the transitional justice initiatives, because 'they doubted that conditions would allow for public clarification and recognition of the crimes committed'.⁸⁶

Victims have also become more prominent in Colombia's transitional justice legislation. International and domestic pressure in favour of victim's rights has influenced the balance between amnesties and criminal justice in Colombia's legal response to the conflict, beginning with the debate over the JPL.⁸⁷ The JPL included 'victim' as a legal subject for the first time in Colombian law.⁸⁸ Critics of the JPL and its implementation were then able to push for the passage of the Victim's Law, which in turn created the National Commission of Reparation and Reconciliation as well as the Historical Memory Group. More recently, victims have appeared on the agenda of peace talks between the FARC and the government.

However, the invocation of the victim has also served as a platform for Colombia to defend its position and strategy. This victim-centred rhetoric is historically unprecedented. In 2010, Colombia's President Santos addressed the Ninth Session of the ICC's Assembly of States Parties (ASP). He discussed the success of the JPL and how it had enabled cases against government officials, as well as the prosecution of a military official. He contended that the victims were at the 'centre' of Colombia's efforts, but noted the cost of implementing the Victims Law.⁸⁹ In a speech before the UN General Assembly in 2013, Santos asked the international community to respect Colombia's right to pursue peace and claimed there was no way it could investigate all of the crimes committed during the conflict. Santos asserted that victims are the priority: 'If we

⁸⁴ C. Rojas, 'Las víctimas del conflicto, o nuevo protagonista de la historia colombiana', *RazonPublica.com*, 26 August 2013.

⁸⁵ *Ibid.* ⁸⁶ M.V. Uribe, 'Memory in Times of War', *Public Culture* 21 (2009), 6.

⁸⁷ Rojas, 'Las víctimas del conflicto'. ⁸⁸ *Ibid.*

⁸⁹ 'Reparación a las víctimas será un esfuerzo de 22 mil millones de dólares, dice Santos en la CPI', *Semana.com*, 6 December 2010.

understand justice and the fight against impunity – in a transition – as a set of measures aimed at satisfying the victims and not just as the administration of criminal processes, it is possible to find a comprehensive solution for all.⁹⁰ UN Resident and Humanitarian Coordinator in Colombia, Fabrizio Hochschild, stated that it was the first time he remembers a president beginning a speech before the United Nations that focused on victims.⁹¹

The vernacularisation of international justice norms in Colombia has thus translated ‘justice’ as victim-oriented and as something broader than the administration of criminal processes. By focusing on the rights of victims, the government emphasises the expressive value of atrocity crimes trials and the importance of establishing the ‘truth’ about the conflict. However, the government avoids speaking of the direct responsibility of the state for crimes committed against those victims.⁹² In addition, although Colombia’s vernacularisation of international criminal justice places great emphasis on victims, they remain relatively absent from legal practice. The development of the narrative thus continues to be top-down, negotiated by those in power who have been the architects of the conflict.

Colombia’s focus on the expressive value of trials and, in particular, on the role of the victim is to the government’s advantage. This focus might arise out of the complicated national context, and the fact that the conflict is ongoing; a focus on retribution can complicate peace negotiations. As the government and the FARC work through a delicate negotiation process, this is an important factor. In addition to providing an alternate understanding of justice that may conflict with or contest the normative values of the ICC, the expressive value of trials in Colombia may also help reinforce the rule of law internally. This is important where large swathes of the country still have little government presence, and where people have turned away from formal legal structures in dispute settlement.⁹³ It also sends a message of the central role of the government to areas of the country that were previously controlled by the FARC, ELN or paramilitaries.

⁹⁰ Statement by the president of the Republic of Colombia, Juan Manuel Santos, Before the General Assembly of the United Nations in its Sixty-Eighth Session, 24 September 2013.

⁹¹ ‘ONU califica de ‘histórico’ discurso de Santos en Nueva York’, *Elespectador.com*, 24 September 2013.

⁹² N.C. Sánchez, ‘Santos y su bipolaridad con las víctimas’; see also “‘Le pido perdón al Presidente Betancur a nombre de los colombianos’: Santos”, *Semana.com*, 1 February 2012.

⁹³ Nagle, Colombia’s Faceless Justice.

However, there are risks associated with a focus on the expressive value of trials – especially when undertaken to protect state power. Judicial trials do not necessarily provide an adequate site of narrative development. Many have argued that law is poorly suited to writing history.⁹⁴ As Clifford Geertz famously noted, 'whatever the law is after, it is not the whole story'.⁹⁵ This is even more salient when the focus of investigations is narrowed.

