



Resisting colonial state crime: The experience of the Peace Community of San José de Apartadó

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Abstract

This article suggests that the impunity of crimes of the powerful in the Global South must be understood in terms of a continuity of colonial state crime. To arrive at this argument, the article deploys a case study of the experience of the Peace Community of San José de Apartadó in Colombia; a campesino community that, in the context of institutionalised impunity for the atrocities committed against its members, broke off relations with Colombia's justice system. By reflecting upon opposing narratives surrounding this rupture, the article seeks to better understand the survivors' perspective in a context where narratives of the historically marginalised tend to be occluded by legalistic rationalities that normalise the crimes of the powerful. In so doing, however, the article seeks not to merely give a voice to subjugated knowledges but to mount a challenge to the capacity of modern/ colonial legality (including Transitional Justice) in bringing about changes that can adequately address histories of violence. On the contrary, to address such dynamics, the article argues, we need to address the crimes of the powerful in their continuity with a colonial social order, wherein the dehumanisation of colonial subjects serves to rationalise the plunder of their territories.

Key words

Colonial state crime; crimes of the powerful; transitional justice; legal pluralism

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Resumen

Este artículo sugiere que la impunidad de los crímenes de los poderosos en el Sur Global es consecuencia de la continuidad del crimen de estado colonial. Para llegar tal conclusión, el texto describe narrativas que han marcado la ruptura de la Comunidad de Paz de Apartadó con el sistema de justicia colombiano. En este sentido, se trata de comprender las narrativas de los sobrevivientes en un contexto en el que las voces de los sujetos históricamente marginados tienden a ser silenciadas por argumentos legalistas que normalizan la criminalidad de los poderosos. Además de resaltar la importancia de comprender los saberes históricamente subordinados, el artículo busca resaltar la necesidad de cuestionar la capacidad de la legalidad (incluso la Justicia Transicional) para hacerle frente a las historias de violencia sistemática. En síntesis, se sostiene que los crímenes de los poderosos deben comprenderse desde su naturaleza colonial, cuya persistencia ha facilitado la deshumanización de los sujetos coloniales, racionalizando el despojo de sus territorios.

Palabras clave

Crimen de estado colonial; crímenes de los poderosos; justicia transicional; pluralismo legal

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1. Introduction

In 2018, the Peace Community of San José de Apartadó (Peace Community) published a series of statements denouncing the complicity of paramilitary groups and members of the Colombian army operating in Urabá. The statements described threats against the Peace Community and paramilitary incursions into their territory, including the village Luis Eduardo Guerra (Constitutional Court T-342, 2020). This space is of great significance to the community because in February 2005, leader Luis Eduardo Guerra was killed, along with seven other people, two of whom were children. This heinous event is remembered as the “Mulatos and Resbalosa massacre” and was perpetrated by army members and a paramilitary unit (Lindsay-Poland 2018, Corte Suprema de Justicia 2019). The massacre exemplifies the historical connivance of the Colombian state with paramilitary forces, which has generated major human rights violations in marginalised regions such as Urabá (Giraldo 2010, MacManus and Ward 2015). Historically, Urabá has embodied the violence of Colombia’s prolonged, multi-actor conflict, characterised by mass displacement of rural populations and land dispossession (Salinas *et al.* 2020).

After the aforementioned massacre, the Peace Community broke off relations with the Colombian justice system. Accusations made by the presidency following the massacre, in which the *campesino* community was presented as guerrilla collaborators rather than victims, intensified the reasons for their rupture narrative (Burnyeat 2018). The community has extended this narrative to the reparation policy entrenched in the transitional justice (TJ) frameworks of 2005 and 2016, because these frameworks undermine their historical experience and justice demands by promoting a narrative of termination of the conflict in Urabá and its beneficiaries, which obscures the community’s “alternative territoriality” (Courtheyn 2018, 2). Moreover, in advancing a narrative that calls for the accountability of the powerful in Urabá and the perverse historical negligence of the justice system towards their case, the community poses a fundamental challenge to legalistic understandings of justice with its short-term temporalities, including TJ. In Carlos Manrique’s words, for the Peace Community, “the promise of justice implies something else, something excessive, that cannot be contained in, or attained by the mechanics of juridical accounts, balances and calculations” (Manrique 2014, 142).

The Peace Community’s 2018 statements are an expression of the community’s opposing narrative towards official discourses on paramilitary violence, security and justice in Colombia. Although this narrative gained juridical recognition within the Inter-American System of Human Rights (Inter-American Commission of Human Rights 1997, Inter-American Court of Human Rights 2000, 2010) and in the Constitutional Court (T-249/2003, T-1025/2007, Order 164/2012), the historically asymmetric narratives on victimhood regarding the crimes of the powerful, entrenched in the aforementioned TJ frameworks, have triggered an interpretive turn in the constitutional understanding of the community’s experience of violence. Order 225/2021 of the Constitutional Court is exemplary of the latter. The decision addressed the 2018 statements and maintained that the denunciations made by the Peace Community violated the honour and good name of the army. The ruling was marked by contrasting views among the justices with a tight verdict of 5 to 4 (CC Order 225/2021).

Despite the close verdict, fostered by a dissenting opinion and the community's attempt to nullify the final decision, the court upheld the ruling and ratified a judicial narrative that undermines the justice demands of the community, these being the accountability for the systemic assassination of hundreds of their members, respect for their territoriality and neutrality, and an official apology regarding accusations made in 2005 by the government of the time, which suggested the community were guerrilla collaborators. Assuming that the conflict between the community and the state is largely overcome, and that any pending issue regarding the community's case should be resolved within the TJ frameworks, judicial order 225/2021 urged the community to refrain from making accusations against army members who have not been condemned by the judicial system.

Against this background, this article suggests that the experience of the Peace Community provides a salient case study for understanding colonial state crime (Atilés 2018). This concept seeks to shed light on the criminogenic aspects of colonialism and its persistence in the realities of the Global South. To this end, the idea of colonial state crime invites us to conduct empirical analysis of coloniality (Quijano 2000) and its violent manifestations in the legal subjectivities shaped by the temporalities of formal legality.¹ In this vein, I argue that a colonial state crime perspective is fundamental to analysing the narrative of historical justice advanced by the Peace Community over recent years. This narrative challenges the temporalities of conflict promoted by the victimhood narratives entrenched in the TJ frameworks implemented in Colombia, replicating the ahistorical underpinnings of international justice regarding crimes of the powerful.

