

Between Positive Complementarity and Magical Legalism: Colombia and International Criminal Justice

Abstract

This article offers an overview and analysis of the findings regarding the case of Colombia within the EU COST Action CA18228 (the Action) and the Scoping Survey examining states' encounters with international criminal justice. It explores Colombia's nuanced and multifaceted approach to international criminal justice frameworks, focusing on the intersection of transnational crimes and the intricate dynamics of internal armed conflicts. It presents Colombia's multi-scalar legal approach to attempting to establish a positive complementarity and multilevel rule-of-law system, acknowledging the challenges inherent in integrating international law with diverse levels of governance and local legislation. It highlights how the ongoing implementation of the peace process and transitional justice mechanisms have sparked debates about striking the delicate balance between peace and justice, conducting in some cases expressions of magical legalism. This article's significance rests in the idea that Colombia's experience serves as an illustrative case study of the complexities involved in applying a multi-scalar positive complementarity legal approach and multilevel legal framework in the pursuit of justice for both national and international crimes.

Keywords

International Criminal Law, International Criminal Court, Colombia, Transitional Justice

1. Introduction

As the data formulated, administered, and published by the European Union Cost Action CA18228 (Global Atrocity Justice Constellations) (hereinafter EU COST Action)¹ is expressing, Colombia has been experiencing structural socio-political and legal changes in recent decades. On 26 September 2016, the Colombian government, and the Revolutionary Armed Forces of Colombia (FARC) brought an end to over 60 years of armed confrontations by signing a peace agreement. Despite an initial 50.2 per cent rejection by the electorate in a polarised referendum, subsequent negotiations led to the approval of a revised peace agreement by the Colombian Congress on 29 November 2016. This marked the official conclusion of the Colombian armed conflict, setting in motion a process for the disarmament, demobilisation, and reintegration (DDR) of former FARC combatants into Colombian society. The peace agreement established three state-led mechanisms to implement a transitional justice process addressing international law and international humanitarian law frameworks: the Special Peace Jurisdiction (JEP), the Truth and Reconciliation Commission (CEV), and the Search Unit for Disappeared People (UBPD)².

It is important to note that the extended armed conflict in Colombia stands as one of the lengthiest in global history, spanning six decades. Approximately 20 per cent of the population

¹ Karolina Aksamitowska and others, *States and International Criminal Justice: COST CA18228 Scoping Survey* (version 2), 2020–2023 [dataset], (University of Edinburgh, School of Law, 2023), <https://doi.org/10.7488/ds/7536> accessed 24 May 2024.

² Camilo Tamayo Gomez, “Recognition as Transitional Justice ‘From Below’: Analysing Victims’ Grassroots Activism in Postconflict Colombia”, 16(3) *International Journal of Transitional Justice*. (2022) 314–330, <https://doi.org/10.1093/ijtj/ijac024>

is believed to be direct victims of this war³, reflecting a staggering toll. The repercussions include nearly nine million internally displaced individuals, 200,000 cases of enforced disappearances, around 47,000 kidnappings, over 17,000 instances of child soldiers, nearly 9,321 recorded landmine incidents, and 16,324 acts of sexual violence⁴. The National Centre of Historical Memory of Colombia has documented over 1,982 civilian massacres between 1980 and 2012. Additionally, the Special Peace Jurisdiction has verified 6,402 extrajudicial executions committed by the Colombian Army from 2002 to 2008⁵.

In response to its specific historical circumstances, Colombia has navigated a multi-faceted response to international criminal justice frameworks and international crime. The transnational dimensions of illicit drug trafficking and related crimes (e.g., money laundering, human trafficking, modern slavery), and the complexity and impact of the dynamics of internal armed conflicts (e.g., serious human rights violations, massacres, forced displacements, torture, disappearances, kidnappings), have given rise to distinct approaches within the realm of international criminal justice. The Colombian government has addressed various local, regional, and international legal frameworks during different periods to prosecute specific crimes. For example, they have utilised international mechanisms to hold perpetrators accountable for crimes against humanity (e.g., executors of massacres, torture, and enforced disappearances) or employed domestic law to deliver justice to victims and pave the way for a sense of sustainable peace.

Nevertheless, the main particularity of this case is that Colombia serves as an example of attempting to apply a complementary multi-scalar and multilevel legal approach in the pursuit of justice for both national and international crimes. This endeavour to establish a positive complementarity⁶ and multilevel rule-of-law system underscores the challenges of integrating international crime law with interdependent national levels of governance and local legislation⁷. The implementation of the peace process and its transitional justice mechanisms has been complex, giving rise to ongoing debates about the delicate balance between peace and justice and conducting, in some cases, expressions of magical legalism⁸. Furthermore,

³ Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición de Colombia. *Hasta la guerra tiene límites. Violaciones de los derechos humanos, infracciones al derecho internacional humanitario y responsabilidades colectivas* (Comisión de la Verdad, Bogotá, 2022). CINEP-CERAC, *Décimo informe de verificación de la implementación del Acuerdo Final de Paz en Colombia*, (CINEP, Bogotá, 2021).

⁴ The National Centre of Historical Memory of Colombia, *Sujetos victimizados y daños causados: Balance de la contribución del CNMH al esclarecimiento histórico* (Colombian National Press, Bogotá, 2018); Human Rights Watch, *World Report*, (HRW, New York, 2022).

⁵ The National Centre of Historical Memory of Colombia, *Enough Already: Memories of War and Dignity* (Colombian National Press, Bogotá, 2013); Jurisdicción Especial para la Paz, *La JEP hace pública la estrategia de priorización dentro del Caso 03, conocido como el de falsos positivos*, (JEP, Bogotá, 2021).

