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Integrating "storytelling" as a method in judicial processes? The case of Justicia Especial para la Paz

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Abstract

This paper examines how Colombia's Justicia Especial para la Paz (JEP) emerges as a tribunal within which the roles of history, politics, and transitional justice becomes contested. The paper starts by placing the JEP in a historical, social, and political context. Building on the contextualization, it focuses on how the JEP appears to be an extension of the five-decade long conflict in Colombia in its attempt to deal with the past. The paper underscores how punishing "bad" things is not an easy task. Against this background, the paper challenges the boundaries of criminal liability by discussing and analyzing "storytelling" as an alternative to truth-telling in the JEP in order to not only provide additional nuances to the conflict, but also as a way to, at least theoretically, tie different social collectives together in a post-conflict society and enable the courtroom to function constructively with difficult social issues in the aftermath of cataclysm.

Key words

Colombia; transitional justice; storytelling; criminal law

Resumen

Este artículo examina cómo la Justicia Especial para la Paz (JEP) de Colombia emerge como un tribunal en el que se contestan los roles de la historia, la política y la justicia transicional. El artículo comienza situando a la JEP en un contexto histórico, social y político. Partiendo de la contextualización, se centra en cómo la JEP parece ser una extensión del conflicto de cinco décadas en Colombia en su intento de lidiar con el pasado. El documento subraya cómo castigar lo "malo" no es tarea fácil. En este contexto, el documento desafía los límites de la responsabilidad penal mediante la

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discusión y el análisis de la “narración” como una alternativa a la narración de la verdad en la JEP, con el fin no sólo de proporcionar matices adicionales al conflicto, sino también como una forma de, al menos teóricamente, vincular a los diferentes colectivos sociales en una sociedad posconflicto y permitir que el tribunal funcione de manera constructiva con las difíciles cuestiones sociales en el período posterior al cataclismo.

Palabras clave

Colombia; justicia transicional; narración; derecho penal

Table of contents

1. Introduction

In November 2016, after an outdrawn and difficult negotiation process in the wake of a more than five-decade long armed conflict, Colombia's congress ratified a peace treaty between the Colombian government led by former president Juan Manuel Santos and the Fuerzas Armadas Revolucionarias de Colombia (FARC). Apart from drawing up the terms for the disbandment of one of the oldest active guerrillas in the world, the agreement also established the Sistema Integral de Verdad, Justicia, Reparación y no Repetición (SIVJRNR), a system that is made up of various legal and non-legal mechanisms that has as its ultimate aim to deal with the aftermath of the conflict. The legal mechanism in this system, the Justicia Especial para la Paz (JEP, Special Jurisdiction of Peace) is a special tribunal within the domestic Colombian justice system (Botero 2020). The principal aim of the JEP, which started operations in early 2018, is to investigate and try FARC members, members of the Public Force who have participated in the Colombian armed conflict and others although under voluntary jurisdiction, as well as with a focus on making reparations to victims (Kelly 2017, p. 808).

The proceedings in the JEP have as their aim to shed light "on the truth about the armed conflict and fostering the transformation of the factors that had a bearing on it as the foundations of a peaceful and dignified coexistence for the victims" (JEP 2019). I argue that these *prima facie* altruistic values invoke a plethora of important questions. I would contend that the most crucial one emerges as the following: In what ways should post-authoritarian and/or post-conflict societies deal with their "evil" past in order to "enable the state itself to [once again] function as a moral agent?" (Borneman 1997, p. 23; see also Koskenniemi 2011, Baaz and Lilja 2016, Strandberg Hassellind 2020). This question constitutes a crucial aspect of what is today known as "transitional justice," an essential component of the contemporary international criminal law (ICL) discourse. Simultaneously, the question points to an important dilemma, namely: how can severe humanitarian crises be dealt with through legal vocabulary and individual criminal responsibility without creating an illusion of empathy, vindication, and progress while evading the painful work of mourning, contemplation, and transformation in the wake of cataclysm (cf. Akhavan 2012, p. 175)? The question, in turn, raises serious concerns about the ability of a criminal trial to preserve and disseminate the "truth" of a complicated chain of events, often closely connected to the realm of international politics, involving many actors with different vested interests.

Being inspired by the "critical" turn in ICL scholarship, the paper examines how Colombia's Justicia Especial para la Paz (JEP) emerges as a tribunal within which the roles of history, politics, and transitional justice becomes contested. In particular, it will display and discuss some of the ways in which the JEP is susceptible to influence by the current leaders in Colombia, such as the sitting president Iván Duque Márquez and other high-ranking members of the Democratic Centre Party (DCP). It will be argued that the current leaders may use the JEP to steer a metanarrative which portrays them as the ones who did not only dismantle the FARC, but also as those who finally brought the criminal enterprise before justice. The paper focuses on how the JEP appears to be an extension of the five-decade long conflict in Colombia in its attempt to deal with the past. The paper moreover challenges the boundaries of criminal liability by discussing and analyzing "storytelling" as an alternative to truth-telling in JEP as a way to, at least

theoretically, tie different social collectives together in a post-conflict society and enable the courtroom to grapple with difficult social questions in the aftermath of cataclysm. The JEP has been increasingly focused on by colleagues. Regarding the field of ICL, important contributions have been made by, for instance, Kai Ambos (2021, 85) and Juliette Vargas Trujillo (2020). It is in this discussion the article is situated. In this regard, the paper does not only contribute to a deeper understanding of the current Colombian transitional justice process but also to the conceptual literature on transitional justice in general and "critical" ICL scholarship in particular. This piece, thus, seeks to document some of the complexities flowing from this interconnection from the context of the JEP.

2. A cursory exposé on the historical, social, and political background to the Colombian armed conflict

The conflict in Colombia has fumed for over five decades, making it the longest internal armed conflict in the Western hemisphere (ICC 2016). Analyzing the historical, social, and political background may guide us in understanding the FARC, the Public Force, and other key actors. It is important to understand and be reflexive on the complex terrain the JEP is situated in to recognize what is at stake in the peace process in Colombia generally. I would argue that the FARC and similar left-wing insurgent movements, the agencies of the right-wing paramilitaries, as well as what is currently happening in the JEP cannot be understood in isolation from, on the one hand, fractional struggles and "Narcopolitics" within the Colombian political superstructure and, on the other, Cold War logic (cf. Baaz and Lilja 2016, p. 149).

On 9 April 1948, presidential candidate Jorge Eliécer Gaitán was assassinated, ushering in the era known as *La Violencia* in Colombia's armed conflict. This period of warfare, characterized by a vicious struggle between the two established political parties was initiated by the Conservative Party launching a furious offensive against supporters of the Communist party who were demanding socioeconomic and political change (cf. Laplante and Theison 2006, p. 53). After some time, in 1958, representatives of the two major political fractions in Colombia brokered the peace treaty known as the Declaration of Sitges, forming the National Front, an agreement regarding the division of political labor to strengthen the politics against socialist influence in times of the Cold War (Wickham-Crowley 1992, p. 17, González González 2014).