Colonial state crime is enhanced by a dominant rationality (Atilés 2018) that renders invisible or unimportant broader temporalities of conflict and structural harm. This rationality is based on abstracted ideas of justice that systematically deny the possibility for historical justice and present the criminogenic aspects of colonialism as something exceptional. It is my contention that this rationality continues to hinder the pursuit of accountability for state sanctioned policies against historically marginalised communities in the Global South, specifically in countries that have endured prolonged political conflicts marked by cold war and colonial narratives (for instance South Africa, Guatemala, Colombia). Notwithstanding that in these conflicts the enmity narratives of authoritarian states reproduce colonial representations of rural populations and their territories (Sanford *et al.* 2016), the ongoing historical harm caused by these narratives, such as systemic deterritorialisation and genocide, are almost non-existent in the legality surrounding TJ and the temporalities informing it. As Atilés (2018) maintains, the terms in which colonial state crime is normally rendered intelligible naturalises the erasure of colonial violence. Consequently, the criminality of the powerful in the Global South is overlooked or seen as an exceptional phenomenon, rather than a systemic practice based

¹ Coined by the late Anibal Quijano (1930-2018), coloniality is an important concept for understanding the epistemic, political and moral persistence of colonialism in the Global South. Coloniality is constitutive of colonial state crime (Atilés 2018). Although widely marginalised in socio-legal and criminological scholarship, recent research on structural racial injustice has highlighted the empirical importance of coloniality in historical injustice. For a study of coloniality in Brazil's racialised criminal justice, see Phoenix Khan 2023. This article's analysis is articulated through the contributions of coloniality in the fields of geography (Courtheyn 2022) and critical approaches to Human Rights and development (Suárez-Krabbe 2016). For a theoretical analysis of the value of coloniality in criminology see (Dimou 2021).

on the highly racialised ideas of nationhood that have normalised the persistence of colonial violence.

In recognising that the army is a juridical person, whose good name and honour are to be protected against denunciations made by historically marginalised citizens, the Constitutional Court has put aside the criminogenic nature of the state in a context historically traversed by the violence of settler colonialism. Thus, the depoliticising effects of legal adjudication serve in practice to reinforce the dynamics of colonial state crime via abstracted notions of equality before the law. This shows the failure of legal adjudication to challenge the ontological truisms that legitimated colonial violence in places like Urabá. In the case of the Peace Community, one such truism is the colonial idea of security embedded in the notion of nation-state sovereignty. The ruling's moralising call for respect for the armed institution is a by-product of the persistence of this truism and the belief that historically excluded communities should trust those who are to securitise nation-state territories, rather than denounce their potential criminality. This begs a compelling question in line with the tradition of scholarship on crimes of the powerful (Pearce 1976): can an adequate understanding of crime emerge when the powerful cannot be subjects of suspicion?

The experience of the Peace Community has been extensively researched. This broad body of research ranges from anthropological analyses (Aparicio 2012, Burnyeat 2018) to critical human rights insights (Sanford 2004, Tapia 2018), political science (Uribe de Hincapié 2007, Anrup and Español 2011) philosophy (Manrique 2014), state crime criminology (MacManus and Ward 2015) and geography (Courtheyn 2018, 2022). This article takes inspiration from these contributions and seeks to dialogue with them, underscoring the role of ethics in socio-legal studies (Norrie 2017). However, the argument here stands out in that it seeks to emphasise how the rationality surrounding the adjudicative approaches that have recently interpreted the community's case has in fact served to reinforce the persistent dynamics of colonial state crime.

The article proceeds in two sections. Section one describes the dominating rationality that has allowed for the normalisation of colonial state crime in Urabá. The section highlights the relationship between foundational nation-state narratives of civilised citizenship and the chronic impunity enjoyed by those responsible for colonial state crime in Urabá. I argue that the legacy of the colonial principle of *terra nullius* has enhanced this impunity. As a settler colonial space, Urabá is not alone in this respect. Thus, the section briefly presents the disturbing similarities between nation-state narratives in Australia and the role of legality in the reproduction of foundational enmity narratives, embedded in the exclusionary ideologies of citizenship in the two countries.

The second section shows how these enmity narratives have been resisted by the Peace Community in Colombia. My analysis of the resistance narrative advanced by the *campesino* group is based on the anthropological approach to legal pluralism (Griffiths 2017, Wolkmer 2018).² This approach is important to understanding the community's experience because it allows us to observe how legal orders differ on several dimensions,

² The term *campesino* differs from the English translation "peasant". As Burnyeat (2013) shows, *campesino* is a cultural category in Colombia and other Latin American countries. The category does not fully correspond to small-scale farmer. Also, as indicated by Courtheyn (2018), the term involves racial, political and social aspects of a subjectivity that challenges modern and capitalistic understandings of land tenure.

one of those being the social scope and basis of legitimacy (von Benda-Beckmann and Turner 2018). Legal pluralism allows us to uncover the epistemic injustice embedded in the securitisation policies of the nation-state and the legalistic interpretive frameworks through which victimhood has been historically understood.

The modern/colonial understanding of legality defines victimhood and crime by a monist understanding of legality that presents the state as the only legitimate lawmaker. In contrast, legal pluralism underscores that the existence of legality does not depend necessarily upon state recognition for its validity (Wolkmer 2003, 2018, Griffiths 2017). Drawing on this aspect of legal pluralism, this article emphasises how legality emerges beyond the monist paradigm of nation-state sovereignty, which allows us to observe the historical configuration of legality and the justice struggles advanced by otherwise neglected communities of the Global South like the Peace Community. In this vein, my contention is that a legal pluralist perspective invites us to revisit the sociohistorical aspects of the Colombian conflict, and the opposing narratives of crimes of the powerful and security to which it has given rise. The remainder of the section elaborates on the recent rulings of the Constitutional Court and its limits to fully comprehending the community's rupture with the justice system and its demands for justice.