⁶ According to Hitomi Takemura, positive complementarity can be defined as activities and actions of cooperation aimed at promoting national proceedings, with specific reference to the prosecutorial policy of an international criminal court, whereby the International Prosecutor encourages genuine national proceedings when possible, by way of relying on national and international networks, and invites relevant States to participate in a system of international cooperation (Hitomi Takemura, *Positive Complementarity*, (Oxford Public International Law, Oxford, 2018).

⁷ Henrik Andersen. "Hybrid Courts and Multilevel Rules of Law: Some Overall Considerations, Challenges and Opportunities", (6) *International Journal of Criminology and Sociology*. (2017) 117–126.

⁸ According to Javier Trevino-Rangel, magical legalism refers to the belief that the mere existence of certain laws or legal provisions will automatically solve complex social problems or address deep-rooted issues, including crimes against humanity and international crimes (Javier Trevino-Rangel, "Magical legalism: human rights practitioners and undocumented migrants in Mexico", 23(5) *The International Journal of Human Rights*, (2019) 843-861.

Colombia continues to grapple with illicit drug trafficking and strives to address the root causes of violence and inequality in the country.

Gaining insight into the contextual factors that influenced the former Colombian armed conflict is essential for comprehending the complexity of the current Colombian case. Understanding the key reasons behind the protracted conflict can help elucidate how Colombia has addressed both historical experiences and the present situation concerning international crimes and international criminal justice. According to Wills Obregón⁹, Gómez Buendía¹⁰, Melo¹¹, Acosta-López¹², and Pécaut¹³ seven contextual factors can be established.

The first factor is *socioeconomic inequality*. Colombia has a long history of socioeconomic disparities, including land concentration, uneven distribution of wealth, and limited access to basic services. These inequalities have created grievances among marginalised groups and fuelled social unrest. The second factor is *political exclusion*. For much of its history, Colombia experienced limited political representation and exclusion of certain social and political groups, particularly from the left-wing spectrum. This led to discontent and the rise of armed political movements advocating for the rights of marginalised communities. The third factor is *the impact of drug trade and illegal economies in the country*. The illegal drug trade, predominantly from the 1970s onwards, played a significant role in perpetuating the armed conflict and catalysed new conflicts. Armed groups, including paramilitary organisations and guerrilla groups, financed their activities through the production, trafficking, and distribution of illicit drugs, mainly, cocaine hydrochloride.

The fourth contextual factor is *a weak state presence in rural territories*. Colombia's geographical terrain, which includes remote and isolated areas, coupled with weak state institutions, allowed illegal armed groups to establish control and influence in various rural regions. The absence of a strong and effective state presence, in particular police forces, contributed to the persistence of the armed conflict and the co-optation of local governments by illegal groups. The fifth factor is *a long tradition of political violence and human rights abuses*. Political violence, perpetrated by both state and non-state actors, was a prevalent feature of the armed conflict and is still present today. Serious human rights violations, including forced disappearances, extrajudicial killings, massacres, and displacement, as highlighted in previous paragraphs, affected millions of Colombians, exacerbating tensions and perpetuating cycles of violence.

The sixth contextual factor is *a polarised public sphere and deep ideological differences*. Contrasting ideological beliefs influenced the former armed conflict in Colombia. Revolutionary armed groups, including the FARC and the National Liberation Army (ELN), emerged to challenge perceived injustices and promote left-wing ideologies. On the other hand, paramilitary groups have formed to counter these leftist insurgencies, often appealing to right-wing ideologies. The final contextual factor is *the impact of a historical legacy of violence*. Colombia's history of violent conflicts, including 'the Violencia' (1948-1958) and 'La

⁹ María Emma Wills Obregón, *Memorias para la paz o memorias para la guerra*. (Critica, Bogotá, 2022).

¹⁰ Hernando Gómez Buendía, *Entre la independencia y la pandemia, Colombia, 1810 a 2020*. (Fundación Razón Pública, Bogotá, 2021).

¹¹ Jorge Melo, *Historia mínima de Colombia*. (El Colegio de México-Turner, México, 2017)

¹² María del Rosario Acosta López and Juana Acosta-López, *Justicia transicional en Colombia Una mirada retrospectiva*. (Ariel, Bogotá, 2023).

¹³ Daniel Pécaut, "La Colombie, une nation fragmentée", 480 (12) *Esprit*. (2021) 119-129.

Violencia' (1958-1970), created a climate of polarisation and unresolved grievances. These historical episodes have deepened societal divisions and contributed to the current continuation of violence in the country.

This article is divided into three sections. The first part describes the data, following the structure of the Scoping Survey¹⁴, and offers information on the case of Colombia. It covers five key areas: law, policies, institutions, civil society, and culture. The second part reflects on the data and presents Colombia as an example of an attempt to establish a positive complementarity and multilevel rule-of-law system. It also discusses the dangers of magical legalism, highlighting different aspects concerning the relationship between Colombia and its encounters with international criminal justice frameworks. The final part concludes by considering how Colombia serves as an illustrative case study of the complexities involved in applying a multi-scalar positive complementarity legal approach and multilevel legal framework in the pursuit of justice for both national and international crimes.

2. Describing the Data

2.1 Laws

The Scoping Survey regarding Colombia lists a range of laws passed between 2000 and 2016 related to criminal and transitional justice, including international criminal justice. These laws address various topics, including the persecution of perpetrators of international crimes, procedures for investigating, prosecuting, and punishing individuals involved in crimes against humanity, and measures to prevent and sanction child recruitment by illegal armed groups, addressing a violation of international law. Please refer to the Scoping Survey for specific pieces of legislation¹⁵.

