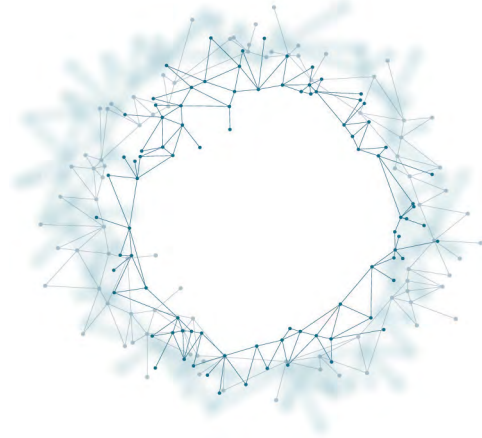


Beyond the Binary

Securing Peace and Promoting
Justice after Conflict



Nelson Camilo Sánchez
Rodrigo Uprimny
Howard Varney
Michael Schwarz
Tatiana Rincón-Covelli
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Finally, without the generous support of the Ford Foundation we would not have been able to hold the workshop and perform the tasks that resulted in the conclusions reached there, which are now transformed into this book.

**Introduction: Building and
Sustaining the Ecosystem of
Transnational Advocacy**

Introduction

Discussions on the meaning and scope of concepts such as justice, accountability, and victim satisfaction continue to be fervent topics in specialized circles of what is now known as “the transitional justice field,” and in societies suffering from mass violence. Instead of solving the practical and theoretical dilemmas of these interpretative disputes, the experience and knowledge accumulated over the more than three decades since this field has been in existence have served only to deepen the debates and to adapt more of these discussions to new and constantly changing scenarios and contexts.

Contemporary experiences that set out to produce lawful political transitions, therefore, seem to repeat initial discussions in the field, such as the one about the role of criminal law and punishment in a transition policy. But this discussion is far removed from the debates that revolved around this topic three decades ago. Legal and contextual factors create significant differences between the challenges faced by transition processes in the 1990s and current ones. One of these challenges, undoubtedly, is the transformation that international human rights law has undergone, together with the consolidation of international criminal law. Another is the change in contexts: many of the initial discussions on criminal law and punishment took place in different transition scenarios, as most of them were looking for a transition to democracy, not for a transition to peace.

In turn, the discussion is not the same because of academic developments, the experience that has accumulated, and empirical investigations that have been conducted during the last couple of years. Today, not only do we have models to explore, debate, discuss, and criticize, we also have case studies and comparisons that nourish these analyses. However, situations like the ones in Colombia, Nepal, the Philippines or, prospectively, Syria, illustrate the need to continue to

debate, in greater depth, the role that criminal law should play in societies that set out to end armed conflicts by negotiated means.

This discussion is inevitable for an organization like the Center for the Study of Law, Justice and Society—Dejusticia—that works in a country like Colombia, which has embarked on a transition process towards peace that seeks to overcome an armed conflict that has lasted for more than five decades. Stemming from the discussion on the Colombian formula for the transition from war to peace, the coordinators of this publication began to reflect on the multiple challenges faced by societies that set out on this same path, as well as the multiple challenges for the very field of transitional justice, which generates a contemporary application of international normative standards on the fight against impunity.

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In the first place, the discussion on form and the definition of procedures and sanctions sparks discussions on the role of contexts in transitional justice interventions. Indeed, a current concern in the literature in this field has been how to interpret the characteristics and necessities of the specific contexts where transition policies are being carried out or promoted (Duthie and Seils 2017). Regarding the specific issue of the role of criminal accountability for atrocities committed, the discussion on contextual differences is presented on several levels: from the controversy over sovereignty and states' margin of discretion to establish their criminal policy to discussions on the acceptance or rejection of traditional ways of confronting crime in different societies.

Second, the theme returns to contemporary discussions on the need to differentiate between paradigmatic transitional contexts (ones that represented the change from authoritarian governments to democratic regimes) and ones that evoke new interests and challenges, such as transitions from armed conflicts to peace (Bell 2016). Violence, generally vertical and in some cases concentrated, as against more horizontal and multi-casual in others, gives rise to differences in the motives, patterns, and repertoires of violence, and this should, in turn, lead us to reflect on whether the criminal response strategy should be different.

Third, the discussion about a post-conflict criminal policy strategy must address the debates on victim participation in transitional processes in general, and justice mechanisms in particular. In contexts of mass violence combined with weak public institutions that lack legitimacy (Waldorf 2017), the challenge of how to guarantee effective, equitable, and non-revictimizing participation by those who were victims in the decision-making process on a global justice strategy is great, especially because the heterogeneous and mass nature of the victims can lead to institutional designs where broad intervention of these interests

may lead to processes failing to progress or conclude, as recent experiences have shown.

Fourth, very little empirical information is still being used to corroborate or reject many of the theoretical assumptions in the field when many of these decisions are being made on how to establish the role of criminal justice and punishment in a transition from conflict to peace by negotiated means. For example, international jurisprudence continues to insist on the idea that a severe sanction is one of the most effective ways to prevent mass atrocities, but very little empirical information exists to determine the real scope of this postulate.

A fifth challenge that arises from the discussion on criminal accountability in negotiated transitions is that of concretely articulating the different and dissimilar objectives that are today attributed to transitional justice. The current hegemonic and holistic vision of the subject has caught the attention and led to much enthusiasm, since it offers a more comprehensive approach to the multiple tasks necessary for social reconstruction after mass atrocities. However, very little information exists about how these objectives are to be achieved by a particular society. For example, how far should social and institutional efforts go for each of these objectives when the model acknowledges that it is practically impossible to achieve every one of them? One of the central questions here regarding the role of criminal action is what state and social efforts should be directed towards judicially clarifying each individual case of human rights violations in contexts of mass violence.

While these questions are important for analyzing the Colombian case, the coordinators of this book consider them to be issues that go beyond the specific needs of this transition and hence common to other cases. This is why we decided, in mid-2015, to invite a group of experts of different nationalities and from different regions to discuss the topic.¹ Our intentions with this discussion were twofold. On the one hand, we believed that hearing perspectives from other latitudes would give our own ideas a breath of fresh air. And on the other hand, we wanted to open up the discussion on these issues to colleagues from other countries, especially the Global South, so as to generate more exchanges and broader analyses of these issues, rather than ones based on a concrete case.

1 The workshop was held on August 13 and 14, 2015, in Bogotá, Colombia. In addition to the coordinators of this book, contributions to the discussions were made by César Rodríguez (Colombia), Tatiana Rincón (Colombia), Howard Varney (South Africa), Andrew Songa (Kenya), Claudio Nash (Chile), Marjana Papa (Albania), Iván Orozco (Colombia), Juan Papier (Argentina), Oscar Parra (Colombia), Meghan Morris (United States), Barney Afako (Uganda), and Kamarulzaman Askandar (Malaysia).

To promote dialogue, the coordinators of this book wrote a paper that would act as a stimulus for exchanging ideas and engaging in debate. That text, which was discussed at our event in 2015, forms the central article of this book. Many of the guests invited to our conference presented written responses to the text, and these are presented as subsequent chapters in this compilation.

The central purpose of the text that we have presented for discussion, both at the conference and in this book, is to initiate a conversation on how to solve difficult dilemmas. We appreciate that some of the proposals may come across as controversial, but what we are looking for is, precisely, to open up the possibility of thinking in an innovative way about how to confront these challenges.

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The main objective of our text is to place on record the need to formulate answers to the question of the role that criminal action and punishment should play in negotiated political transitions from war to peace. There are two reasons for our making this observation. On one hand, given the institutional, legal, and political challenges facing societies that nowadays attempt to take this step, there is a need for the issue to be analyzed. On the other hand, the conclusion reached from an initial analysis is that the academic and the practical seem to be trapped in a polarizing discussion between those who defend a legal interpretation of the duty to investigate, prosecute, and punish—which appears to threaten the possibility of achieving negotiated transitions—and those who, in order to prevent that risk, deny or resent the existence or consolidation of such a principle.

Faced with this situation, our proposal seeks to encourage a dialogue on the subject that includes legal discussion, empirical research, and philosophical debate. To initiate this dialogue, we present our contribution to a possible solution. We commence this task with a legal review of the content and scope of the duty to investigate, prosecute, and punish, from the perspective of international law. In this analysis, we present both the points on which we believe there is a legal consensus and also those where, in our opinion, there are gaps or issues that can be interpreted in different ways. We conclude from this exercise that there are strong legal bases for preventing a staggered debate at both ends. Hence, our proposal searches for an intermediate point: we begin by recognizing that the state's duty to investigate, prosecute, and punish is an obligation that has been consolidated internationally as an *ius cogens* norm, but we maintain that this is not an absolute duty and that any concrete implementation of it must be mediated by conducting a balancing of interests exercised in contexts where application of

this duty may conflict with other legitimate interests of a society, such as peace.

In order to carry out this second step, namely the concrete balancing of interests, we turn to considerations based on philosophical debate about the role of transitional justice and criminal justice, and the relationship between these two in contexts of negotiated transitions from conflict to peace. Furthermore, we make use of available empirical research to aid consideration of the arguments. Based on these two steps, we conclude by presenting what we consider serve as guidelines for ascertaining the role of criminal law and punishment in contexts like these.

The papers form the contributors to this book in response to our chapter met our expectations, as coordinators, in terms of what we set out to achieve. Each of them aims to present, from a specific perspective, a reflection on the central text by putting forward a contrary or complementary view. Several of the papers, for example, emphasize legal or strategic disagreements with our proposal. Others, meanwhile, mention points that do not necessarily lead to disagreement, but which are considered to have not been sufficiently addressed in our text. Other papers clearly focus on the legal aspect, while others reflect on the legal proposal, based on experience gained from other contexts, and, finally, some others are oriented more towards the dialogue between the legal and other social sciences. On various occasions, meanwhile, the papers make specific references to the Colombian case, and their considerations and conclusions reflect the needs, expectations, and limitations of societies that are on the way to bringing armed conflicts to an end through negotiation.

Two of the papers present eminently legal responses and, based on their legal analysis, tend to disagree with certain elements of our proposal. In the first one, entitled “International Human Rights Standards in the Context of Transitional Justice,” Tatiana Rincón-Covelli draws up a comprehensive inventory of decisions made by international human rights bodies in order to evaluate the possibility of resorting to criminal prosecution strategies such as case selection in transition contexts. In her legal study of decisions made by the United Nations Human Rights Committee and various other decisions by the Inter-American Court of Human Rights, Rincón-Covelli maintains that transitional justice reaffirms the fact that states have a duty to meet their international obligations on human rights, especially the obligation to impart justice. This obligation, the author remarks, must be examined from three perspectives: (i) the nature of the crimes investigated; (ii)

the obligation to guarantee the right to equality before the law; and (iii) satisfaction of the right to justice. She therefore considers that any interpretation of those standards which limits the interpretation of international agreements is wrongful. Consequently, she considers that the challenge, in the case of armed conflicts in negotiated transition scenarios, lies in “build[ing] new standards, not in undermin[ing] those already in place, but complementing them.”

The article entitled “Transitional Justice and the Limits of the Punishable: Reflections from the Latin-American Perspective,” by Claudio Nash, is in a similar vein. However, there are certain differences between the two texts in terms of their approach and response to dilemmas. Nash starts from the question of how much impunity a society in conflict needs in order to secure the peace process. He aims to determine the viability of conditional amnesties that do not affect progress in a peace process. While he is of the opinion that every answer should take into account the sociopolitical context of the country in which the transition process takes place, he turns to analyzing the lessons from previous transitional justice processes carried out in Latin America in order to word his response. He therefore concludes that, given inter-American normative standards, an amnesty law, even if it were to be approved by a democratic regime and ratified by its citizens, is not necessarily legitimate in the eyes of international law.

Nash also approaches the matter from a criminal policy perspective. In this regard, he concludes that a possible lack of criminal response by the state to these types of violations may lead to “chronic impunity,” which would foment crime in the near future, instead of preventing it. The author puts forward an additional normative argument to complement his thesis, namely the legal culture that exists in Latin-American society. According to Nash, given the developments of both the Inter-American Court and national courts, the region has created a generalized legal culture that would reject a formula for impunity or for alternative measures that was less exhaustive than that required under current inter-American standards. But this does not mean, in Nash’s view, that an alternative which aims to balance the interests of justice against those of peace does not exist. His proposal is not to turn to figures such as amnesty or selection, but rather to have alternatives consisting of different punishments, with clemency and mercy measures for the peace process, with the criminal response of jail being reserved as punishment for the most serious crimes.

The contribution by Howard Varney and Michael Schwarz, entitled “The Pitfalls of Post-Conflict Justice: Framing the Duty to Prosecute in the Aftermath of Violence,” follows this line of analyzing legal

standards with relevant regional practice. Unlike the previous articles, which focus on international human rights law, Varney and Schwarz analyze international criminal law, especially the Rome Statute. In their legal analysis of these standards, the authors conclude that “penal consequences of serious crimes that do not involve incarceration are not necessarily offensive to the Rome Statute, provided they are seriously implemented and are not intended to circumnavigate a country’s obligations.” To reach this conclusion, the text is based on an analysis of the provisions established in the Rome Statute, and on three case studies: Sierra Leone, Timor-Leste, and South Africa. Based on the positive and negative aspects of these conflicts, the authors state that “in the aftermath of conflict and oppression, criminal proceedings ought to be seen as part of a larger set of measures, such as truth seeking, reparations, and institutional reforms.”

The following text by Tara Van Ho—while showing some support for the idea that under certain circumstances states are justified in not punishing criminals completely since certain interpretations of international law are required—concentrates on dealing with what the author considers to be an aspect yet to be addressed by the central text, namely the role of victims in these processes. Throughout the text, she explores and reflects on the difference between “good victims” and “bad victims” and what role victims should play in peace negotiations. The article investigates how relationships between state and criminal and between state and victim can affect the victim–criminal relationship, concluding that it is of little importance, and it likewise proposes a relationship structure where victims are more relevant—giving the victim a more central role—claiming that prosecution is not necessarily for punitive purposes, but rather is intended to protect victims and provide reparation for the damages they have suffered.

Finally, the book closes with a text by Oscar Parra entitled “Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges.” In his fascinating article, the author sets out to expand on some of the problems identified in the initial article, especially with reference to Inter-American Court practice and jurisprudence, in order to question how an international court should develop jurisprudence that takes into account the challenges posed by international contexts. He reviews the extensive jurisprudence on the subject, and points to two important factors for evaluating the role of this type of court: (i) litigation strategies and procedural steps in a case, and (ii) studying the context when it comes to evaluating an institutional design for transition. His reflections not only illustrate a critical but constructive view of how the Inter-American Court

could deal with these cases, they also serve as a guide that any court with similar characteristics can refer to and reflect on.

As coordinators of this book, we hope that the central text and the articles in response pave the way to dialogue on this subject. All our theses and arguments are up for debate. We admit that they are complex dilemmas and that our positions can be contested. If this is where the book leads to, our objective will have been achieved.

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1. The Challenges of Negotiated Transitions in the Era of International Criminal Law

*Nelson Camilo Sánchez and
Rodrigo Uprimny*

From its inception, the field of transitional justice has been very vibrant; it has expanded to cover multiple topics and areas of discussion, and several of its components have reached significant degrees of specialization and development (Bell 2009). One of these developments, which has had an important theoretical, normative, and institutional impact, is the consolidation of a paradigm of individual responsibility regarding past atrocities and the development of international criminal law as an unavoidable component of the accountability process.

The “era of justice,” as this consolidation process has been called, has led not only to the proliferation of normative standards and to the creation of a very sophisticated institutionalism for making them effective, but also to the progressive development of a political consensus regarding the importance of investigation, prosecution, and punishment of the gravest crimes (Sikkink 2013; Olsen, Payne, and Reiter 2010; Payne, Lessa, and Pereira 2015). The basic idea, based on this process, is that even if a transition is unable to take a maximalist stand with regard to criminal justice and punishment, it should be guided by minimum standards of individual accountability derived from criminal proceedings.

These developments have fostered a reinterpretation of the traditional dilemmas associated with transitional justice. Thus, while discussions some years ago focused on an inevitable confrontation between the values of peace and justice, today their relationship is viewed as an existing tension that must be addressed via a balancing of interests, where under no circumstance can one value be favored over the other, or, at least, where the search for justice cannot be restricted in order to favor the interests of peace.

This apparent political and academic consensus regarding the existence of what today is known as the duty to investigate, prosecute, and punish the gravest violations of human rights and infringements

of international humanitarian law¹ has nevertheless aroused interest in classical discussions of transitional justice regarding the relationship between criminal justice and political transitions. In parallel, societies currently facing difficult armed conflicts and carrying out political negotiations aimed at ending those conflicts struggle over how to adopt frameworks that will allow them to search for a peace that is both fair and sensitive to the rights of victims. They similarly debate a concept of justice and of victims' rights that allows for a negotiated peace, which is ethically superior to one achieved through military victory. Just as a peace process that does away with victims' rights does not seem either legally or politically viable, a conceptualization of victims' rights that impedes a peace process is not legally viable.

Nevertheless, a significant number of the arguments surrounding this political discussion—and to a great extent, the academic discussion—have polarized. On one side are those who defend the existence of a general, broad, and clear duty to investigate, prosecute, and punish. On the other side are those who deny the existence or content of such a duty. However, in between these extremes, not only is there a variety of option, there is also room for an important and lively debate about how to deal with the existing legal gaps and how to establish institutional designs that allow the task of accountability to advance.

The objective of this text is to contribute to this line of the debate. What we want with this article is to promote innovative academic reflections on contexts that are currently facing these dilemmas and are largely located in the global South. We are interested in incentivizing academic and practical exchanges between societies with similar needs in order to allow consensus-building and hence attempt to fill these theoretical, judicial, and institutional gaps.

In the interests of clarity and academic honesty, we first want to outline the five fundamental theses that we will defend in this article. All five are proposals based on a combination of our legal interpretation and our philosophical and empirical study in the area. However, we recognize that they are subject to debate and that some of them may be controversial. The purpose of this text is precisely to open up these theses to debate and potential review.

The first thesis is based on recognition of the existence of a general international duty to investigate, prosecute and, eventually, punish grave violations of human rights. The existence of such a duty is, in our judgment, a positive and humanitarian development in international

1 We will refer to this obligation generally as the international duty to investigate, prosecute, and punish, but in some parts of this article we will mention it simply as the duty to investigate and prosecute.

comparative law. Since it is a general international duty, we defend the idea that States, particularly those that have ratified the Rome Statute, are obliged to adopt measures that seek to fulfill this duty, which implies keeping it in mind even in political transition situations following mass violence.

The second thesis, nevertheless, starts from the idea that this duty is not absolute and that in practice, particularly in times of political transition, implementing it can lead to tension as far as other duties and values that the State should protect are concerned, such as the value of peace or the rights of victims. We accordingly defend the idea that this duty should be weighed against other specific State obligations and in light of the particular context in question. Consequently, it is not possible to determine, in the abstract, to what extent this duty should or could be applied.

For that reason, our third thesis proposes a dialogue between the legal standards that establish the duty to investigate, prosecute, and punish, at the international level, and empirical findings and philosophical discussions about the objectives of transition, the role of criminal proceedings in the transition process, and the goals and functions of punishment. In situations where various options exist for implementing international standards in local contexts, there is a need to promote a dialogue about normative categories, the political aims of the transition, and the specific capacities and limitations of the society in transition. Only by undertaking these debates would it be possible to establish what concrete role criminal prosecutions should play in a broader transition policy.

Stemming from this, the fourth thesis that we defend is that—depending on the magnitude of the violence and States' ability to fulfill their objectives—some strategies that attempt to concentrate criminal action may be valid, as long as they form part of a comprehensive and honest transitional justice policy and include clear, achievable, verifiable objectives.

Finally, the last thesis we defend concerns the goals and functions of punishment in a transitional context. Philosophical debates and available empirical studies illustrate the complexity of directly transferring the goals ascribed to punishment in contexts of isolated violence to situations of mass and atrocious violence. While the debate remains open, and at this point there seems to be no conclusive evidence, there is a relative consensus on the idea that in situations of mass violence, punishment should focus on distinct parameters. In this article we defend the hypothesis that, on evaluating the possible normative goals that may be associated with criminal punishment, the ones that seem

most relevant to supporting a transitional policy are associated with moral condemnation, assigning responsibility, and building a culture of non-repetition. For this reason, we defend the idea that striking a balance between the punitive and the expressive functions of punishment should be considered a responsible criminal prosecution strategy in the transitional context.

With a view to putting these theses into context and defending why we consider them rational, we adopt a dual-faceted, methodological approach to this article. On the one hand, this text seeks to generate a dialogue between the legal discussions, empirical studies and philosophical debates on the subject, since we believe such an approach is necessary, so that points in common in different disciplines can be reviewed. This approach stands in opposition to abstract, generalized legal interpretation, which does not seem to be the most useful tool for tackling the challenges described. On the other hand, based on this interdisciplinary dialogue, the article seeks to describe the positions in the debate in some detail, not simply for the sake of description, but rather as a means of defending the aforementioned five theses. The text is accordingly divided into two main parts. The objective of the first section is to study the nature, content, and scope of the duty to investigate, prosecute, and punish, highlighting the doctrinal debates surrounding that duty and its interpretation in transition contexts. The second section seeks to offer tools for consensus-building in this area, focusing as much on guidelines for legal interpretation of the duty as on the role of criminal law in transition contexts.

Investigation, Prosecution, and Punishment as an International Legal Duty

In this section, we will describe the principal legal debates regarding the nature, content, and scope of the duty to investigate and prosecute. First, we will present the debates about the existence of the duty and its obligatory status as a general norm of international law. We will then go on to explore what conduct has been considered to be possibly covered by the duty. We will then analyze the different positions regarding what a State is specifically obliged to do under this duty. We will finish this section by describing the discussions that interpretation of the duty has given rise to in contexts of mass violence and political transition.

The Nature of the Duty

There is currently a seemingly broad consensus that States have an international obligation to judicially prosecute those who have committed certain atrocities that would today be considered crimes against humanity. This obligation has been consolidated due to the development of three branches of international law: international human rights law, international humanitarian law, and international criminal law.

This development has been commonly referred to as the post-Nuremberg model, since it began when the postwar military tribunals were installed, and continued with the adoption of human rights treaties that specifically signal States' obligation to prosecute. As the first source, this duty was thus initially included explicitly in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,² the Geneva Conventions of 1949,³ the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid,⁴ and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵ Subsequent treaties, both regional and universal, have reiterated the duty more recently. Among them are the 2006 International Convention for the Protection of all Persons from Enforced Disappearance (Article III), and, in the Inter-American context, the 1985 Inter-American Convention to Prevent and Punish Torture (Article VI), the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Article VII), and the 1994 Inter-American Convention on Forced Disappearance of Persons.⁶

Concurrently, as a second source, recognition of this duty has been confirmed by the adoption of multiple soft law documents, especially stemming from the work of United Nations authorities. The pioneer documents in this trend were the 1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary

2 Article I establishes that "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

3 Common Articles I and III refer to this duty in regard to international conflicts and non-international conflicts, respectively.