2. A king's visit to Urabá: Spatial elements of colonial state crime

Located in the north-western corner of today's Colombia, Urabá is a place that connects colonial histories. In 1956, King Leopold III visited Turbo, a neighbouring town to Apartadó (Steiner 2017). The king's visit was motivated by his archaeological interest, which led him to Santa Maria del Darién, Latin America's first episcopal city founded by Spanish conquerors in 1510. Accounts of the visit indicate that Leopold III was declared an honorary guest of Turbo by decree, in "what was the first piece of legislation to be enacted in Turbo" (Steiner 2014, 187). Likewise, the king's attendance to Sunday's mass was considered of great benefit to the country (Steiner 2017). It was the time of "La Violencia (1946–1964)", the period in which the Liberal and Conservative parties fought fiercely over the territorial control of the country, causing a death toll of approximately 200,000 people and extreme rural poverty (Guzmán *et al.* 2005, Uribe Alarcón 2018).

The designation of the Belgian king as a guest of honour in Turbo illustrates the rationality of colonial state crime, according to which, law is used to reaffirm colonial power, while the historical experience of the inhabitants of colonised territories is erased (Atiles 2018). This foundational use of legality to declare Leopold an honorary guest exemplifies the role of coloniality within the epistemic framework of the nation-state and the diplomatic relations of the capitalist world system. Through these, colonial violence is concealed, while establishing its own ontological truths (Suárez-Krabbe 2016). The fact that Colombian lawmakers did not challenge Leopold's visit indicates the extent to which certain issues are rendered invisible, notably the Belgian Monarchy's crimes in the Congo, as well as the struggle for the liberation of the Congo that was taking place at the time of the king's visit to Urabá. It also sends a strong signal about which events and personalities are deemed worthy of honour. Despite the geographical distance between places like the Congo and Urabá, their historical injuries are interwoven by extractive economies and the normalisation of colonial state crime that informs local and international legality and diplomacy (Ó Síocháin 2014).

This deliberate disregard of colonial crimes draws our attention to the criminogenic nature of colonialism and its historical trajectories of harm, largely disregarded and ignored within criminology and related fields such as international criminal law and TJ (Agozino 2003, Dimou 2021).³ At the core of colonial legal epistemology lies the normalisation of the violence of the principle of *terra nullius* (Mattei and Nader 2008, Rojas-Páez 2017). According to this colonial principle, colonised territories were empty spaces, subject to the will of colonial power, manifested in the imposition of anthropocentric property regimes related to land ownership, resources and exploitation. Therefore, it comes as no surprise that during his visit, Leopold III constantly mentioned that the Darién fields in Urabá – today used as a dangerous migratory route – reminded him of the Congo (Steiner 2017). The use of legality to honour the visit of a king with deep links to colonial genocide is illustrative of what Lewis Gordon calls “bad faith” (Gordon 1999). Bad faith is embedded in the dynamics of legal knowledge production that inform the acritical historicization of colonialism within the legality of nation-states of the Global South. The criminality of the powerful is deliberately put aside from the legal realm because bad faith entails choosing to believe and defend comfortable lies about other groups (Gordon 1999, 75) and their histories.

Due to its proximity to the Atlantic and Pacific oceans, Urabá has been coveted for its natural resources since colonial times (Courtheyn 2018). Gold was abundant in this part of northern Colombia and conquerors such as Vasco Nuñez de Balboa found and exploited it from the 1530’s (Monroy 2013). However, the conquerors’ campaigns were far from peaceful and involved not only massacres but also the looting and plundering of Indigenous cemeteries (Monroy 2013). This exemplifies the racial violence entrenched in colonialism, which Suárez-Krabbe describes in her work on the struggles of the Indigenous communities of the Sierra Nevada, using the Indigenous notion of the death project (Suárez-Krabbe 2016). In her words, “the death project is the exercise of the power of whiteness, including its capacity to dispose over life and death as these are defined and hierarchized within a colonial ontology” (Suárez-Krabbe 2016, 51).

The violent legacy of the *terra nullius* principle can also be observed in the implementation of large-scale extractive projects in Urabá. Throughout the first half of the XX century, French, German and North American companies exploited different resources such as wood, rubber and the banana monoculture (Monroy 2013).⁴ This management of marginal territories was grounded in the idea of the emptiness of formerly colonised territories and the imposition of the enclave economy as a means of

³ In a recent paper Dimou outlines this problematic. In her analysis, Dimou draws on the contributions of Nigerian scholar Biko Agozino and various Latin American thinkers of the decolonial tradition such as W. Mignolo, R. Segato, and M. Lugones. As Dimou maintains, an important contribution of the decolonial perspective concerns the constitutive relationship between colonialism and modernity. In this article I use the expression modern/colonial legality to emphasise the political and historical interdependence of colonialism and modernity.

⁴ Among the corporations that were present in the region, it is worth mentioning the United States Rubber Corporation and the French company Río Sinú (Salinas *et al.* 2020), and the Hamburg Kolumbien Banana Gesellschaft, which was granted a licence for 50 years in first half of the past century. The United Fruit Company arrived from neighbouring Magdalena in the 60s after the scandal of the Banana Massacre of 1928 (Monroy 2013).

economic development.⁵ The formation of enclaves was central to the governance of national territories, defined by the 1863 constitution as “vast jungles with great economic potential but ungovernable because of being inhabited by wild tribes” (Serje 2011, 16). According to Serje, these large areas accounted for half of the national territory, and the aforementioned constitution established that they were to be administered by the central government for their colonisation and improvement (Serje 2011).

Enclaves intensified at the outset of the 20th century when Law 66/ 1909 authorised the granting of concessions for economic exploitation to public and transnational corporations. According to Serje, the concessions were a sophisticated version of the colonial system of *encomienda* (Serje 2011). As a technology of settler colonialism in many of the Spanish colonies, the *encomienda* consisted of land grants given to specific colonisers by the Crown (Suárez-Krabbe 2016). The Indigenous communities who inhabited the land were left at the mercy of the colonisers who charged them a tax. In exchange, “the indigenous communities were to be instructed in the Spanish language and the Catholic faith and to receive the so-called protection” (Suárez-Krabbe 2016, 50). Until today, the enclaves are the embodiment of coloniality and replicate the idea of emptiness engrained in the *terra nullius* doctrine. As Serje highlights, the enclave economy “has not only allowed for the construction of roads and the large-scale exploitation of resources in the country, it has also justified the extermination of Indigenous communities” who inhabited the territories given in concession (Serje 2011, 268).⁶

Another element of the development of enclaves concerns its security strategies, through which state, but also private, armies seek to guarantee the permanence of foreign investment and infrastructure (Vega Cantor 2014). In addition, Urabá was one of the national territories where the provision of security by legal and illegal groups for the protection of largescale development projects, including large monocultures such as banana since the 1960’s, African palm and extensive cattle farming since the late 1990’s, contributed to the development of a violent political economy of conflict. This is illustrated by the funding of paramilitary groups by transnational corporations such as Chiquita in the late 1990’s (Salinas *et al.* 2020).⁷

The above use of Urabá’s territories shows another feature of colonial state crime; the historical relation between the state, corporations and colonialism. As Atilés argues, “colonial domination was not limited to the government of colonies, but colonial states

⁵ Margarita Serje defines enclaves as: “areas surrounded and enclosed by territories that belong to a different regime within a country” (author’s translation) (Serje 2011, 262).