Furthermore, Colombia has actively incorporated international legal standards into its domestic legal framework to tackle international crimes, particularly those related to human rights violations and crimes under international law. One notable development is the adoption of Law 589 of 2000, which integrated the Rome Statute of the International Criminal Court (ICC) into Colombian law. This law empowers Colombia to prosecute individuals for crimes within the ICC's jurisdiction, including genocide, crimes against humanity, war crimes, and aggression.

Colombia has also taken legislative measures to address various international crimes, including enforced disappearances, extrajudicial killings, and torture. Reforms to the penal code and criminal procedure code aim to ensure the domestic prosecution of those responsible for such offences. The legal framework also includes provisions related to extradition, facilitating the extradition of individuals accused of international crimes to face justice in other countries or international tribunals, following international agreements.

Additionally, Colombian laws addressing the assistance of victims of international crimes include Law 1448 of 2011 (Victims and Land Restitution Law), which establishes mechanisms for reparations, protection, psychosocial support, land restitution, and access to justice for victims of armed conflict. This law provides a comprehensive legal framework to recognise and address the rights of victims of armed conflict in Colombia. It includes provisions related to providing reparations to victims, including compensation, restitution of property, and various

¹⁴ Aksamitowska, *supra* note 1, p. 1.

¹⁵ *Ibid.*

forms of assistance. The law also provides for measures to prevent retaliation against victims, recognises the importance of psychological support, and facilitates victims' access to justice, including legal representation and access to information about their cases. Thus, Law 1447 of 2011 (Penal Code), Law 1752 of 2015¹⁶, and the National Commission for the Search of Disappeared Persons (Transitional Justice Law) contribute to victim assistance and protection.

Colombia's legal framework recognises freedom of speech, protected by Article 20 of the Political Constitution. While there are general restrictions based on necessity, proportionality, and respect for human rights, specific regulations related to international crimes primarily fall under broader laws against hate speech, defamation, and incitement to violence.

2.2 Policies

Since 1990, Colombia has engaged in significant parliamentary discussions on international criminal justice, including: 1) *Ratification of the Rome Statute* (2002): Colombia ratified the Rome Statute, establishing the ICC, leading to debates about the country's commitment to international criminal justice and accountability for war crimes, crimes against humanity, and genocide. 2) *Justice and Peace Law* (2005): This law provided a framework for demobilising paramilitary groups, sparking debates about balancing justice and peace. It offered reduced sentences for those who confessed to crimes, raising concerns about undermining international justice standards. 3) *Extradition of Paramilitary Leaders* (2007-2008): The extradition of paramilitary leaders to the U.S. prompted discussions about its impact on domestic justice processes and potential delays in achieving justice for victims. 4) *Peace Agreement with the FARC* (2012-2016): Debates focused on including transitional justice mechanisms in the peace agreement, leading to the creation of the Special Jurisdiction for Peace (JEP) to investigate and prosecute serious crimes from the armed conflict.

Colombia has made significant efforts to align its domestic legal framework with the Rome Statute of the ICC through several key measures: 1) *Incorporation of the Rome Statute into Domestic Law*: Law 589 of 2000 integrates the Rome Statute into Colombia's legal system, allowing authorities to prosecute crimes against humanity, war crimes, and aggression as domestic offences. 2) *Amendments to the Penal Code*: Law 599 of 2000 amends the Penal Code to include provisions related to ICC jurisdiction, aligning Colombian law with the Rome Statute's definitions and penalties for relevant crimes. 3) *Extradition Laws*: Colombia's legal framework includes provisions for extraditing individuals accused of international crimes, ensuring compliance with the Rome Statute and facilitating trials in other countries or international tribunals.

Colombia has demonstrated its commitment to international criminal justice by actively cooperating with the ICC. This cooperation includes providing information and evidence for ICC investigations and facilitating the travel of ICC officials and witnesses within Colombia, which enhances the effectiveness of international justice mechanisms. While the ICC has jurisdiction over crimes under the Rome Statute, Colombia retains its jurisdiction to investigate and prosecute these crimes domestically. The ICC can intervene if Colombia is unable or

¹⁶ Law 1752 of 2015: This law establishes measures for the protection of human rights defenders, social leaders, and community leaders who may be at risk due to their work in promoting human rights and peace. Victims of threats and attacks fall under the purview of this law.

unwilling to prosecute. This approach aims to establish a multilevel rule-of-law system¹⁷, applying a multi-scalar and multilevel legal strategy for pursuing justice for both national and international crimes.

Furthermore, Colombia has shown a strong commitment to promoting criminal justice for international crimes through its foreign policy, particularly in regional and international forums. This commitment includes: 1) *Support for the ICC*: As a state party to the Rome Statute, Colombia supports the ICC's mission to prosecute individuals for genocide, crimes against humanity, war crimes, and aggression, thereby promoting global accountability. 2) *Participation in International and Regional Organisations*: Colombia actively engages in multilateral forums, including the United Nations and the Organisation of American States (OAS), to discuss human rights and international justice. 3) *Support for Truth and Reconciliation Processes*: Colombia has implemented truth and reconciliation processes to address its history of conflict and human rights violations, aiming to provide justice, accountability, and reparations for victims. 4) *Promotion of Transitional Justice*: Colombia has promoted transitional justice mechanisms, including the JEP, to address crimes committed during the armed conflict as part of its broader efforts to achieve justice and accountability.