Even though the political system established by the Declaration of Sitges was successful in ending La Violencia, it did not manage to quench the violence between the political fractions. In fact, the National Front excluded all other actors from political participation (Von der Groeben 2011, p. 142). Eventually, the system was seen as a form of political repression towards dissidents (Esquirol 2000). During the 1960s, there was a proliferation of guerrilla movements across Latin America in general and Colombia was no exception. Literature on the armed conflict suggests that the guerrillas in the beginning were based on notions of self-defense (González González 2014). From the start, the guerrillas did not have the purpose of changing the political system. Even the Guerrillas del Llano did not try to go to the political center of Colombia. Rather, they tried to establish localized power clusters. Consequently, by the 1960s and 1970s, the remnants of La Violencia had transformed into "a relatively low-intensity guerrilla insurgency, as peasants, students, intellectuals, [and] Communists (…) took up arms

against a closed and fundamentally undemocratic regime that had emerged with the ending of the first phase of violence" (Chernick 2003, cited in Valencia 2007, p. 445). FARC, the most powerful and numerous left-wing rebel group in the Colombian conflict, was formed in 1964 by Pedro Antonio Marín Marín, alias Manuel Marulanda, and other Marxist-Leninist supporters in this complex political context. The FARC has operated with the ultimate goal of promoting a political line of anti-imperialism ever since. The organization, however, had a very complex development through its many conferences. Today, it is estimated that the FARC has committed grave breaches of human rights "such as murders of protected persons, torture and hostage-taking, which affected many civilians, including men, women, returnees, boys and girls and ethnic groups" (UN 2005, para. 25). Adding to this, their operations have, to a large extent, been financed by drug trade and ransom kidnappings (Weinstein 2007, p. 291). Displacements and sexualized violence should be mentioned in this context as well (see Historical Memory Group – GMH – 2016).

As violent insurgencies increased in intensity, the Colombian State promoted the formation of the "Convivir"-groups that later transformed into groups known as paramilitaries (Tate 2002, cited in Laplante and Theison 2006, p. 54). State sponsorship of these groups was first established by the Colombian presidential decree 3398 of 1965, which later was succeeded by Law 48 of 1968. This latter piece of legislation endowed the Colombian executive with the power to establish civil patrols by decree and allowed the Defense Ministry to supply such patrols with military-grade weaponry (Richani 2002, p. 104). Thus, to put it bluntly, the Colombian government enabled the formation of armed civilian groups to work together with the government in counterinsurgency missions. The initiative to "rent out" military operations to private actors was inferred from a Cold War logic, as the Colombian government followed recommendations of US military counterinsurgency advisors who were sent to the Andean nation due to the increased prevalence of armed communist groups in rural Colombia which formed during and after La Violencia (Stokes 2005, pp. 71–72). In this way, the counterinsurgency strategy chosen by the Colombian government echoes similar strategies deployed by other nations and actors in Latin America, acting at the behest of anticommunist interests followed by the US such as with the Contras in Nicaragua (cf. D'Amato 1985). But the complexities extend deeper still. The Colombian counterinsurgency strategy, says Lisa J. Laplante and Kimberly Theidon, "lay the groundwork for the paramilitaries to become the preferred means of protecting the interests of the powerful elite, suppressing social protest viewed through the prism of anticommunism and ultimately assisting in the expansion of drug trafficking throughout Colombia" (Laplante and Theidon 2006, p. 54).

From the 1980s and onwards, the conflict in Colombia can be characterized as a "multi-polar war with left-wing guerrillas, right-wing paramilitaries, and a weak and fragmented state competing for control across the political divisions of the national territory" (Chernick 2003, p. 185). This state of affairs persisted well into the new century. During the right-wing presidency of Álvaro Uribe, the Colombian government launched an offensive directed against FARC and other outlawed leftist groups. Eventually, the cadres of FARC fighters dwindled and, in 2012, the peace process gained significant momentum. Consequently, peace talks between the Juan Manuel Santos-government, who recently had taken office, and FARC representatives intensified. When the peace

talks were complete, a peace treaty was signed in Havana. The treaty was touted as a success internationally, and even awarded Santos a Nobel Peace Prize. Nonetheless, it has been the subject to polarizing debate in the domestic setting. The polarization can be aptly demonstrated by the fact that, in 2016, Colombia held a referendum on the peace agreement, in which 50.2% of the voters voted against the peace treaty.

The deliberately cursory exposé above does not claim to deliver a dispositive portrayal regarding what actually has happened in the Colombian conflict, nor does it assert itself to function as the authoritative statement on the subject. The ambition, however, is to point to the fact that the context in relation to the JEP is complex and calls for carefulness and reflection. Hence, I would like to suggest that there are many layers to the conflict, and consequently, many ways of understanding the contextual parameters that saturate the setting. The question then becomes: How does the JEP deal with this complex situation? Is it a problem for its monolithic judicial approach that there are many ways of understanding? What does that complexity mean for the transitional justice approach of JEP? Such questions remain broadly unresolved and require a work that is doing analysis beyond the historical facts. I will return to these aspects later in the paper.

3. The composition, configuration, and socio-legal context of the JEP

As suggested above, the quest to set up a tribunal dealing with the armed conflict within the political context of Colombia was a difficult and polarizing task. In fact, the process and creation of the JEP itself remain one of the most controversial topics in contemporary Colombian politics. The JEP is embedded within the SIVJRNR, an integral system that incorporates judicial and non-judicial mechanisms with a view of complementarity. Apart from the JEP, the SIVJRNR system is also made up of the Comisión de la Verdad and the Unidad de Búsqueda de Personas dadas por Desparecidas (UBPD). The former is a national autonomous public entity whose mission is to listen and understand; to shed light on the limitations committed therein, and to offer society a broad explanation of its complexity and an account that includes all voices. The latter is an extrajudicial, humanitarian, autonomous and independent entity of the State directs, coordinates, and contributes to the implementation of humanitarian actions to search for and locate living persons presumed missing in the context and by reason of the armed conflict.

In contrast to the other mechanisms in the SIVJRNR, the JEP is an apex-level court within Colombia's legal system, meaning it is on par with the nation's other three high courts: the Supreme Court of Justice, the Council of State, and the Constitutional Court (Botero 2020, p. 304). The JEP is thereby the adjudicatory component of Colombia's broader transitional justice system and is a modified version of what is colloquially referred to as a "war tribunal" in other contexts (cf. Botero 2020, p. 301). The idea is to place victims at the center of the proceedings and to apply restorative justice as a "guiding paradigm" (see Art. 4 Law 1957 of 6 of June 2019 [Statutory Law of the Special Jurisdiction for Peace]). The JEP has its own judges and rules of procedure. It is, thus, an *ad hoc* institution seeking to enable for transitional justice in Colombia, tasked with investigating, clarifying, prosecuting, and punishing the most serious crimes committed during the Colombian armed conflict before 1 December 2016, with some exceptions (JEP 2020, cited in Valiñas 2020). The JEP's mandate is limited. The deadline for the conclusion of the functions of the Special Jurisdiction for Peace consisting of the presentation of accusations by the Investigation and Prosecution Unit is 10 years from the effective entry

into operation with, similarly to the Comisión de la Verdad, an optional subsequent period of 5 years and a maximum period of 20 years in total to complete its judicial activities (Art. 34 of the Statutory Law of the JEP).

The tribunal receives some – although minor – technical and financial support from the United Nations (UN). The JEP is clearly not created by the UN in contrast to other, similar war tribunals, such as the ones in Rwanda, former Yugoslavia, Sierra Leone, Lebanon, and Timor-Leste, but nonetheless maintain a close relationship with the ICL discourse, as will be elaborated below.