⁶ Serje draws on Vega Cantor’s work, who describes the extermination of the Yariguíe community in Santander, a region given in concession to TROCCO (see Vega Cantor 2004). Although Indigenous communities have borne the brunt of development, their extermination continues to be treated as an exceptional phenomenon. In Colombia, 68 out of the 115 Indigenous communities are facing extermination (ComunicaONIC 2020). Serje also shows that regions where enclave economy was installed presented high homicide rates at the end of the past century (Serje 2011). For an Indigenous account of the atrocities caused by the rubber industry in the Amazon see Candre Yaramakury 2014.

⁷ The Chiquita Brands case is well-known. In 2007 the company was fined because it made payments to paramilitary the AUC between 1997 and 2002 (Centro Nacional de Memoria Histórica – CNMH – 2022). However, as Aviles (2006) shows, there was legal framework that endorsed this practice, which was aligned with the resource extraction development policies implemented by central and regional governments in Urabá.

made systematic use of national and transnational corporations and local elites to ensure the survival of colonial rule” (Atilas 2018, 315). The outcome of this criminogenic relation is the deterritorialisation of Indigenous and ancestral communities. In the ancestral Katío language, Urabá means “plantain river” which, as Monroy asserts, is an expression that embodies “the depredation and exploitation to which the jungles of the Darién and Urabá have been subjected for centuries” (Monroy 2013, 227).

2.1. *Nation-state legality as rationalised continuity of Terra Nullius*

The continuities of *terra nullius* in Urabá have meant that the ways of life of its inhabitants have been systematically disregarded. Similar to First Nations communities in North America (Churchill 2004, Castillejo-Cuellar 2013, Purvis 2018) or Australia (Grewcock 2018), ancestral inhabitants of Urabá such as the Katío and Cuna Indigenous communities were “de-indigenised” and dispossessed through civilisation discourses embedded in religious missions authorised and financed by the state (Gómez and Rodríguez 2018). The concept of sovereignty played an important role in the normalisation of *terra nullius* and its dehumanising implications for the colonised. What happened in Urabá and many other colonised territories with religious missions falls within this line of reasoning. This, concurrently, reflects the imperial dynamics of power surrounding the hierarchical production of legal knowledge, embedded in civilisational violence, justified in legal arrangements such as the Berlin conference (1884–1885).

In 1887, two years after said conference, in which powerful European nation-states divided the African continent, the Colombian state signed a treaty with the Roman Catholic Church (Concordato 1887). Article six of this treaty stated:

The state and the church will cooperate duly and efficiently to promote the human and social conditions of Indigenous communities as well as other residing populations of marginalized zones, that require a special canonical regime. (Concordato 1887, author’s translation)

Although Catholic missionaries such as the Cappuccino order were present in Urabá before formal independence from Spanish rule in 1810 (Monroy 2013), the reaffirmation of the civilising rationality that justified colonial missions in the republican era illustrates the complicit role of legality in the erasure of colonial violence. On the grounds of the aforementioned treaty, the Catholic Church founded and ran boarding schools where Indigenous children were forced to practice Catholicism and speak Spanish, obligations intended to convert them into good, civilised citizens (Suárez-Krabbe 2016). The racist ideology of “kill the Indian to save the man” (Churchill 2004), that justified genocides in settler colonial societies, was also of great importance in the formation of the exclusionary idea of nationhood that has marked the conflicted history of Colombia’s peripheral territories (Serje *et al.* 2007).

Alongside the language and faith requirements, “good citizens” were expected to comply with assimilation laws created by the nation-state. A remarkable example of this type of regulation was law 89/1890, which in its first article stated, “The general legislation of the Republic will not operate among the savages, who will be progressively

reduced to civilised life through missions” in the early described national territories.⁸ This law engrained the racist representation of ancestral and Indigenous communities and undermined their legal capacity based on racial prejudice.

The above-described set of legality is illustrative of what Gomez-Correal terms the “hegemonic emotional habitus” that has historically informed the formation of the Colombian nation-state and its narratives on enmity (Gómez Correal 2015, 109). These narratives combine modern/ colonial ideas of civilised citizenship and violence against any person or group opposing the homogenising political project of the nation-state. The complicit role of modern/colonial legality and legal adjudication in the reproduction of these enmity narratives has been pervasive.⁹ As illustrated by a ruling from the Council of the State produced in 1922:

Regarding the Indigenous savages, which amount to 200,000, according to calculations, the republic has passed several laws with the purpose of reducing them into populations and civilising them (...) almost none of said laws have been fully implemented, and the little that has been done to implement them has not produced satisfactory results (...). It seems that progress has begun regarding this issue, as missions have been funded, which is to our mind the best means of civilising the Indians. It may be that there comes a day when we no longer talk of Colombian savages, because there will not be any. (Council of State, Section first, t 972, 1922, cited by Gómez and Rodríguez 2018, 53; author’s translation)

This ruthless endorsement of the funding of missions normalises what Nelson Maldonado-Torres calls the “non-ethics” of war (Maldonado-Torres 2007), that characterises colonial state crime and the wider death project. Maldonado-Torres’ notion of the non-ethics of war is an in-depth reflection of the ontological meanings of the conquest of the Americas in 1492 (Maldonado-Torres 2007). By non-ethics of war, Maldonado-Torres means that the colonised peoples were dehumanised on the basis of racialised othering ideologies that justified the colonisation of the Americas. In analysing the reasons for the voracious violence of the conquest, Maldonado-Torres highlights that such violence was rooted in the colonial belief that the ancestral inhabitants of the Americas were not human beings. For the Puerto Rican scholar, the act of doubting the humanity of other human beings is constitutive of a misanthropic scepticism, through which the lives of colonial and racialised subjects are considered dispensable (Maldonado-Torres 2007, 246).¹⁰ This misanthropic scepticism has been the kernel of historical injustice grounded on “coloniality and entails the supposed inferiority of

⁸ Although this article was declared unconstitutional in 1996, the representation of Indigenous communities as inferior continues to play central role in the country’s development policies. The law was aligned with similar legislation of Settler Colonial nations, for instance Canada and its Indian Act of 1876 which legalised the creation of residential schools. Urabá was considered a national territory and as such, it was subjected to missions and the enclave economy.