4 Article IV (2) considers the obligation to prosecute and punish in regard to apartheid.

5 UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984), <http://www.refworld.org/docid/3ae6b3a94.html>. Article IV of this Convention considers this obligation in regard to torture.

6 Article I of this Convention considers the duty to prosecute and punish in regard to forced disappearances.

Executions,⁷ the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,⁸ and, to a lesser extent, the 1993 Vienna Declaration.⁹ This trend was confirmed by the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, initially prepared by Louis Joinet in 1997,¹⁰ updated by Diane Orentlicher in 2005,¹¹ and embraced through a UN General Assembly resolution. That document was approved almost concurrently with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted in 2005.¹²

As a third source, a new public international law discipline emerged and became established during this time period, namely international criminal law.¹³ Several important historical developments influenced the establishment of the field: (i) the Security Council response to mass violence in situations such as those in the former Yugoslavia, Rwanda, and Sierra Leone, and the subsequent setting-up of international tribunals for the prosecution of certain crimes; (ii) the establishment of hybrid tribunals, such as the ones for Cambodia and Timor Leste; and (iii) complementarily, and in order to avoid the criticism that the establishment of such ad hoc tribunals aroused, the initiation by the

7 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Economic and Social Council Res. 1989/65 (May 24, 1989), Principle 19, <http://www.unrol.org/files/PRINCI-2.PDF>

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10 Rep. of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final Report prepared by Louis Joinet, Question of the Impunity of Perpetrators of Human Rights Violations (civil and political), pursuant to Sub-Commission Decision 1996/119 (1996), UN Doc. E/CN.4/Sub. 2/1997/20/Rev.1 (Jun. 26, 1997), http://www1.umn.edu/humanrts/Amensty%20Laws_Joinet.pdf

11 Diane Orentlicher (Independent Expert), Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (Aug. 2, 2005), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

12 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 (Dec. 16, 2005), http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf

13 This branch of law had grounding in the precedents set at Nuremberg and Tokyo, as well as in the Convention against Genocide.

world community of the process to establish a permanent International Criminal Court, which culminated in 1998 with the Rome Statute.

As a fourth source, quasi-judicial institutions and human rights tribunals began to interpret basic international human rights law treaties and to derive from them the general obligation to respect and guarantee rights as well as the right to an effective judicial recourse, with a consequent obligation to investigate and prosecute. This jurisprudence has been boosted, particularly, by the Inter-American Court of Human Rights (I.-A.C.H.R.), which, for as long as it has been active, has defended the existence of the duty to investigate, prosecute, and punish violations of human rights recognized under the American Convention on Human Rights (ACHR). Since the seminal *Velásquez Rodríguez vs. Honduras* case,¹⁴ the Court has emphatically determined that this obligation stems from the obligation to respect rights, as recognized in Article 1.1 of the ACHR. Furthermore, the Court has held that by reading the right to justice in conjunction with the right to an effective judicial recourse (ACHR Article 25), underpinned by compliance with the rules of due process (ACHR Article 8.1), an obligation is established for the State to guarantee effective access to the administration of justice and to simple and speedy legal remedies which guarantee that those responsible for human rights violations are prosecuted and that reparations are received for the harm suffered.¹⁵

In its extensive case law, the I.-A.C.H.R. has been refining the definition of this duty by assigning to it at least five characteristics: (i) its source is articles 1, 8, and 2 of the ACHR; (ii) it applies to grave violations of human rights committed within a State Party to the Convention; (iii) it is an obligation of means that is fulfilled once it can be determined that the State has performed due diligence in the course of its punitive activity to unveil the structures that permitted said violations; (iv) it implies the holding of criminal trials to identify all actors

14 *Velásquez Rodríguez vs. Honduras*, Merits, Judgment, I.-A.C.H.R. Series C No. 4 (July 29, 1988), para. 166, http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf

15 *Loayza Tamayo* case, Reparations, I.-A.C.H.R. Series C No. 42 (Nov. 27, 1998), para. 169, http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf; *Velásquez Rodríguez* case, Preliminary Objections, Judgment, I.-A.C.H.R. Series C No. 1 (June 26, 1987), para. 91, http://www.corteidh.or.cr/docs/casos/articulos/seriec_01_ing.pdf; *Fairén Garbí & Solís Corrales* case, Preliminary Objections, I.-A.C.H.R. Series C No. 2 (June 26, 1987), para. 90, http://www.corteidh.or.cr/docs/casos/articulos/seriec_02_ing.pdf; *Godínez Cruz* case, Preliminary Objections, I.-A.C.H.R. Series C No. 3 (June 26, 1987), para. 93, http://www.corteidh.or.cr/docs/casos/articulos/seriec_03_ing.pdf; *Massacre of La Rochela vs. Colombia* case, Merits, Reparations and Costs, I.-A.C.H.R. Series C No. 163 (May 11, 2007), para. 145, http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf

involved in the crime, both materially and intellectually; and (v) it specifies the duty of imposing a pertinent punishment, although it is unclear as to what that punishment should consist of.

Based on this reinterpretation of the obligation to respect and guarantee, the I.-A.C.H.R. and other international tribunals¹⁶ and treaty monitoring bodies¹⁷ have impeded State actions that have sought to perpetuate impunity for grave and systematic violations through the application of legal devices such as statutes of limitation, the prohibition of double prosecution even in the case of minor trials, and the granting of *de jure* or *de facto* amnesties.¹⁸

The legal community's response to developments relating to this duty has not been unanimous. Initially, important members in the fields of criminal law and criminology strongly criticized the bases for its existence. Some of their criticisms were based on such aspects as (i) the alleged inexistence in binding texts of concrete language that expressly recognizes this obligation and which could lead to identifying the consent of States involved (particularly in regard to general human rights treaties; Mallinder 2008), (ii) the presumed inconsistency in the human rights community shifting its position on punitiveness and criminal retributivism after decades of defending the limited use of criminal law and the theories relating to the preventative function of punishment (Malarino 2010; Orozco 2013), and (iii) the inconvenience and illegitimacy of translating what would be a general obligation on

16 *Aksoy vs. Turkey*, E.C.H.R. No. 21987/93 (Dec. 18, 1996), at ¶98, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003>; *Abdülsamet Yaman vs. Turkey*, E.C.H.R. No. 32446/96 (Feb. 2, 2005), at ¶55, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67228>; *Marguš vs. Croatia*, E.C.H.R. No. 4455/10 (May 27, 2014), at ¶126, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-114487>.

17 *Rodríguez vs. Uruguay*, Comm. No. 322/1988, UN Doc. CCPR/C/51/D/322/1988 (Aug. 9, 1994), at ¶14, <http://www1.umn.edu/humanrts/undocs/html/vws322.htm>; *Basilio Laureano Atachahua vs. Peru*, Comm. No. 540/1993, UN Doc. CCPR/C/56/D/540/1993 (Mar. 25, 1996), at ¶10, <http://www1.umn.edu/humanrts/undocs/540-1993.html>; *Boucher vs. Algeria*, Comm. 1196/2003, UN Doc. CCPR/C/86/D/1196/2003 (Mar. 30, 2006), at ¶11, http://www.worldcourts.com/hrc/eng/decisions/2006.03.30_Boucherf_v_Algeria.htm

18 *Barrios Altos vs. Peru*, Merits, I.-A.C.H.R. Series C No. 75 (Mar. 14, 2001), para. 41, http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf; *Gomes Lund and Others (Guerrilha o Araguaia) vs. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, I.-A.C.H.R. Series C No. 29 (Nov. 24, 2010), para. 175, http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf; *Gelman vs. Uruguay*, Merits and Reparations, I.-A.C.H.R. Series C No. 221 (Feb. 24, 2011), para. 225, http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf; *Massacres of El Mozote and Nearby Places vs. El Salvador*, Merits, Reparations, and Costs, I.-A.C.H.R. Series C No. 252 (Oct. 25, 2012), para. 283–296, http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf

the State into fundamental rights; in other words, the creation of a fundamental right held by victims that enables them to demand the criminal punishment of third parties (Orozco 2014).

Additionally, different authors' interpretations of the nature of the duty have resulted in different consequences being attributed to it. For example, authors like Cryer (2010), Freeman (2010), and Mallinder (2007) point out that amnesties are still an existing practice, and they argue that there are at least four reasons why we cannot yet presume that there is an absolute obligation to investigate, prosecute, and punish. First, with regard to State conduct, Mallinder maintains that during the last 30 years, a significant number of States have resorted to amnesty laws, even for international crimes. Second, it has been as common in recent times for States to support amnesties established by other states as it has been for them to condemn them. Third, when negotiating international treaties, States have consistently refrained from prohibiting amnesties. Finally, national courts have not been consistent, in practice, as there are courts that have endorsed amnesties and others that have refused them. Consequently, Mallinder (2014) states that although crimes against humanity and war crimes committed in non-international armed conflicts are widely perceived as international offences and have sometimes been prosecuted before national and international courts, this does not automatically imply the existence of a *mandatory* duty to prosecute. Thus, with regard to crimes regulated by international custom, at most a permissive duty, rather than an obligatory one, would exist.

Similar objections have been raised with respect to the binding nature of other sources, such as soft law instruments and international jurisprudence. As far as *soft law* instruments are concerned, it should be stressed that although they adopt a more critical view of amnesties, they are still non-obligatory by nature, according to the definition in classical sources of public international law. Meanwhile, court practices and case law developments relating to amnesties have been highly criticized. To begin with, critics stress that jurisprudence cannot create a new rule of international law, as it can only express opinions about the existence of such a rule. From another point of view, authors like Freeman (2010) have firmly questioned the legal integrity of these decisions.¹⁹

19 According to Freeman (2010), "Supranational courts have not been thorough in their investigations of the amnesty practices of states. Instead, they have tended to rely on the pleadings before them or on the conclusions of prior cases, no matter how perfunctory or insufficient in their assessment of state practice and irrespective of whether made only *in obiter*" (p. 47).

Critics who argue that the only acceptable sources for edifying the nature of this duty are treaties which specifically state the obligation to investigate and prosecute recognize that the duty exists only for States that have ratified these treaties, and within the specific limits set out in the agreement. Mallinder (2007) thus maintains that, according to the letter of the conventions, the obligation to investigate and prosecute genocide and war crimes committed in international armed conflicts is absolute, while the duty to investigate and prosecute torture and enforced disappearances seems optional rather than imperative.

The Content of the Duty

The discussion about the content of the duty generally focuses only on which crimes should be included as part of this international obligation. There are three predominant schools of thought on this issue. For the first group, the discussion should be limited to crimes mentioned in treaties that explicitly establish the obligation. For the second, the definition of the obligation that best establishes its legal limits is that which refers to “international crimes.” Finally, another group of academics and practitioners argue for a broader application of the duty, which would extend to all behaviors that would be considered “gross violations of human rights” (Uprimny, Sánchez, and Sánchez 2014).

Scholars in the first group defend a more limited conception of the nature of the duty to investigate and prosecute. They accordingly hold that the duty extends only to crimes which are specifically referred to in the relevant treaties, namely genocide, torture, forced disappearance, and war crimes committed in an international armed conflict (Scharf 2006; Tomuschat 2002).

The second group defends the idea that while it is true that States have the right to determine the criminal behaviors that are included, there is a limit imposed by international law, and today that limit is governed by the concept of international crime. There is nevertheless no universally accepted definition of the concept of international crime. For example, some maintain that “international crime” includes all crimes mentioned in international norms and therefore includes crimes associated both with human rights violations and with other behaviors considered transnational or international crimes, such as drug trafficking or terrorism. Others maintain that for the purpose of defining the duty to investigate and punish, the concept of international crime should be limited to crimes covered by international criminal law: essentially, in other words, crimes included in the Rome Statute. The obligation would therefore apply to crimes of genocide, crimes

against humanity, and war crimes as outlined in the Statute. From this perspective, it is important to study decisions where the International Criminal Court has interpreted the Rome Statute, because in certain contexts, human rights violations may constitute crimes against humanity or war crimes, provided that they fulfill certain characteristics established in the Statute. The Rome Statute lays out a series of elements of international crimes for determining when an act constitutes an international crime, based on the authority granted by its Article 9.²⁰ For purposes of defining crimes against humanity, a requirement to prove that the acts under investigation were committed as part of a systematic or generalized attack on civilians has been considered.

The question therefore remains as to whether a violation that is considered grave by human rights tribunals, such as torture, should be covered by the duty to investigate and prosecute as a general rule of international law, even if it was not committed in a context established by the Rome Statute. In response to this question, the third group argues for a broader and more inclusive definition of which crimes are covered by the duty, such as “grave violations of human rights.” This term, “grave human rights violations,” or the similar “serious human rights violations,” has been incorporated into various treaties, jurisprudence, and *soft law* international human rights instruments. The question that nevertheless arises is what, exactly, constitutes a grave violation of human rights. In reality, as a recent study conducted by the Geneva Academy of International Humanitarian Law and Human Rights²¹ demonstrated, there are references in the body of instruments and jurisprudence that makes up this branch of international law not only to “grave” violations of human rights but also to “serious,” “flagrant,” “gross,” “particularly serious,” and “egregious” violations.²²

20 The elements of the crimes outlined in Article 9 of the Rome Statute were adopted by the General Assembly of States Parties to the Rome Statute held in New York from September 3 to September 10, 2002.

21 Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 6: *What amounts to “a serious violation of international human rights law”?* *An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty* (2014), p. 6, http://www.genevaacademy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf

22 A clarification is necessary on this point. The definition of what constitutes a grave violation of human rights is connected to a recurring debate, which is that of the great reluctance that persists towards establishing a human rights hierarchy, given the interdependency of those rights. Effectively, it is understood that every violation of human rights is *prima facie* of equal importance in terms of the guarantee and protection of that right. Nevertheless, if there is an attempt to categorize rights according to whether or not they

The Scope of the Duty

Discussions about the scope of the duty to investigate and punish have concentrated on the legal consequences that derive from the duty. Here it is possible to identify several approaches. The first, and the most severe one, holds that the duty to investigate and punish always implies an obligation to impose a prison sentence for these crimes, which should be proportionate to the gravity of the act committed and must be served by the perpetrator. The main feature of the second approach is conditional severity, and it maintains that sentences other than imprisonment may be admissible for these crimes, as long as they impose a certain degree of distress or punishment. The third approach establishes that the duty to punish is fulfilled when a responsible actor is sentenced to imprisonment, but the State has the discretion, for important reasons, to suspend the sentence because of certain compromises. The fourth and final approach allows that under circumstances similar to those considered in the third approach, the State can even choose to excuse any fulfillment of the sentence.

As explored in the previous section, international treaties which establish the duty to investigate, prosecute, and punish do so in terms of a criminal trial of those responsible for the crimes that the treaty refers to.²³ Decisions by Inter-American System entities also tend in the same direction. Although there was some ambiguity relating to the substance of this duty in the first cases heard by the Inter-American Commission on Human Rights (IACHR)²⁴ (in the sense that it was not completely clear whether the duty necessarily required the holding

surpass a particular threshold of gravity, that categorization must have at its root an understanding that under certain circumstances international human rights law establishes a reinforced protection. Accordingly, the proposal is not to draw up a category of grave violations as a means of constructing a rights hierarchy, but rather, as Professor Cherif Bassiouni explains, to establish circumstances under which a human rights violation that has been committed is considered so severe or grave that it should receive special treatment across jurisdictions (Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, submitted pursuant to Commission on Human Rights Resolution 1998/43, para. 85).

23 The Convention on Genocide discusses trial by a competent tribunal, the Convention against Torture refers to adequate punishments which, in the light of due process guarantees, implies the holding of a trial, the International Convention against Forced Disappearance talks of prosecuting those responsible, and the Preamble of the Rome Statute refers to a State duty to exercise criminal jurisdiction. In this sense, and with regard to the crimes covered by these treaties, the duty in question is a duty to hold criminal trials.

24 With regard to the ambiguity in these decisions, see Guariglia (2001) and Scharf (1996).

of criminal trials), later decisions both by the IACHR²⁵ and by the I.-A.C.H.R. leave no doubt that the duty implied a requirement to conduct criminal trials.²⁶

At the same time, the I.-A.C.H.R. has established that this duty to prosecute and, where appropriate, to punish those responsible for grave violations of human rights is an obligation to undertake certain actions, but it is not an obligation to obtain particular results. The Court has adopted the standard of due diligence, which acquires particular meaning when applied to cases of human rights violations that occurred in the context of mass or systemic atrocity. In such cases, due diligence requires the adoption of a systematic perspective in the criminal investigation that puts those who order the violence or criminality on notice and allows for the identification of chains of command. This second step is necessary for bringing to light the power structures behind mass human rights violations and avoiding any repetition of such acts in the future.²⁷

Now, considering that a guilty verdict is the logical result of a criminal trial in which the prosecution is able to prove the criminal responsibility of the accused, the question becomes whether the duty to prosecute and punish requires the effective imposition of a punishment and, if so, if that sentence necessarily must be imprisonment or whether it is possible to consider alternative punishments. The conventions which establish this duty refer explicitly to the duty to punish, but

25 *Garay Hermosilla and Others*, I.-A.C.H.R. Case 10.843, Report No. 36/96 OEA/Ser.L/V/II.95 (1997), <http://www1.umn.edu/humanrts/cases/1996/chile36-96.htm>

26 *Contreras et al. vs. El Salvador*, Judgment, I.-A.C.H.R. Series C No. 232 (August 31, 2011), at ¶ 135, http://corteidh.or.cr/docs/casos/articulos/seriec_232_ing.pdf. See also *Gomes Lund and Others vs. Brazil*, at ¶ 297; *Almonacid Arellano and Others vs. Chile*. Preliminary Objections, Merits, Reparations, and Costs, Judgment, I.-A.C.H.R. Series C No. 154 (Sep. 26, 2006), at ¶ 150, http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf

27 In the *Manuel Cepeda Vargas vs. Colombia* case, the I.-A.C.H.R. determined that “In complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation. Thus, determination of the perpetrators of Senator Cepeda’s extrajudicial execution will only be effective if it is carried out based on an overall view of the facts that takes into account the background and context in which they occurred and that seeks to reveal the participation structure.” See *Cepeda Vargas vs. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment, I.-A.C.H.R. Series C No. 213 (May 26, 2010), at 118, http://www.corteidh.or.cr/docs/casos/articulos/seriec_213_ing.pdf

they do not strictly specify what type of sentence has to be imposed. For example, the Convention on the Prevention and Punishment of the Crime of Genocide states that “Persons committing genocide or any of the other acts enumerated in article III shall be punished” (Article IV), and that States should adopt “the necessary legislation . . . to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III” (Article V). The various conventions against torture and forced disappearance provide that States should punish with penalties proportional to the gravity of the crimes.²⁸ Similarly, the Rome Statute states in its Preamble that “the most serious crimes of concern to the international community as a whole must not go unpunished.”

The response to this question is less clear when it comes to other grave violations of human rights. On the one hand, the I.-A.C.H.R. has indicated that States are obliged to impose “appropriate punishment” on perpetrators.²⁹ At the same time, the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that States have the duty to punish individuals who have committed such crimes (Principle 4). The United Nations Office of the High Commissioner for Human Rights, addressing the issue of amnesties for grave human rights violations, has recognized the benefits of reducing sentences in exchange for a full and complete telling of the truth about the facts, provided that “the sentence imposed . . . [is] proportionate to the gravity of the offence,”³⁰ which appears to defend some degree of punishment. In contrast, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity³¹ refers to the duty of States to sentence, not to punish (Principle 19).

Nevertheless, as we will argue in the next section, other authors have severely criticized the unquestioned incorporation of doctrines defining the goals and functions of punishment that were developed

28 See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4.2; Inter-American Convention to Prevent and Punish Torture, art. 6; International Convention for the Protection of All Persons from Enforced Disappearance, art. 7.1; Inter-American Convention on Forced Disappearance of Persons, art. 3.

29 *Velásquez Rodríguez vs. Honduras*, Merits, at ¶174.

30 United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*. New York and Geneva: United Nations (2009), p. 45, http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf

31 Orentlicher, Updated Set of Principles (2005).

from the context of isolated violations of criminal law into contexts of generalized violence. Finally, a third group defends the idea that even if a basic rule on the imposition of punishment (including imprisonment) could be adopted as a starting point, that rule would still be a *prima facie* duty that could be adapted to suit the specific transitional justice context. In such contexts, the doctrine of general negative prevention does not provide strong support for the need to impose prison sentences, whereas there are strong reasons in favor of using alternative measures or of excluding punishment completely.

The Duty in Transitional Contexts

Determining the content and scope of the duty is more challenging in situations of mass violence. Firstly, if it is, in fact, very often a hard duty to perform in isolated cases of violence or ordinary criminality, then in the context of generalized violence there are even more concerns about the ability of the State, which has previously been unable to adequately control internal security, to effectively and efficiently investigate, prosecute, sentence, and punish a large number of perpetrators for an exponential number of crimes.

Additionally, transitions from dictatorship to democracy or from war to peace through a peace agreement leave societies with the difficult tasks of overcoming a past of extensive and grave human rights violations and doing the groundwork to ensure that such atrocities do not occur again. Prior to the 1980s, the dominant focus in transitional contexts was on “forgive and forget,” and the tools of choice were general and unconditional amnesty laws. From the 1980s onwards, the focus on amnesties began to be seriously questioned, not only because amnesties implied ignoring the pain and suffering of victims, but also because ignoring the chain of abuses that had been committed did not seem to be the best way to lay the foundations for a transition into a society that would be truly democratic and respectful of human rights.

In international law, the only conventional norm that deals with amnesties is contained in Additional Protocol II to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of Non-International Armed Conflicts. The International Committee of the Red Cross has nevertheless stated that this reference to the granting of amnesties does not extend to war crimes or to other crimes covered by the international duty to prosecute.³²

32 In a thorough compilation of international humanitarian law drawn up by the International Committee of the Red Cross (Henckaerts and Doswald-Beck 2009), customary international law norm 159 states that “At the end of

Amnesties therefore appear to be acceptable in cases of violations of international humanitarian law that do not constitute war crimes. Building off this idea and the previously cited jurisprudence of international courts, some argue that general amnesties—ones that impede the investigation of all grave violations of human rights and of international humanitarian law and the trial of those responsible for such offenses—contravene international law.³³ This idea follows not only from the clear existence of a duty to prosecute but also from the fact that such amnesties would be incompatible with the objectives of the transition toward overcoming past abuses and atrocities. Orentlicher (1991) has defended this thesis, stating that “a failure to punish *any* of the past violations would thwart the deterrence objective underlying the general duty to punish” (p. 2601, emphasis original).