Colombia has implemented national prosecutorial policies to address international crimes and ensure accountability, aligning its legal framework with international standards. Key elements of these policies include: 1) *Specialised Units*: Colombia has created specialised units within its prosecution service to investigate and prosecute international crimes. Notably, the Unit for Crimes against International Humanitarian Law and Crimes against Humanity handles cases related to war crimes and other serious violations. 2) *Transitional Justice Mechanisms*: The JEP investigates and prosecutes crimes committed during the armed conflict, aiming to achieve truth, justice, and reparations. 3) *Legal Reforms*: Colombia has reformed its Penal Code and Criminal Procedure Code to incorporate definitions and provisions related to international crimes, including genocide and war crimes. 4) *Victim-centred Approach*: Prosecution policies prioritise the rights and needs of victims, providing support and ensuring their participation in legal proceedings. 5) *Extradition and Cooperation*: Procedures for extradition and international cooperation facilitate the transfer of individuals accused of international crimes to face justice in other jurisdictions.

As addressed in previous paragraphs, Colombia has implemented national policies aimed at providing treatment and assistance to victims of international crimes, particularly in the context of its efforts to address the legacy of the long-running armed conflict. These policies are designed to recognise the rights and needs of victims and promote their well-being and rehabilitation. Law 1448 of 2011 (Victims and Land Restitution Law), in particular, is a cornerstone of Colombia's victim-centred approach to addressing the consequences of the armed conflict. Key components of the law include reparation¹⁸, psychosocial support¹⁹, land

¹⁷ International Criminal Court. *Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia*. (ICC, Bogotá, 2021). Available at: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf> accessed 24 May 2024.

¹⁸ The law establishes mechanisms for providing reparations to victims, including compensation, restitution of property, and various forms of assistance.

¹⁹ Recognising the importance of psychosocial support, the law provides for access to psychosocial services for victims to address trauma and mental health issues.

restitution²⁰, access to justice²¹, the establishment of the National Commission for the Search of Disappeared Persons (UBPD)²², the development of reconciliation and memory initiatives²³, the guarantee of victims' participation during the implementation of transitional justice mechanisms²⁴, and the pursue of truth and reparation for extrajudicial execution victims²⁵.

2.3 Institutions

Colombia has established a robust framework of specialised institutions and mechanisms to address the aftermath of its protracted armed conflict, emphasising transitional justice, reparations, and support for victims of international crimes and serious human rights violations. At the forefront is the JEP, a specialised judicial institution created in 2017. The JEP is dedicated to investigating, prosecuting, and adjudicating serious human rights violations and international crimes committed during the armed conflict. While accountability and justice are its primary focus, the JEP ensures that victims' rights are recognised and respected. Victims have had opportunities to participate in legal proceedings, share testimonies, and seek reparations through this institution.

Working in tandem with the JEP is the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR). This comprehensive framework encompasses various institutions and mechanisms, including: 1) *Colombia's Truth and Reconciliation Commission*. Tasked with uncovering the truth about human rights violations and abuses during the conflict, this commission collected testimonies, conducted investigations, and produced comprehensive reports. 2) *The Unit for the Search of Disappeared Persons*. Focused on locating and identifying individuals who disappeared during the armed conflict, including victims of enforced disappearance, a serious international crime. Additionally, the SIVJRNR plays a crucial role in providing support to victims and facilitating reparations through various programs and initiatives. Further specialised institutions include 1) *the National Commission for the Search of Disappeared Persons*. An institution created to exclusively address the issue of enforced disappearances, conducting searches, investigations, and efforts to locate and identify individuals who disappeared during the conflict. 2) *The National Centre for Historical Memory* (Centro Nacional de Memoria Histórica). Conducting research and documentation related to the armed conflict's impact on society and victims, preserving memory, and ensuring the experiences of victims are documented and acknowledged.

Colombia's multifaceted approach demonstrates a commitment to addressing the legacy of the armed conflict comprehensively, acknowledging the importance of truth, justice, and reparations for victims of international crimes and human rights abuses.

²⁰ The law addresses the rights of victims to the restitution of land and property that they were forcibly displaced from due to armed conflict or violence.

²¹ It includes provisions to facilitate victims' access to justice, including legal representation and access to information about their cases.

²² Colombia established a National Commission (Unidad de Búsqueda de Personas dadas por Desaparecidas) to search for and locate persons who disappeared during the armed conflict, addressing enforced disappearances. This initiative is aimed at providing answers to victims and their families.

²³ Colombia has also initiated reconciliation and memory programs to promote healing and understanding among victims and the broader society. These initiatives acknowledge the suffering and experiences of victims.

²⁴ Colombia has taken steps to ensure the active participation of victims in various processes, including legal proceedings, truth commissions, and peace dialogues, allowing them to share their experiences and perspectives.

²⁵ Colombia has implemented specific measures to address victims of extrajudicial executions and unlawful killings, acknowledging their suffering and providing support.

2.4 Civil Society

In Colombia, several non-governmental organisations (NGOs) and international non-governmental organisations (INGOs) are actively addressing issues related to international crimes, human rights, and justice. These include: 1) *Centre for Justice and International Law* (CEJIL), an international NGO working across the Americas, including Colombia, to promote human rights and access to justice, and advocate for accountability for human rights violations. 2) *Human Rights Watch* (HRW), an international NGO present in Colombia that conducts research, advocacy, and reporting on human rights issues, including international crimes, aiming to hold perpetrators accountable. 3) *International Centre for Transitional Justice* (ICTJ), an international organisation providing expertise in transitional justice, supporting Colombia's efforts related to truth, justice, reparations, and institutional reform. 4) *International Federation for Human Rights* (FIDH), an international human rights organisation collaborating with Colombian NGOs and defenders to address international crimes and advocate for justice. 5) *Colombian Commission of Jurists* (CCJ), a Colombian NGO focusing on human rights and the promotion of the rule of law, working on accountability for international crimes and providing legal support to victims. 6) *Corporación Excelencia en la Justicia* (CEJ), a Colombian NGO dedicated to justice reform, access to justice, and human rights, engaging in activities related to international crimes within the broader context of justice and accountability.