⁹ These enmity narratives are part of a wider process of othering through which the rights of the enemies of the nation-state project are systematically neglected. Relatedly, in the context of colonial state crime, enemies of the nation-state project do not have rights and the laws of war do not apply to them.

¹⁰ Maldonado Torres’s analysis is fundamental to shedding light upon the neglected criminogenic aspects of colonialism. The Valladolid (1550-1551) debates provide the foundational example of the non-ethics of war in International Law. The non-ethics of war is articulated with the work of Franz Fanon and liberation philosopher Enrique Dussel. Dussel introduces the concept of “misanthropic skepticism”.

colonised subjects for mere reasons such as their race, gender, or precedence” (Atilés 2018, 317).

The non-ethics of war can be understood as the inter-subjective dimension of *terra nullius*. Since this principle established that the places inhabited by the colonised peoples were empty, the spatial and social relations advanced by these peoples were deemed inexistent, which resulted in the systemic denial of their humanity and other forms of being. This was endorsed by modern/colonial legality as observed in the Valladolid debates, through which it was discussed whether Indigenous communities had a soul and were worthy of rights. As Suárez-Krabbe asserts, the notion of humanity informing the criteria for defining the humanity of colonised peoples within the foundational debates of international law, “dehumanised those who were not Christian, European, property owning, productive and men” (Suárez-Krabbe 2016, 58). This was fundamental for the emergence of the death project. In Suárez-Krabbe’s words: “inasmuch as the imperial attitude was also displayed in the conquered territories that were seen as *terra nullius*, that similarly to the colonised subjects was to be penetrated exploited and domesticated, the Death Project had already emerged” (Suárez-Krabbe 2016, 69).

In addressing questions of historical justice that involve the criminogenic aspects of colonialism, the legality of newly formed nation-states reproduces and radicalises the non-ethics of war. This can be observed in different settler colonial contexts. In his analysis of genocidal policies in Australia, specifically the uprooting of Indigenous children, Grewcock cites the following extract of the Chief Prosecutor of Aborigines in Western Australia:

The native must be helped, in spite of himself. Even if a measure of discipline is necessary, it must be applied (...) there must be complete and enthusiastic cooperation between those charged with its initiation and conduct without reservation, and no backsliding, changes or let down behind Authority’s back must be permitted (...) the end must justify the means employed – to wipe out forever an existing blot upon Australia’s escutcheon (...). (Neville 1947, 80–81, cited by Grewcock 2018, 224)

Shaped by the falsehood embedded in *terra nullius*, the sovereignty of nation-states and its legality are articulated here, with dehumanising implications for the colonised, normalising historical injuries. As Mandani (2020) recalls, drawing on the work of foundational authors such as R. Cobden and J.S. Mill, this articulation was deliberate. It was maintained that sovereignty applied only to European nations, which consequently had the right to colonise “the uncivilised who were at the mercy of the civilised because they lacked sovereignty” (Mandani 2020, 7).

The *terra nullius* principle has been fundamental to shaping the dominating rationality of colonial state crime in Urabá, through which local elites, replicating civilisation discourses on nationhood, have promoted the idea that the state has the right to secure land as a commodity for extractive economic purposes. As a result, other forms of land tenure and territorial relationships developed by the inhabitants of these territories have not been properly considered, like in the case of Pacha Mama (Suárez-Krabbe 2016). This central element of historical injustice is widely bypassed within formalistic understandings of legality and the idea of the securitization of peripheral territories as militarisation endorsed by nation-state narratives. In prolonged conflicts like

Colombia's, the violence of this narrative has informed the political agenda of armed groups, closely linked to state ideas of development and resource extraction.

A paramilitary commander's statement illustrates the colonising logic to which Urabá was subjected as a peripheral territory:

We want permission to build new models of businesses, enterprises (...) in Urabá we have palm crops, I personally found the businessmen to invest in long-lasting and productive projects. The idea is to get rich people to invest in these projects in different zones of the country. Once the rich arrive in those zones, state institutions arrive. Unfortunately, state institutions only get involved when there are rich people there. We need to take the rich to all the regions of the country and that is one of the missions that all commanders have. (Semana 2005, cited by Vega Cantor 2014, 65; author's translation)

In sum, in Urabá the legacy of *terra nullius* can be observed in the modern/colonial laws that regulated peripheral territories, leading to the deterritorialisation of ancestral inhabitants through the enclave economy and religious missions. The normalisation of this territorial and human representation of Urabá was embodied in securitisation policies of the past century. Although exceptionality policies intensified in the 1990's and at the beginning of this century, as exemplified by the declaration of Urabá as Rehabilitation Zone, where military interventions were authorised to guarantee public order, the idea of militarization as a means of territorial and population control has been historically entrenched in Urabá. The establishment of military majors resulted from a 1951 letter, addressed to the president by the Antioquia governor, in which it explained that the only way to control political turmoil in the ethnically diverse region was to leave it under the authority of the military (Monroy 2013). Until the late 1980s military majors and inspectors were designated as the main authorities in several municipalities of Urabá, including Apartadó.

Otherring narratives against political opponents justified the criminalisation of the communist party in 1954, and required workers (many of them with Black and campesino background) from infrastructure projects to carry passes. Those who did not carry the passes, were expelled from the region. The resemblance of this practice with the South African Apartheid is illustrative of the racialised nature of legality in a cold war context exacerbated by the enclave economy and a model of resource extraction development promoted by the state and corporations.

The non-ethics of war normalised the enmity narratives entrenched in the modern/colonial nation-state, and armed groups intensified it against formerly colonised subjectivities. For instance, Cuartas (2014) maintains that the purpose of the paramilitary groups was to clear the territory of *campesinos*, and within that category they included ethnic communities. As Courtheyn (2022) shows, despite having been characterised as mixed race, mestizo people, many Peace Community members are of Indigenous descent, however, the colonial racialisation that informed the nation-state process resulted in their "de-indigenisation" (Courtheyn 2022, 107). Hence, the importance of understanding the Peace Community's alternative territoriality, which will be addressed in the next section.