However, it is not yet completely clear whether the conceding of conditional and partial amnesties, such as ones granted in a case where a crime and responsibility selectivity policy was applied, is in breach of the international legal framework. As mentioned previously, one important group of legal scholars and social science investigators has been critical of the supposed prohibition of amnesties as a general duty of international law. On the other hand, the I.-A.C.H.R. has developed a broad jurisprudence in which it has declared a good number of amnesties in the region incompatible with the ACHR. The Court’s rulings on the subject have nevertheless all been in reference to cases of self-amnesties, like those in Chile and Peru, or general and unconditional ones, such as those in Brazil and Uruguay. To date, the I.-A.C.H.R. has not addressed the question of compatibility in the case of partial and conditional amnesties, particularly when those amnesties are granted in the context of a negotiated transition. What is more, in its most recent case on the subject, *Massacres of El Mozote vs. El Salvador*, where for

hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes” (p. 611), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>. This same reasoning is found in *Massacres of El Mozote and Nearby Places vs. El Salvador*, at ¶ 286.

33 On this question, the UN Secretary-General stated that “United Nations–endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights” (The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2004/616 [Aug. 23, 2004], ¶ 10, <http://www.unrol.org/files/2004%20report.pdf>). Similarly, the UN Secretary-General urged the Security Council to reject the granting of any form of amnesty for these crimes (The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2011/634 [Oct. 12, 2011], ¶ 67, http://www.unrol.org/files/S_2011_634EN.pdf

the first time the I.-A.C.H.R. addressed the issue of an amnesty at the end of an armed conflict, as opposed to at the end of a dictatorship, the opinion included some hints which suggest that there was no single formula that satisfied the duty to prosecute and punish in a transition context. The ruling seemed to suggest that the Court could, at some future date, be open to refining its precedents if faced with transitional formulas that were different from those it had thus far rendered decisions on.³⁴ At the same time, it seems questionable whether a transition formula that was designed in good faith, and which includes selectivity of cases and responsibility, would necessarily trigger ICC jurisdiction, even if that formula did not include every one of the perpetrators.

In fact, the status of amnesties in the Rome Statute is also ambiguous. As Scharf (2006) states, on this point “the provisions that were adopted reflect ‘creative ambiguity’ that could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statutes as permitting recognition of an amnesty or asylum exception to the jurisdiction of the court” (p. 367). That ambiguity, as Scharf calls it, arises because the Rome Statute permits that, under certain conditions, States can decline to take criminal action when faced with crimes that come under the jurisdiction of the ICC. This can be deduced from Article 17(1)(b), which defines as a criterion for inadmissibility of a case that it “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” What is more, Article 53(1)(c) states that the ICC Prosecutor can decide not to initiate an investigation if “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

The Office of the ICC Prosecutor³⁵ has nevertheless stated that the “interests of justice” concept should be interpreted in the light of the

34 Legal academic Zalaquett (2007) stated that there are still aspects of the Inter-American System that need to be clarified: “(a) Does the duty to prosecute and punish necessarily require a sentence of imprisonment and the holding of criminal trials like those that have been undertaken in the majority of countries? Or would alternative customary procedures or, in the case of South Africa, the granting of amnesties (with the exception of those crimes that could not be deemed politically motivated) be applicable, subject to the accused giving a complete public testimony of what occurred and participating fully as a declarant? (b) If a person has already been convicted of war crimes or crimes against humanity, is it legitimate that he benefits from subsequent clemency measures, as long as these are not, in effect, a means of evading the impact of justice?” (p. 194).

35 Office of the Prosecutor of the International Criminal Court, Policy Paper on

objective of the Statute and that, in this sense, factors such as the prevention of serious crimes or long-term respect for international justice can be taken into account when exercising the discretionary power granted under Article 53. What is more, this policy formally adopted by the Office of the Prosecutor differentiates between the interests of justice and the interests of peace, assuming that they are distinct and that only the Security Council has the authority to examine the impact of an ICC peace investigation and even potentially to suspend it for a year, extendable indefinitely. The only thing that the Office of the Prosecutor can accordingly take into account is the interests of the victims, as Article 53 establishes.³⁶

This maximalist interpretation of the obligation to investigate and prosecute by the Office of the ICC Prosecutor has recently been adopted by other courts. In the Inter-American system, for example, in its recent report on Colombia,³⁷ the Inter-American Commission on Human Rights left very little leeway for a peace negotiation, since it established that even a judgment system that focused on investigating, judging, and effectively sentencing only those most responsible for grave crimes would contravene the interests of justice by permitting that no further criminal action could be taken against those who were pardoned.

Similarly, in his recent report on “prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious

the Interests of Justice (2007), <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF0973422BB23528/143640/ICCOTInterestsOfJustice.pdf>

36 Although the ICC has not yet made a decision which addresses these types of questions, it is worth mentioning that during the constitutionality review process for the Legal Framework for Peace in Colombia, the Office of the ICC Prosecutor sent the Colombian Constitutional Court two letters, in which it expressed its opinion regarding the policy of selectivity of cases and responsible actors and the possibility of suspending the sentences of those responsible for atrocious crimes. On the first issue, the Prosecutor focused only on clarifying the fact that the procedural strategy of focusing prosecution efforts on those most responsible should not be interpreted as a precedent authorizing States to adopt a similar strategy in the future. The Prosecutor nevertheless did not include any warning in terms of whether such an adoption could trigger the jurisdiction of the ICC. On the question of punitive benefits, on the other hand, the Prosecutor’s approach was more pointed, stating that suspension of prison sentences for those most responsible for international crimes was incompatible with State obligations under international law in general, and under the Rome Statute in particular. The Prosecutor nevertheless did not explain his reasoning in the letter, and accordingly, although it is an important document, it is hard to derive from it an authoritative position from the ICC Prosecutor.

37 Inter-American Commission on Human Rights, Colombia Country Report: Truth, Justice and Reparation, OEA/Ser.L/V/II, Doc 49/13.31 (2013), ¶¶ 353–354, <http://www.oas.org/es/cidh/docs/pdfs/Justicia-Verdad-Reparacion-es.pdf>

violations of international humanitarian law,” the UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, Pablo de Greiff, adopted a position that also left little leeway for societies that want to engage in a political negotiation for peace.³⁸ The report does recognize the challenges of large-scale accountability processes and that “experience demonstrates that only a fraction of those bearing responsibility for massive violations are ever investigated” (para. 104). It accordingly makes recommendations focusing on the prioritization of cases. However, the report appears to be against a selection strategy that focuses only on those most responsible.³⁹

These maximalist visions of the obligation to prosecute have brought together an important group of scholars and practitioners concerned about the negative impact that a high standard of justice could have on peace negotiations. These proponents include the group that published the Belfast Guidelines on Amnesty and Responsibility (Mallinder 2014), a set of guidelines that “assist states in recognizing the positive role of certain forms of amnesty in advancing transitional policy and conflict transformation goals” (p. 1).⁴⁰

The Role of Criminal Law in Political Transition and Debates Regarding its Efficacy

The discussion about the implementation strategy for the duty to prosecute and punish in a given situation will depend very much on the specific context. A concrete balancing of the principles can only be

38 Pablo De Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, UN Doc. A/HRC/27/56 (Aug. 27, 2014), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/148>.

39 Even though it is not expressly stated, this conclusion can be drawn from two of the report’s findings. On the one hand, the report states that “States may not relieve suspected perpetrators of individual responsibility through amnesty, prior immunity or indemnity, the defense of obedience to superior orders, unreasonably short statutes of limitation or other impediments” (§101). On the other hand, this is complemented by the statement that “the Special Rapporteur is gravely concerned at amnesties for suspected perpetrators of genocide, war crimes, crimes against humanity and other gross human rights violations or other serious violations of international humanitarian law. Such amnesties risk further entrenching impunity. They have also even proven counterproductive in the sustainable prevention of the recurrence of violations and vicious circles of violence” (§103).

40 The authors of this text participated in the group’s deep and interesting discussions, but for the reasons outlined in the next section, we decided not to sign up to the Guidelines. For the Guidelines, see Mallinder (2014).

conducted on the basis of the individual characteristics of each conflict, each society, and each case. This is where the domestication of international standards comes into play.

The discussion about the implementation of normative standards should thus not be limited to elements of legal interpretation, but should be broadened in order to include other factual and political considerations, meaning that both relevant empirical information and diverse social research methodologies should be turned to. The development of a broad strategy of justice, or of a criminal transition policy, should be based on both legal and extralegal elements.

When performing this task, it is essential that the legal discussions described in this text be combined with other types of studies, so that the relevant normative standards can be applied to concrete situations. At present, there appears to be an unhealthy disciplinary separation between international norm theorists and those who focus on other research fronts. In the early days of transitional justice, these played a much more central role and spearheaded debates. There is therefore a need to restore these debates and to foster interdisciplinary exchanges of ideas. At least three types of debates could make very important contributions to this task: (i) discussions about the aims of punishment and criminal proceedings; (ii) the relationship between the goals of criminal law and the specific objectives of a given political transition; and (iii) verification of the actual impact of judicial discourse and institutional structures that are established for promoting the transition.

The Goal of Punishment and the Criminal Process

Normative and doctrinal evolution, in terms of the importance of criminal law as one of the tools of accountability in transition periods, has not always gone hand in hand with a more philosophical and political reflection on the role that these normative standards should play in the complex mechanism that is a transition policy. These discussions have been lacking even though, historically, there has been as much debate as to why and to what end we should impose punishment. These debates continue to be relevant today, as demonstrated by the fact that various theories on the goal of punishment (retribution, prevention, and mixed) still exist. What is more, each theory has been the subject of diverse critiques, such as that put forward by Luigi Ferrajoli in his book *Derecho y Razón* (1989, 260–280). Even if theories associated with prevention seem to underlie many criminal justice systems in Western societies today, there is no system that is purely based on one method, and there is no system that is without its critiques. If such polemical

debates arise over ordinary and, it can be said, sporadic crime, it is not surprising that in the case of atrocious and mass violence there are also debates about the goals of prosecutorial action as part of transition strategy.

In reality, the classic literature on transitions shows that the traditional critiques of criminal law are exacerbated in situations of mass atrocity (Elster 2006; Orentlicher 2007). The doubts that have been raised in the field of criminal law over the ability of criminal law and punishment to achieve their own objectives in situations of ordinary criminality are further magnified in the transition context. For example, as Osiel (2000) demonstrates, proponents of the idea of punishment as direct retribution for a reproachable action attempt to overcome theoretical challenges by establishing representative punishments in an attempt to generate equivalent responses. However, those punishments do not seem proportional, either because the excessive cruelty of the crime far surpasses the capacity of the response under liberal criminal law, or because the contextual social mentality makes it difficult to derive individual culpability for conduct that ceased to be socially condemned in the midst of a bloodbath (pp. 126–129). Additionally, punishment theories that focus on deterrence also encounter challenges, such as the extent of any real influence that criminal law could have on dissuading people from perpetrating mass atrocity (as much with regard to those who participated in a particular atrocity as to anyone who might participate in an atrocity in the future). In her book *The Justice Cascade* (2013), Kathryn Sikkink illustrates in great detail that a broad bibliography on sociological and psychological criminology “suggest[s] that enforcement may not be necessary in all circumstances and that behavioral change might be possible in the absence of strong enforcement mechanisms” (p. 191). Sikkink also highlights the existence of a bibliography on psychology which “suggests that material incentives like punishment can sometimes have negative or unintended effects on behavior because they ‘crowd out’ other, more positive, processes of change” (p. 174).

An additional challenge exists in establishing how much punishment is necessary in transitions. International standards and doctrine have not defined how much punishment (in terms of either who should be punished or the severity of the punishment) would meet the objectives generally attributed to criminal law and punishment. Neither in specialized literature nor in academic or institutional comparative evaluations of mechanisms used in transitions has a conclusion been reached as to how much punishment is necessary for transitional justice to improve the rule of law in society, for example. While a single

formula seems unrealistic and counterproductive, given how much depends on context, there also does not even seem to be any approximate measurement of how severe, or widespread, punishment has to be in order to produce a particular social effect. Even authors who have defended punishment theories considered to be more punitive or totalitarian have not argued that it would be necessary to punish every individual participant in an atrocity in order to generate change. They have also not identified one form of punishment that best catalyzes social change. Even Diane Orentlicher (1991), who is considered by many to come within the more punitive field, has argued that “a bounded program of exemplary punishment” (p. 2601) can be capable of generating social messages (the socializing function of punishment discussed by Sikkink 2013, 185–204) that can represent a challenge to the culture of impunity (the dissuasive function of punishment). Obviously, there is an implied notion that a justice strategy that is socially perceived to be precarious or poorly designed will not have the capacity to generate change.

Both the emergence of a new international legal order, which we explored earlier in this text with respect to treaties that establish a duty to prosecute, and the growth of the transitional justice field call for not only the revitalization but also a deepening of this classic debate about the function of punishment and criminal law. It is important to keep in mind that not all contexts are the same, and what is today considered to be a transition is not necessarily the same as when the field was established. In reality, in terms of applying criminal norms, there appear to be serious arguments in favor of separating transitions from dictatorship to democracy (vertical transitions) from transitions from contexts of armed conflict towards a negotiated peace (horizontal transitions).

Many of the initial debates about the role of criminal punishment in transitional contexts were structured around experiences gained from vertical transitions. The reflections by several of the authors recognized here depend substantially on these experiences (principally on experiences in the Southern Cone of Latin America, especially Argentina). Examples include the debate between Carlos Santiago Nino (1991) and Diane Orentlicher (1991), Sikkink’s initial study of the Justice Cascade in Latin America (Sikkink and Walling 2007), and the reflections of Mark Osiel (2000). Nevertheless, it is becoming increasingly clear that different questions should be considered in transitions where circumstances differ or, at least, that differences between types of transitions should be accounted for.

As far as this discussion is concerned, it is pertinent to review the distinction between vertical transitions and horizontal transitions, as discussed by authors like Iván Orozco (2009) who insists that the particular type of context that needs to be overcome should be considered. He argues that the logic behind, and the possibilities of, forgiveness are not the same in a transition from dictatorship to democracy as they are in a transition from civil war to peace. According to this paradigm, it is necessary to distinguish between two types of mass human rights violations: on the one hand, dictatorships or totalitarian regimes, such as Nazism and the dictatorships in the Southern Cone, which were characterized by a vertical or asymmetric victimization or brutality, and, on the other hand, civil wars and armed conflict where the brutality is more symmetric or horizontal and the distinction between victims and perpetrators is much less clear, given that each armed actor (with his respective social support base) is at the same time a victim (because he suffers the attacks of the other) and a perpetrator (because he inflicts violence on the other armed actor and his social support base). There is therefore a reciprocal victimization. This is why the figure of the avenger (the victim who becomes a perpetrator) plays such an important role in horizontal violence situations, where the figures of victim and perpetrator can sometimes be confused (Orozco 2002).

After making this distinction, Orozco (2003) goes on to propose the thesis that pardons may be more legitimate and are seen to be more politically viable and adequate in the context of a horizontal transition to peace. In such a horizontal transition context, there is often a “double transition,” whereas a transition from dictatorship to democracy tends to be classified as a “simple” transition. While Orozco recognizes that the empirical evidence in this area is far from conclusive, he considers it reasonable to suppose that in a double transition arising from horizontal violence or symmetric brutality it is more plausible (and even legitimate), for both normative and factual reasons, to turn to pardons. On the one hand, in negotiations, the most demanding sections on both sides of the conflict will have to agree, in order to avoid punishment for their atrocities, and this alone gives considerable backing to favoring pardons. Additionally, those fighters, as well as those sections of their social support base, would have to consider pardons as legitimate because they would be seen as forms of reciprocal pardon whereby, due to a degree of ambiguity with respect to victims and perpetrators, each actor sees himself as a victim who forgives a perpetrator and thereby has some right to be forgiven, as a perpetrator, by the other party.

On the other hand, authors like Thomas Obel Hansen (2011, 9) have argued that concerns over the constitution and strengthening the

rule of law, which have been put forward as justifications for criminal processes, are not necessarily a concern in all transitional justice processes, but rather predominant elements in the transition to liberal democracy in Latin America and Eastern Europe. Accordingly, in transitions that do not involve a regime change, it becomes necessary to analyze whether State institutions are discredited or illegitimate. In such cases, transitional justice and criminal trials can be a mechanism for returning legitimacy to the Rule of Law.

The Relationship between the Goals of Criminal Law and the Global Objectives of Transition Processes

A review of existing literature reveals that there appears to be no consensus regarding the justifications and objectives of criminal justice in transition processes. Rather, in some cases, the different objectives of, and justifications for, resorting to criminal trials seem to contradict each other, since they “pull in different directions, reducing each other’s power simultaneously and creating tensions” (Damaska 2008, 331). The dominant views about the concept of transitional justice nevertheless interpret criminal justice as an irreplaceable political tool and attribute to it the ability to achieve certain democratization goals. For example, in the aforementioned report by Rapporteur Pablo de Greiff, which specifically focuses on the issue of criminal prosecution as a transition strategy, four objectives of criminal processes are highlighted, namely to acknowledge victims, to foster trust between persons, particularly within State institutions, to consolidate the rule of law, and to promote social cohesion or reconciliation.⁴¹

In fact, one of the principal justifications for criminal trials and punishment as transitional justice mechanisms is that they contribute to consolidating the rule of law and democracy. According to Ruti Teitel (2000), this argument in favor of punishment in periods of transition is consequentialist and prospective, as it focuses on the possible future effects of these processes. Supporters of this theory argue that criminal trials play a foundational role in establishing or strengthening the rule of law (p. 28).

Proponents of this argument see amnesties as a way of fostering a sense of impunity which can lead to a renewal of the conflict (van Zyl 2008, 33). Consequently, a further goal of criminal trials is to promote political reconciliation and the consolidation of institutionalism (Leebaw 2011). This is why authors like Orentlicher (1991) perceive that

41 De Greiff, Report of the Special Rapporteur, 2014.

individual sentences are necessary, in order to send out the message that no one is above the law.

Thus, both in academic texts⁴² and in documents justifying the setting-up of tribunals,⁴³ the arguments most often used to justify the use of criminal law are directed at long- or medium-term goals and not necessarily at the more classical objectives of criminal law in ordinary situations. It is uncommon, for example, for a human rights trial involving perpetrators of grave human rights violations to be justified by issues such as the need for punishment, the need for incapacitating perpetrators, or even for preventing future violations. It is more common, on the other hand, to have recourse to justifications such as strengthening the rule of law, democratization, and reconciliation (Sánchez 2015).⁴⁴

Nevertheless, general or final goals are hard to define and measure, especially in the short term, and they bring huge follow-up challenges. As social scientists who have followed this topic have pointed out, one of the main problems in determining what the role of criminal law should be in a global transition strategy is the need to have

42 For Martha Minow (2008a, 248–253; 2008b, 161–162), for example, the objectives that may be achieved through criminal processes include repairing social connections, establishing lasting peace, generating accountability rituals that defy impunity and forced forgetting, avoiding vengeance, and achieving reintegration. Sikkink (2013, 273–78) mentions that the following are plausible goals for criminal processes: creating improvements in the fight for human rights, improving human rights practices, avoiding a culture of impunity, and placing civil power above military power.

43 For example, the documents establishing the special War Crimes Tribunal for Bosnia and Herzegovina determined that the goals of the tribunal were to maintain peace, to prosecute the perpetrators of international crimes, to build national capacity for the prosecution of grave crimes, and to promote public trust in state institutions. The Gacaca court system for Rwanda was established for purposes of determining the truth about what occurred during the genocide, reinforcing efficacy in the resolution of criminal trials, eliminating impunity, promoting reconciliation and social solidarity, and demonstrating national judicial capacity with regard to case processing (Rwanda, Organic Law No. 16 of 2004).

44 The use of criminal law in transition processes has purported to have four types of goals, where the first type has prevailed, at least in political discourse: (i) general or final goals, which are those that align with the general objectives of the transition, such as strengthening the rule of law, the promotion of social reconciliation and solidarity, and the construction of civic trust; (ii) case processing efficiency goals, which are more immediate and directed towards advancing cases, such as demonstrating national legal capacity, meeting specific goals of relieving judicial congestion, etc.; (iii) goals associated with the satisfaction of victims' other rights, such as clarifying and unveiling the truth and obtaining reparations; and (iv) political goals not openly described, such as solving prison overcrowding problems, affirming national capacity in order to avoid international intervention, prosecuting political enemies, etc. (Sánchez, 2015).

recourse to ethereal social concepts that have very controversial meanings and are difficult to define (Kim and Sikkink 2010). For example, the concept of rule of law that is present in a good part of the specialized literature continues to be the subject of important academic and practical debates.

Consequently, there is a need for each society to conscientiously define how applying criminal law norms could help promote such objectives, depending on the interests and context of its transition and the global tools employed. In doing so, reasonable objectives should be established regarding the extent to which criminal law is able to contribute to those goals, without overestimating its potential or overloading this tool.

The Need to Advance Methods of Assessing the Real Impact of Legal Tools

In addition to the aforementioned difficulties in reaching an agreement on defining central concepts, other challenges exist with respect to measuring impact or conducting empirical assessments. Given the complexities of these social processes, which are driven by various underlying causes and circumstances, it is difficult to say that, in any specific context, the use of criminal law or human rights tribunals would help achieve any of these particular objectives (Sikkink 2013; Olsen et al. 2010). Additionally, because of the aforementioned complexities, the cultural, social, and institutional transformations that are generally necessary if these social phenomena are to be impacted are large and require significant time, which makes it even more difficult to establish methods for measuring impact and evolution.

Scholarship that has focused on this question has not reached a consensus on the true impact of applying criminal law in transitional societies. For example, in a very influential text entitled “Trials and Errors: Principles and Pragmatism in Strategies of International Justice,” Leslie Vinjamuri and Jack Snyder (2003) refuted the dominant thesis on the consequences of justice obtained through criminal trials. Their investigation—based on thirty-two cases around the world—concluded that, under certain conditions, trials for grave violations of human rights could actually increase the likelihood of further atrocities occurring in the future, exacerbate conflicts, and undermine the democracy-building process.

Their thesis encouraged a series of critics who argued, without clear empirical evidence, that trials obstruct conflict resolution. On the other side of the spectrum, a group of authors, also lacking substantive

empirical evidence, have argued that trials are an effective means of constructing democracy, strengthening the rule of law, obtaining justice for victims, and combatting impunity.

The rigorous empirical studies carried out by Kathryn Sikkink and Leigh Payne are a notable example of advances in this debate. Fundamentally based on the experience of Latin America (a region where the majority of transitions were vertical), Sikkink's work (2013, 185–204) has attempted to demonstrate how human rights trials can, in certain contexts, have positive impacts on democratization and the promotion of rights. Payne, who uses a systematic methodology that is similar to Sikkink's but differs in its sources and coding process, has found that only where a combination of amnesties and trials are used are advances in favor of promoting human rights achieved. According to her statistical analysis, in the majority of cases, isolated trials did not have a statistically significant impact on human rights. However, when combined with amnesties, trials increased the probability of positive change (Olsen et al. 2010, 991ff).

This debate demonstrates the need to further the use of social science research methods that will help to better evaluate the impact of criminal law tools in a particular transition. A policy strategy that focuses on accountability should be accompanied by evaluation methods that can measure the contributions made by prosecution and confirm the extent to which criminal processes are achieving the goals outlined.