The JEP has a complex structure, and the following section will only draw up its main contours. The tribunal's configuration and scope were, as indicated above, negotiated by representatives from the Juan Manuel Santos-government and FARC as part of the peace talks in Havana. The tribunal applies a model of allowing for limited amnesty for members of the FARC. For instance, members of the FARC are granted amnesty for political crimes, or alternatively, more lenient sentencing for those who "cooperated with efforts to clarify the truth" (Botero 2020, p. 306). In case they decide to not make those efforts, that leniency is not offered. There is, however, a broad list of crimes that exclude the possibility for amnesty, which include, *inter alia*, genocide, crimes against humanity, sexual violence, torture, forced displacement, war crimes. It is thus clear that the peace treaty has been brokered between groups with conflicting Interests. In regard to the punishment available in the JEP, there is a divergency between the FARC wish to not be subject to "regular" punishment and the Colombian government's reluctancy to allow for impunity. Nonetheless, for these crimes, a perpetrator can be punished for five–eight years with "effective restrictions of freedoms and rights". This term should, in the case a defendant offers the truth as a service in return, in no case shall be understood as imprisonment, nor the adoption of equivalent forms of detention (cf. Colombia–FARC Peace Agreement 2016, p. 120). This is, perhaps, the most innovative feature of the JEP model, in the sense that the system does not privilege some victims' rights over others (cf. Bermúdez Liévano 2019). But at the same time, placing "truth" at the center, as we shall see, may sit uneasily together with the format of an adversarial, criminal trial.

The JEP is made up of several organs in the conducting of its investigative and judicial activities. It has three Judicial Chambers, four sections of the Tribunal for Peace, and a Unit for Investigation and Prosecution. In this sense, it is a *sui generis* legal body within Colombia as well as internationally. A case is initiated by the Chamber for Acknowledgement of Truth and Responsibility and Determination of Facts and Conduct. Then, a quite convoluted judicial process takes place, as aptly described by Marta Valiñas:

> [T]he Chamber will submit its resolutions of conclusions to the Section on Acknowledgement of Truth and Responsibility for Facts and Conduct of the Tribunal for Peace. If there is incomplete or no acknowledgement, the Chamber will submit the case to the [Unit for Investigation and Prosecution], who will then decide whether to formulate an accusation before the Tribunal's Section on Absence of Acknowledgment of Truth and Responsibility for Facts and Conduct. With regards to the latter, the process followed is adversarial, akin to a trial in the ordinary criminal justice system, with the intervention of the [Unit for Investigation and Prosecution] as the prosecutorial body. The Chamber may also send cases that are less serious or representative to

> another Chamber — the Chamber for the Determination of Legal Situations. (Valiñas 2020, p. 453)

The outcome is that the JEP is somewhat of a unique construction in the current transitional justice paradigm, especially seeing the ways in which it coexists with other non-judicial mechanisms within the context of SIVJRNR. At the heart, it is a domestic transitional justice mechanism based on a civil law rationale. Simultaneously, even though the JEP does not use national and international law in tandem, international norms are indeed central in the adjudication of the cases. This is, to exemplify, evident in Art. 3 of the Legislative Act No. 01 (2017), in which it follows that the investigation is thought to be geared towards the so-called "core crimes" in ICL. Even though the JEP operates strictly within a domestic context without much support of the UN, the connection to ICL is evident. Apart from what preciously has been stated in this regard, it should be noted that the statutory law of the JEP, it is indicated that the JEP commits to giving special emphasis of serious violations of international criminal law and international humanitarian law (Art. 13, Law 1957 of 6 June 2019). Moreover, the structure, scope and configuration are similar to previous war crimes tribunals that we have witnessed in the history of ICL. I would therefore like to suggest that the JEP can best be described as a project lying somewhere in the rift between national criminal law and a broader ICL logic. For that reason, we are also well-suited to look at prior scholarship on ICL in connection to transitional justice processes.

4. Reflections on the restorative justice paradigm in the setting of JEP: The relationship with precedents and other truth-telling processes

A key aim of the JEP is to advance the restorative justice paradigm (JEP 2019). In my view, it would be important to reflect on what this means before going further. Restorative justice has prevailed as an alternative approach to retributive justice. Within the restorative justice paradigm, the aim is to heal broken relationships between victims and perpetrators rather than punishing perpetrators (Amstutz 2005, p. 110). The overall logic in the restorative justice paradigm is underpinned by the notion that not only judicial mechanisms can end hostilities in the present. In the context of the JEP, this is evident in how the JEP is sequenced together with The Comisión de la Verdad and the UBPD. Within this framework, the search for truth can be regarded as a key aspect of the restorative justice idea in the JEP. Following Richard Goldstone, it is possible to characterize this focus as being concerned primarily with the past (Goldstone 1998, p. 198).

The labelling of JEP as being a tribunal founded on the restorative justice paradigm does not make it so automatically. The more crucial point is how the operations are practically carried out. In considering the JEP, it is important to correlate its precedents within the transitional justice paradigm as the peace and justice process, as well as other truth-telling processes in the country, such as the National Center for Historical Memory which recently has engaged in the dialogue and articulation of plural memories of the armed conflict that guarantees the inclusion of different actors and populations and contributes to the comprehensive reparation, historical clarification, guaranties of non-repetition and the construction of a sustainable peace (Historical Memory Group – GMH – 2016). It could, thus, be argued that since the JEP is embedded in a broader social system, the risks associated with falling into a retributive logic will be mitigated.

Above and beyond this criticism, even if it is embedded in a broader system with a connection to non-judicial mechanisms, the legal framework of the JEP follows the traditional structure of a criminal process, an accusatory and punitive process. What is interesting to note is that there appears to be a tension between the Colombian government and FARC in regard to how to conceptualize restorative justice within the broader legal framework of the JEP (cf. Björkdahl and Warvsten 2021). This tension has permeated the entire peace process, with the FARC opposing the legal framework for the JEP on many grounds early on, by arguing that the legal framework did not address the responsibility of the State in an appropriate manner (FARC 2015). Notably, the FARC believed the framework was unilaterally imposed on them by the government. It is difficult to move beyond the impression that it is an uphill struggle for the people working in the JEP to make sure that the is founded on the idea of restorative justice. This is particularly important as the format of the tribunal – the setting of a criminal procedure – appears to work against notions of reconciliation and peaceful co-existence. In turn, means that it should be of paramount importance to scrutinize means and measures that could help the JEP in realizing the ambitions of restorative justice.

5. The "critical" turn in ICL

After the end of the Cold War, we witnessed a change in international society as numerous countries opted for alternative justice mechanisms to respond to periods of massive violence and human rights violations (Teitel 2003, p. 3).[1] Rather than being primarily concerned with states and interstate interactions, many transitional justice processes instead started to deal with the responsibility of individuals. The investigation and prosecution of individuals for international crimes, such as genocide, crimes against humanity, war crimes and violations of the Geneva Conventions is today considered commonplace within international law in general and within transitional justice projects in particular (cf. May and Hoskins 2010, p. 1, Baaz 2015, p. 160). The reason for this might be the conflict structure after Cold War: given the asymmetric character of interstate conflicts it is difficult to make a state responsible

The notion that there should be no one "outside-the-law" in the global criminal law project, whatever place of activity or formal position today seem deeply entrenched in our legal discourse, in spite of the fact that this has not always been the case (Koskenniemi 2002, p. 2). One of the first instances in which individuals were held responsible for international infractions can be traced back to the seminal decision to initiate criminal proceedings against Axis leaders in the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) in the wake of the Second World War. The logic is eloquently elaborated in one of the judgments in the IMT as: "crimes against international law are committed by men, not by abstract entities, and only in punishing individuals who commit such crimes can provisions of international law be enforced" (Judgment of the IMT, quoted in Duffy 2005, p. 74).

[1] I define the international society as a group of independent political communities, not only forming a system, in the sense that the behavior of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations and recognize their common interest in maintaining these arrangements (see Bull and Watson 1984, p. 1).

The legal doctrine of individual criminal responsibility for international offences, even though it was construed in the 1940s, lay dormant for quite some time thereafter. It witnessed, however, a re-emergence by virtue of the establishments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and a proliferation through similar constructions in Sierra Leone, Lebanon, Cambodia, Timor-Leste and not least the establishment of the International Criminal Court (ICC) and the Rome Statute in 2002. These developments did not occur simply by happenstance or in a political vacuum but were made possible due to the end of the Cold War, and the consequential vanishing resistance towards the "global liberal project" in international society (Heller and Simpson 2013, p. 4, Baaz 2015, p. 161, Gidley 2019, p. 18). That is not to say, of course, that there is some sort of homogenous masterplan for world society – shifts, contradictions and tensions are visible.