Furthermore, several NGOs and INGOs in the country focus on issues related to victims of international crimes. Notable organisations include: 1) *Foundation for Due Process* (Fundación para el Debido Proceso), which engages in human rights, due process, and justice initiatives, providing legal support to victims of international crimes. 2) *CINEP / Peace Program* (Centro de Investigación y Educación Popular / Programa por la Paz (CINEP/PPP)), a non-profit foundation created by the Society of Jesus for promoting peace and sustainable human development. 3) *Dejusticia* (also known as The Centre for Law, Justice and Society), a non-profit legal organisation established in 2005 that promotes human rights and the social rule of law in Colombia, Latin America, and other regions of the Global South. Additional organisations include: 4) *Colombian Institute of International Humanitarian Law* (Instituto Colombiano de Derecho Internacional Humanitario), which addresses issues related to international humanitarian law, focusing on the protection of victims in armed conflicts. 5) *Colombian Red Cross* (Cruz Roja Colombiana), an organisation which provides humanitarian assistance and support to victims of armed conflicts and disasters, including those affected by international crimes.

While there are NGOs and INGOs in Colombia that focus on issues related to victims and human rights, organisations specifically dedicated to addressing the rights or needs of perpetrators of international crimes are less common. The primary focus of most organisations and initiatives in Colombia is on victim support, transitional justice, and accountability for serious human rights violations and international crimes. International criminal justice systems, including the ICC and other international tribunals, are designed to handle cases related to individuals accused of committing international crimes. These mechanisms prioritise the prosecution of perpetrators and the accountability of those responsible for such crimes.

However, it is important to note that efforts related to peace and reconciliation in Colombia, particularly through the JEP, involved engagement with former combatants and individuals associated with the former armed conflict. These efforts included processes for disarmament, demobilisation, and reintegration (DDR), as well as alternative sanctions for those who fully

confess to their crimes, cooperate with investigations, and contribute to reparations for victims. These processes primarily aim to achieve peace and reconciliation while ensuring accountability for international crimes.

2.5 Culture

As reiterated in previous paragraphs, Colombia bears the weight of a tumultuous history marked by armed conflicts and human rights violations. In addressing the legacy of international crimes committed within its borders, the country has established museums and memorials as poignant testaments to the gravity of these events. One noteworthy institution is the *Museo Casa de la Memoria* (House of Memory Museum) in Medellín, a space dedicated to preserving the memory of armed conflict and human rights violations in Colombia. Through exhibitions, testimonials, and educational programmes, the museum sheds light on the profound impact of the conflict on Colombian society. In Bogotá, the capital city of Colombia, the *Centro de Memoria, Paz y Reconciliación* (Memory, Peace, and Reconciliation Centre) acts as a beacon of memory. Focused on preserving the memory of the armed conflict, this centre actively promotes peace and reconciliation through exhibitions, events, and discussions related to transitional justice mechanisms.

Moreover, other relevant examples to construct processes of collective memory from a civil perspective include *The Memorial for the Victims of Violence* (Memorial por la Vida) in Bogotá and the *Monument to the Victims of Violence* in the city of Medellín. Both memorials commemorate those affected by regional violence, featuring sculptures and plaques with the names of victims to honour their memory. Additionally, *The Memorial to the Victims of Bojayá* in the Chocó Department is an acknowledgement of a tragic incident during the armed conflict. Erected in memory of the Bojayá massacre in 2002, this memorial stands as a tribute to the lives lost during the violence.

Concerning the implementation of mnemonic activities to commemorate and address the consequences of international crimes in Colombia, one relevant event is the *National Day of Memory and Solidarity with Victims* (Día Nacional de la Memoria y la Solidaridad con las Víctimas), observed annually on April 9th. This day serves as a dedicated platform to remember the victims of the armed conflict and foster solidarity with survivors and affected communities. Across the country, diverse events, commemorations, and educational activities unfold, emphasising the importance of collective memory and support for those impacted by the conflict. Despite the absence of specific examples of cultural activities focusing on international criminal justice, the commitment to memory and solidarity remains evident through this event. It is an effort to contribute to shaping a collective narrative that acknowledges the impact of international crimes on Colombian society.

Regarding Colombia's mass media ecosystem, mainstream media in Colombia appears to regularly report on domestic cases related to international criminal justice. However, the coverage of international criminal justice matters beyond the state and its immediate region is limited. This suggests a local focus in media reporting, with less emphasis on global issues in this context. For those interested in gaining a comprehensive understanding of Colombia's media landscape, several sources are recommended. *La Silla Vacía*, an independent online news outlet, stands out for its focus on investigative journalism and analysis of Colombian politics and current events. *El Tiempo*, one of the largest and most widely read newspapers in Colombia, provides coverage of national and international news, politics, business, and culture. *El*

Espectador, known for its independent journalism, covers a broad spectrum of topics, including national and international news, culture, and opinion pieces.

W Radio Colombia, a platform offering news, talk shows, and analysis, is recognised for its political and current affairs programs. *Semana* and *Cambio*, leading news magazines, contribute to in-depth reporting and analysis on various topics, including politics, economics, and social issues. Also, *Cien Días vistos por CINEP*, an NGO magazine, provides a critical perspective on Colombia, offering insights into social and political issues, including international crime.