Finding a Way Out of the Zero-Sum Debate

Situations like those in Colombia or Syria today are crucial experiments that will test whether it is possible to bring cruel, prolonged armed conflicts to an end through peace negotiations that are compatible with international obligations deriving from the Rome Statute and other international instruments. Given the characteristics of transitional societies, it is obvious that a peace agreement is not possible if maximalist views of the duty to investigate and prosecute are adopted, as the State would then be required to investigate all perpetrators of all international crimes and sentence them in proportion to the gravity of their crimes, namely with severe prison sentences. No guerilla or insurgent group would agree to demobilize if the majority of its members were to receive long prison sentences.

What is more, formulas for negotiating peace and justice demands have complexities which stem from the fact that it is nearly impossible to sequence them. In the past, formulas where peace was secured first,

before discussing justice, were often preferred.⁴⁵ Nowadays, participants in peace processes are not inclined to consider disarmament until they have achieved certain assurances in the agreements on justice matters. At the same time, a peace formula that does not foresee justice processes of some kind would be easily rejected by the international community.

Consequently, a prospective peace agreement cannot adopt the maximalist view of the duty to prosecute and punish, which may be reasonable in other contexts but makes negotiated peace impossible in certain transitions. This does not mean, however, that all peace agreements should opt for inadmissible forgive-and-forget formulas. Intermediate transitional justice formulas are possible, since the peace agreement can envisage truth-seeking measures (such as truth commissions), reparation programs, and guarantees of non-repetition. As far as criminal justice is concerned, the agreement can envisage trials for the persons most responsible for international crimes, with alternative criminal penalties and reduced sentences. In order to give legal security to a peace process, the agreement can also establish conditional amnesties for those who are not the most responsible for these crimes.

Given that an agreement of this kind does not fit in with a maximalist view of the duty to investigate and punish, three questions arise. Would that State be breaching its international human rights obligations? Would such an agreement violate the duty to investigate and prosecute, particularly with regard to the Rome Statute? In that case, should the ICC initiate investigations in these countries, despite the possibility of this gravely affecting the chances of peacebuilding? Due to the aforementioned dialogues regarding legal standards and empirical and philosophical considerations, our answer to each of these questions is in the negative, because we consider, firstly, that the duty to investigate and punish is not an absolute rule but rather a duty that should be balanced against other State obligations; secondly, that an investigation by the ICC which destabilizes a peace process that has made a genuine effort to take victims into account and to establish a balance between peace negotiations and the search for justice goes against the "interests of justice"; and thus, thirdly, that a transition agreement must conscientiously evaluate what the role of criminal action should be within the broader framework of the transition.

45 This was either because the peace formula was never viewed as justice in the first place and its considerations had to come years later due to the large number of demands by victims, or because once combatants had made peace pacts, agreements were breached and punitive measures were implemented.

The Duty to Investigate, Prosecute, and Punish as a Prima Facie Rule of International Law, Rather than an Absolute One

Our vision therefore distances itself from the two extreme positions regarding the nature of the obligation. We distance ourselves from those who think that there are no legal grounds for determining that this obligation exists as a general rule of international law (Mallinder 2014, 10–11). We also distance ourselves from those who, after admitting that the duty exists, absolutize its content in order to indicate that it absolutely requires a State to exhaustively punish every single participant in every single violation, in order to avoid breaching its international obligations. Consequently, we argue that there must be room to make this maximalist view of the duty more flexible.

We are not alone in defending these flexibilization mechanisms. In fact, result-wise, our proposal seems very similar to the Belfast Guidelines on Amnesties. However, where it differs is in the structure of the legal arguments used to reach these similar conclusions. In our opinion, the Belfast Guidelines are the fruit of very serious legal exploration and interpretation work, as well as case research, all of which resulted in accomplished public policy considerations. However, we decided to distance ourselves from their conclusions. We share what we believe is the general idea of the document. By this we mean the idea that, in certain contexts, amnesties which are specifically designed to recognize the responsibility of armed actors can be combined with selective prosecutions and other means of establishing responsibility in order to promote peace and other important values in a society. Equally, we consider the policy options and recommendations that are made about the scope of amnesties to be adequate and intelligently formulated.⁴⁶

Where we disagree, however, is in the legal treatment of the nature of the duty to investigate and punish. We feel that while the Belfast Guidelines base their analysis and policy recommendations on the non-existence of a consolidated duty to investigate, prosecute, and punish in international law,⁴⁷ our position is different. In our view, a

46 Especially those recommendations that relate to the selection and exclusion of beneficiaries, the selection of crimes, the temporal and geographical scope of amnesties and the conditions under which amnesties would be granted or revoked.

47 Nowhere in the text is there a clear and explicit State duty under general international law which establishes standards against impunity with respect to gross human rights violations or war crimes that include investigation, prosecution, and punishment of, at the very least, the perpetrators most responsible for such crimes. The only mention of it is in Guideline 3, regarding “The Role

duty to investigate, prosecute, and punish grave human rights violations does exist, even though it is not an absolute duty but rather one that must be balanced against other values that it comes into conflict with, such as other legal principles. In some contexts, this balancing test can result in the choice being made to overlook this duty and to legitimize certain forms of amnesty.

In our view, not only is this legal reasoning the most appropriate from an interpretative point of view, it is also supported on ethical and political grounds. With regard to the former point, we consider that to recognize the existence of this duty is to recognize and defend a very important civilizing advance in international law and international relations. And on the latter point, we believe that, drawing on that recognition but at the same time stressing that this duty is not absolute and that in certain circumstances it must be balanced against a society's other duties and possibly yield to them, it is much easier to have reasonable dialogues with an important section of the international human rights legal community that has firmly opposed amnesties and that would not consider the excellent policy proposals contained in the Belfast Guidelines, because it maintains that to support the Guidelines is to justify impunity.

In our opinion, a general duty to investigate, prosecute, and punish international crimes does exist, at least for those States that have ratified the Rome Statute (and with respect to war crimes and crimes against humanity committed in internal or international conflicts). Currently, at least 123 States have ratified the ICC Statute, including all South American countries, almost all European ones, and many African nations. Approximately thirty others have signed it, and even if they have not ratified it, in a way they have adhered to its principles and committed themselves to not violate its purpose. This is a very broad adhesion, which shows that it is a treaty that, to a certain extent, expresses a principle of international law.

The treaty states in its Preamble that States Parties to it declare "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," and that they are "determined to

of Prosecutions," which states in section a) that "International law creates obligations on states to prosecute and punish international crimes." However, the idea of "specific crimes" reiterates the idea that it is not a general duty, rather that it would cover only certain crimes such as genocide, international war crimes, and torture. This is reiterated in Guideline 6 where the Rome Statute thesis of a duty to investigate and punish is rejected.

put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” Additionally, they stress that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” and that it is precisely to achieve the attainment of those ends that they establish the ICC, which complements national justice.

In our opinion, having made such declarations and having created an institution that is complementary to national institutions in order to punish these crimes, it is hard to maintain that the duty to investigate and punish does not exist. In recognizing the subsidiary nature of the ICC when it comes to investigating these crimes, States’ primary role is implicitly recognized. This idea is reinforced by the adoption of various soft law documents and State pronouncements on the matter. Some of these documents were considered when the Guidelines were being drawn up, but ultimately their position on this issue was not included. For example, we cannot understand how a general accountability duty is easily accepted on the basis of these documents while one of the central components, namely the duty to investigate and punish, is steadfastly rejected. This duty is rejected even though the obligation is recognized as an authentic interpretation of different human rights treaties in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity⁴⁸ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, as adopted by the Human Rights Council and the UN General Assembly.⁴⁹

The question that arises, then, is how to support the legitimacy of certain amnesties if this obligation is recognized as a general international duty that is enforceable against States. We propose that the Belfast Guidelines’ political considerations would be bestowed with greater legal, ethical, and strategic legitimacy if they recognized that a non-absolute duty exists, and thus, as Mark Freeman (2010, 52–53) suggests, an absolute prohibition of amnesties does not exist. This conclusion arises because, in any particular case, the balancing of different State duties may require that implementation of this particular duty yield in order to allow for amnesties accompanied by selective prosecution of the most responsible perpetrators and other forms of accountability.

48 Orentlicher, Updated Set of Principles (2005).

49 G.A. Res. 60/147, 2006; that is to say, via acts of State recognition that help to identify *opinion juris* on the matter.

A Holistic Approach that Balances Opposing Interests

The basis of this argument lies in recognizing that in transitions from war to peace, States have duties that may conflict with one another and that, in these cases, the best alternative is to try to harmonize those obligations rather than opt to fully comply with one of the duties to the detriment of the others. This position is fundamentally based on two premises. The first of these is recognizing an integral or holistic approach to possible justice and accountability measures in a process of transition. The second relates to the conceptual distinction between rules and principles, and to a balancing test, since these have proven to be adequate tools for dealing with the dilemmas and complexities that a transition brings about.

On the first point, we concur with those who subscribe to the Belfast Guidelines in that individualized criminalization is one possible form of accountability, albeit not the only one. Nor is it a formula that can respond in itself to all the justice needs of a society that has experienced mass violence. Here we adhere to the holistic focus of transitional justice currently defended by an important sector of academic doctrine (Boraine 2006; de Greiff 2009) and by international political institutions.⁵⁰ Such a focus promotes links between different judicial mechanisms (criminal trials and amnesties) and non-judicial mechanisms (truth commissions and administrative reparations programs), on the premise that no one instrument is sufficient in itself to meet the complex demands that arise during a transition process.

The strength of a holistic or comprehensive focus lies in the fact that it recognizes both the virtues and the limitations of each instrument of transitional justice, and accordingly sets out to find formulas that profit from the advantages of each tool while also reducing the risks and limitations associated with each. In fact, the need to combine different instruments arises from the multiplicity of aims and the combination of tensions that characterize transitional justice processes.

Criminal trials and the punishment of perpetrators of grave violations can play a definitive role in the social condemnation of unacceptable conduct and, as such, in affirming the respect for human rights that the society in transition intends to establish. As Martha Minow (2011) said, “the role of tribunals offers rituals of responsibility and of public recognition as they defy forced forgetfulness and impunity” (p. 95). Equally, one of the general functions of retributive justice, namely preventing people from taking justice into their own hands, occupies

50 De Greiff, Report of the Special Rapporteur, 2014, para. 22–27.

a distinguished position in transitions from war to peace, since it contributes to transition stability by deterring possible future cycles of revenge and reducing the playing field for possible saboteurs of peace agreements.

These theoretical considerations are complemented by the empirical studies mentioned in the second section of this article. Leaving aside debates on whether criminal law is relevant for achieving the general objectives of the transition,⁵¹ and even assuming that the debates on the correct way to measure the impact of criminal law on those objectives were resolved, the literature seems to suggest that, in most cases, criminal law may help to promote the objectives of the transition but is incapable of achieving them on its own. This finding leads to the conclusion that a transition strategy cannot be based solely on a policy of criminal prosecutions. Despite methodological and substantive differences, Sikkink and Payne reach similar conclusions: the combination of a series of tools is what would best allow progress to be made toward achieving transition objectives. For example, Sikkink (2013, 201) finds that tribunals combined with truth commissions are the most productive. To this combination, Payne, who has a less optimistic view of truth commissions, adds amnesties (Olsen et al. 2010, 1003). But definitively, as the 2014 report by Pablo de Greiff indicates, the possibility of combining mutually complementary policies is what generates the strongest mechanisms for achieving the objectives of the transition.⁵²

Criminal tribunals and punishment, however, also pose obstacles to transitions and have limitations that impact their ability to fulfill transitional justice objectives. On the one hand, as previously observed, a maximalist vision of retributive justice acts as a disincentive for ending an armed conflict through negotiated means, and this can lead to the chances of achieving a transition being undermined completely.

51 “We all agree that prosecutions appear to have an impact, but we don’t yet understand well enough the ways in which trials work. We dispute the claims of trial skeptics who say that prosecutions are exacerbating human right violations in the world. We suggest, on the contrary, that it appears that prosecutions lead to improvements in human rights. But until we resolve some of our differences, we won’t have more precise theoretical statements or clearer policy recommendations. We can’t yet sort out clearly whether trials work mainly through deterrence and punishment or through socialization and collective memory. We also can’t say yet whether it is better to combine prosecutions with amnesties, or to annul amnesties. We suspect that the answers, like most in the social world, are complicated: that prosecutions work both through deterrence and socialization; that prosecutions combined with some kinds of partial amnesties may be a good solution; and that blanket amnesties should be avoided” (Sikkink 2013, 187–188).

52 De Greiff, Report of the Special Rapporteur, 2014, para. 22–27.

On the other hand, even though criminal trials not only aid in satisfying the right to justice but also contribute in terms of reparations, truth, and guarantees of non-repetition, the reality is that their impact in these areas is more limited than that provided by other mechanisms. International tribunals have defended the idea that, in certain contexts, there could be a restorative dimension to punishing perpetrators in terms of victim satisfaction, and that it could play a dissuasive role with respect to future violations because of the deterrent aspect of punishment. Additionally, criminal trials contribute to truth, in that they help to solve crimes and identify those responsible for them. Despite this, trials are a very incomplete mechanism and they are also a slower and more expensive way to guarantee victims' rights. Thus, not only should trials be combined with other methods, the limits of their impact, in a context of limited resources and as compared to that of other mechanisms, should be determined.

We now proceed to the second part of our argument, which is based on the normative distinction between principles and rules. Following Robert Alexy's (1994) approach, "rules are norms which, when the type of act occurs, prescribe a definite judicial consequence, that is, when certain conditions are present, they definitively order, prohibit, or allow something, or definitively authorize something. Hence, they can be called 'definitive mandates'" (p. 75). Additionally, Alexy (1988) states that "rules are norms that demand full compliance and, to that extent, they can always only be either unfulfilled or fulfilled" (p. 143). On the other hand, principles are understood to be mandates of optimization "which order that something be realized to the extent possible according to the factual and judicial possibilities" (Alexy 1993, 86). With this distinction in mind, it is more accurate to consider the norm that establishes the duty to investigate, prosecute, and punish grave violations of human rights as a principle and not as a rule.

Generally, there are at least two possible criteria for determining whether a norm is a rule or a principle. They can be complementary, but they are not cumulative, because they reflect different theoretical approaches. On the one hand, it has been suggested that the difference between a rule and a principle lies in the logical structure or the linguistic formation of the norm; specifically, in the degree of uncertainty or abstraction of the conditions that dictate when the norm applies (Atienza and Ruiz 1991, 108) and/or in the possibility of gradual fulfillment of the prescribed conduct (Lopera 2004, 230ff). A legal norm would thus be a rule if its conditions for application were closed and/or the prescribed conduct did not allow for gradual fulfillment, while

it would be a principle if its conditions for application were open and/or the prescribed conduct allowed for gradual fulfillment.

On the other hand, it is possible to conclude that the linguistic formulation of legal norms can indeed be indicative of whether they are a principle or a rule, by nature, but that the difference is ultimately not determined by some intrinsic property but rather by the particular circumstances in which the norm is to be applied. According to this view, espoused by Lopera (2004),

the classification of a norm as a principle or as a rule cannot be made through an isolated or abstract interpretation of its underlying deposition, but rather can only be made when it is put in the context of the particular circumstances of the case to be decided and alongside the rest of the norms that are relevant for the case. (p. 235)

More specifically, the designation “would be a response to an interpretative convention which could be described as an agreement under which certain types of judicial decision, those known as ‘difficult cases,’ require that norms that offer reasons for a decision be interpreted not as carriers of a ‘real or definitive duty,’ that is to say, as rules, but rather as carriers of ‘an ideal or prima facie duty,’ that is to say, as principles” (p. 234).

As far as the duty to investigate and prosecute grave violations of human rights and international humanitarian law is concerned, both the linguistic structure of the norm and the concrete circumstances surrounding its interpretation determine whether we are dealing with a principle or a rule, for two reasons. Firstly, as we saw in the first part of this section, the duty in question is a duty of means and not a duty of results. In practice, fulfillment of the duty is achieved by a State’s due diligence in investigating grave human rights violations, even if, despite using its best possible efforts, the State is ultimately unable to clarify the facts and identify and punish all those responsible. In this sense, the duty to prosecute is not an “all-or-nothing” norm, as a rule would be, but rather allows for a gradual fulfillment, which is measured in the light of the actions that the State takes. Under the special conditions of a transition to peace, the due diligence standard can even justify the decision to not take criminal action in certain cases, if that decision is made with the goal of achieving the best results with regard to uncovering the truth and identifying responsible actors.⁵³

Secondly, the particular context in which the discussion about the scope of the duty to prosecute takes place is characterized by a series

⁵³ Regarding the nature of the theory of the duty to prosecute, see Uprimny, Sánchez, and Sánchez (2014, 80ff).

of normative tensions, such that we always find ourselves confronted with a difficult case. Effectively, in the exceptional context of transitional justice, there is an inevitable collision between equally worthy interests and expectations in society: on the one hand, the duty to investigate and prosecute grave violations committed in the context of the conflict that the society is attempting to overcome, and, on the other hand, the duty to achieve peace and guarantee democratic stability. If the first of these duties is assumed to be a definitive mandate, it would ultimately require opting for *prima facie* for the first duty to take priority over the second, without that decision having been subjected to the necessary balancing test. It is also important to note that the duty to investigate and prosecute should not be weighed only against the duty to guarantee peace, but also against the rights of the victims themselves to truth and to reparation; if the first duty is understood to be absolute, there is a risk that the State may neglect its duties relating to reparation and truth.

One critique leveled against this proposal is that it confuses tools and debates in constitutional law with the application of norms in international law. This critique suggests that the proportionality analysis methodology, as used in domestic law, is inappropriate for interpreting international law. This position, nevertheless, does not seem to be substantiated normatively, and also does not seem to be substantiated by current understanding and practice in international law. This current understanding is evident in the work of the United Nations Commission on International Law on the subject of the expansion and fragmentation of international law. In its final report, edited by Rapporteur Martti Koskenniemi, the commission expressly recognizes the importance of the distinction between rules and principles for resolving normative conflicts in international law. The report also calls for the use of harmonization mechanisms in conflicts between principles.⁵⁴ Additionally, and following the same logic, international courts such as the I.-A.C.H.R. have developed judicial decision-making methodologies, similar to those used in constitutional courts, that are based on proportionality in cases where there is a conflict between principles,

54 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, addressed to the International Law Commission, Report of the Study Group of the International Law Commission (2006), finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (Apr. 13, 2006), ¶¶ 25 et seq. http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

such as in the I.-A.C.H.R. case of *Kimel vs. Argentina*, and, more recently, in *Artavia Murillo vs. Costa Rica*.⁵⁵

Accordingly, the immediate consequence of characterizing a legal norm as a principle is that its scope is defined in every concrete case in accordance with the possibilities, both factual and legal. These possibilities can only be determined through a proportionality analysis. Now, given that this requires balancing the different duties and values involved in such a way as to optimize the satisfaction of each one, it is possible to conclude that the extreme models have to be discarded, given that they necessarily focus on maximizing one of the principles being weighed. A complete prosecution and punishment model is thus as improper as full and unconditional amnesties.⁵⁶

Between the two extremes, it is possible to conceive multiple models. The minimum model that could be considered admissible would involve criminal trials only of those most responsible for crimes against humanity, genocide, and war crimes, and these could culminate in the imposing of a sentence other than prison, or a suspended sentence. For the remaining cases, the model would allow a complete waiver of prosecution. In both cases—the one relating to those most responsible for selected crimes, the other to those responsible for other crimes or participants with less responsibility—the concession of benefits, namely alternatives or suspended sanctions in one case and amnesties in the other, would be subject to certain conditions being met, such as surrendering arms, taking responsibility, contributing to the process of uncovering the truth, the holistic reparation of victims, freeing hostages, and the release of illegally recruited minors.

This is just one of many possible models. A formula could also be designed that would broaden the range of crimes, such as to include all grave violations of human rights, while still concentrating on those most responsible, and allowing for trials to conclude with a reduced

55 *Kimel vs. Argentina*, Merits, Reparations, and Costs, Judgment, I.-A.C.H.R. Series C No. 177 (May 2, 2008), http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf; *Artavia Murillo et al. (in vitro fertilization) vs. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, I.-A.C.H.R. Series C No. 257 (Nov. 28, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf

56 This refers to the so-called “amnesic amnesties,” according to the typological tool proposed by Robert Slye (2002). According to Slye’s analysis, these amnesties are typified by (i) a lack of restrictions on the behaviors they cover (or, if there are restrictions, they are minimal); (ii) the beneficiaries of the amnesty are usually not determined on an individual basis and the motivations for their actions are not considered; (iii) nothing is asked of the beneficiaries of the amnesty in order for them to qualify; and (iv) the amnesty does not envisage any action in favor of the victims.

prison sentence being imposed. Or a formula could be designed that would require all those involved in certain grave and representative crimes to stand trial, but without a prison sentence being imposed at the end.

In addition to these suggested formulas, multiple variations are possible. It is nevertheless hard to anticipate, in general terms, which concrete formula would meet international standards, especially considering the gray area that still exists in this regard. In fact, it is difficult even to establish a single valid formula, because this would mean decontextualizing the question at hand, when in reality, any attempt to balance the different duties at play and the factual limitations requires that the question be placed in a particular context. Accordingly, the fact that one country elects a particular formula in order to fulfill its duty to punish grave human rights violations, and that that formula is considered admissible by the international community, should not mean that the formula has set a rigid precedent, such that all other countries have to follow it, for the simple reason that every context is different.

A Defense of Prosecutorial Selection and Punishment

Our vision implies recognizing that there is no single way to fulfill the obligation, and international law should therefore grant a certain degree of deference to democracies that implement it. This degree of discretion—or margin of appreciation, as it is commonly called—is obviously limited. It cannot be construed as a clause that supports derogation of the duty, but rather as an opportunity to select the best tools available, based on the local context. Especially in transitions, this selection of means is tied to considerations of reasonability, efficacy, and victim participation, and it should be endorsed by vigorous democratic mechanisms.

In line with this text, a clear limit would be that a response of a criminal judicial nature to the gravest atrocities cannot be completely omitted. The issue lies in establishing, for each particular case, what role criminal prosecutions should play in the broader transition strategy, and what specific scope they should have.

For this, it is necessary to summarize the discussion about the functions of the criminal process and of punishment, which was brought up in the second section of this article, and to assess these functions on the basis of the specific characteristics of the particular transition. We have already mentioned two starting points. On the one hand, lively discussions have taken place about the possibility of transferring the ordinary functions of punishment to transitional contexts. On the other

hand, the type of transition in question, especially whether it is a horizontal or vertical one, is extremely relevant, among all relevant contextual characteristics, when establishing the role of criminal action in a political transition strategy.