Due to this advancement, the discussion concerning ICL attracted an increasing amount of attention, both in terms of public debate and in academic scholarship (Schwöbel 2013, pp. 169–170, cited in Baaz 2015, p. 161; Baaz and Lilja 2016; see also Mégret 2018, p. 835). Although, put in the words of Rebecca Gidley, "the transitional justice literature is still steeped in the language of democracy and liberalism [and] holds tight to the assumption that the post-conflict government is pursuing transitional justice in order to bring about positive societal change" (Gidley 2019, p. 19). The same logic, I would like to add, applies to the contemporary discussion on ICL, which is largely concerned with "positive" contributions of the field to various peacebuilding projects. This does not, at the same time, imply that critique and criticism of ICL is absent. In fact, the substantive engagement with various blind spots and issues relating to, *inter alia*, imperialism, memorialization, and exclusion and has long been the acumen of scholars hailing from "critical" body of legal theory, such as Frédéric Mégret and Merima Bruncevic (Mégret 2013, Bruncevic 2022). But I remain convinced that there is reason to call for an increased substantive engagement with these various blind spots (cf. Strandberg Hassellind and Baaz 2020).

According to Anne Orford and Florian Hoffman (2016, p. 4), "a new genre of critical scholarship that emerged in the post-Cold War period began to enliven and provoke impassioned debates about the proper relation between theory and practice in international law." Continuing, following Christian Reus-Smit, legal scholars inspired by a critical approach argue that "liberalism is stultifying international legal theory, pushing it between the equally barren extremes of 'apology' – the rationalization of established sovereign order – and 'utopia' – the naïve imagining that international law can civilize the world of states" (Reus-Smit 2014, p. 286, Koskenniemi 2016, Baaz and Lilja 2016).

"Critical" approaches may take on a plethora of forms. Put differently, they are not uniform in nature. That is not to say, however, that "anything goes." Additionally, it is important not to belittle existing contributions to the field. In recent time, there has been a wide range of additions, such as critical scholars who address international law in terms of resistance (Buchanan 2008, Baaz and Lilja 2016), those who discuss the upsurge of a professed "justice cascade" via individual criminal responsibility (Sikkink 2011), those who engage in a historical genealogy of the research field (Elster 2004, Zunino

2019), and those who include emotions as a vector to the analysis within the discipline (Bandes 1999, Ross 2018, Flower 2018).

The conceptual point of entry for scholars who are critical towards "traditional" liberal legal theory is to emphasize that we must move beyond legalism and problem-solving within "a self-referential search for origins, authority, and coherence" (Purvis 1991, p. 105). Instead, those who are inspired by a "critical" turn in ICL suggest that liberal international law should be understood as ideology and argue that "the motivation or 'knowledge interest' of all critical research is 'emancipatory'" (Minkkinen 2013, p. 119; see also Kennedy 1987).

After the International Military Tribunal in Nuremberg delivered its judgments, Hannah Arendt remarked on one of the great dilemmas facing ICL, and by extension, transitional justice, namely that "the Nazi crimes explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough (…). This guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems" (Arendt as quoted in Kohler and Saner 1992, pp. 51–54). Thus, sometimes, the scale and gravity of a tragedy, the purported impregnability of the perpetrators, and the inconceivable suffering of the victims may be so great that punishing one or a few individuals does not come close to measure up to the atrocities. In turn, the legal format for grappling with past human rights violations has been severely questioned and criticized due to their enormous historical, political and moral significance (cf. Sikkink and Booth Walling 2007, p. 427). Hence, it is often put forward that the significance of transitional justice trials, such as in the JEP, lies elsewhere than in convicting or acquitting a few individuals for crimes of international concern. The locution "elsewhere" is instead understood as establishing the truth of the events that has occurred, or rather the possibility of having a gross injustice recognized publicly in order to contribute to processes of reconciliation (Koskenniemi 2011, pp. 172–172). At the same time, it could be suggested that truth recovery is an ancillary but unavoidable feature of various ICL and transitional justice projects and that the main function is to establish retribution and deterrence on an individual and societal level (cf. Nersessian 2010, p. 192). From my perspective, I would note that all these logics are intertwined, and in some contexts, certain parameters are more predominant than others. Nonetheless, history-making appears to be a crucial aspect of any transitional justice trial, regardless of whether one believes it to be the most or least important element (Wilson 2011, pp. 1–23). This is particularly evident in the setting of the JEP, which has as an explicit aim to establish the truth of what actually has happened in the long Colombian armed conflict and to educate future generations about this dark chapter in Colombia's history.

When viewed from this perspective, I would note that any judgment or decision made by the JEP will produce a narrative on how to understand the agency of key actors in the five-decade long conflict in Colombia. Hereby, the narrative construction the JEP will provide can be seen as a judicialized version of the Colombian armed conflict, that is shaped by a particularly judicialized logic and cannot contain "all colors" of the Colombian history (cf. Wilson 2011, p. 23). In this way, the JEP could, at least in theory, serve as an important stepping-stone in the Colombian transitional justice process. The trials, thus, surely have the potential to make a seminal contribution to the reconciliation and reconstruction of Colombia but could also be a factor that is forcing social tensions.

The success of the JEP, however, presupposes that the trials are conducted in a responsible and tactful manner. But it nonetheless is important to remember that criminal trials produce historical narratives which ultimately are permeated with dissent (Jain 2018, p. 1163). This is a future prognosis, and we still cannot know the actual impact of JEP. Besides that, it is not a new idea to expect the JEP to create a conflict narrative. Below, I will return to elaborate more the kind of narrative that could be expected to be created by JEP.

I would suggest that legal truths and historical truths are sometimes coinciding, but often they are far from identical. The question of paramount interest in a trial within the realm of international criminality, building on the adversarial system, is: can it be proven beyond reasonable doubt that the accused has committed the act they are charged with? Contextual questions relating to, for instance, political motives, ideological convictions and so forth, are of lesser importance within this paradigm. Although, in transitional periods, the debate relating to why people did what they did, which are questions political in nature, are of central concern. In the JEP, there is space for broader questions relating to political context, for instance by the policy of granting political amnesty, but it is wise to remember that the mere criminalization of certain actions depends on which framework of interpretation is to be applied. If someone is contributing to a social project based on an understanding that it is moral, just and historically necessary, and they feel their individual contribution is essential in order to fulfill the wider goal – may it be liberation from oppression or happiness of mankind, says Martti Koskenniemi (2011, pp. 179–182), "then little, if anything at all is gained by a retrospective interpretation of the effect of the effort."

In terms of intersubjectivity, I argue that it is important to remember that for all major political events there are a plurality of vested interests, and by consequence, several conceptions of truth. The task to construct a finite truth that could serve as a meta-narrative for the future, to move beyond a traumatic event is, per definition a "struggle for memory" (see Dukalskis 2011, Baaz 2015, Baaz and Lilja 2016, Strandberg Hassellind and Baaz 2020). The JEP along with the social context surrounding it, as we shall see below, emerges as a space in which the framing of collective memories and the relationship between power, law and memory is brought to the fore. This development is not unique to this context, as David Rieff (2016, p. 122) rightly puts it: "efforts to mobilize and manipulate collective memory or manufacture it have been made by regimes and political parties of virtually every type."