3. Alternative legality and the possibility of neutrality in the midst of war

We, the Indigenous communities of Antioquia, are neutral to the armed conflict, but not indifferent to death.

(Indigenous Organisation of Antioquia, cited in Burnyeat, 2018, 69)

Inspired by similar declarations to the above, in 1997, the Peace Community declared its neutrality in the face of all actors of the Colombian armed conflict and refused to leave their territory (Uribe de Hincapié 2007, Burnyeat 2018, Courtheyn 2022). The 1990s was a decade in which the violence in northern Colombia reached dramatic levels. In Urabá, between 1997 and 2004, 318,349 people were forcibly displaced, which accounts for nearly 50% of all victims of this crime throughout Colombia over the same period (Salinas *et al.* 2020). Similarly, during the 1990's, as Suárez indicates, 96 massacres were reported (Suárez 2007).¹¹ The majority of victims belonged to either *campesino*, Indigenous or Black communities, which illustrates the continuities of the previously described death project and its unaccounted for criminogenic effects.

In defence of life amid its destruction, 500 years after Columbus' arrival to the Americas, the voices of the subalternised were raised. The defence of life was embodied in the declarations of neutrality upheld by different communities (Burnyeat 2018, Courtheyn 2018), who used such declarations as a strategy for resisting deterritorialisation. In their opposition, these communities emphasised the importance of understanding the harm caused by colonial injuries and their ongoing consequences. Struggles against colonial domination have been historically marked by resistance to deterritorialisation. The collective suicides of Indigenous communities, who chose death rather than slavery or displacement from their territories during the conquest, exemplify the ontological dimension of this practice (Zinn 2003, Serje 2011). Alas, the normalisation of the impunity enjoyed by colonial state crime, exacerbated by the homogenising violence of the nation-state has obfuscated this ontological dimension, largely neglected within criminology and its related fields such as international law.

In the case of the Peace Community, refusing to leave their territory in a context of chronic insecurity gave way to what geographer Chris Courtheyn (2018) terms alternative territoriality. According to Courtheyn:

In contrast to the state territoriality of control over land and population, which produces nationalistic and capitalist subjects, San José's peace project produces a communal and solidarity subject that nurtures a relational territoriality between humans and 'nature' as well as across communities resisting the state-corporate violence of land grabbing. (Courtheyn 2018, 5)

This alternative territoriality is fundamental to understanding the Peace Community's history and its collective subjectivity. Through this form of territoriality, the Peace Community resists the commodification of land, rooted in the colonial death project. Relatedly, this territoriality is also constitutive of a different approach to safety, that promotes ideas of food security and food sovereignty (Courtheyn 2018). This approach

¹¹ The violence in Urabá is representative of the complexity of the Colombian conflict. FARC and AUC are the actors responsible for massacres against civilian population, including ex combatants of EPL and some FARC units. The Chinita massacre committed by FARC in 1994 is representative of this retaliatory tendency (see Suárez 2007).

questions the idea of security as military control endorsed by armed actors including state forces. Understanding these two aspects of the Peace Community's subjectivity poses a major challenge to the modern/colonial epistemic frames of nation-state legality, as exemplified by the Constitutional Court's latest ruling on the community's case, referred to at the outset of this article.

Although inspired by the Geneva Convention's idea of neutrality and the need to protect civilians during armed conflicts, the Peace Community's neutrality entails a deeper approach to this principle, rooted in the ethical grounds of an alternative legality that rejects formalistic understandings of justice and brings to the fore the question of universal justice (Lanchero 2005). Further, in the community's case neutrality was declared by the civilian population and not by belligerent parties, as the Geneva Convention states. The community's late leader Eduar Lanchero rightly emphasised this aspect of the Peace Community's coming into being. In his words:

The Peace Community's process seeks to reaffirm itself in an alternative vision of legality, the process' major regulatory force stems from the fact that the total rejection of war is what defines and identifies the community, while the participation in the war is what excludes it. (Lanchero 2005,152; author's translation).

As will be observed in the remainder of this section, recognising this neutrality would imply the recognition of the political conflict in the country, a situation that was systematically denied by the security policies advanced by far-right President Álvaro Uribe's governments (2002–2010), but that seems to have some effect on the recent constitutional rationale on the community's case.

The interpretive use of the Geneva Convention by the Peace Community localises the spirit of the Geneva Convention and challenges the death project by re-signifying the value of neutrality and challenging understandings of international legality, which have historically undermined the agency of historical victims and their justice demands. This strategic use of the international legality – borrowing from Suárez-Krabbe – counters coloniality's intense “epistemic, spiritual, social, material and political [impact] worldwide” (Suárez-Krabbe 2016, p. 9).

Although the Peace Community's alternative legality has coexisted with the violent legalities of armed groups in Urabá since the end of the 1990's (MacManus and Ward 2015), it is important to note that the Peace Community's stance arises from different moral grounds, as Lanchero's previously referred to remark shows.¹² Moreover, the experience of the community is representative of the contributions made by the Latin American tradition of legal pluralism in historical justice, through which collective subjectivities such as the landless movement in Brazil have advanced territorial struggles (Wolkmer 2018). These struggles fight colonial legacies and understand legal pluralism as an emancipatory project. As Wolkmer writes:

¹² MacManus and Ward (2015) highlight that in conflict zones like Urabá, armed groups develop punitive repertoires in order to control and discipline the people who inhabit the territories where armed conflict takes place. Drawing on Benjamin's analysis of the violent nature of law, the aforementioned authors show how in war zones, violent interventions are foundational of legal orders implemented according to the political agendas of armed groups. Lethal violence is a central part of the punitive repertoires of armed groups, as exemplified by the use of massacres as a means of deterrence for the population.

Given the limitations of the formal basis of the liberal and monocultural model of legality, in their condition of new collective identities, social movements embody a political and legal pluralism of transformative nature, which emerges out of the struggle, resistance, and political demands surrounding the shortcomings, aspirations and fundamental human needs. (Wolkmer 2018, 297)

In this vein, the Peace Community's alternative legality resembles these projects and challenges the hegemonic individual understanding of legal subjectivity by emphasising an ethics of solidarity. According to Wolkmer, this ethics differs from the abstract rationality of modern legality for it originates from the needs of the excluded and proposes the construction of a pedagogical praxis in order to enhance the emancipation of the "injusticiados" and expropriated (Wolkmer 2003).¹³ Accordingly, the Peace Community's alternative legality embodies a way to resist colonial state crime.