3. Reflecting on the Data

3.1 Key Challenges in Establishing a Positive Complementarity Framework in Colombia

After reviewing and analysing the findings related to the case of Colombia within the Action and the Scoping Survey, it is clear that Colombia faces significant challenges in establishing a positive complementarity transitional justice framework and a multilevel rule-of-law system to deliver truth, reparation, and justice for the victims of the former armed conflict. This framework needs to integrate international criminal law with various levels of governance and local legislation. Different legal systems and jurisdictions often have divergent approaches and definitions of crimes, making harmonising these approaches across various scales and levels complex and time-consuming²⁶. Achieving this harmonisation requires careful coordination and cooperation among international, regional, and domestic legal systems. This legal harmonisation is one of the main challenges facing Colombia today.

Furthermore, after reviewing the data, it is evident that complementarity is a crucial element in measuring the effectiveness of the implementation of transitional justice mechanisms in Colombia. Complementarity, as outlined by the ICC²⁷, mandates that national jurisdictions take precedence over international ones in prosecuting individuals for international crimes, provided they are willing and able to do so effectively. However, the practical implementation of complementarity can be hindered by challenges such as capacity limitations, institutional weaknesses, and political obstacles within national legal systems. In Colombia's case, despite significant progress in legislative and institutional reforms aimed at addressing past atrocities, gaps remain in the capacity and willingness of domestic and hybrid courts to effectively prosecute perpetrators of international crimes, as shown by the Scoping Survey's data. For example, eight years after the signing of the peace agreement, only 10 per cent has been implemented²⁸, and the JEP has not yet adopted or imposed any judicial decision or sanction²⁹.

Also, in the case of Colombia, determining which jurisdiction has the authority to investigate and prosecute international crimes can be challenging, in particular, where crimes against

²⁶ Franziska Bremus and Tatsiana Kliatskova, "Legal harmonization, institutional quality, and countries' external positions: A sectoral analysis" (107) 102217 *Journal of International Money and Finance*. (2020) 01 - 19.

²⁷ International Criminal Court. *Informal expert paper. The principle of complementarity in practice*. (ICC, 2003). Available at: <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> accessed 24 May 2024.

²⁸ Laurel Quinn, *Implementation of the Colombian Peace Accord Reaches its Sixth Year* (Version 1) (University of Notre Dame, Notre Dame, 2023). <https://doi.org/10.7274/6395w666821>

²⁹ Andrés Bermúdez Liévano, *Colombia's JEP unveils alternative sanctions but remains silent on punishment*, (Justice.Info, 16 April 2024) <https://www.justiceinfo.net/en/130952-colombia-alternative-sanctions-silence-on-punishment.html> accessed 24 May 2024.

humanity are involved. International crimes often transcend national borders, making it difficult to establish jurisdiction. Conflicts of jurisdiction, overlapping legal frameworks, the implementation of transitional justice mechanisms, and issues related to extraterritorial jurisdiction can arise, requiring clear guidelines and legal instruments for resolving these challenges. The case of delivering justice for the victims of massacres perpetrated by FARC and ELN that happened in the Colombian borders of Ecuador and Venezuela or establishing the responsibility of other states, particularly the United States of America³⁰, in the former armed conflict, are good examples of this challenge.

Another challenge to consider is capacity building. Implementing a positive complementarity transitional justice framework and a multi-scalar and multilevel legal approach requires building the necessary institutional capacities at various levels. This includes enhancing the capabilities of domestic legal systems, training legal professionals, establishing specialised courts or tribunals, and facilitating cooperation and information sharing among different stakeholders involved in international criminal justice. Also, this may involve updating more regularly legal codes (as happened during the peace agreement negotiations), improving legislative processes, and ensuring that national legal frameworks are always aligning with international standards. It also requires investing in technological infrastructure to streamline legal processes and facilitate efficient case management.

Moreover, the element of access to justice can be seen as another crucial challenge (57 per cent of Colombians say they have no confidence in the justice system at all and Colombia also remains one of the countries in the world with the highest levels of impunity³¹). Ensuring equitable access to justice for all individuals affected by international crimes is essential but can be a significant challenge in the case of Colombia. Many victims may not have the means or resources to pursue justice on their own, requiring comprehensive support mechanisms, legal aid, and victim protection programs to facilitate their participation in legal processes. Thus, facilitating the participation of marginalised or vulnerable groups, including indigenous communities or women, is also vital for ensuring truly equitable access to justice. Specialised outreach programs, culturally sensitive legal services, and gender-inclusive approaches are necessary to address the specific challenges faced by different segments of the population.

In this context, another challenge is political will and international cooperation. The effective implementation of a positive complementarity transitional justice framework and a multi-scalar and multilevel legal approach for the case of Colombia relies heavily on political will and multilateral and international cooperation. This involves commitment from both domestic and international actors to collaborate, share information, extradite suspects, enforce judgments, and support transitional justice measures. Overcoming political obstacles and fostering a cooperative environment is essential, nevertheless, can be challenging in practice. Political considerations, diplomatic complexities, and divergent national interests may hinder collaboration, in particular, establishing the truth of serious violations of human rights where foreign states were involved. Also, in the case of Colombia, historical and socio-political

³⁰ Comisión de la Verdad, *Caso “Cien años de injerencia acordada entre Colombia y Estados Unidos. Una mirada desde la asistencia militar y policial”* (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, Capítulo Narrativa Histórica, Bogotá, 2022). Available at: <https://www.comisiondelaverdad.co/caso-injerencia-estados-unidos> accessed 24 May 2024.

³¹ Programa de las Naciones Unidas para el Desarrollo (PNUD), *Informe sobre Desarrollo Humano para Colombia Cuaderno 3*, (PNUD, Bogotá, 2023). Available at: https://www.undp.org/sites/g/files/zskgke326/files/2023-05/UNDP_Co_PUB_Cuaderno3_INDH_Acceso_efectivo_justicia_personas.pdf accessed 24 May 2024.

factors as an outcome of ‘the war on drugs’ can further complicate efforts to secure cooperation from both domestic and international actors.