6. Recalling the theoretical difficulties of individualizing guilt for complex historical, social, and political events

The JEP applies a mode of individual criminal responsibility in the same way as comparable international tribunals who have dealt with past human rights abuses in conflicts bearing a strong connection to the political realm. This doctrine is today common currency within the transitional justice field. As noted, the JEP is tasked with assessing crimes committed in extraordinary chaos that contain complexities domestic trials usually do not need to cover. In this context, the long and painful history of the Colombian conflict embedded in a Cold War history, fractional struggles and "Narcopolitics" disrupt the status quo. I would connect the aforementioned setting to

the ways in which, put in the words of Immi Tallgren, "[t]he seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation surrounding the violence" (Tallgren 2002, p. 593). But at the same time, as noted by David Luban (2011, p. 624), in these situations, actions are not committed in an anti-social way, but rather as a form of criminal normality, where "[c]rime becomes law, law becomes crime." Hence, it is compelling to argue that individual criminal responsibility emerges as a reducing phenomenon, by simplifying complexity and the scale of multiple responsibilities to a mere background. By virtue of this logic, it could be suggested that, drawing from Neha Jain (2018, p. 1163), these trials are positioned in an impasse between two rationalities: the individual focus and the wider contextual narrative of events. The answer to this question, I argue, lies in what we believe ICL is for, and is thereby a question of ideology and political convictions (cf. Strandberg Hassellind 2020). Simultaneously, drawing from Kathryn Sikkink (2011, pp. 10–15), evaluating facts in transitional justice trials cannot be isolated from evaluating context. One might thus surmise that placing emphasis on individuals' actions, their purported autonomy and rational convictions risks misrepresenting the political, social, and historical context permeating them. However, at the same time, it could be discussed if a judicial process that is not based on individual responsibility is possible at all. I will return to these questions below.

I would like to suggest that individual conduct cannot be fully isolated from structural explanations. But at the same time, a too contextual approach might trivialize the actors involved in the cataclysm that at dispute. Hence, at this stage, we can pinpoint a point of tension when it comes to the deployment of individual criminal responsibility: it is possible to characterize this stalemate as a reification of a conflict ever-present in historical studies relating to competing conceptions of history, namely between historical materialism and historical idealism. The struggle relates to what one accepts as a reasonable explanation scheme for broader historical events, in which structural mechanisms compete with liberal notions of self-determination. This is not necessarily a controversial claim, considering the current state of the field, but it is nonetheless important to reflect on the complex mechanisms underlying that process of interpretation in holding individuals accountable for atrocities closely linked to political developments. This is a reflection that this article will contribute to.

The limitations of a criminal trial, with its binary means of response to complex events, emerge as, to put it mildly, problematic. The inherent limitations can be better understood by looking at what Jean-François Lyotard termed the *différend*. The *différend*, Lyotard explains (1983, p. 9), is a case of conflict between (at least) two parties that could not be resolved equitably for lack of a rule of judgment applicable to the two modes of argumentation. Although, Lyotard continues, "that one is legitimate does not imply that the other is not (…) a universal rule of judgment among heterogeneous genres is in general lacking" (Lyotard 1983, p. 9, cited in Baaz and Lilja 2016, p. 147). This is a way to acknowledge the multiplicity and nuance of phrase and reality, without attempting to apply a universal, standardized system. Put differently, a plethora of perspectives can co-exist together peacefully.

The setting of a criminal trial, however, is somewhat different. In that setting, it is of utmost importance to choose and decide on one interpretation (Baaz and Lilja 2016, p.

147). The chosen interpretation of a given context constitutes the very framework for the trial. To accept the contextual frame offered regarding, *inter alia*, who is to be the accused, what acts are within the remit of the court, et cetera is to accept one interpretation of the context among those between the political struggle has been waged, and in extension, bestow validity to that interpretation of reality (Koskenniemi 2011, p. 183). As Nigel Eltringham (2017, p. 8) argues, such an analysis introduces a "sorely needed dose of realism to balance naïve claims regarding the value of 'historical records' generated by international trials." In the case of JEP, this means that a consequence of bringing a complex conflict to court will be that it comes across as one out of many interpretations regarding how to understand key actors in the Colombian conflict.

7. The JEP as an extension of the conflict in Colombia?

As argued above, the idea that the use of transitional justice trials, sequenced with a focus on individuals, could serve as a community-creating symbol of reaffirmation in order to, following John Borneman (1997, p. 23), "perform (…) a successful 'final judgment' in the religious sense, a performance that would ultimately enable the state itself to function as a moral agent", is a delicate and difficult undertaking. There are many parameters that must be carefully dealt with in order for criminal proceedings to function constructively in transitional justice processes when dealing with history. From one perspective, it is of paramount importance that they are perceived as credible. In case they are not, they risk coming across as a completely uncredible, and consequently, being bluntly political in character (Heller and Simpson 2013, pp. 1–13, Baaz and Lilja 2016, p. 148, Strandberg Hassellind and Baaz 2020, p. 259). Juxtaposed to these broader questions, there is also the perennial debate concerning "truth vs. justice" and "peace vs. justice" and the ways in which trials can be strung together with other measures within the transitional justice paradigm (cf. Rotberg and Thompson 2000).

As we now know, the JEP, which is one of the key elements in Colombia's transitional justice process, is not only about convicting or acquitting a certain number of individuals or adjudicating a select number of cases. It is also, and perhaps more importantly, about establishing the truth of what actually took place in Colombia during the conflict. The cohesion and adhesion with the Comisión de la Verdad regarding this monopoly of conflict determination deserves special attention. The JEP is the judicial institution whereas the Comisión de la Verdad is a discursive institution. The realization of a truth-telling endeavor is not only challenging, but it is also a risky undertaking. This is especially true when other mechanisms are tasked with similar assignments. In the setting of transitional justice, no mechanism to confront past abuses is beyond moral reproach. As Elizabeth Kiss argues, not only "are there difficult trade-offs between punishment and reconciliation, and between individual reparations and collective social development, but there are also new challenges and forms of injustice that easily are overlooked by transitional regimes" (Kiss 2000, pp. 91–92). Simultaneously, I concede, no public trial can avoid having elements of a "history lesson" – it considers historical acts, is held in public, and its outcome is disseminated. Hereby, I would note, it becomes imperative to be moderate with our attitudes towards the criminal proceedings. It is also crucial, when the tribunal is mobilizing the legal constructions related to the proceedings, judges, that prosecutors and other legal actors perform in a transparent, reflective, and responsible manner and strive to stay dedicated to the truth-finding

ambition of the tribunal, which of course is not an exclusive criterion for transitional justice processes. In other words, it is essential that the participation of legal actors and other key stakeholders amounts to a good faith effort.

The transitional justice process in Colombia – and by extension, the JEP – is a complex entanglement between politics and justice. The judicial institutions are autonomous in their own direction. There are other judicial institutions created for judicial self-administration (Consejo Superior de la Judicatura, for instance). There are also other non-judicial control-institutions. Anyhow, all these institutions are embedded in political decisions. This indicates a complex, not a simple, relation between Rama Judicial and Rama Ejecutiva. Even in this context, the situation connected to the presidential sanction for the JEP's statutory law stands out (International Court of Justice – ICJ – 2019, p. 72).