Since their foundation in 1997, the Peace Community has enacted their own legality, which can be observed in the foundational declaration of the community and their internal code (MacManus and Ward 2015). Among the rules established in concise documents, it is worth mentioning several points. Members of the community cannot use weapons, drink alcohol nor grow illicit crops (Banco de Datos de Derechos Humanos y Violencia Política de CINEP 2005). Neither can they provide information nor assistance to the parties of the conflict (Banco de Datos 2005) and, more importantly for the purposes of this paper, paragraph e of article 3 establishes that members of the community should fight against injustice and impunity (Banco de Datos 2005).

In declaring themselves neutral in 1997, the community gave way to a context of legal pluralism which has served them in advancing a distinct narrative about the moral value of their experience of survival and resistance. However, this neutrality attempt did not inhibit armed actors' violence, as they continued to perpetrate selective killings and massacres against various members of the community. In the very same year as their foundation, FARC and paramilitary forces targeted and subsequently killed community leaders in massacres (Courtheyn 2022).

Based on interviews, MacManus and Ward (2015) report that since the foundation of the Peace Community, 200 community members have been killed. In fact, the relationship of the Peace Community with the Colombian state radicalised in 2005 after the Mulatos and La Resbalosa massacre. As earlier stated, following this event the Peace Community broke off relations with the Colombian justice system. This rupture materialised in the incorporation of another rule into the community's legality: the rejection of the reparation policy offered by state TJ policies. The following statement of a community member illustrates the moral ground of the rejection:

The reason why the community does not agree with individual reparations is because the state's reparation programme is linked to the Justice and Peace Law for the demobilisation of the AUC (paramilitary groups) (...) individual reparations serve to legitimate everything the state has done and create the idea that anyone who has money can kill, and pay the money and get away with it. (Community member's remarks, documented by Burnyeat 2018, 161)

¹³ The term "injusticiados" (Wolkmer 2003, 14) resonates with Fanon's (2004) "wretched of the earth". I prefer the Spanish/Portuguese word to underscore the subjectivities that have historically been subjected to modern/colonial injustice and that scape the realm of abstracted individualistic formal subjectivity.

This statement shows a challenge to the teleological character of TJ policies based on a discourse of individual rights and the naturalisation of the capitalist economy without considering the actual political economy of war, historically rooted in coloniality as expressed in the nation-state's exclusionary ideas of citizenship. With this in mind, this article now turns to illustrate how the community's rupture with the Colombian justice system brought about a tension that is yet to be resolved. This highlights the need to put forth a broader interpretation of the impunity of the crimes of the powerful, one that challenges its formalistic ontological historicization and goes beyond the modern/colonial notion of nation-state sovereignty.

3.1. *The rupture narrative and judicial interpretation*

After the Mulatos and La Resbalosa massacre, based on their principle of justice entailing the struggle against impunity, the Peace Community announced their rupture with the Colombian justice system. In their 2005 *comunicado* the community made four requests that are summarised as follows:

Firstly, the community demanded that the government retract former president Uribe's accusations that they were guerrilla collaborators. Secondly, they demanded respect for humanitarian zones [according to human rights law principles]. The third request called for the removal of state Armed Forces from San José and finally, the community demanded the creation of a 'Commission for the Evaluation of Justice' to clarify the crimes they have endured since their foundation. Since 2005, these four points have been the conditions on which the community would resume dialogue with the Colombian state. (Burnyeat 2018)

The four demands are deeply rooted in the Peace Community's collective subjectivity and the neutrality and justice principles that have defined it since 1997. Concurrently, the four interrelated demands constitute a form of resistance to the legal rationality that obscures colonial state crime and its normalised impunity, a way in which the *injusticiados* counter the non-ethics of war informing prolonged conflicts such as Colombia's.

Two years after the 2005 massacre, the Constitutional Court produced ruling T-1025 of 2007, which ordered the government to address the four requests expressed by the community. Since the government did not comply with this sentence, the court produced Order 164/2012, which sought to monitor compliance with the community's conditions for resuming dialogue with the state and its justice system. In 2017, more than ten years after the beginning of the rupture and influenced by the victimhood narratives entrenched in the TJ frameworks of 2005 and 2016, the Constitutional Court produced Order 693, which referred the community's case to the Special Jurisdiction for Peace, the TJ tribunal established by the 2016 accords between the FARC and the Colombian government.

The referral of the case was grounded on the court's interpretation of the nature of the orders established in the 2012 ruling (CC 164/2012). According to the court, these orders are of a "complex" nature, meaning that the judicial body can delegate the task of monitoring the implementation of the ruling to other state institutions.

Based on this technicality, the court emphasises that in the community's case, "its role is restricted as it cannot replace the institutions in charge of evaluating the required actions

to resolve a situation” (CC Order 693/2017). The court’s positioning shows an inherent limitation to judging crimes of the powerful and the relationship with security policies that favour militarisation. This can be observed in the court’s reading of the state’s compliance with the second and third demands of the community, these being the recognition of the humanitarian zones and the removal of military forces near the community’s territory. With respect to the former, an extract of the aforementioned ruling states:

The court cannot request that the Colombian government agree upon demilitarised zones or “protected zones” as articles 59 and 60 of the Geneva Convention suggest, partly because such a request would entail the recognition of the belligerency of the groups that have occupied the territories left by FARC. The control of public order and military strategy are beyond the jurisdiction of this court. (CC Order 693/17, author’s translation)

The above extract shows how the court undermines the community’s alternative territoriality and the ethical substance of their alternative legality, informed by a localised use of the Geneva Convention as described earlier. As a result, the possibility of resolving the tension between the community and the justice system is marred by an argument that reproduces the antinomic character of modern legality (Norrie 2017). Through this, substantial arguments are displaced by those that focus on preserving legal form, leaving the possibility of historical justice unaddressed.

Following the same line of argument, concerning the removal of the armed forces from the community’s territory, the court considered that the relocation of the Voltigeros military battalion 400 metres from its original location, indicates that there has been an important degree of compliance by the state with the community’s third demand (CC 693/17).