The final challenge is cultural and linguistic diversity. Dealing with international crimes often involves engaging with diverse cultures, languages, and traditions. Colombia is a culturally diverse country (5.7 per cent of the total population is indigenous and 13.3 per cent are Afro-Colombians³²). This requires sensitivity and cultural competence to ensure that legal processes are inclusive and that all individuals involved, including victims, witnesses, and defendants, can effectively participate in and understand the proceedings. Also, in the case of Colombia, addressing cultural and linguistic diversity extends to the composition of legal teams and personnel involved in international criminal justice. Efforts should be made to ensure diversity within legal institutions, with representation from different cultural and ethnic backgrounds. This not only contributes to a more inclusive and representative legal system but also enhances the overall effectiveness and legitimacy of the legal framework.

3.2 Overcoming Magical Legalism

Another element after analysing the findings related to the case of Colombia within the Action and the Scoping Survey is the need to create mechanisms to overcome magical legalism³³ in the country. As expressed in previous paragraphs, magical legalism refers to the belief that the mere existence of certain laws or legal provisions will automatically solve complex social problems or address deep-rooted issues, including crimes against humanity and international crimes³⁴. In other words, it is a phenomenon whereby society places an excessive reliance on the law to bring about social change, without considering the broader social, economic, and political contexts in which legal systems operate. Thus, magical legalism assumes that the law has inherent transformative powers and that its formal presence is sufficient to create desirable outcomes. This perspective often overlooks the practical challenges, power dynamics, and social realities that affect the implementation and effectiveness of legal frameworks. In other words, it ignores the gap between *law on paper* and *law in practice*.

According to Sandoval, Martínez Carrillo and Cruz-Rodríguez³⁵, a good example of magical legalism in the case of Colombia concerns the Victims and Land Restitution Law (Law 1448 of 2011). This law has encountered significant obstacles because it fails to address the socio-economic conditions that led to land dispossession in the first place. The law's focus on legal restitution overlooks the need for comprehensive rural development and security measures to protect claimants from ongoing violence and threats. This disconnection between legal provisions and socio-economic realities exemplifies magical legalism, where the mere existence of a law is expected to rectify complex issues. However, Lemaitre³⁶ argues that magical legalism in Colombia belongs more to theories regarding legal fetishism, in other words, the impulse of desiring and enjoying the law not as a means to an end, but rather as an

³² United Nations Population Division, *World Population Prospects*, (UNPD, New York, 2022).

³³ Javier Trevino-Rangel, “Magical legalism: human rights practitioners and undocumented migrants in Mexico”, 23:5 *The International Journal of Human Rights*. (2019) 843-861, DOI: 10.1080/13642987.2017.1314649

³⁴ Patricia Lundy and Mark McGovern, “Whose Justice? Rethinking Transitional Justice ‘from the Bottom Up’”, 35(2) *Journal of Law and Society*. (2008) 265-292.

³⁵ Clara Sandoval, Hobeth Martínez-Carrillo, Michael Cruz-Rodríguez, “The Challenges of Implementing Special Sanctions (*Sanciones Propias*) in Colombia and Providing Retribution, Reparation, Participation and Reincorporation”, 14(2) *Journal of Human Rights Practice*. (2022) 478–501.

³⁶ Julieta Lemaitre, “Legal Fetishism: Law and Social Movements in Colombia”, (77) *HeinOnline*, (2008),331-334.

end in itself. This theory shows how this emotional investment in the law is problematic, while it makes emotional and political sense as a response to violence and injustice in unequal societies as Colombia.

Another good example concerning magical legalism in Colombia refers to legislation concerning the reintegration of ex-combatants into society and how to create a holistic process of reconciliation and recognition between victims and perpetrators³⁷. The JEP's role in fostering reconciliation has been limited by a lack of societal buy-in and support. According to Brett³⁸, many Colombians remain sceptical of the JEP's ability to deliver justice, particularly in regions heavily affected by the conflict. The belief that legal instruments and transitional justice mechanisms alone can bridge deep societal divides and promote reconciliation exemplifies magical legalism, disregarding the need for inclusive and participatory processes that engage communities in meaningful dialogue and healing. Nevertheless, in order to confirm this argument, there is a need to conduct more empirical studies about this issue, along with a careful analysis of the contexts that would allow us to establish case-by-case causal relationships between the laws, judicial decisions, and transformations of the actual circumstances of injustice.

Moreover, the focus on prosecuting perpetrators through local legislation (e.g., the Colombian penal code), international criminal law, and transitional justice mechanisms often overshadows the need for comprehensive victim support and rehabilitation programmes, reflecting a form of magical legalism that prioritises legal outcomes over holistic approaches to justice. Research by Sarmiento-Marulanda, Aguilera-Char, González-Gil and Wilson López-López³⁹ highlights that many victims of the armed conflict feel neglected by the legal processes, which focus primarily on prosecuting perpetrators rather than addressing victims' needs for support, rehabilitation, and reintegration into society. This imbalance underscores the magical legalistic assumption that legal proceedings are sufficient to deliver justice, without adequately considering the broader social and psychological needs of victims.