The current right-wing government in Colombia is highly skeptical of the transitional justice process in the nation. During Duque Márquez's presidential campaign, he focused on putting into question the legitimacy of the 2016 peace agreement and the institutions created by it (ICG 2018). In fact, during the 2018 elections in Colombia, the future composition and structure of the JEP was one of the most pressing issues with Duque Márquez fervently voicing his criticism of the tribunal along with his plans to limit its reach (Bermúdez Liévano 2019). In March 2019, President Duque Márquez vetoed to six articles in the JEP statutory law, an action that was preceded by the then-Attorney General petitioning the president to object to the bill (ICJ 2019, p. 73). The argumentation was based, apart from Duque Márquez's political opposition to Santos, on the popular vote in the 2016 Colombian peace agreement referendum, in which 50.2% of the voters voted against the peace treaty (Symmes Cobb and Casey 2016). Duque Márquez has also made other attempts of influencing the judicial process, such as cutting its funding (Foggin 2019). These tactics have led members of the FARC reacted to Duque Márquez's objections, sending a letter to the United Nations Secretary General expressing their profound concern for the attempts to harm the implementation of the peace accord (Foggin 2019). But perhaps the most worrisome tactic consists of, Andrés Morales argues, "the apparent unwillingness to protect witnesses, victims and former FARC militants", as 253 former FARC members have been murdered since 2016 (Morales 2021). This ongoing tragedy negatively impacts the work of the JEP and hinders this tribunal's ability to satisfy the rights to truth and justice of victims. The assassinations of former FARC-members are a problem for the JEP because if key actors cannot be protected within the proceedings, it is hard to believe that the proceedings at all would function.

Hence, the conflict, peace and, by extension, the contemporary political landscape in Colombia is far from a struggle between "good" and "evil". There is today a high polarization around the implementation of the peace agreement. The protests in 2021 have underscored how the peace treatment is a claimed issue. Nevertheless, it is far from the most important topic within the Colombian context. On its 5th anniversary there was only little attention beyond its own institutions. The polarization of the peace agreement has a deeper justification, social inequalities, and is not a result of the peace agreement in itself. It is also important to remember that, when it comes to the case of Colombia, no one "won" the war. Santos did not "win" the war for the Colombian government, he

only found the political majorities for the peace agreement, which is something different. What is interesting today is that conservative, ultra-conservative and rightwing actors, that probably would have won the war given a continuity of Uribe's policy of Seguridad Democrática, are now polemic against the JEP.

But the complexities extend deeper still. There are other poignant examples which puts the integrity of the JEP's operations into question, such as the late Carlos Holmes Trujillo, the former Minister of Foreign Affairs, who asked the Inter-American Commission on Human Rights to cancel a thematic hearing that was scheduled with the JEP (Rodríguez 2019). The involvement of political officials in the judicial process in this manner is striking. Moreover, a Colombian prosecutor has allegedly accepted a bribe in the case of Jesús Santrich, one of the most high-profile cases before the JEP, as he was a high-ranking member of FARC. These circumstances add to the overall picture alluded to above, namely that the Colombian judiciary is highly politicized and dependent. Taken together, I would suggest this casts doubt over the capability of the JEP to establish the "truth" of what happened during the fateful decades in Colombia, and it seems to echo the outlines of the Colombian conflict in itself. Granted, the cases opened are of great importance. However, the serious allegations regarding not only corruption but also concerning other irregularities have been directed against the JEP ever since the establishment of the tribunal. There is little that suggests that these dynamics will decrease in intensity as time goes by, seen in light of recent statements made by President Duque Márquez:

> We do not want more tricks, [we want] that [FARC] tell the *truth*, and that the country knows it in depth. It is enough to see the testimonies of the women of Rosa Blanca to understand that there are no spaces to confuse the facts, trying to digress or trying to reduce the margin of *truth.* (Duque Márquez as quoted in Colprensa 2020. Italics added)

It is difficult to move beyond the impression that Duque Márquez's conception of "truth" in the quote above allows for peaceful, co-existing interpretations of "truth". Instead, we see here the imposition of a *différend* to the agency of the FARC. Thus, it is a form of double silencing which possess a direction of wrongdoing, which is not only pointed towards the FARC in a locked trial setting, but also on a broader social level. This view is further supported by the fact that Duque Márquez in other contexts have characterized the FARC as a "group of narco-terrorists" that had tried to intimidate Colombia "under false ideological pretexts" (UN Affairs 2019). This mode of argumentation echoes the struggles that lie at the heart of the conflict and in many ways echo the social climate before and after La Violencia. In this light, the JEP could, somewhat simplified, be seen as a modern-day Declaration of Sitges. In this regard, it should be noted that the FARC has had apprehensions regarding how the "truth" was to be told. In fact, the FARC commander Timoleón Jiménez has expressed fear concerning that the Colombian government will use truth to further their own ambition by masking uncomfortable testimonies and emphasizing those useful to them (Jiménez 2014).

In fact, it appears easy to suggest that we are falling into a simple FARC bad/the Colombian state good binary, at least within Colombia, a framing that would ultimately put the fragile peace process at risk. At the same time, I would note that it is not controversial to state that the JEP will take note of historical, political, contextual and

structural questions when adjudicating the crimes committed during the conflict. Taking a position on how to understand the issues which arise from the proceedings would thus be an ideological excursion and an extension of the conflict that lies at the heart of the proceedings. Of course, setting out to ensure the remembrance of atrocities is a viable, altruistic goal, but I believe the remembrance of such events should not be attached to the proceedings before courts of law. It is surely necessary to establish in some way what kind of organization the FARC was, and how to characterize the agency of the state/paramilitaries, but this is not a responsibility the JEP should take on. Classic evidence in criminal law cannot be equated with memory. Arranging and rationalizing evidentiary material in order to construct historical narratives includes operations of placing weight and evaluation which are endeavors easily subject to critique. What courts set out to do is to convict or acquit. That standpoint, in a legal sense, will be final, especially when an appeal is not pursued or has been concluded, but its foundational assessments will always be open for scrutiny. In this way, a broader spectrum of political conflicts is imported into the setting of the courtroom, at least implicitly. This viewpoint is further bolstered by the fact that only FARC-members have been indicted in the JEP thus far (Emblin 2021). That is not to say that any members of the public forces or the paramilitaries will be exempt from the proceedings. Not at all, but it appears crucial to ponder the way the social and historical context in which they are brought to the book.

In my view, there is thus a clear risk that the JEP may materialize as an extension of the Colombian conflict in itself, reflecting the alienation and suspicion between the many parties involved together with social and political problems that lie at the core of the armed conflict. Of course, the JEP is just one component of the broader transitional justice process in Colombia, but it nonetheless plays a key part. Also, a tragedy of transitional justice processes is that if one element is not fulfilled, the others cannot reach legitimacy. In addition, bearing in mind the politicized character of the Colombian judiciary seen in light of the statements, allegations of corruption as well as other irregularities, it seems likely that the current rulers in Colombia will seek to use the JEP to steer a metanarrative which portrays them as the ones did not only dismantle the FARC, but also as those who finally brought the criminal enterprise before justice. There is, thus, an evident danger that the JEP will function as an engine that spurs on polarization in the Colombian social and political climate. These points also underscore what kinds of narratives that could be expected to be created by JEP. The judicialized narrative over a socially, politically, and economically complex picture risks being characterized as a one-sided, simplistic narrative. What is taking place in Colombia and in the JEP at the moment is thus not only a moral and legal dilemma. It is outright dangerous, not only regarding the Colombian transitional justice process as such, but also to the very idea of ICL.

8. Challenging the boundaries of criminal liability: toward a new "storytelling" approach in transitional justice trials?

Above, I have shown how it is possible to characterize the proceedings in the JEP as an extension of the conflict in Colombia. From this perspective, says Eltringham (2017, p. 8), "[d]issent is inevitable. The question is how to manage it." In this section, the focus thus shifts to flesh out a tentative answer out of many to the question how dissent could be dealt with. My argument here is that a narrow, rule-oriented context of determining

criminal liability through a judicial process, the preoccupation with and disputes over the legal idiom inescapably result in a distancing from human experience and emotion, while simultaneously being open for political dominion (cf. Akhavan 2012, p. 174). An extension of this argument is that we are, perhaps, well-suited to stop using an idea of a positivistic "truth" as a hallmark for a meaningful, benevolent transitional justice process. Instead, I suggest, it might be wise for legal actors to opt for a more fluid approach to dealing with historical questions in the courtroom based on a "storytelling"-methodology in their legal professionalism.