The court cannot see the fact that the Voltigeros military unit has been moved 400 metres, as anything but positive, in spite of the military advantage to armed groups operating at the margins of the law and the possible sacrifice of the troop’s security. The court understands that any additional withdrawal requires examining a series of logistical variables of military strategy, which this court is not entitled to judge. (CC Order 693/17)

As the extract shows, the court does not consider the possibility of demilitarisation, which hinders the possibility of bringing about a significant change in the state’s securitisation practices. From a colonial state crime perspective, the question that arises is: to what extent can a judicial body interpret the violence of coloniality and the moral force of the community’s narrative of resistance against it?

The rationale of the court was deeply shaped by the official apology presented by the Santos government on 10th December 2013. Through this apology, the government retracted the accusations made against the community which had categorised them as guerrilla collaborators in 2005. According to the court, the government’s public apologies “constitute an unquestionable contribution to the restoration of the dignity and good name of the Peace Community, with regard to the stigmatisation and aggressions to which the community has been subjected” (CC Order 693/17).

The Peace Community partially acknowledged the presidential apology, while highlighting the lack of compliance with the second part of the order, that urged the state

“to advance procedures to prevent stigmatisations” (Burnyeat 2018, 156).¹⁴ In this vein, the community drew attention to the effects of the retraction regarding the accountability of securitisation policies that have led to the undermining of their agency and livelihood. In other words, the enmity narratives that have historically marked the criminal policy of the conflict. The stigmatisation of marginalised communities in prolonged conflicts is a central element of mass atrocity contexts. In the Antioquia region, this stigmatisation led to the assassination of leaders who denounced the connivance of paramilitary groups with the army in the militarisation of the marginalised district known as Comuna 13 at the beginning of this century, like in the case of Ana Teresa Yarce in Medellín (*Yarce y otras v Colombia*, 2016, Rojas Páez 2018). Similarly, denunciations of the devastation caused by development projects such as the hydroelectric Urra dam, located in neighbouring Córdoba led to the targeting of Indigenous leaders, like in the case of Embera leader Kimy Pernía (1950–2001). Kimy was forcibly disappeared by paramilitary forces in 2001 for leading a campaign against the construction of the said dam, which flooded the crops and sacred sites of his community after having been constructed without the community’s consent in the 1990’s (Rodríguez-Garavito 2011).

As Sanford *et al.* (2016) indicate in their analysis of sexual violence as a weapon in the Guatemalan genocide and during the cold war, the “internal enemy” discourse promoted by the US endorsed anti-communist doctrine of national security exacerbated racialised relations. As a result, historically marginalised groups were targeted by the state as the social basis of the guerrilla movements. In Guatemala, the dictatorial regimes created an affinity between the Maya communities and insurgent groups to justify the elimination of Indigenous communities. In Colombia, the historical use of exceptionality securitisation policies, such as the democratic security policy (2002–2010), has mirrored this situation. The community has embodied this stigmatisation, which is based on the modern/colonial non-ethics of war, as exemplified by the testimony of a soldier involved in the Mulatos and La Resbalosa massacre. The soldier maintained that commanders in charge had ordered the assassination of the children because they believed they would become guerrillas once they grew up (Anrup and Español 2011).

As the new judicial narrative is marked by the teleological character of TJ and its closure narrative (Nagy 2012), the historically entrenched enmity narratives that justified state sanctioned violence in Urabá are treated as something exceptional, rather than as a structural phenomenon. Thus, coloniality persists through the depoliticising logic of legal adjudication. Relatedly, in relation to the fourth demand, the court acknowledges that the commission for the evaluation of justice did not work, and that the different bodies that integrated it never fully assembled. Notwithstanding the fact that the court declared that this demand had not been met, based on this finding, the court reiterated its understanding of the community’s case as of a “complex” nature, and decided to refer it to the Special Jurisdiction for Peace. In doing so, the court undermined the fact that the Peace Community does not want to appear before the tribunal for several reasons.

Three of these reasons deserve to be mentioned. On the one hand, the tribunal is designed to judge actors of a conflict in which the Peace Community has not taken part.

¹⁴ Although the community welcomed the symbolic value of the apology, the fact that Santos delegated a ministry to make the apology raised criticism within the community.

On the other hand, the tribunal's jurisdiction does not include presidents nor corporations (Giraldo 2019). In fact, corporations' representatives will appear before the tribunal only on a voluntary basis, which is illustrative of how transitional justice mechanisms replicate the modern/colonial structure that deliberately ignores the crimes of the powerful normalising their historical and chronic impunity. Therefore, it should not come as a surprise that after the referral of the community's case to the Special Jurisdiction of Peace, in 2020, the Constitutional Court produced ruling T-342, through which the Community's freedom of expression was curtailed, as described at the outset of this article.

4. Concluding remarks

Whether the referral of the community's case to the JEP will provide a nuanced interpretation of the tension that has marked the community's historical experience of violence is highly uncertain. Modern/colonial legal adjudication has always wrestled with understanding the criminality of the powerful, and in a context of prolonged violence, this epistemic, political and ontological difficulty is exacerbated by limited understandings of the criminogenic effects of colonial violence and its impact on the present.

The experience of the Peace Community illustrates how ongoing structural, colonial violence is unaccounted for within the realm of a monist legality that does not challenge the idea of securitisation as militarisation, embedded in the truism of nation-state sovereignty and exclusionary citizenship. This article contends that the community's struggle for justice through a bottom-up understanding of neutrality exemplifies a significant strategy for countering the non-ethics of war (Maldonado-Torres 2007), informing the different forms of violence to which they have been subjected. Theirs is an attempt to challenge the spatial, ontological and juridical manifestations of colonial state crime in a place otherwise considered *terra nullius* like Urabá. Community spokesperson Javier Giraldo's comment on Ruling 693/17 exemplifies this point:

The Peace Community is conscious that the abandonment [of the ruling] is part of a profound crisis in our model of State that is grounded in corruption, impunity, injustice, fiction and violence. The community has wanted to demand and urge compliance to the Constitution and the universal norms, bastions of the human dignity shared by the nation with the rest of the world. Although this has been a failed attempt, this failure will not hamper the community from pursuing its complaints and demands, nor from claiming that different functionaries administer and reform the institutional structures in favour of human rights and dignity. (Giraldo 2018)

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