Another aspect to consider concerning magical legalism in the case of Colombia is the aspect of symbolic legislation without effective implementation. The enactment of symbolic legislation in Colombian law often does not translate into effective implementation on the ground, reflecting magical legalism where the presence of laws is deemed sufficient to achieve justice. Scholars like Garcia⁴⁰ highlight the use of the symbolic efficacy of law in Colombia, arguing that Colombian governments have consistently used to their advantage the gap between the enactment of progressive laws and their actual application to gain legitimacy without taking any other action beyond the adoption of the law. As a result, it is important to stress the importance of supporting and monitoring symbolic legislative measures (e.g., the Truth and Reconciliation Commission and the Unit for the Search of Disappeared Persons) to guarantee their full implementation. Both institutions have struggled with limited resources, political

³⁷ Gavin Hart, and Camilo Tamayo Gomez, “Is Recognition the Answer? Exploring the Barriers for Successful Reintegration of Ex-Combatants into Civil Society in Northern Ireland and Colombia”, 11(2) *Peacebuilding*. (2023) 205–221. <https://doi.org/10.1080/21647259.2022.2065792>

³⁸ Roddy Brett, “Victim-Centred Peacemaking: The Colombian Experience”, 16(4), *Journal of Intervention and Statebuilding*, (2022), 475–497. <https://doi.org/10.1080/17502977.2022.2104437>

³⁹ Laura Sarmiento-Marulanda, Amira Aguilera-Char, Catalina González-Gil, et al. “Psychosocial rehabilitation experiences of women victims of armed conflict in Montes de María, Colombia”, 79(31) *Arch Public Health* (2021) 05-22, <https://doi.org/10.1186/s13690-021-00548-w>

⁴⁰ Mauricio García-Villegas ‘The Symbolic Uses of Law: At the Heart of a Political Sociology of Law’ in: García-Villegas, M, *The Powers of Law: A Comparative Analysis of Sociopolitical Legal Studies*, (Cambridge University Press, Cambridge, 2018) pp 19-37.

interference, and security concerns, which hinder their ability to fulfil their mandates effectively.

The final example concerning magical legalism in Colombia addresses the political instrumentalisation of local legislation and transitional justice mechanisms. For example, the political instrumentalisation of the JEP has been a contentious issue, with various political factions attempting to influence its proceedings for their own benefit. As Bermúdez Liévano⁴¹ argues, this politicisation undermines the credibility and effectiveness of the JEP, leading to public scepticism and resistance. The expectation that legal institutions can function impartially and effectively in a highly politicised environment reflects a magical legalistic view that overlooks the complex interplay of politics and law. Thus, recognising this complex interplay is crucial for understanding the challenges facing the JEP. It requires acknowledging that legal frameworks are contested spaces and legal institutions like the JEP are arenas where different political actors vie for influence. As a result, their design, implementation, and outcomes are subject to negotiation and contestation.

4. Conclusion

The case of Colombia serves as an example of attempting to apply a multi-scalar and multilevel legal approach in the pursuit of justice for both national and international crimes. This endeavour to establish a multilevel rule-of-law system underscores the challenges of integrating international crime law with interdependent national levels of governance and local legislation. The implementation of the peace process and its transitional justice mechanisms has been complex, giving rise to ongoing debates about the delicate balance between peace and justice conducting, in some cases, expressions of magical legalism. Thus, it is clear that Colombia continues to grapple with illicit drug trafficking and strives to address the root causes of violence and inequality in the country.

As we can see in this particular case, on paper, there is a strong legalistic architecture and enough set of laws to promote socio-cultural changes in Colombia and deliver justice for the victims. For some scholars and international bodies, Colombia's positive complementarity transitional justice framework and multilevel legal approach is a positive example in the world⁴². Nevertheless, in practice, the legal system in Colombia is weak, there are high levels of impunity, state corruption, and public mistrust in governmental institutions⁴³. As a result, we can question if there is a sense of naïveté or blind faith in legal solutions in Colombia that is undermining the establishment of more real/contextual solutions and effective ways to deliver justice to overcome the complex problems that are facing the country. However, magical legalism is a critical concept that stresses the limitations of a purely legalistic approach to societal challenges. By highlighting this aspect, we can encourage the Colombian Government and Colombian legal institutions to develop a more holistic perspective that can consider

⁴¹ Andrés Bermúdez Liévano, *In Colombia, transitional justice is caught up in politics*, (Justice.Info, 30 July 2019) <https://www.justiceinfo.net/en/42052-colombia-transitional-justice-is-caught-up-in-politics.html> accessed 24 May 2024.

⁴² Natalia Silva, 'Colombia and the International Criminal Court: A Case of Positive Complementarity in Transitional Justice Contexts', in D. Bilchitz, and R. Cachalia (eds), *Transitional Justice, Distributive Justice, and Transformative Constitutionalism: Comparing Colombia and South Africa* (Oxford University Press, Oxford, 2023)

⁴³ Jeremy Sarkin and Ines Pereira-Lopes, Reaching for both justice and peace in Colombia: Understanding the Special Jurisdiction for Peace's mixed approach (using both retributive and restorative justice) to deal with international crimes, 26(2) *Contemporary Justice Review*. (2023)123-144.

multifaceted socio-political and economic factors along with legal measures to address and deliver national and international criminal justice.

To conclude, as the EU COST Action data regarding Colombia shows us, the case of Colombia requires a comprehensive and coordinated approach to overcome magical legalisms referencing the application of national and international criminal law frameworks in the country. It involves the collaboration and determination of international organisations, states, civil society, and other stakeholders. It also necessitates ongoing dialogue, capacity-building initiatives, technical assistance, and the continual adaptation of legal frameworks to effectively respond to the complexities of international crimes. The legal infrastructure, normative, and architecture already exist, and it is there 'on paper'. However, the challenge is how to effectively deliver peace, truth, reconciliation, justice, and guarantee the rule of law in a country in socio-political transition and armed conflict recovery that it is showing that 'in practice' is not providing enough positive outcomes.