An initial question becomes what exactly does the concept of storytelling mean for the purposes I pertain to? To begin these reflections, Richard Kearney reminds us that the act of "storytelling", in which we "recount [our] present condition in the light of past memories and future anticipations," is mimetic in that it carries with it the promise of "a creative redescription of the world" (Kearney 2002). Adding to this, I approach the concept of storytelling as an invitation to join in creative redescriptions in order to achieve the "cathartic conflation of empathy and detachment" (cf. Zolkos 2008, p. 216). By this, our "here and now"-narration is a construction that must be understood as a product of our habitus and our societal position. Thereby, seen in the context of the courtroom, by allowing for the subjects in the courtroom to tell their stories, putting into words emotions connected to the conflict and respecting their stories from the other end could be seen as integral to the process of healing. The underpinning logic is that by telling stories, those experiencing aftermath of a trauma can start "translating the chaotic swirl of traumatic ideation and feelings into coherent language" (Harber and Pennebaker 1992, p. 360).

As noted by Dan Bar-On, a psychologist who worked with Holocaust survivors, "[t]elling stories helped release tension, elicit warm support from other members, and reconstruct a more genuine discourse" (Bar-On 1996, p. 185). This is crucial because, by "owning" a narrative, instead of stultifying it, the subjectivities of survivors may possibly be regained (Scarry 1985, p. 82). For that reason, I would suggest that a storytelling approach is not merely a self-indulgent practice, but rather a therapeutic means to an end: a tool to display and illuminate nuances to complicated legal matters. Not only this, but storytelling is also central to the catharsis of a society reckoning with a history of mass violence (Akhavan 2012, p. 171). Of course, storytelling could be used in an injuring manner. The question of revictimization could, for instance, be considered. The risk is that the courtroom then would be used to harm, and caution would thus be advised. The judicial procedure is a struggle between professionals that represent their clients. This might be a problem for a therapeutic approach. Although, at the same time, emotions already play an integral role in the courtroom (Flower 2018). However, by telling stories in the courtroom, sequenced with allowing for a diverse body of narratives, the *différend* could be deconstructed and added to. As such, storytelling not only implies a "redemptive promise and potential therapeutic effects" for both the storyteller and the listener but also reveals itself as a moral act (Zolkos 2008, p. 216). This is because when faced with abhorrent life histories, we are not altogether powerless – we can tell our story about them.

Any international criminal trial has a unique ability to condemn, in the sense that their judgments will always have strong normative undertones (Kennedy 1987). Bringing to

the fore such nuances highlight the close connection between law and politics in transitional justice projects. In the same way as with traditional literature, the judgment construed by a court creates and establishes narratives. The "story" of the judgment is based on the perpetrator, but also mirrors and reflects the audience in their perception of atrocity and the perpetrators. Through these mechanisms, the judgment is not limited to reviewing past events, but also produces, creates and develops an understanding of atrocity for the future. This is not only a theoretical intervention, but also finds support in empirical terms. In fact, the Trial Chamber in the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* devoted the first 70 pages detailing the Balkan history, an account that was later used in the *Milošević* trial (Wilson 2011, pp. 74–75). In this regard, the judgment links the past to the present in order to give a question to the question: what has happened here? (cf. Zunino 2019, p. 21). It could also be asked, using a contrast, why these types of trials take recourse to such an extensive contextualization while other courts not in, for instance, private processes, tax processes, etc (cf. Emblad 2020).

As noted above, one of the main aims with the JEP was to contribute to the paradigm of restorative justice. A connected question to the idea of storytelling could be: How can the JEP critically deal with the multitude of stories that would be allowed within the processes, and how would it further the aims of restorative justice? I would like to connect this inquiry to a finding that Richard Rorty points to, namely that the transformation of society cannot be based on "convergence toward an already existing truth" (Rorty 1989, p. xvi). Instead, we need to engage in what Rorty calls "sentimental education", in which we aspire to acquire an increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences. From this perspective, moral progress towards restoration, "is a matter of wider and wider sympathy" rather than of "rising above the sentimental to the rational" (Rorty 1999, p. 82). When addressing the legacies of judicial processes, it is important to not only look at the legal realm, but also at justice in the context of broader political processes, artistic depictions, and other cultural insertions that have a huge impact on the ways in which we think about the world. Many times, it could be useful to ponder what really changed the world in a given situation – was it a piece of music or was it a court? Many times, I believe, it would be the former. My point is, as lawyers, we must be modest about our ability to change the human condition. Surely, lawyers play some role, and in this paper, I would contend that one role could be to facilitate for storytelling in the aftermath of trauma, but there are many other instrumentalities that exist in the nexus to the work of lawyers.

Furthermore, it is necessary to ask what a court, such as the JEP, does in the critical case if no one is able or willing to tell stories in a judicial proceeding. The complex conflict history in Colombia, which has been emphasized throughout this text, is challenging a base-rooted information generation. The critical reflection of knowledge regarding the armed conflict is also a tricky endeavor, which could be problematic in the long run if storytelling was allowed for. It should be remembered that the Colombian society is marked by inequalities which include also unequal forms and habits of articulation. How would the JEP deal with such unequal stories and the forms they are told? Also, what would it do in the case of lacking knowledge, or to preferences of not speaking about what occurred in the conflict? In this context, it should be borne in mind that it is

not necessary that all parties speak. Silence does not automatically need to be seen as repressive but can rather be seen as reverent. Adding to this, as Paul Slovic so succinctly observes, borrowing from Mother Teresa, "if I look at the mass I will never act. If I look at the one, I will". He continues by noting that our "capacity to feel is limited" – we become numb to the abstract suffering of individuals although we are primed to respond to the suffering of identifiable individuals (Slovic 2007, p. 90). Widening the narrative in transitional justice trials is within the formulated goals of constructing a reliable historical context of conflict, but the complicated task of establishing the "truth" of events seems out of any capacity, seeing as the multitude of truths that are prevailing. Painting a bigger picture is a task difficult enough to multiply the issues at hand in a trial. A good example of this incapacity is how the FARC background of trade of narcotics is faced with reductionism, being cast as a group of "narco-terrorists" instead as a political enterprise within the public debate, where the complexity of the context is trivialized (cf. Emblin 2021). All these issues would need to be dealt with in some way or another for the proceedings to function constructively.

On this note, it is perhaps time to draw a line between truth and *accepting* a narrative. By extension, there may be reason to stop using the concept of truth as a marker for a valid and sought-after story within the transitional justice paradigm and to be somewhat indifferent, or at least skeptic, towards claims of definite truth. Put in the words of Jakob v. H. Holtermann (2017, p. 227), "the only viable version of this skepticism is not as a blanket rejection, but simply a call for moderation in our ambitions with regard to truth". This does not necessarily mean that a tribunal shall accept all accounts from various legal subjects as dispositive realities, but it may be appropriate to approach historiography in the courtroom with a goal of letting the parties in a limited context create narratives they are content with. In the aftermath of a conflict, it is seldom that there is a simple good/evil storyline possible to follow but rather it is common that followers of both sides of the conflict have experienced trauma while at the same time having blood on their hands (cf. Drumbl 2005). It is thus a complex, hybrid position that must be dealt with. Historians rarely agree on how to write the past. Moreover, there are likely few historians who subscribe to the view that the "clash of bias and counter-bias favors truth discovery" (Damaška 2008, p. 333, Koskenniemi 2011, p. 179). In fact, the more complicated the subject matter and investigation is, the more partisan the polarization. The context of a trial cannot be presumed to manifest good faith from all parties (Baaz 2015). This is an aspect that becomes painfully apparent bearing in mind the recent security problems for social leaders, especially for those from FARC, which means that there is not a safe environment at the time of writing. In my view, this makes it particularly warranted to scrutinize our traditional boundaries of criminal liability, seriously considering progressive alternatives, such as storytelling.