The necessity for, and functionality of, punishment is a subject that has been debated for decades in the fields of criminology, criminal law, and philosophy of law.⁵⁷ One of the issues most debated relates to the nature of punishment, to whether it should be considered as an aim or as a means of criminal action. Today, this debate revolves around three types of theories: (i) absolutist theories which only address the purpose of punishment and overlook its aims, and therefore tend towards a definition of punishment that focuses on retribution, (ii) relative theories, which focus on the aims sought through punishment, and (iii) eclectic or union theories, which seek to reconcile the two extremes (Muñoz Conde 2012).

For retributionists, punishment is retrospective and based on past criminal conduct, and it is strictly designed to sanction, in proportion to the gravity of that conduct. This gravity can be established, according to retributionists, through the degree of harm caused, the number of unfairly acquired advantages, or the “moral imbalance” caused by the claim that a crime has been committed. According to Santiago Mir Puig (2006), this theory responds to the deep-rooted conviction that evil should not remain unpunished and that the guilty party should get what they deserve. Thus, the function of punishment is not deemed to be directed towards the attainment of utilitarian goals of social welfare, like protection of society, but rather as an ethical requirement derived from the value of justice.

However, a good number of philosophers of law have rejected absolute retributionist theories for several decades. They have criticized the idea of ethical justification of the “moral deservingness” of punishment. Even those who accept that this deservingness could be ethically acceptable point out that a judicial institution cannot be based on this premise or, at least, not only on this premise (Elster 2006). However, in both criminal systems and public opinion, the idea of retribution continues to be present (Scanlon 1999, 259).

The attacks on absolute theories have come, to a great extent, from those who defend preventive theories, which are based around motivating the delinquent and citizens to not hurt or endanger a legal good

57 “The problem with the justification of punishment, that is, of the power any political community has of exercising programmed violence over one of its members, is perhaps the most classical philosophy-of-law problem” (Ferrajoli, 1989).

that is protected by the penal system. As Ferrajoli (1989) states, these doctrines can be classified according to two criteria. On the one hand, according to who the prevention is aimed at, which can be specific or general, depending on whether it is directed solely at the delinquent or at society at large, and on the other hand, according to the features of the punishment, which can be positive or negative (p. 263).

Theories of Prevention:Aims of Punishment

	Specific	General
Positive	Correction/Rehabilitation	Integration
Negative	Incapacitation	Intimidation

If punishment is to be able to generate these types of preventative influences, philosophers of law have suggested that two characteristics must be present. First, the perception that punishment is probable matters more than the severity of the punishment (Vinjamuri and Snyder 2003). And second, it is important to bear in mind that these theories are based on the idea that transgressors are rational actors and thus include the risk of punishment in their decision-making process when committing a crime.

Some critiques of the idea of negative general prevention are based on critiques of these assumptions (Vinjamuri and Snyder 2003); for example, some argue that prevention theories may not work when dealing with the types of crimes where citizens do not evaluate the pros and cons before committing them. Similarly, there are moral critiques of resocialization and its ideal of normalizing the individual, as well as practical critiques based on empirical evidence showing the failures of prison resocialization. Issues regarding the efficacy and efficiency of the threat of punishment and sentencing also play a role when prevention theory is being criticized.

Critics also point to the limitations of prevention theories, insofar as they homogenize cases that should be treated differently. If Von Liszt’s classification is used, three types of criminals can be identified, namely ones who require correction, ones who do not require correction, and ones who cannot be corrected and need to be incapacitated. Positive, specific prevention would apply with respect to the first group, in line with resocialization theories, while negative, specific prevention would apply with respect to the third group, through incapacitation. However, it is not clear what the purpose would be of sentencing those who do not require correction, as it would appear to be purely retributive.

Literature on transitional justice has nevertheless used the aforementioned categories to justify criminal processes and punishment as transitional tools. The retribution or deservingness idea has been defended in transitional justice literature as a way to officially deal with the deep and prolonged effects that atrocities have on victims and on society (as opposed to private vengeance). International tribunals have thus justified punishment as an expression of humanity's condemnation of the criminal act and as a way to moderate the anger of victims and societies.⁵⁸ The idea of rehabilitation has also been adopted by international criminal law, as reflected, for example, in Article 7 of the Statute of the Special Court for Sierra Leone, which mandates the promotion of rehabilitation for persons who committed crimes when they were between the ages of 15 and 18. The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) case law recognizes that rehabilitation is one of the purposes of punishment, even suggesting that rehabilitation can be achieved by forcing perpetrators to come face to face with the impact that their actions had on victims.⁵⁹ The idea of specific prevention has been used in transitional contexts to defend the thesis that punishment can prevent future political violence and even resolve conflicts peacefully.⁶⁰ In a similar manner, it has been argued that general prevention can be adapted to promote objectives with a longer reach, such as reconciliation, democracy, and the reestablishment of a rule of law.⁶¹

58 In the ICTY *Ranko Češić* case, for example, the Court stated that "Retribution expresses society's condemnation of the criminal act and of the person who committed it and imposes a punishment in return for what he or she has done. The International Tribunal's penalty thus conveys the indignation of humanity for the serious violations of international humanitarian law for which an accused was found guilty. Retribution satisfies the need for justice and may reduce the anger caused by the commission of the crime among the victims and the community as a whole" (*Prosecutor vs. Češić*, Sentencing Judgment, I.C.T.Y. IT-95-10/1 (Mar. 11, 2004), ¶23).

59 *Prosecutor vs. Rutaganira*, Sentencing Judgment, ICTR-95-1C-T (Mar. 14, 2005), ¶113; *Prosecutor vs. Obrenović*, Sentencing Judgment, I.C.T.Y. IT-02-60-2-5 (Dec. 10, 2003), ¶53.

60 The Rome Statute Preamble, for example, stipulates that one of the goals of the International Criminal Court is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crime." The UN Security Council had argued something similar when justifying the creation of the ad hoc tribunals for Rwanda and for Yugoslavia as a response to threats to peace and international security (UNSC Res. 827 (1993) Preamble).

61 The UN Security Council specifically established that one of the objectives of the ICTR was to contribute to the process of national reconciliation. UNSC Res. 955, Preamble, UN Doc S/RES/955. The ICTY also considered reconciliation to be a goal. See, for instance, ICTY Trial Chamber, *Prosecutor vs. Biljana Plavšić*, para. 80.

Other functions of criminal processes and punishment that have been discussed in the literature on transitional justice include the expressive or performative function, and the function of reasserting norms and the rule of law. The argument relating to these functions is that atrocious crimes threaten social cohesion and, accordingly, societies should prosecute crimes in order to condemn them publicly, reasserting social norms as well as the validity of the rule of law in the process (de Greiff 2009). At the same time, imposing punishment via the criminal process helps to demonstrate justice and impartiality and to confirm due process standards in the eyes of society.

However, important criticisms have also been made of these supposed functions of punishment in transition processes. In the first place, as stated in the critiques summarized by Mark Osiel (2000), the core concept of retribution is impossible when the crime at issue is atrocious violence, and even more impossible when that crime is on a mass scale. This was precisely the observation made by Hannah Arendt about the trials, both in Nuremberg and in Israel, of those accused of crimes in the Second World War and Nazi genocide (Koskenniemi 2002; Osiel 2000).

The prevention goal also has its fierce critics, who argue against its basic premises. On the one hand, as Koskenniemi (2002) observes, if crimes against humanity really emerge from what Kant classifies as “radical evil,” that type of criminal mind is way beyond any type of rationality and the “rational actor” premise on which the prevention theory is based therefore does not apply (p. 8). But even working on the premise that this violence does not result exclusively from such “radical evil,” Koskenniemi maintains that prevention theories are still unsatisfactory because modern violence has not “emerged from criminal intentions but rather [from] the desire to do good” (p. 8). Orozco adopts this argument and applies it directly to the so-called delinquent politicians or rebels in non-international armed conflicts. For Orozco, in a transitional context and on the assumption that rebels are armed groups made up of people who, at least in principle, have done bad things but with the intention of doing good, the most reasonable thing to assume is that these people are not aware of having done wrong and, accordingly, the punishment cannot perform, in a strict sense, a retributive, preventative, or reformatory function (Orozco 2013). In addition to the fact that good intentions cannot be “resocialized,” Orozco maintains that those intentions, when combined with certain group dynamics, “are highly immune to preventative intimidation.” The goal of incapacitating the criminal can also be criticized, since if the peace is negotiated via a political agreement, the danger of reoccurrence fades,

not necessarily because of the punitive measures taken (such as imprisonment) but rather due to the context in which the war occurred and the violations were committed having ceased to exist (Seils 2015, 10). With regard to the discussion on general deterrence, in addition to the traditional, moral and empirical criticisms raised in the field of critical criminology, some authors maintain that the more systematic, prolonged, and generalized the crimes, the less persuasive the argument that general deterrence will be effective (Seils 2015, 10). In the same vein, Orozco (2014) criticizes the idea that punishment could send a social message of intimidation or integration in contexts where “there is no basic social consensus with regard to values.”

Because of this, we agree with Koskenniemi, Aukerman, and Orozco in that, in these contexts, it is necessary to consider the degree to which the criminal process, or the idea of staging justice, and punishment should be evaluated through a different lens. Extraordinary justice cannot simply follow the same objectives as ordinary justice. As far as the first question, the objective of the criminal process, is concerned, Orozco and Koskenniemi have defended the idea that unlike classical liberal criminal law, it is commonly accepted today that “extraordinary justice fulfills a pedagogical role and because of that it can and should be oriented towards what anthropologists denominate a rite of passage, with the purpose of reconstructing historical memory and transforming the memory of identity within a society” (Orozco 2014). Something similar occurs with respect to the goals of punishment. Given that in extraordinary contexts, punishment cannot fulfill its ordinary functions, there is a need to assign complementary or even substitutionary functions to it.

In this regard, and in view of the proposition that we defended in the previous section that there is a need to integrate criminal prosecution strategies into holistic transitional justice models, we believe that it would be logical to define the goal of punishment on the basis of its communicative dimensions, or what some refer to as the theory of deterrence as a product of the expressive function of punishment. In this way, the act of carrying out justice and imposing punishment could be oriented towards sending out a particular social message that would allow society to delineate a “before and after.” Additionally, the transitional justice project should seek to grant victims a certain degree of dignity, which would allow for confronting cycles of violence by precluding the need for revenge and promoting reparation for the harm associated with the crime (Minow 2008a; Minow 2008b). These objectives, with regard both to the criminal process in general and to punishment in particular, could be achieved through different types

of plans and institutional arrangements. Two methods that could adequately achieve this difficult balance are concentrating criminal action on those who are today considered to be those “most responsible,” and on the discussion about “alternative punishments.”

Concentrating criminal action is currently defended as part of the selection and prioritization thesis. As Orozco (2013) states, “to select is to decide what to take and what to set aside, what to pursue and what not to pursue. To prioritize, on the other hand, is to decide what to pursue now and what to pursue later.” Selection is not a new concept, either in criminal law or in transitional justice. On the one hand, in all criminal systems, even in contexts with high levels of constitutional normality, it is impossible to prosecute all crimes that occur. This holds true for ordinary and extraordinary systems as well as for national and international ones. Because of this, selection is always present, either as a planned phenomenon or as a *de facto* reality (which may be capricious, involuntary, and uncontrolled). For this reason, modern criminal policy strategies tend to rationalize State intervention to determine criminal justice system priorities in a democratic way, rather than maintain the duty to punish as a rigid rule, which only ends up covering up crime and discrediting the justice system. On the other hand, selection is also a principle that is inherent in transitional justice, since, given the mass scale of events and perpetrators and the sheer quantity of tasks that need to be undertaken by the State, plus the scale of public needs in times of transition, State and society actions have to be rationalized, in line with fundamental basic agreements.

We agree with Bergsmo and Saffon (2011) in that selecting crimes seems inevitable in peace processes that follow extreme, long-lasting cruelty. The best way to guarantee the rights of victims is therefore not to forbid selectivity, but rather to defend the criteria by which selection will be carried out, so that expectations of truth, justice, and reparations can be met as fully as possible. To achieve such a goal, three guidelines should be followed for defining the prosecutorial framework. The first is that the cases selected should provide elements that will contribute to guaranteeing the rights of victims whose cases are not selected. The starting guideline, to select the most representative cases, is useful, but there should also be a focus on selecting perpetrators who, for example, can provide the greatest amount of information about the group’s general activities and best contribute to the dismantling of its structures. The second guideline is that the selection criteria should be sensitive to victims’ vulnerability and take into account differentiating focuses, while the third is that the criteria should clearly define the

transitional compensation mechanisms for victims whose cases are not selected and who will see their expectations for justice restricted.

In our opinion, the effective implementation of a selectivity framework that takes into account at least the above criteria would be in line with international non-impunity standards. This conclusion is supported by the most recent international decisions and instruments, which tend towards demarcating specific standards with regard to transitions from war to peace. Examples of this are the recent *El Mozote* case⁶² where the Inter-American Court recently passed judgment and the Chicago Principles on Transitional Justice.⁶³

One additional point in the debate relates to the scope of the duty with reference to the use of alternative punishments to prison. As far as the legal standard is concerned, we have already recognized that various conflicting arguments exist, and continue to be debated, on the scope and content of the duty. Arguments have been put forward that, given the gravity of the crimes, a punishment proportionate to the most severe sentence allowed under domestic legislation could be considered an estimation of the harm. However, there is no conclusive norm in international law which establishes that punishment is a necessity, and even less is there a consensus regarding whether punishment must be in the form of imprisonment.

Bearing in mind the considerations mentioned above regarding the function of punishment, we consider that the argument put forward by Nino (2006) and Elster (2006), that we should not seek to be absolute with respect to the retributive and general preventative functions of punishment but at the same time should also not dismiss the expressive function it can have for achieving certain transition objectives, is relevant. Maintaining a certain degree of retribution within the general transition system will therefore always be justified, if and when this degree of retribution achieves additional goals relating to the expression and affirmation of norms, as Pablo de Greiff (2009) indicates. At the same time, the symbolic nature of the combination of retribution and expression could serve the purpose of preventing violence not only by those who have already committed violations but also by those

62 *Massacres of El Mozote and Nearby Places vs. El Salvador*.

63 International Human Rights Law Institute, Chicago Council on Global Affairs, Istituto Superiore Internazionale di Scienze Criminali, and Association Internationale de Droit Pénal (2007), *Los principios de Chicago sobre justicia transicional*, <https://biblioteca.iidh-jurisprudencia.ac.cr/index.php/documentos-en-espanol/verdad-justicia-y-reparacion/1312-los-principios-de-chicago-sobre-justicia-transicional/file>

affected by it, since they could otherwise enter into a vengeful cycle of violence, as Minow (1998) states.

In the context of a transition, pardons, in cases where a sentence has already been passed, are therefore one of the central concessions that a State can offer in order to achieve a successful negotiation. Although all pardons reduce the severity of a sentence, some are more extreme than others. Sentence reductions, where some part of the time to be spent in prison is preserved, are more rigorous than measures that completely do away with a prison sentence, such as those that offer a conditional suspension of the sentence or alternative punishments to prison.

Effectively, by performing the function of shining light on atrocity and on those responsible for it, trials provide a boost for the claims both of society in general and of victims in particular for some concrete reproach to be included that is more than the mere symbolic reproach of a guilty verdict. This demand emerges naturally when specific details of the atrocity are revealed, and it increases feelings of repudiation of the actions and their perpetrators. In this sense, it also increases the expectation that, after establishing that the crime has been committed and identifying those responsible, something else should happen to indicate a clear rejection of those actions.

It is for this reason that, on a practical level, a minimum punishment should be reserved for those most responsible. This would enable the domestic formula to be brought into line with international non-impunity standards. From a philosophical point of view, and specifically with regard to reflections on the goals of punishment, a minimum degree of retribution is necessary in order to assert the values violated by the grave human rights transgressions (Crocker 2002; Uprimny and Saffon 2006). Additionally, in practical terms, a minimum punishment provides better protection for the peace process, not only because it would be acceptable to the international community but, especially, in the highly polarized domestic context.

The question that therefore arises is what is understood by minimum punishment. If punishments tend toward eliminating the afflictive aspect and concentrating on symbolic aspects, they are rejected by sectors of the victim population because they are seen to be very soft, and they are also rejected by international human rights organizations because they are considered to be contrary to normative standards. On the other hand, if punishments concentrate only on the afflictive aspect, they are rejected by combatants, who will therefore attempt to impede political projects because they feel that the dignity of the revolution has been affected.

The domestic discussion, at least in contexts of negotiated peace, should thus start from the need to optimize three existing, at times contradictory interests: (i) measures that would be acceptable to the armed actors, and in the case of rebels, measures that would be compatible with their political project and their idea of revolutionary dignity; (ii) measures that would be acceptable under international standards; and (iii) measures that would be acceptable to a substantial number of victims and to society in general, so that they would not be boycotted by those opposed to the peace process.

To achieve these objectives, unorthodox formulas that would allow a loosening (but not elimination) of the afflictive components of the punishment would need to be turned to. Examples include the idea of a reduced sentence within a broader model of imprisonment, distinct from the traditional model, or a formula which, even if it had an imprisonment component, would allow combatants to continue their political project, with access to the means to do so and with the liberty to continue their development from their place of imprisonment.

Similarly, other cases could design a principle of afflictive penalties not necessarily linked to imprisonment, but where perpetrators must perform burdensome or risky tasks that could be viewed as punishment. One example could be to require them to do jobs that would be normally be done by the military (meaning that such punishment would be compatible with revolutionary dignity), but where they take on both responsibility and risk, as would be the case, for example, with obligatory demining.

Orozco has defended this idea, stating that “in the area of post conflict justice, the penalties should be social penalties that encourage political integration and are reparatory in nature.” Orozco argues that in the context of a politically negotiated transition from war to peace, the integrative and social functions of punishment should focus on convincing rebels to exchange their arms for democratic mechanisms. This first step could hopefully create the necessary conditions for a minimum consensus on procedures and values and, on the basis of that consensus, criminal law could, in the future, perform a general, positive preventative function by establishing a guarantee of non-repetition for victims and for society in general. Orozco therefore argues that for perpetrators and victims alike, penalties should, above all, be reparative. Ways should then be sought for ex-combatants to take part in community infrastructure tasks or demining activities (in contexts where mines have been used as a weapon of war), and alternatives should also be looked for that would, for example, assign delinquent

politicians convicted of grave crimes to work in companies that produce public goods and collective services (Orozco 2013).

Conclusions

In this article we have sought to demonstrate the current position in international law regarding the duty to investigate and prosecute, as well as the principal debates surrounding that duty. We have highlighted the various positions that exist regarding its nature, content, and scope, with the intention of encouraging academic consensus-building, and in order to facilitate the structuring of transitional justice mechanisms in different contexts and to search for formulas which will reconcile the latent tension that exists between the principles of justice and of peace.

With this goal in mind, we stress that the challenges of negotiated transitions in the era of international criminal law begin with issues related to the binding nature of the obligation. Positions regarding this point range from those that deny the very existence of the duty to the most restrictive, which consider that the duty to investigate and prosecute is not only binding on States but also requires imposing the most severe sanctions permitted in the domestic legal system.

Equally, it is not yet clear which types of criminal conduct or human rights violations States are obliged to investigate and prosecute. The debate revolves around an array of interpretations, ranging from ones that envisage this duty as applying only to designated international crimes to ones that widen the sphere of action, interpreting the duty as extending to all grave human rights violations. Differences still persist over defining the category of grave violations.

With regard to the scope of the duty or the legal consequences of applying it, we have seen that while there is no specific formula in treaty texts referring to a duty to punish, there is a strong trend toward considering that punishments which are imposed in response to egregious crimes must be the harshest possible and must be carried out in detention centers.

Faced with this range of debates and interpretations of international law sources, we aim to propose a formula which, from our point of view, is intermediate, in that it addresses the nuances that exist in the positions mentioned above. To build on our proposal, we draw from the premise that, in effect, there is a duty to investigate and prosecute as such, which stems from several treaties and, in particular, from the Rome Statute. This is why we distance ourselves from the position adopted by the academics who drew up the Belfast Guidelines. However, unlike other dissenters, we consider that this position does not mean

that in a transitional context there is no possibility of allowing alternative punitive mechanisms, such as conditional and non-generalized amnesties.

Our position is underpinned by the idea that the duty to investigate and prosecute, as found in various sources, is structured as a principle and not as a rule, in the sense that it is expressed as an optimization mandate rather than as an all-or-nothing requirement. Thus, because of the latent tension that exists between this principle and peace, something which commonly arises in negotiated transition contexts, we must necessarily opt for a balance that tends toward a fair and just equilibrium between both. This is why we defend the idea that, at present, the possibility of granting punitive clemency measures to armed groups should not be prohibited, provided that those measures are conditioned by requirements to make significant contributions in terms of truth and reparation, and by guarantees of non-repetition that will ensure that peace is achieved.

Viewing transitional justice from a holistic perspective, the role of criminal law as a component of justice must be defined, if this balancing exercise is to be carried out in contexts of negotiated transitions. In particular, we must consider the question of how the application of alternative punishments in the processing of demobilized combatants can promote the ultimate objectives of transitional justice in specific contexts.

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2. The Pitfalls of Post-Conflict Justice: Framing the Duty to Prosecute in the Aftermath of Violence*

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This chapter examines the nature and scope of the duty to investigate, prosecute, and punish as a response to Nelson Camilo Sánchez and Rodrigo Uprimny's ("the authors") contribution, "The Challenges of Negotiated Transitions in the Era of International Criminal Law." It first sketches the authors' view of the nature and scope of the duty to investigate, prosecute, and punish (A). Second, it addresses the legal consequences that emerge from that duty and discusses the ramifications in light of three recent transitions from conflict to peace. This is done to highlight the pitfalls these societies grappled with and to draw initial lessons from their experiences for future scenarios (B). It then describes the Colombian process for accountability emerging from the peace talks (C) and underscores lessons learned from the three comparative examples (D). Finally, the paper concludes that penal consequences of serious crimes not involving incarceration are not necessarily offensive to the Rome Statute, provided they are seriously implemented and are not intended to circumnavigate Colombia's treaty obligations (E).

The "Nature" of the Duty to Investigate, Prosecute, and Punish

Sánchez and Uprimny's point of departure is their conviction that an international legal duty to investigate, prosecute, and punish does exist in international law, at least vis-à-vis States that ratified the Rome Statute. More precisely, they argue in favor of such a general duty regarding crimes against humanity and war crimes, pursuant to Article 5 of the Rome Statute. Against the backdrop of their "holistic approach to possible justice and accountability measures in processes of transitions," they then pose the question of how one could "support the legitimacy of certain amnesties" in the light of the existence of the aforementioned duty. Their contention that the duty in question falls short

of an absolute duty rests on two premises: (i) their conviction that an integral or “holistic” approach to transitional justice is needed in order to achieve lasting justice and peace and that numerous instruments, of which criminal justice is but one, are necessary to hold individuals to account for criminal acts; and (ii) their application of the theoretical distinction between principles and rules as two mutually exclusive categories of norms. In transitions from conflict to peace, their argument continues, States are subject to a plurality of duties, which create normative tensions between such duties. Resorting to the dichotomy of rules and principles allows them to identify the duty to investigate, prosecute, and punish as a legal principle which, as a consequence of the underlying legal theory, provides the opportunity for a balancing test in which certain exceptions can be justified because certain lenient measures, such as conditional amnesties, lighter prison sentences, other forms of restrictions on liberty and/or community service, may ultimately promote important objectives within the general framework of justice in order to facilitate transition and achieve long-term peace.