The trials and hearings conducted under Colombia's international justice framework could thus lead to skewed or partial versions of the conflict.⁹⁶ Selective trials – reflected in Colombia's new prosecutorial strategy of focusing on those 'most responsible' – can lead to selective truths. Criminal trials are dominated by complex rules of procedure and evidence. Such rules can bolster the seeming 'authenticity' of the narrative, but they can also detract from it.

Trial management strategies, like the ones implemented in Colombia in efforts to streamline and reduce trial time, can also 'flatten' narratives. Interrupted performances are another risk: trials that end abruptly because an accused is no longer 'available' create partial narratives. This is especially true for processes that focus on a few select individuals, and where there is a risk that high-level perpetrators could be extradited to the United States on drug charges. Indeed, there is a real possibility that the Colombian government might act on other extradition requests for several high-level FARC members, including those participating in peace negotiations.

Another risk of the Colombian process is the fact that, while parties to the conflict have negotiated the international justice framework, victims and other constituencies of Colombian civil society have been largely absent from these negotiations. In some ways, this version of the truth might pose an obstacle to peace, as it arises out of a bargain between historically empowered actors and marginalises the grievances and roles of the un-empowered. The narrative that these trials produce may be incomplete or may reduce or eliminate uncomfortable facts. These risks might ultimately detract from the overall expressive value of the trials in addition to minimising their potential benefit. As Drumbl argues,

⁹⁴ R.A. Wilson, *Writing History in International Criminal Trials* (New York: Cambridge University Press, 2011), 6.

⁹⁵ C. Geertz, 'Fact and Law in Comparative Perspective', in C. Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (New York: Basic Books, 1983), 167–234, 173.

⁹⁶ Uribe, 'Memory in Times of War', 5.

'flattening the narratives to protect power drains some of their transformative content'.⁹⁷ Flattening or transforming the conflict narrative is, I argue, a key aspect of the Colombian state's approach in its domestic uptake of the ICC's normative framework.

Conclusion

This chapter has explored how the Colombian government is using a vernacularised discourse of international justice to assert control over how the country's conflict is portrayed. The government's actions mirror a number of larger socio-legal effects, including externalised contestations over Colombian sovereignty and internalised contests over the other parties to the conflict. By controlling the forms of narration, there is a risk that the government's narrative will embed understandings of justice that are incommensurate with the lived experience of many sectors of society, thereby exacerbating existing societal exclusions and reinforcing powerful networks.

Tensions concerning how the conflict is presented reflect broader tensions over competing conceptions of sovereignty. The Colombian approach to transitional justice entails signalling to the ICC and other global actors that it retains its sovereignty and political supremacy. This is apparent through Colombia's statements before the United Nations and the ASP. Yet, internally, Colombia presents a complicated picture of rivalries and struggles for power. Although this chapter has focused on the Colombian government, there are other micro-contestations and active participants, including a vibrant victims' movement, and contestations between the executive and the judiciary. There has also been a striking difference of approach and rhetoric between the Santos government and its predecessor, with the current administration taking advantage of an opportunity to develop an authoritative conflict narrative. The government is also asserting its powers over other parties to the conflict and the political opposition. As discussed above, this includes a victim-centred rhetoric and a focus on expressivism over retribution. This approach further enables the government to solidify its position as 'victor', even in the case of a negotiated end to the conflict.

However, in application of the law, victims appear to have a more marginal role than the government's discourse would imply. For example, the JPL gave a central voice to perpetrators, that is, paramilitary

⁹⁷ Drumbl, 'Atrocity and Punishment', 178.

leaders who confessed to their crimes. In practice, this process has been criticised for not facilitating broad victim participation and for limiting the voices of victims. Although the JPL did give rise to the Historical Memory Group, which has investigated massacres and crimes, this 'voice' is distinct from what victims might have in the judicial context. It also reflects a historical lack of access to justice for those with little political capital. Thus, although the ICC's relationship with Colombia has led to victims playing a more central role in the conflict narrative and the development of victim-centred legislation, a closer look suggests that they have remained on the sidelines, as subjects of the state's political and judicial control. This, ultimately, could undermine the authority that the state struggles to maintain.⁹⁸

Beyond the shadow of the ICC and its normative discourse, Colombian society faces broader challenges in resolving what has proven to be an intractable conflict. The Court's involvement in Colombia has had far-reaching effects that have extended beyond what legal tests and normative impositions could adequately address. Rather, the ICC has become an active participant in contestations surrounding the Colombian conflict narrative. The interaction between the Court and the Colombian government has given rise to a broader discursive struggle over the terms through which political power is exercised.

⁹⁸ Clarke, *Fictions of Justice*, 146.