It could be argued that this sits uneasily with what many view as the primary responsibility of ICL institutions, namely the determination of individual criminal responsibility and storytelling is not about legal acrobatics. An even more important question would be: why is it supposed to mitigate the procedural problems of traditional criminal procedures? What I believe is the key point to take away from my article is that storytelling is about regaining subjectivity by rousing healing and empathy. This is a part of the practice of what Paul Gilroy terms "conviviality", which is a social pattern that designates the processes of cohabitation and interaction that makes it possible to

live with difference and hybridity (Gilroy 2004, p. 3). Hence, by accepting storytelling within the courtroom as a didactic tool in the legal process could, at least theoretically, bridge between different social collectives and a way to approach "the Other" and engage in the painful work in the aftermath of cataclysm (cf. Lévinas 1969, p. 39). This is the central theme the storytelling methodology would help in achieving. This is not to say, however, that the idea of a storytelling paradigm somehow explodes the binarism of history-making in the courtroom. Some of the procedural problems of traditional criminal procedures would remain, but the storytelling methodology could be a potential alternative that lawyers could use to gain more nuance of the complex aftermath of armed conflicts. In addition, there are risks associated with putting a premium on storytelling, as well. In my view, it is not credible to claim that giving room for storytelling deconstructs the *différend* and makes it possible for actors to place themselves outside the deployments of legal strictures altogether. The idea of *lex talonis* will likely always be present, and judgments require taking a stance in how to understand a conflict. But my point is that by incorporating a storytelling logic, allowing for a plurality of truths within the international courtroom, we are provided with means to give additional nuance to the official picture. It is a way of adding more layers to the conflict and can aid in exposing and help dealing with the "blind spots" in transitional justice trials. Within the realm of international politics, it will not be possible to achieve any absolute truth, and a contextualized picture may provide a more satisfactory outcome in order to retain legitimacy for contemporary and future transitional justice processes (Gidley and Turner 2018, p. 52). It is for this reason the JEP is, apart from the perils pointed to above, an opportunity as well, if it is carried out carefully. The tribunal is still quite young and very much in the making.

All the above-mentioned difficulties, however, point to the strong possibility that the traditional format of tribunals simply cannot deal with the dilemmas connected to complex historical events in an evenhanded manner and I suggest we may want to rethink our approaches to courtroom historiography if we want the processes to yield results that can enable peaceful co-habitation between old enemies. In this sense, providing space for legal actors to pursue storytelling, and the opportunity for viewing the "truth" in a protean way could help in moving the trial into a different arena in which the proceedings *per se* functions as a form of "narrative therapy" in which, through storytelling, survivors of the conflict can manifest the trauma, transforming it to a collective problem rather than something merely personal (cf. White and Epston 1990, cited in Akhavan 2012, p. 170). This would, in an overarching manner, be in line with what I have proposed in this paper – that by covering our "evil past" in a legal veneer and filling it with inflated implications that go beyond the restraints of positive law, we are faced with a plethora of problems. Where legal narratives are portrayed, overtly or not, as definitive means of containing dispositive realities, jurisprudence may succumb to a broader "temptation of closure" (Friedlander 1994, p. 261). The risks associated with this are tied to creating a chimera of empathy and "progress" while not dealing with the painful work of transformation in the aftermath of cataclysm, when it is precisely that category of questions that are of prime importance in a polarized, post-conflict society (Akhavan 2012, p. 174, Strandberg Hassellind 2020).

9. Concluding remarks

The story of the conflict in Colombia is complex. It is comprised of several interwoven layers and is thus not aptly understood in binary terms. Based on what we have seen so far in the JEP, such as political interference of the operations of the court, allegations of corruption and other irregularities, the tribunal emerges as a particularly delicate institution in an already fragile peace. In the polarized social climate in Colombia, these occurrences seriously compromise the JEP goal of establishing the truth of events and extreme caution is therefore warranted. In spite of bipartisan participation, it is difficult to move beyond the characterization of the trials are, to put it mildly, susceptible to influence by the current leaders in Colombia, who have already tried to use the JEP as a space for steering a metanarrative which portrays them as the ones who did not only dismantle the FARC, but also as those who finally brought the criminal enterprise before justice. There is thus a risk that the courtroom in the JEP may function as just another battleground for the Colombian armed conflict, reinforcing or even being an extension of the Cold War logic, fractional struggles and "Narcopolitics" that lays at the heart of the horrible conflict (cf. Strandberg Hassellind and Baaz 2020). The question if the outcome of the proceedings really will contribute to the reconstruction and reconciliation of Colombia, in order to "enable the state itself to function as a moral agent" (Borneman 1997, p. 23) remains an open one, as does the question: is the traditional format of tribunals appropriate to deal with history?

The aforementioned question leads us back to the Arendtian skepticism concerning the ability of the criminal trial to capture the "truth" of a complex series of events. In addition, in the same way as with any battleground, "dissent is unavoidable." The key question, however, is how to manage it. The argument I have laid forth in this paper relates to the untapped potential in allowing for a plurality of "truths" by virtue of allowing for a fluid form of storytelling within the courtroom. The promises are many, such as therapeutic and convivial aspects, but there are, of course, plenty pitfalls that remain. Nonetheless, I remain convinced that storytelling in the courtroom can help, at least theoretically, in painting a more nuanced picture of depictions of history within the courtroom, or at the very least negotiating and challenging the official picture. However, empirical evidence is needed, and further research necessary. The negotiation of the *différend* attached to the courtroom prompts a call for balancing our ambitions with regards to create historical records through the international criminal trial. In line with this, the suggestion to rely on storytelling may come across as relativistic. Even worse, it could be perceived as a call for impunity. Yet, quite often, it is difficult to understand why the painful past did actually happen. We prefer to approach it in terms of a simple good-evil storyline in order to attain comprehension, but it is seldom that this is representative of the horrors that actually took place. In this sense, providing space for legal actors to pursue storytelling, and the opportunity for viewing the "truth" in a protean way could help in moving the trial into a different arena in which the proceedings *per se* functions as a form of "narrative therapy" in which, through storytelling, survivors of the conflict can manifest the trauma, transforming it to a collective problem. Hence, the recognition of a pluralism of truths may be one way to start doing the painful work in the aftermath of cataclysm in order to tide over the gap between old enemies. In my view, this could be seen as a progressive alternative to the traditional mode of establishing criminal liability.

By way of conclusion, as of December 2021, the JEP has just recently gained momentum. After having delivered their first ruling since its creation just recently, it could be argued that the discussion of a single, transitional justice tribunal in the starting pits of its operations did not take us very far. I submit that the JEP may well function constructively in Colombia's setting, but it is nevertheless important to remember that, currently, there are many issues that casts shadow over its aim to "establish the truth" of what has happened in Colombia, some of which I have tried to document in this paper. In relation to the JEP, many stones remain unturned. In this paper, however, I seek to point to findings of a conceptual character that can be used to inform future research endeavors, both relating to transitional justice in general and the JEP in particular. To name a few queries that remain interesting to ponder: How could courtroom historiography in the JEP be "resisted"? How do we measure the success of a transitional justice trial? Is it viable to cover our "evil past" via the traditional legal idiom? Even if these questions fall outside the immediate ambit of this paper, they are of paramount importance to scrutinize.

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