Among the revered aims of transitional justice are the creation of a reliable record of past human rights abuses, holding perpetrators of such crimes accountable, providing reparations to victims of atrocities, bringing an end to violence and fostering social and political stability, including the restoration of trust in official institutions within the polity (Eisikovits 2014). These competing aims must be reconciled, bearing in mind that no one, single duty unconditionally or categorically overrides another.¹ The effect of criminal justice measures should be evaluated and justified against this background, not merely in terms of their compliance with the duty to investigate, prosecute, and punish, but also in terms of efforts aimed at establishing peace and stability. Investigations leading to prosecutions and, eventually, to some sort of punishment, even if this is regarded as lenient, may be justified following a considered analysis of the competing objectives of the transition. This is well in line with the authors’ holistic approach, which “promotes the links between different judicial mechanisms, criminal trials and amnesties, and non-judicial mechanisms—truth commissions and administrative reparations programs—under the theory that no one instrument is by itself sufficient to satisfy the complex demands posed during a process of transition.”

1 On the theoretical premises, as well as an alternative to Alexy’s principle/rules on dichotomy, see Günther 1989.

Mapping the Legal Consequences of the Duty to Investigate, Prosecute, and Punish

In attempting to map the implications of the duty to investigate, prosecute, and punish in more detail, to the extent that it exists, it is acknowledged from the outset that any normative claim is limited or preconditioned by the “natural” ability to perform those actions. In respect of the criminal justice process, “natural conditions” figure in several ways: a crime constitutes facts or elements that take place at a certain time and in a certain place. Satisfying the applicable criminal standard of proof is a function of the evidence obtainable. The more time passes from when a crime is committed, the more the memory fades and potential witnesses pass away. Other pieces of evidence are lost or destroyed. This is particularly so when crimes are committed during conflicts that endure for decades.

In addition, it must be asked to what extent “natural conditions” include the available social and economic resources to carry out investigations and prosecutions. In other words, if a society is unable to fully investigate and prosecute because it lacks resources, would it follow that it has failed to comply with the duty? The complexity of this question becomes apparent in the case of a society in transition. Public funds and other “social capital” are limited; thus, how much of its resources is a State in transition obliged to direct towards complying with the duty to investigate, prosecute, and punish when there are competing demands for functioning infrastructure, public education, and general welfare? These pertinent questions go beyond the scope of this paper. It should be noted that Sánchez and Uprimny argue that even if resources are plentiful, in some cases lenient treatment may still be justified in order to achieve other ideals and functions of transitional justice.

In what follows, we first inquire into the legal consequences of the duty to investigate, prosecute, and punish, to the extent that they exist. In the remaining part of the paper, we deal with three examples of transitions from conflict to peace and present the challenges these societies faced in the light of the duty to investigate, prosecute, and punish. We do so in order to highlight the pitfalls that societies undergoing a mass transition have to grapple with in terms of the duty, so as to get a glimpse of the complexity involved in this process. There are important lessons to be learned from the three experiences. We then apply these lessons to the Colombian situation.

The Duty under the Rome Statute and other International Instruments

In relation to the legal duty to investigate and prosecute, we suggest that the Rome Statute does not alter pre-existing obligations on States Parties in any substantive sense. The Rome Statute only creates substantive new obligations under Part IX² in relation to the duty to cooperate, but it imposes no binding duty on States Parties to prosecute.³ All it does is require the International Criminal Court (ICC) to act if national authorities do not.⁴ However, no new obligations are created. While the Preamble to the Rome Statute speaks of “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” the Preamble does not form part of the enforceable text of the treaty.

According to Article 77 of the Rome Statute, the International Criminal Court (ICC) may impose prison sentences of up to 30 years, or life imprisonment when so justified due to the extreme gravity of the crime and the individual circumstances of the perpetrator. In addition to such imprisonment, the Court may order fines or the seizure of property resulting directly, or indirectly, from the crime committed. Money or property collected through fines or forfeiture may be transferred to a trust fund, established pursuant to Article 79, to be used for the benefit of victims and their families. Accordingly, the Rome Statute envisions a traditional system of penalties for cases tried under the jurisdiction of the ICC by giving priority to prison sentences that may be supplemented with financial sanctions. Following a strict reading of Article 77, the Court may order fines or freeze assets only *in addition* to the imposition of a term of imprisonment.

This penalties regime applies only to the ICC and not to national courts. In accordance with the more general principle of complementarity, Article 80 states that nothing in Part VII of the Rome Statute dealing with penalties will affect the imposition by States of penalties prescribed in their national law. This provision thus serves as an interface between the international criminal legal order and the national legal order of States Parties to the Rome Statute by declaring different modes of punishment for crimes as generally admissible, according to Article 5. If national law provides for alternate forms of punishment to incarceration in respect of serious crimes, including crimes under

2 Part IX is entitled “International Cooperation and Judicial Assistance.”

3 See Stahn 2012 in answer to Heller 2012.

4 See Article 17 (“Issues of Admissibility”).

Article 5, such a measure does not, as a matter of course, constitute a breach of the State's obligation under the Rome Statute. It should be noted that tolerance of alternative modes of punishment, according to national law, allows for more lenient as well as more severe measures, such as capital punishment (Seils 2015).

Other international legal sources operate in a similar manner to the Rome Statute, either not specifying the punishment to be imposed or permitting flexibility. An example is Article 4(2) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, which reads "[e]ach State Party shall make these offences punishable by *appropriate penalties* (emphasis added) which take into account their grave nature." Article 7 of the Convention reads

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Another example is Article 7(a) of the 2006 Convention for the Protection of all Persons from Enforced Disappearance, which allows every State Party to establish "[m]itigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance." In the transitional justice context, leniency has been offered where perpetrators have come to make full disclosure about their crimes.⁵

While the Rome Statute and other international instruments defer to national jurisdictions on the question of penalties under domestic law, we do not suggest that any and all punishment sanctioned by national law in respect of Article 5 crimes, and other serious crimes under international law, will necessarily comply with the complementarity principle. In our view, punishment that is designed to defeat the ends of justice, or circumnavigate the impact of the Rome Statute, is likely to fall short of the demands of complementarity.

However, the extent to which the complementarity regime permits the scrutiny of penalties imposed after conviction in national

5 Regarding South Africa, see Section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995 (<http://www.justice.gov.za/legislation/acts/1995-034.pdf>); regarding Colombia, see Law 975, Ley de Justicia y Paz (Justice and Peace Law of 2005).

prosecutions is unclear. The ICC Prosecutor has argued that an excessively lenient penalty may amount to an attempt to shield an accused, in terms of Article 17(2)(a), or that it would not be consistent with an intent to bring to justice under Article 17(2)(c) of the Rome Statute (Semana 2013). There are significant legal difficulties with both arguments. Article 17(2)(a) relates to proceedings carried out for the purpose of shielding a perpetrator from criminal responsibility, meaning that it relates to the determination of guilt or innocence, not the punishment imposed after the determination of guilt. It remains to be seen whether the ICC judges believe the article could reasonably extend to the question of punishment. Under Article 17(2)(c), a two-pronged test is established, in order to assess, firstly, whether or not the proceedings in question were conducted independently or impartially, and secondly, whether they were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice. A court applying penalties perceived as lenient but created by properly passed legislation is not necessarily acting with a lack of independence or impartiality.

Developments in International Law regarding the Duty

Sánchez and Uprimny maintain that it is important to frame the scope of the duty to prosecute within a holistic transitional justice policy in a specific context. In the aftermath of conflict or oppression, criminal proceedings ought to be seen as part of a larger set of measures, such as truth-seeking, reparations, and institutional reforms. The aim of such an approach is to construct a lasting peace agenda.

Sierra Leone

Our first example illustrates that context determines everything, when it comes to structuring a transitional justice process. The prevailing circumstances determine the nature of the steps that may be taken following conflict. In some contexts, this may mean little or no criminal justice at all. Such a context was Sierra Leone in the late 1990s. During this period, Sierra Leone was in the grip of one of the most brutal conflicts in recent history, one that had already cost tens of thousands of lives. There appeared to be no end in sight. Regional peacekeeping efforts had failed to contain the civil war, and the international community, at that stage, had made no commitment to send in troops to end the war and maintain the peace.⁶ Ultimately, a peace agreement was struck

6 *Report of the Truth and Reconciliation Commission for Sierra Leone, 2004, vol.*

in 1999 that guaranteed a blanket amnesty covering commanders and combatants on all sides. The Report of the Truth and Reconciliation Commission for Sierra Leone noted as follows:

The signatories to the 1999 Lomé Peace Agreement agreed to amnesty in order to secure the peace. It was accepted, at the time of the signing of the Lomé Peace Agreement, that the RUF would not have signed the agreement if there had been any prospect of legal action being taken against its members. A truth and reconciliation process was seen as an alternative mechanism for accountability. The Commission was viewed as a means to address impunity so that violations and abuses of human rights would not simply be forgotten. Through its creation of an “impartial historical record” and its holding of public hearings and ceremonies, the Commission would promote a sense of restorative justice in Sierra Leone.

Perpetrators would be identified and held accountable in the report of the Truth and Reconciliation Commission. The origins and causes of the conflict, together with the contextual story of the conflict in all its nuances, would be told in order that the full horror of the war might be acknowledged by the country as a whole. Recommendations would be made to prevent the repetition of conflict. Impetus would be given to the process of national healing and reconciliation. Violations suffered by victims would be redressed through reparations.⁷

The Commission concluded that it was unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement, since it was apparent that the rebel forces would not end the hostilities if they were not guaranteed a pardon or amnesty. It found that

those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. Amnesties may be undesirable in many cases. Indeed, there are examples of abusive amnesties proclaimed by dictators in the dying days of tyrannical regimes. The Commission also recognises the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they ascend to the level of gravity of crimes against humanity. However, amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases would be to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end.⁸

2, ch. 2, para. 388–411, http://www.sierraleonetr.com/index.php/view-report-text-vol-2/item/volume-two-chapter-two?category_id=20

7 TRC Sierra Leone, vol. 3B, ch. 6, para. 5–6, http://www.sierraleonetr.com/index.php/view-report-text-vol-3b/item/volume-three-b-chapter-six?category_id=9

8 TRC Sierra Leone, vol. 3B, ch. 6, para. 11.

The Commission maintained that the amnesty was not too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in 1999. It ultimately provided the framework for a process that “returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.”⁹

Although the government of Sierra Leone and the United Nations established a hybrid court, known as the Special Court for Sierra Leone, in 2002, following breaches of the peace accord, its jurisdiction was confined to those bearing the greatest responsibility and it tried only a few suspects.¹⁰ In terms of domestic law, the general amnesty remained in place for pre-peace accord violations. Little attention was given to the fact that the Special Court and the Truth and Reconciliation Commission operated in parallel while dealing largely with the same matters. The two bodies operated entirely separately, and when their operations did intersect, the relationship was a troubled one. Future transitional justice initiatives that require truth-seeking and criminal justice bodies to operate simultaneously should take care to define the relationship and harmonize the objectives of the different entities in order to minimize or prevent operational tensions.¹¹

Timor-Leste

In Timor-Leste, after the violence following the 1999 referendum on independence from Indonesia, it was ultimately decided that serious crimes were to be prosecuted by the Serious Crimes Unit (SCU) and tried exclusively by the Special Panels for Serious Crimes (SPSC) in the Dili District Court. Serious crimes included war crimes, genocide, and crimes against humanity, as well as serious domestic crimes such as murder, sexual offences, and torture.¹² Parallel to this process, the

9 *TRC Sierra Leone*, vol. 3B, ch. 6, para. 12. See also the findings set out in vol. 2, ch. 2, para. 577–603, http://www.sierraleonetr.com/index.php/view-report-text-vol-2/item/volume-two-chapter-two?category_id=20.

10 Thirteen indictments were brought against leaders of the various fighting factions. Nine persons were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years: <http://www.rscsl.org/>.

11 *Ibid.* See also *TRC Sierra Leone*, vol. 2, ch. 3, para. 474–481, http://www.sierraleonetr.com/index.php/view-report-text-vol-2/item/volume-two-chapter-three?category_id=20; and *TRC Sierra Leone*, vol. 3B, ch. 6, para. 220–233, http://www.sierraleonetr.com/index.php/view-report-text-vol-3b/item/volume-three-b-chapter-six?category_id=9; see also Varney 2007.

12 The Special Panels issued 95 indictments covering 440 people and authorizing 270 arrest warrants. In total, the Special Panels tried 87 defendants in 55 trials, with 84 convicted of crimes against humanity and other charges. Sentences for crimes against humanity ranged from five to 33 years’ imprisonment. Most of those convicted received sentences in the range of seven to 15

Commission for Reception, Truth and Reconciliation (CAVR) was put in place, which included granting a form of immunity for perpetrators of less serious crimes through its Community Reconciliation Process (CRP).¹³

The CRP was a village-based participatory process that involved community hearings in which victims, perpetrators, and the wider community could participate directly. The perpetrator was required to admit his violation(s), after which an agreement could be brokered, allowing the perpetrator to undertake community service, deliver an apology, pay a symbolic fine, and/or provide reparations to the victims.¹⁴ In return, the perpetrator was accepted back into the community. A CRP process could not proceed if the Office of the General Prosecutor indicated an intention to prosecute the applicant. Once a court approved the reconciliation agreement and the perpetrator complied with his duties under it, immunity from civil or criminal action was authorized.¹⁵

The CAVR's mandate allowed it to refer serious violations to the SCU for investigation and prosecution. In practice, a lack of coordination and forward planning led to the formation of an "impunity gap," involving middle ground crimes. Due to this gap, low-level perpetrators of serious crimes were not eligible for reconciliation procedures, but they ultimately avoided trials before the serious crimes regime because of its limited resources and the three-year operational time limit (Varney 2007; Ryan 2006, 93, 101). The bulk of the CAVR's recommendations on serious crimes reached the SCU after its mandate had expired. A shift in political interests between the governments of neighboring Indonesia and newly independent Timor-Leste in search of good bilateral relations rather than justice further undermined and, *de facto*, brought an end to the serious crimes regime (Ryan 2006, 97).

years: <https://ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf>

13 See UNTAET/REG/2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor.

14 Community service usually consisted of a task performed once a week over a set period, often no longer than three months. Tasks included repairing public buildings, tree planting, erecting a village flagpole, and cleaning church grounds or other facilities. Reparations varied from payments in cash or in kind to reimburse the victim for goods lost, stolen or destroyed, such as livestock, to more symbolic payments with a ritual value. Often a perpetrator would donate a cow to be eaten at a communal meal. <http://www.etan.org/etanpdf/2006/CAVR/09-Community-Reconciliation.pdf>

15 See <http://www.cavr-timorleste.org/en/reconciliation.htm>

In short, the model for justice in Timor-Leste may be described as “one involving good intentions that were not backed up by the strategic planning and effective support” (Hirst and Varney 2005, 1). In terms of a general conclusion, two lessons can be drawn from this experience. First, for any coherent approach to transitional justice to be successful, serious and consistent political support is crucial. Second, if criminal justice mechanisms and truth commissions are to work optimally side by side, institutional arrangements must ensure an integrated and co-operative relationship in order to avoid impunity gaps.

South Africa

The South African transition is often put forward as the benchmark of transitional justice. It involved a negotiated settlement, which resulted in the cessation of violent political conflict, a participatory constitution-building process and the beginning of reforms in all public institutions (Ebrahim 1998). In order to secure the buy-in of all stakeholders, the country chose a middle road to deal with the past (Tutu 1999; Chapman and van der Merwe 2008). There would be a truth and reconciliation commission to interrogate the past and provide a platform for victims to share their pain and experiences with the nation. Perpetrators on all sides would have the opportunity to tell the truth and benefit from an amnesty. While it was accepted that many victims would be denied justice, the quid pro quo would be the provision of truth and reparations.¹⁶

The first part of South Africa’s transition, following the “unbaning” of resistance movements and the release of Nelson Mandela, was characterized by the most violent period in South Africa’s modern history. It is often overlooked that thousands perished between 1990 and 1994 in bitter political conflicts that seemed to have no end. The rollout of the National Peace Accord (Spies 2002), targeted special investigations (Lue 1996), an interim constitution¹⁷ and a temporary power-sharing body (Paruk 2009) to control the executive in the run-up to the 1994 elections all contributed to halting the bulk of the violence.

The Truth and Reconciliation Commission (TRC) and its amnesty process, in particular the public and open manner of its operations,

16 Azanian People’s Organization (AZAPO) and Others vs. President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (Jul. 25, 1996), para. 17, 18 and 47, <http://www.saflii.org/za/cases/ZACC/1996/16.html>

17 *Constitution of the Republic of South Africa Act 200 of 1993*, <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993>

assisted South Africans in coming to terms with the past.¹⁸ Indeed, the process of the Commission's work was considerably more important than its ultimate outcome. While much truth was unearthed and important historical events clarified through its investigations and research, the amnesty process itself, which was largely shunned by politicians and decision-makers, did not deliver significant truth to victims; while several police officers, including senior officers, applied for amnesty, in most cases they confined their disclosures to what was already in the hands of investigators (Sarkin 2004, 273–274).

The follow-up to this process required that perpetrators who were denied amnesty and those who did not apply for amnesty should face justice. Victims should also have been afforded adequate reparations (De Wet 2012). Aside from taking various perfunctory steps, successive post-apartheid administrations have failed to deliver on these statutory and constitutional obligations (Varney 2010).

In fact, prosecution authorities have taken forward fewer than a handful of cases (Bubbenzer 2009; Ernest 2007). Not only have these matters not been vigorously pursued, active steps have also been taken to subvert the course of justice. Notwithstanding its constitutional obligations, the South African government established a secret "Amnesty Task Team" in 2004 to explore avenues for avoiding criminal prosecutions of cases arising from the TRC process.¹⁹ The proposals made by this body included an amendment of the prosecution policy in order to permit the National Prosecuting Authority (NPA) to decline to prosecute on various new criteria, including the same amnesty criteria employed by the TRC. It effectively allowed for a backdoor amnesty under the guise of prosecutorial discretion. When striking down this policy, the High Court described it as an impermissible and unconstitutional rerun of the TRC's amnesty program.²⁰

The Amnesty Task Team also proposed a special dispensation for political pardons to accommodate perpetrators who claimed they were

18 It should be noted that the amnesty process was a large and complex administrative and logistical exercise. The South African Amnesty Committee was supported by several investigators, researchers, and administrative staff, who were required to verify claims made by applicants, together with considerable support staff. While the Commission itself operated between 1995 and 1998, the life of the Amnesty Committee had to be extended to 2002. In relation to the need for detailed mapping and costing of the process, see Seils 2015.

19 Report: Amnesty Task Team, which was classified "secret" and disclosed during the proceedings in the *Nkadimeng & Others vs. The National Director of Public Prosecutions & Others* case (T.P.D Case no. 32709/07).

20 *Nkadimeng & Others*: <http://www.saflii.org/cgibin/disp.pl?file=za/cases/ZAGPHC/2008/422.html&query=Nkadimeng>

not able to apply for the TRC's amnesty.²¹ This initiative was carried out behind closed doors. Not even the victims affected were consulted. The High Court issued an urgent order restraining the president from granting such pardons²² and the Constitutional Court confirmed that victims had to be consulted before political pardons could be granted.²³

It emerged in a test case launched in 2015 by the family of a disappeared activist that the cases recommended for prosecution by the TRC had been abandoned, as a direct result of political interference in the work of the NPA (Khoisan 2015). The family sought a High Court order compelling the NPA to make a prosecutorial decision in respect of known suspects.²⁴ The victim was abducted and disappeared by the South African Security Police in 1983, and the TRC recommended that the suspects face justice. The political interference brought to bear on the National Director of the NPA emanated from the ministerial level. It caused the investigation and prosecution of this case, and all the other so-called political cases, to be suppressed.²⁵

The South African experience illustrates that transitional justice is not simply a collection of events. As important as the TRC process was, both its significance and its impact were seriously hindered by the failure to appreciate the need for effective follow-up. As far as criminal justice accountability is concerned, the lack of a clear and transparent strategy opened the door to political manipulation. In our view, a prosecutorial policy, in respect of the political cases, that was the product of an open participatory process would have gained credibility in the eyes of the public. This may have shielded the prosecutorial process from political interference. It would also have helped prosecutors to

21 As with the amnesty process, applicants for political pardons had to disclose the truth and demonstrate that the offence was committed for a political objective.

22 Judgment and Order of Seriti J, Apr. 28, 2009, *CSVR & Others vs. President of the Republic of South Africa & Others*, Case No. 15320/09, North Gauteng High Court, <http://www.saflii.org/za/cases/ZAGPPHC/2009/35.html>

23 *Albutt vs. Centre for the Study of Violence and Reconciliation & Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (Feb. 23, 2010): <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2010/4.html&query=Albutt>

24 *T P Nkdimeng vs. National Director of Public Prosecutions & Others*, Case No. 3554/2015, Gauteng Division of the High Court of South Africa, <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-challenging-npa-inaction-for-trc-related-prosecutions/>

25 *Ibid*, see affidavits of Vusi Pikoli and Anton Ackermann: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/05/Vusi-Pikoli-Affidavit-Simelane.pdf>. These proceedings are currently on hold since the National Director of Public Prosecutions instituted criminal proceedings in 2016.

act fairly and consistently and to prioritize the most egregious cases for prosecution (Varney 2005).

Approach to Accountability in the Colombian Peace Talks

On December 15, 2015, as a result of the Colombian peace talks between the government and the FARC guerrilla group, a 75-point agreement was issued on the agenda item dealing with victims and justice, including the establishment of an integrated approach to truth, justice, reparations, and non-repetition²⁶ consisting of such mechanisms as the establishment of a Truth Commission²⁷ and a Special Jurisdiction for Peace. The Special Jurisdiction will be made up of a Peace Tribunal and Judicial Panels that will identify which cases go to trial. It will handle “grave violations of human rights and humanitarian law” committed by FARC guerrillas,²⁸ as well as crimes perpetrated by State agents “related to” the armed conflict and “connected” to civilians who participated in a “determinant” or “habitual” manner in the committing of crimes.²⁹

The agreement stipulates that perpetrators will follow one of three different courses of action, once they have submitted to the peace jurisdiction. Firstly, those who have committed political crimes, such as rebellion, and have not been involved in committing grave violations of human rights, are entitled to an amnesty.³⁰

Secondly, perpetrators of serious crimes who disclose the truth about their crimes and make a contribution to reparations and guarantees of non-recurrence, taking into account the gravity of the crime and their level of responsibility, will not be incarcerated, but will receive punishment that has a “restorative and reparative function.” Perpetrators will be required to provide services to assist victims of the conflict. They will, however, face “effective restrictions on [their] freedoms and rights,” which “are necessary for [the] execution” of their restorative

26 *Sistema integral de verdad, justicia, reparación y no repetición.*

27 *Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición.*

28 Agreement on the Victims of the Conflict [*Acuerdo sobre las Víctimas del Conflicto*], Dec. 15, 2015, p. 23, <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/borrador-conjunto-acuerdo-sobre-las-victimas-del-conflicto-1450190262.pdf>

29 *Ibid.*, p. 26.

30 *Ibid.*, p. 28.

and reparative sanctions.³¹ Such sanctions are likely to last between five and eight years.³²

Thirdly, perpetrators of serious crimes who decline to disclose the truth or who make only partial confessions will face the full force of the law in criminal proceedings, including prison sentences of up to 20 years. Perpetrators who participate in the Special Jurisdiction program but who fail to comply with the conditions ordered by the Peace Tribunal will have their benefits revoked.³³

In terms of the analysis presented in this paper, the basic terms of the peace agreement would not, as a matter of course, offend international law or the Rome Statute, in particular.³⁴ In the first place, there is to be no amnesty, conditional or blanket, for the most serious crimes.³⁵ There is to be no suspension or cessation of criminal prosecutions in respect of the gravest of crimes. Public accountability is to be upheld in terms of both criminal justice and truth-seeking.³⁶ Serious violations of human rights are to be investigated and prosecuted through the criminal justice system in open courts. Accountability will be enhanced if the public and the media are able to attend these proceedings and witness perpetrators facing justice. Although perpetrators who cooperate with the Special Jurisdiction are exempt from prison sentences, they do face some penal consequences involving restrictions of liberty lasting for several years. Those who refuse to cooperate face the full force of the law, including prison sentences. There will be no extinguishing of criminal records. Those convicted, including those who benefit from the Special Jurisdiction, will carry their criminal records for the rest of their lives (Varney 2005, 10–11).

31 *Ibid.*, pp. 40, 45.

32 *Ibid.*, p. 39.

33 Office of the High Commissioner for Peace, “Q&A: Special Jurisdiction for Peace,” Sept. 23, 2015, <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documents/qa-special-jurisdiction-for-peace.pdf>

34 For a counter-view, see Human Rights Watch Analysis of Colombia–FARC Agreement, Dec. 21, 2015, https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement#_edn23

35 Point 37 in the Agreement provides that “upon the termination of hostilities, pursuant to IHL, the Colombian State will grant the broadest possible amnesty for political and related/connected crimes,” but such crimes exclude, in point 40, “Crimes against humanity, genocide, serious war crimes ... hostage-taking or other serious deprivations of freedom, torture, extrajudicial executions, forced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of minors ... as established in the Rome Statute.”

36 However, see below in respect of serious shortcomings in the proposed truth-seeking mechanism.

While implementation will need to be closely monitored by the United Nations and others, it cannot be said that the terms of the peace agreement dealing with accountability are designed to subvert Colombia's obligations under the Rome Statute or other binding international instruments. This preliminary conclusion rests on the assumption that the truth, justice and reparative measures will be rigorous processes and that sanctions involving "restrictions on freedom and rights" will be seriously enforced. This conclusion will have to be adjusted if the impunity gap—in which middle-ground perpetrators appear to escape all forms of accountability—is not addressed. This shortcoming is considered below.

We are in agreement with the conclusions reached by Paul Seils in his paper entitled "Squaring Colombia's Circle" where he notes that as long as the punishment meted out is not illusory, other experiences, and international law in particular, are not that relevant to the specific context of Colombia (Seils 2015, 6, 15). He points out that a successful conclusion of the peace agreement would diminish or remove the incapacitation, deterrence, and retributive purposes of punishment (Seils 2015, 15). He cautions that some meaningful punishment would have to be implemented that should involve an "approximation of condemnation, persuasion, and reform" (Varney 2005, 10–11). He recommends that any such punishment should encourage perpetrators to recognize the harm caused by their crimes and that the punishment must be seen as a serious condemnation of the violation of core values of society. The court proceedings should be "public, transparent and serious," and involve victim participation (Varney 2005, 16).

Lessons from Comparative Experiences

There are reasonable prospects that Colombia may avoid some of the pitfalls highlighted in the three examples from Sierra Leone, Timor-Leste, and South Africa. Unlike Sierra Leone, the truth-seeking and criminal justice mechanisms will not be products of separate, potentially contradictory processes. They will be established as part of a larger package of instruments with shared objectives. This means that the roles, responsibilities, and rights of persons vis-à-vis the respective entities and operational relationships can be identified and clarified upfront. If this is done coherently, it will prevent or reduce tensions or territorialism developing between the entities.

There is, however, the possibility of an impunity gap, as occurred in Timor-Leste, developing in Colombia, since it is possible that the less egregious of the serious or grave crimes will not be prioritized for

prosecution. Indeed, the agreement appears to confirm that only the “most serious cases and the most representative conducts or practices” will be prioritized from the outset for judicial processing.³⁷ Since it appears that the proposed Truth Commission will not be able to assign individual responsibility or name names (Pastor 2013, 21ff.), the “less egregious” group of perpetrators may escape all forms of accountability, including non-judicial accountability. While there may be good justification for limiting prosecutions to the “most serious cases,” there can be little or no justification for shielding other perpetrators from accountability through non-judicial mechanisms, such as a truth commission. This concern may be resolved by the proposed Chamber of Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts. However, its primary role appears to be that of a clearing house aimed at correctly directing cases to the various divisions of the Peace Jurisdiction.

Careful note should also be taken of the South African experience, in which little was done to hold perpetrators who were not granted amnesty to account. Perpetrators who do not disclose the full truth and make use of the beneficial procedures under the Special Jurisdiction should face justice without undue delay. Failure to vigorously prosecute such perpetrators may seriously undermine the meaning of, and the rationale behind, the Colombian approach to transitional justice. It may also add to victims’ trauma. Those exercising prosecutorial decisions will need to demonstrate that they are applying fair and objective criteria and that the process is not in any way tainted by political interference.

Conclusion

We have submitted that the penal consequences of serious crimes, such as Article 5 crimes under the Rome Statute, which do not involve incarceration, are not necessarily offensive to the Rome Statute or to international law standards. This is the case as long as such sanctions are not illusory and are not designed to subvert or circumnavigate international treaty obligations. We agree with Sánchez and Uprimny that a transitional justice approach ought to take into account both accountability for past crimes as well as the main goals of the peace negotiations, which include maintaining peace and integrating the armed groups into the constitutional order. In such a fragile context, traditional and rigidly formal approaches to justice and punishment will

37 Agreement on the Victims of the Conflict, p. 33.

not always serve such goals and may destroy the prospects of peace and nation-building.

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3. International Human Rights Standards in the Context of Transitional Justice

Tatiana Rincón-Covelli

Rodrigo Uprimny and Nelson Camilo Sánchez’ paper, “The Challenges of Negotiated Transitions in the Era of International Criminal Law,” calls attention to the regulatory challenges that transitional justice needs to resolve, in particular, when trying to respond to the obligation to investigate and to impose criminal penalties. This paper seeks to highlight more explicitly some of the challenges posed by international human rights standards, and it aims to expose the need for a better model. I will assume a starting point that is perhaps debatable. Due to word limit constraints, I cannot explain why I chose this particular starting point, although I believe it will permit me to better address the following problem with Uprimny and Sánchez’ proposal: the requirement for States to fulfill their human rights obligations during transition periods cannot be assessed from the minimalist and maximalist extremes proposed.¹ International human rights obligations are simply that, *obligations*, defined by treaties, customary law, *jus cogens* norms, and the decisions of supervisory bodies that oversee

1 I refer to the two extremes only to the extent that the paper explicitly refers to them: “Nevertheless, a significant number of the arguments surrounding this political discussion—and to a great extent, the academic discussion—have polarized. On one side, there are those who defend the existence of a general, broad, and clear duty to investigate, prosecute, and punish. On the other side, there are those who deny the existence or content of such a duty.” The paper discusses the important part of this content with a “maximalist” position. For example, “These maximalist visions of the obligation to prosecute have brought together an important group of scholars and practitioners concerned about the negative impact that a high standard of justice could have on peace negotiations.” Secondly, it says, “Given the characteristics of transitional societies, it is obvious that a peace agreement is not possible if maximalist views of the duty to investigate and prosecute are adopted, as the State would then be required to investigate all perpetrators of all international crimes and sentence them in proportion to the gravity of their crimes, namely with severe prison sentences.” Thirdly, it says, “Consequently, a prospective peace agreement cannot adopt the maximalist view of the duty to prosecute and punish, which may be reasonable in other contexts but makes negotiated peace impossible in certain transitions.”

compliance with treaties that look to guarantee and protect the rights of all human beings.

As a theorist interested in transitional justice, I have expressed my thoughts on this subject in several writings ranging from a more philosophical approach to one that is political and moral, as opposed to legal (see, among others, Rincón-Covelli 2012, 2014). Without entirely abandoning my philosophical approach, I have tailored my approach in this paper to reflect decisions made by United Nations' bodies and judgments of the Inter-American Court of Human Rights. I am not interested in challenging or distancing myself from the standards established by these bodies. I only want to show how these standards came into being and note that they exist. Uprimny and Sánchez' proposal should deal adequately with these established standards, but as it stands, it does not. I will therefore focus this paper on the two problems I identified in Uprimny and Sánchez' paper: firstly, the relationships between transitional justice, the obligation to investigate, and criminal justice; secondly, the right of access to justice.

Transitional Justice and Justice: The Regulatory Link

In the United Nations, where the concept of transitional justice has been developing more consistently and rigidly over the years, it has acquired a more normative character (like a duty), as opposed to an empirical one, which imposes certain challenges. These challenges are not meant to be solved through a more interdisciplinary approach to the law in order to accommodate an empirical approach, as Uprimny and Sánchez' paper proposes. In the United Nations' approach, there is still an assumed duty. The following questions then often arise. Why should it be an interdisciplinary approach? Why is this approach more empirical? Why choose these interpretation methods with regard to transitional justice? If these questions are not answered adequately, what this approach would offer would be a model of understanding the law which, compared to another model of understanding, did not affect the internal logic and rules of the transitional justice concept.

Transitional justice, as a normative concept, points to a close link between political transitions and justice. In my opinion, this means that political transitions must have, in a normative sense, justice. The notion of justice that defines transitional justice is then understood as including criminal justice.² Consequently, one can either support the idea that

2 I am assuming, albeit without the ability to develop this idea, that criminal justice refers to the acceptance of criminal punishment in transitions as opposed to the express refusal to apply criminal punishment. This second option

transitional justice be done in a manner similar to the transitions at the end of World War II—the International Military Criminal Trials in Nuremberg and Tokyo—which is the position I hold, or one can advocate for the position adopted by other authors, that transitional justice be done as it was with the transitions in the Southern Cone during the 1980s.

The Nuremberg and Tokyo trials make this link with criminal justice even more evident. As shown by David Cohen (2006), these trials not only produced criminal sanctions, they also made an enormous contribution to revealing the truth, because they exposed the horrors of the Nazi regime (the Nuremberg Trials in particular) and enabled detailed knowledge and documentation of those horrors to be divulged, and they furthermore revealed who was responsible for conceiving, planning, ordering, and executing them, not only on an individual level but on an institutional one as well. In this sense, the Nuremberg Trials created a truth commission by way of a criminal justice system.³ Cohen demonstrates through his analysis of the Nuremberg Trials that criminal justice and truth are inseparable, and that both contributed essentially to the international community's condemnation of the Nazi regime as an experience that should never be repeated.

The United Nations' Special Rapporteur espouses a more holistic and explicit concept of transitional justice that integrates truth, criminal justice, reparation measures, and guarantees of non-repetition as inseparable elements. All four of these elements are considered necessary to achieving the normative ends of transitional justice.⁴ The United Nations' Special Rapporteur identifies the State's duty to (i) recognize victims; (ii) maintain their dignity, given the atrocities committed against them in the past; (iii) strengthen its rule of law; and (iv) restore victims' confidence in the fact that they live in a State that respects the law and guarantees and protects the human rights of all people under

requires a previous discussion on how to cope with the demands of punishment.

3 The role of criminal trials in clarifying and constructing truth is a disputed subject that I cannot adequately explain in this text. I assume, in this paper, that in transitional justice processes, criminal trials play a role in the establishment of different truths in ordinary situations. One of the differences lies in helping to clarify what happened, not only by identifying perpetrators but also by ascribing impunity and criminal sanctions. This can be seen in Osiel (2000).

4 Human Rights Council, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence," Aug. 9, 2012 (A/HRC/21/46), para. 21.

its jurisdiction.⁵ However, as noted by the Special Rapporteur, these four elements, in addition to shaping a holistic concept of transitional justice, are linked to States' international obligations.⁶

In several of its Resolutions, the Human Rights Council has maintained the position that the global scope of transitional justice does not allow States to disassociate themselves from their international human rights obligations; rather, transitional justice reaffirms States' duty to meet these obligations.⁷ Consideration of contexts, which the Human Rights Council also calls attention to, does not signify or imply that States can fail to meet their international human rights obligations. Contexts must be taken into account, "with a view to preventing the recurrence of crises and future violations of human rights, and to ensure social cohesion, institution-building, ownership and inclusiveness at the national and local levels."⁸ This means that contexts must be taken into account in order to deal with the past and each society's hopes of unifying under common policies, which include a desire to prevent and avoid future human rights violations.

Specifically, and in relation to the subject proposed in Uprimny and Sánchez' paper, the Human Rights Council has reasserted "the responsibility of States to comply with their relevant obligations to prosecute those responsible for gross violations of human rights and serious violations of international humanitarian law constituting crimes under international law, with a view to end impunity" It has also urged, in particular, that "when prosecuting persons for gender-based and sexual violence, [States must] ensure that all victims of such violence have equal access to justice," and furthermore stressed "the importance of ending impunity for such acts as part of a comprehensive approach to seeking truth, justice, reparation and guarantees of non-recurrence."⁹

Criminal justice, and States' international obligations in the matter are therefore considered today, many decades after the Nuremberg Trials, to be a nodal element in transitional justice. In the report on criminal investigation strategies in transitions, the Special Rapporteur

5 Human Rights Council, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence," Aug. 27, 2014 (A/HRC/27/56), para. 19.

6 *Id.*, para. 18.

7 See Human Rights Council, Resolution 12/11, "Human Rights and Transitional Justice," Oct. 12, 2009; Human Rights Council, Resolution 4/102, "Transitional Justice," Mar. 23, 2007.

8 Human Rights Council, Resolution 21/15, "Human Rights and Transitional Justice," Oct. 11, 2012, para. 2.

9 *Id.*, para 6.

has demonstrated, in this sense, how criminal investigation contributes, normatively, to achieving the goals of transitional justice.¹⁰ The Special Rapporteur notes that criminal proceedings demonstrate that no one is above the law,¹¹ which means that they reaffirm and strengthen the most basic and normative elements of the rule of law, namely, the primacy of law and a law-abiding government (see Raz 2011; Dworkin 1992).

The reaffirmation of the rule of law that can be achieved through advanced criminal proceedings in transitions involves special recognition of victims as holders of rights. This is because criminal proceedings help, in this sense, to restore victims' dignity through repudiation, which is, in and of itself, an aspect of criminal reproach of conduct which, because of its atrocity, barbarity, and cruelty, has not only violated fundamental human rights but also diminished the dignity of the victims of these violations. Jean Hampton provides a provocative analogy of how, from a normative perspective, criminal proceedings contribute to transitional justice processes: the perpetrator descends from a place of superiority that he has acquired illegitimately, and the victim is restored to his rightful place as a holder of rights (Hampton 2007). Hampton's image corresponds to the basic rule of law principle and what this principle ensures: equality of all under the law. Today, this principle is established in Inter-American Court jurisprudence as a *jus cogens* norm.

There are three principal aspects of States' international obligation to criminally investigate past atrocities during the transition period, namely the nature of the crimes to be investigated, guaranteeing the right to equality before the law and equal protection under the law, and ensuring the right of access to justice. All three are issues that a proposal such as that made by Uprimny and Sánchez needs to consider in depth. The second of them represents an enormous challenge, one that is not sufficiently addressed in their document when it defends theses relating to the selection theory and weighting rights in the context of heinous crimes. For spatial reasons, I will only expound upon the first and third aspects. Analysis of these two will paint an adequate picture of the second aspect, rendering further explanation unnecessary.

10 Human Rights Council, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence," Aug. 27, 2014 (A/HRC/27/56), para. 22.

11 *Id.*, para. 23.

The Nature of Crimes to be Investigated

The first of these aspects is of special relevance. The duty to investigate is preponderantly linked to grave human rights violations or those committed on a mass scale or systematic level. In this sense, the Special Rapporteur has said that during transitions, States have the duty to investigate and prosecute human rights violations and international humanitarian law violations that constitute crimes under international law and under domestic law; in particular, genocide, war crimes, crimes against humanity, and other grave violations that include summary or extrajudicial executions, torture, and other forms of cruel, inhuman, or degrading treatment, slavery, forced disappearances, rape, and other forms of sexual violence. Failure to comply with the obligation to investigate and prosecute these violations constitutes a violation of human rights treaties.¹²

These human rights violations, together with international humanitarian law, collectively give rise to condemnation by the international community because of their atrocity, to such an extent that their absolute prohibition and the duty to protect against them are now considered to be *erga omnes* and *jus cogens* obligations. This has been the position held by the International Court of Justice in relation to principles and rules concerning basic human rights, including protection against genocide, slavery, torture, racial discrimination, and violations of basic international humanitarian law norms considered by the Court as *erga omnes*¹³ and also as *jus cogens*¹⁴ norms. It has also been the position adopted by the Inter-American Court with respect to human

12 *Id.*, para. 27.

13 Case Concerning the Barcelona Traction, Light and Power Company (Belgium vs. Spain), Judgment, I.C.J. Rep. (II) 1970, Feb. 5, para. 33, p. 3 and p. 32; Case Concerning East Timor (Portugal vs. Australia), Judgment, I.C.J. Rep. (I) 1995, Jun. 30, para. 27, p. 3 and p. 32; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. (I) 2004, Jul. 9, para. 154–159; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Rep. (I) 1996, Jul. 11, para. 185, p. 120 (the prohibition of genocide as an *erga omnes* obligation); Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo/Rwanda), Judgment, I.C.J. Rep. 2006, Feb. 3, para. 64 (the prohibition of genocide as a *jus cogens* norm); Questions Relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal), Judgment, Rep. 2012, Jul. 20, para. 99, p. 457 (the prohibition of torture as a *jus cogens* norm).

14 See International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*. Report by the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Apr. 13, 2006 (A/CN.4/L.682), para. 377–379 (reconstructing the jurisprudential line of the International Court of Justice).

rights violations such as extrajudicial executions, torture, forced disappearances, and sexual violence.¹⁵ In relation, specifically, to torture, the Committee Against Torture has categorically maintained that absolute and non-derogable prohibition of torture “has become accepted as a matter of customary international law”; that is to say, a *jus cogens* norm.¹⁶ Similarly, the International Law Commission has maintained that the prohibition of crimes against humanity is a *jus cogens* norm in international law, and that because of their atrocity, they constitute flagrant attacks against human dignity that offend not only the victim but all humanity.¹⁷

The obligation on States to investigate the grave human rights violations mentioned, and also crimes against humanity, is not modified in the context of transitional justice. Philosophically, this would be explicable when it is understood, as the Special Rapporteur does understand, that transitional justice seeks to deal both holistically and precisely with atrocities that manifest themselves through the violence that typifies these grave violations. Legally, this obligation materializes, as the International Court of Justice says, in treaties.

Assuming the most positivist point of view in relation to the obligation to investigate, as Uprimny and Sánchez do in their paper, treaties are explicit and leave no room for doubt that State Parties are obliged to investigate and criminally prosecute those responsible for grave human rights violations such as genocide, torture, forced disappearances,

15 *Río Negro Massacres vs. Guatemala* case, Preliminary Exception, Background, Reparations and Costs, Judgment, I-A.C.H.R. Rep. (I) 2012 (Sep. 4) Series C No. 250, para. 227, where the Inter-American Court summarized its thoughts on the matter in its jurisprudence: “the lack of investigation of the allegations of torture, forced disappearance, rape, and slavery and involuntary servitude in the context of the internal armed conflict in Guatemala represents a failure to comply with the State’s obligations regarding grave human rights violations, and contravenes non-derogable norms (*jus cogens*) under which Guatemala has a duty to investigate and punish those practices, pursuant to the American Convention and, additionally in this case, in light of the Convention against Torture, the Convention of Belém do Pará, and the Convention on Forced Disappearance of Persons.”

16 Committee against Torture, General Comment No. 2, Application of Article 2 for States Parties, Jan. 24, 2008 (CAT/C/GC/2), para. 1. The complete text reads as follows: “Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee’s authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.”

17 United Nations International Law Commission, “Special Rapporteur’s First Report on Crimes against Humanity,” Feb. 17, 2015 (A/CN.4/680), para. 27 and 30.

and sexual violence.¹⁸ Based on subsidiary principles, the Rome Statute holds that these types of crimes come within the jurisdiction of the International Criminal Court, and States that are parties to the Statute are responsible for meeting these obligations.

In the Inter-American human rights protection system, its judicial body, the Inter-American Court, has repeatedly held that in regard to these violations (extrajudicial executions, torture, and enforced disappearances, and more clearly with respect to sentencing in the *Castro Castro Prison vs. Peru* sexual violence case), States have the obligation to carry out an *ex officio* investigation that is prompt, serious, impartial, and effective as a fundamental and conditioning element for protecting the rights affected by such violations.¹⁹ In these cases, investigations need to be directed toward determining the truth and capturing, trying, and prosecuting those responsible.²⁰ The Inter-American Court has kept to this jurisprudence in the context of non-international armed conflicts and recently terminated conflicts; in other words, during transition and post-transition periods. In these contexts, the Inter-American Court has not ceased to recognize the special situation of a transitioning country, as it did in its first ruling on this subject in the *Moiwana vs. Surinam* case. The Inter-American Court has also upheld the position that a State can take specific circumstances or limitations arising from the conflict into account when evaluating whether or not the State has met its obligations. A specific manifestation of this practice is found in one of its latest sentences, the *Cruz Sánchez and Others vs. Peru* case. Nevertheless, alongside more contextual considerations, the Court has reiterated in all of its cases that the fact that a rights violation (in particular, extrajudicial executions, forced disappearances, torture, or sexual violence) has occurred in the context of a non-international armed conflict does not mean that the State is relieved of its obligation to respect people's rights and to act in accordance with

18 Convention for the Prevention and Sanctioning of the Crime of Genocide; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance; Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; and Convention on the Elimination of All Forms of Discrimination Against Women.

19 *Cruz Sanchez and Others vs. Peru* case, Judgment, I.C.H.R. Rep. (I) 2015 (Apr. 17), para. 347; *Massacre of Pueblo Bello vs. Colombia* case, Judgment, I.C.H.R. Rep. (I) 2006 (Jan. 31), para. 145; *Nadege Dorzema and Others vs. The Dominican Republic* case, Judgment, I.C.H.R. Rep. (I) 2015 (Oct. 24), para. 101.

20 *Cruz Sanchez and Others vs. Peru*, para. 349.

said obligations.²¹ Specifically, it does not relieve the State from its obligation to conduct an *ex officio* investigation of these violations that is without delay, impartial, and effective.

This position adopted by the Inter-American Court can also be seen in the United Nations Human Rights Committee's decisions and in the Committee on the Elimination of Discrimination against Women's posture in its General Recommendations. In various cases involving enforced disappearances that have occurred during a breakdown in democracy or in times of peace in countries undergoing a transition process, such as Sri Lanka, Algeria, and Bosnia and Herzegovina, the Human Rights Committee has held that States Parties to the International Covenant on Civil and Political Rights (ICCPR) have an obligation to provide families with an effective remedy, consisting mainly of thorough research and a diligent investigation of the fate of their relatives, their immediate release if they are still alive, and the release of information pertinent to the investigation, together with adequate reparations in the form of compensation. The Committee has said, in these cases, that even if the Treaty does not establish the rights of individuals to request that a State initiate a criminal case against another person, the State is expected to not only investigate the alleged human rights violations, in particular when they relate to enforced disappearances and attacks against the right to life, but also to criminally prosecute, try and punish those held responsible for these violations.²² Failure to investigate violations or to submit cases of torture, cruel, inhumane, and degrading treatment, extrajudicial executions, and enforced disappearances to justice could, in itself, constitute a separate violation of the Treaty.²³

The Committee on the Elimination of Discrimination against Women, meanwhile, has stated in General Recommendation No. 30, on women in conflict prevention, conflict, and post-conflict situations, that under the CEDAW, "States Parties' obligations to prevent, investigate and punish trafficking and sexual and gender-based violence are reinforced by international criminal law, including jurisprudence of international and mixed criminal tribunals and the Rome Statute

21 *Cruz Sanchez and Others vs. Peru* case, para. 271; *Bámaca Velasquez vs. Guatemala* case, Judgment, I.C.H.R. Rep. (I) 2000 (Nov. 25), para. 207.

22 Cf., among others, CCPR, Communication No. 1327/2004 (*Grioua vs. Algeria*) and Communication No. 1328/2004 (*Kimouche vs. Algeria*). See also Communication No. 563/1993 (*Nydia Erika Bautista vs. Colombia*), Communication No. 612/1995 (*José Vicente and Amado Villafañe Chaparro et al. vs. Colombia*), and Communication No. 931/2000 (*Raihon Hudoyberganova vs. Uzbekistan*).

23 Cf., CCPR, Communication No. 2003/2010 (*Zilkija Selimović et al. vs. Bosnia and Herzegovina*).

of the International Criminal Court, pursuant to which enslavement in the course of trafficking in women and girls, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity may constitute a war crime, a crime against humanity or an act of torture, or constitute an act of genocide.”²⁴

In this same Recommendation, and explicitly referencing the post-conflict period and transitional justice mechanisms, the Committee on the Elimination of Discrimination against Women recommended that States Parties to the Convention “Combat impunity for violations of women’s rights and ensure that all human rights violations are properly investigated, prosecuted and punished by bringing the perpetrators to justice.” This Committee has also recommended that State Parties “Ensure that support for reconciliation processes does not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls, and that such processes reinforce efforts to combat impunity for such crimes.”²⁵ In line with this position, in its final observations in 2013 on the Congo, the Committee on the Elimination of Discrimination against Women expressly called on the State to prioritize the fight against sexual violence in areas of armed conflict, to advance effective and independent investigations of women’s rights violations committed both by State armed forces and other armed groups, and to prosecute the perpetrators of these violations, including those with command responsibility.²⁶

Treaties and treaty bodies have consistently maintained, in relation to what qualifies as grave human rights violations (genocide, slavery, extrajudicial executions, torture, enforced disappearances, rape and sexual violence, and racial discrimination) that States Parties to the respective treaties are obliged to criminally investigate, prosecute, and punish perpetrators of these violations. Neither such situations as armed conflict, post-conflict, or transition periods, nor treaties (because they have not been modified), nor jurisprudence have established any exception to this rule. This appears to be confirmed by the positions on

24 Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, Nov. 1, 2013 (CEDAW/C/GC/30), para. 23.

25 *Id.*, para. 81 (i), (c).

26 Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports on the Democratic Republic of the Congo, Jul. 23, 2013 (CEDAW/C/COD/CO/6-7), para. 10(b).

Truth, Justice, Reparation, and Guarantees of Non-Repetition adopted by the Special Rapporteur in his reports.

The Guarantee of the Right of Access to Justice

It is relevant to note, in relation to the third aspect of States' international obligation to investigate grave human rights violations, that the Inter-American Court has established, and I quote at length, that "Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so."²⁷

This is a law that the Inter-American Court has maintained and reiterated since the first sentence in which it made it explicit, the *Goiburú and Others vs. Paraguay* case, and has later formulated in subsequent sentences. Thus, the Court has said, and I quote at length, that

the obligation to investigate and the corresponding right of the alleged victims or their next of kin [to have substantial possibilities of being heard and acting in the respective proceedings in order to clarify the facts and punish those responsible, and to seek due reparation] is not only evident from the treaty-based provisions of international law that are binding for State Parties, but also arise from domestic law regarding the obligation to investigate *ex officio* certain unlawful conduct, as well as from the norms that permit the victims or their next of kin to denounce or submit complaints, evidence or petitions, or take any other measure in order to play a procedural role in the criminal investigation in order to establish the truth of the facts.²⁸

Establishing, as the Inter-American Court does in its capacity as international court with proper jurisdiction to interpret international human rights laws, that the right of access to justice (in conjunction with the obligation to investigate and the right of victims to participate in the investigations) constitutes a peremptory norm of international law, in other words that it is a *jus cogens* norm, has extremely important

27 *Goiburú and Others vs. Paraguay* case, Judgment, I.C.H.R. Rep. (I) 2006 (Sep. 22), para 131.

28 *Fernández Ortega and Others vs. Mexico* case, Judgment, I.C.H.R. Rep (I) 2010 (Aug. 30), para. 192. See also *Rosendo Cantú and Others vs. Mexico* case, Judgment, I.C.H.R. Rep. (I) 2010 (Aug. 31), para. 176; *Gomes Lund and Others ("Guerilla of Araguaia") vs. Brazil* case, Judgment, I.C.H.R. Rep. (I) 2010 (Nov. 24), para. 139.

effects on international law. This means that not only is this an *erga omnes* obligation²⁹ that obliges all States to comply, irrespective of treaties, but also that these norms are non-derogable, preemptory norms.

The right of access to justice is a non-derogable norm that occupies a higher place in the hierarchy of *jus cogens* norms.³⁰ On this specific point, the International Law Commission has maintained that a norm which conflicts with a *jus cogens* norm becomes, *ipso facto*, meaningless.³¹ This means, at least in the Inter-American system, that States are obliged, in an imperative and non-derogable manner, to guarantee the right of access to justice. This obligation is reinforced in relation to grave human rights violations (such as genocide, slavery, extrajudicial executions, torture, forced disappearances, sexual violence, and racial discrimination), in that the absolute prohibition of these is also an international law, and a *jus cogens* prohibition.³² On the subject of enforced disappearances, torture and extrajudicial executions, the Inter-American Court has been explicit and repetitive in pointing out that the obligation to investigate such crimes and to prosecute and punish the perpetrators and other participants is also a mandatory obligation of international law, which means that it is also a *jus cogens* obligation.³³ This establishes a clear judicial limitation on the possibility

29 See International Law Commission, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law." Report by the International Law Commission Study Group, Apr. 13, 2006 (A/CN.4/L.682), para. 380 (concerning the relationship between *jus cogens* norms and *erga omnes* norms).

30 *Id.*, para. 365 (concerning the higher place occupied by *jus cogens* norms in the hierarchy).

31 *Id.*, para. 365–367.

32 As noted in the previous section, there is a consensus in the international community to consider the *jus cogens* international ban on certain behaviors, including serious human rights violations. With a view to better establishing the rules of international law, the International Law Commission has stated that "Overall, the most frequently cited candidates for the status of *jus cogens* include (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population ('basic rules of international humanitarian law')" (*Id.*, para. 374).

33 *Gomez Paquiyauri Brothers vs. Peru* case, Judgment, I-A.C.H.R. Rep. (I) 2004 (Jul. 8), para. 76 and 128; *La Cantuta vs. Peru* case, Judgment, I-A.C.H.R. Rep. (I) 2006 (Nov. 29) para. 157; *Goiburú and Others vs. Paraguay* case, para. 84; *Chitay Nech and Others vs. Guatemala* case, Judgment, I-A.C.H.R. Rep. (I) 2010 (May 25) para. 86; *Ibsen Cárdenas and Ibsen Peña vs. Bolivia* case, Judgment, I-A.C.H.R. Rep. (I) 2010 (Sep. 1), para. 61; *Gelman vs. Uruguay*, Judgment, I-A.C.H.R. Rep. (I) 2011 (Feb. 24), para. 75; *Osorio Rivera and Relatives vs. Peru* case, Judgment, I-A.C.H.R. Rep (I) 2013 (Nov. 26), para. 112. It is important to

of weighing, in international law, the right of access to justice against other rights, particularly regarding grave human rights violations. The obligation to guarantee access to justice is imperative, a minimum requirement for States in the Inter-American system, and it is reinforced when it comes to grave human rights violations, where the prohibitions are *jus cogens* in character.

This means that a State in the Inter-American system cannot deny a victim of such violations his or her right of access to justice, even in transitional justice situations. The State is therefore obliged, by virtue of the mandatory nature of the obligation, to guarantee this right and, in accordance with the content of the right of access to justice, to guarantee a criminal investigation of these violations. The State is similarly obliged, as the Inter-American Court has stated in its jurisprudence, to guarantee the right of victims and their relatives to substantial opportunities to be heard and to participate in the respective proceedings when seeking and clarifying the facts and then punishing those responsible.³⁴ It is important, in this regard, to also acknowledge that

note that, with regard to torture, this is the position adopted by the Committee against Torture. The Committee stated the following: "Article 2, Paragraph 2 [of the Convention] provides that the prohibition against torture is absolute and non-derogable ... The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability." General Comment No. 2, Implementation of Article 2 by States Parties, para. 5. Where appropriate, this position has effect on all States party to the United Nations Convention against Torture, not only on States party to the American Convention on Human Rights. States party to the Convention against Torture number, at this time, 161, and 9 more States have signed the Convention without ratifying it. Of all existing States, to date only 27 have neither signed nor acceded to the Convention. See, "States' Ratification of the Convention against Torture and Other Forms of Cruel Punishment, Inhuman or Degrading Treatment," http://www.ohchr.org/Documents/HRBodies/CAT/OHCHR_Map_CAT.pdf

34 Based on its judgment in the *Blake vs. Guatemala* case, Judgment, I-A.C.H.R. Rep. (I) 1998 (Jan. 24), the Inter-American Court of Human Rights has held that Article 8.1 of the American Convention recognizes that the families of victims of enforced disappearance have the right, among other things, to have the disappearance and death of their family members effectively investigated by State authorities through a process instituted against those responsible for said crimes and, if necessary, to have the appropriate sanctions imposed on said perpetrators (para. 97). The Court has not ruled expressly with respect to the quantum of punishment. When it has ordered, in its judgments, that the State investigate, bring to trial, and punish those responsible, it has generally limited itself to the following formulas: "identify, prosecute and, if applicable, punish those responsible," "determine possible criminal responsibilities and, if necessary, effectively implement sanctions," or "identify, prosecute and, where appropriate, punish those responsible." For cases where the Court has established the existence of acts of rape, torture, extrajudicial executions, or disappearances, see the following cases: *Velasquez Paiz and Others vs. Guatemala*, Judgment, I-A.C.H.R. Rep. (I) 2015 (Nov. 19), para. 229; *Ruano Torres and Others*

enforced disappearance constitutes a crime of a permanent or continuous character, and it remains as such until the whereabouts of the disappeared person is known and the facts are clarified. Preventing a victim of a grave human rights violation from exercising the right of access to justice and having the violation of rights that are protected by human rights treaties criminally investigated, or denying a victim access to such right, which is contrary to the object and the goal of these treaties,³⁵ would imply the failure of explicit mandatory international obligations and the emergence of international responsibility for the State concerned.

We could add to this failure, in line with Inter-American Court and the Human Rights Committee jurisprudence, an autonomous violation of treaties such as the American Convention (Article 5) and the ICCPR (Article 7), due to the suffering that lack of access to justice can cause victims and their families.³⁶ Additionally, in the cases where these obligations are not met, States cannot prevent victims from exercising their right to have recourse to the respective international bodies. This is also a right recognized and protected in the aforementioned two treaties.

In view of this normative reality, the challenge facing transitional justice, particularly in scenarios of armed conflict, lies in how to

vs. El Salvador, Judgment, I-A.C.H.R. Rep. (I) 2015 (Oct. 5), para. 198; *Farmer's Community of Santa Barbara vs. Peru*, Judgment, I-A.C.H.R. Rep. (I) 2015 (Sep. 1), para. 289; *Rodriguez Vera and Others (Disappeared from the Palace of Justice) vs. Colombia*, Judgment, I-A.C.H.R. Rep. (I) 2014, para. 556. This does not mean that there is no duty to punish crimes classified as serious human rights violations in international law. The Special UN Rapporteur on extrajudicial, summary or arbitrary executions has said the following on this point: "The duty of the State to investigate any extrajudicial, summary or arbitrary execution that has occurred, to identify those responsible and to impose appropriate sanctions is of the highest order and is independent of any right of action, whether penal or civil" (United Nations Economic and Social Council, "Special Rapporteur's Report on Extrajudicial, Summary or Arbitrary Executions" [UN Resolution 1992/72, Commission on Human Rights, Dec. 28, 1992 (E/CN.4/1993/46), para. 24]. The Committee against Torture (General Comment No. 2, Implementation of Article 2 by States Parties, para. 11) has maintained that in penal codes, which include torture as a crime, "the need for appropriate punishment that takes into account the gravity of the offence" will be highlighted.

35 The Vienna Convention on the Law of Treaties stipulates the following in Article 31: "General rule of interpretation. I. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and considering its object and purpose." The Inter-American Court has been consistent and repetitive in its jurisprudence that "the protection of human rights" is the ultimate goal of the Inter-American system. See International Law Commission, "Special Rapporteur's First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation," Mar. 19, 2013 (A/CN.4/660), para. 20 and 21.

36 See, for example, *Radilla Pacheco vs. Mexico* case, Judgment, I-A.C.H.R. Rep. (I) 2009 (Nov. 23), para. 167.

maintain the level of protection achieved in international law for the right to justice while, at the same time, favoring a negotiated transition when the parties are responsible for serious human rights violations or conducts that today constitute international crimes under the Rome Statute. The challenge lies, therefore, in building new standards, not to undermine those already in place, but to complement them.

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**4. Transitional Justice and
the Limits of the Punishable:
Reflections from a Latin-American
Perspective**

Claudio Nash

Peace processes, like the one in Colombia, present theoretical and practical complexities. Some of the most complex aspects of effectively instituting a peace process are striking a balance between providing what is necessary for all parties to the negotiation to move forward while the State is in the midst of an armed conflict, ensuring the proper safeguards are in place so that the conflict will end, and making sure that the guarantees agreed upon are compatible with the international human rights obligations assumed by the State.

The text by Uprimny and Sánchez touches on some of the aspects that are crucial for peace, such as the role of criminal responses to crimes committed during a conflict that is ending. One of the classic questions relating to the transitional justice experience in Latin America has been how much impunity a transitional justice process requires in order to consolidate a democracy. In pacification processes, the question becomes how much impunity a society in conflict needs in order to ensure the peace process.

As always happens in transitional justice processes, context is a decisive factor in giving a clear answer for a normative framework in which to encapsulate political decisions adopted by the parties in the conflict. For example, in the case of pacification processes, this is, precisely, the most complex aspect because, in a developing armed conflict, the elements of the transitional justice process become part of the political negotiation process. Obviously, it is not the same transition process once the conflict is over or when a dictatorial regime is being replaced by a peaceful one in the midst of a developing conflict. This is an element that needs to be considered when giving a legal and pertinent response to the developing conflict. In this context, what seems relevant is being able to determine the viability of a conditional amnesty with respect to those responsible for grave human rights violations committed during an armed conflict.

The hypothesis I intend to put forward in this study is that in cases of grave human rights violations (war crimes and crimes against humanity), amnesties that impede criminal sanctions are not viable; however, it is possible to present alternative sanctions in conjunction with forgiveness and clemency, thus making the peace process more viable. To argue this tentative response to the subject put forward by Uprimny and Sánchez, this study will be divided into the following parts: (i) the transitional justice process and the obligation to investigate, prosecute, and punish, in the light of the State's international obligations; (ii) the role of criminal policy in transitional justice processes; (iii) the weighing of judgments; (iv) some possible alternative outlets in criminal proceedings; and (v) some conclusions.

Transitional Justice Processes from the Latin American Perspective

The objectives of every transition process, in terms of human rights, are to repair the harm done to victims by way of violations of their fundamental rights and to prevent the repetition of these events in future. The means that can be employed for meeting these objectives are to find out the truth and impart justice, and also to design a reparations policy for victims of human rights violations. The instruments used to fight for these objectives are varied, and the truth has been sought through non-judicial mechanisms, namely "truth commissions" with different characteristics, while efforts in the field of justice have focused in our region on retributive justice; reparations have been sought through measures taken from State policies (Boraine 2000; Kritz 1995; Nash 2010).

Faced with these general objectives, Latin American comparative practice has recognized the existence of another element that is central to the design of a national strategy for a transition to democracy: the consideration of a democratic system—namely giving viability to the formal democratic system and providing spaces for it to develop (Za-laquett 1999). In effect, this general objective has become a criterion of correctness in democratic processes and has therefore served to guide and limit public truth and justice policies. Colombia's peace process is a variation on this general process, since in this case, this criterion of correctness is pacification, namely fighting for peace after more than six decades of internal armed conflict (Uprimny *et al.* 2006).

Central to understanding the Latin American experience in transitional justice is the idea that the reality in which decisions are made concerning punitive justice justifies the State not complying with its

international obligations. Nino (1991) refers to the Argentinean experience and proposes that sometimes “what may appear to the international community as inaction by a government can in fact be an active form of safeguarding against future violations at the cost of ignoring past crimes. In other words, the present context may frustrate the government’s efforts to promote the punishment of persons responsible for human rights abuses, unless it runs the risk of provoking more violence and a return to a non-democratic regime” (p. 2639).

However, the Inter-American Court, recognizing the difficulties of national processes, argues that there are certain minimal obligations that a State is required to meet. Here, it holds that “The Court appreciates the difficult circumstances that Colombia was and still is experiencing, and in which its population and its institutions are endeavoring to achieve peace. Nevertheless, the country’s situation, however difficult, does not liberate the State Party to the American Convention from its obligations under this treaty, which subsist particularly in cases such as this.”¹

Faced with this situation, the International Human Rights system and, in particular, the Inter-American system began to react by establishing limits on the power of the State to manage its punitive power on a discretionary basis.² The argument that has often been resorted to when building support for this response to legislation limiting the State’s punitive activity is that this omission consisted of a violation of the duty of the State to guarantee the full enjoyment and exercise of human rights, since by failing to investigate the facts and punish those responsible, relating to impunity, the State sends the message that legitimizing human rights violations does not effectively prevent future repetition (Nash 2009).

One of the central issues in this process is precisely the same one presented in Uprimny and Sánchez’ paper, namely the obligation to investigate and sanction those responsible for grave human rights violations and legitimate limitations thereon in complex, transitional justice contexts. It is correct that the text analyzed begins by assuming that this is the State’s obligation. This international obligation has been established in different forums. Here, we will consider some that are influential in the Latin American process.

1 *Pueblo Bello Massacre vs. Colombia* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2006 (Jan. 31), Serie C No. 140, para. 146.

2 Office of the High Commissioner for Human Rights, “Instruments for Rule of Law Societies that have Emerged from Conflict: Amnesties,” HR/PUB/09/1.

Concretely, regarding human rights, the UN principles on the rights of victims establish the right for the State to investigate and punish those responsible for human rights violations. These principles were approved by the General Assembly of the United Nations in 2005 and read as follows: "Art. 4. In cases of gross international human rights violations and serious international humanitarian law violations that constitute crimes under international law, States have an obligation to investigate and, if there is sufficient evidence, to prosecute people allegedly responsible for the violations and, if found guilty, the duty to punish. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent to investigate such violations and prosecute those responsible."³

In this sense, the United Nations Human Rights Committee has ruled as follows:

Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).⁴

In the Inter-American system, the response to State decisions that establish limits on the investigation and sanctioning of human rights violations has been based on a "right to truth" emanating from the general obligations on the State to respect and guarantee the rights enshrined in the American Convention on Human Rights. The right to truth has been developed by the Inter-American Court of Human

3 UN General Assembly, Resolution 60/147, "Basic Principles and Guidelines on the Right of Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law to a Remedy and Reparation," Dec. 16, 2005.

4 United Nations Human Rights Committee, General Comment 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 80th Session (26 May 2004), (CCPR/C/21/Rev.1/Add.13), para. 18.

Rights (hereinafter “the Court”) from two points of view, namely as a collective or social right to know the truth, and as an individual right. The Court has stated the following:

This Court has referred repeatedly to the right of the next of kin of victims to know what happened and the identity of the State agents responsible for the respective facts. As the Court has state[d], “Whenever there has been a human rights violation, the State has a duty to investigat[e] the facts and to punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality.”

This measure benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future.⁵

Regarding the duty to investigate, the Court has determined that this is an obligation of means that must be met in all seriousness by States, so as to meet certain minimum requirements for fulfilling the obligation to guarantee. The Court has stated that the investigation should be effective, and directed toward prosecuting and punishing those responsible; representatives of the victims should be able to participate in all stages and at all levels of the process, the results of which should be made public.

In light of the above, and to repair this aspect of the violations committed, the State must conduct an effective investigation into the facts of the Sánchez Massacre Plan so as to identify, prosecute and punish the perpetrators and masterminds. The victims must have full access and competence to act at all stages and in all bodies of these investigations, in accordance with domestic law and the provisions of the American Convention. The result of the proceeding must be publicized so that Guatemalan society may know the truth.⁶

Meanwhile, on the question of punishing persons responsible for human rights violations, the Court has proposed an obligation to punish those guilty of these crimes. In this regard, it pointed to Bolivia’s case of forced disappearances and stated the following:

As for the demand that the Court declare that Bolivia should investigate and punish the perpetrators of the facts in this case and their accessories; in the first place, this Court should indicate that the American Convention guarantees access to justice to all persons in order to protect their rights and that the State Parties have the obligation to prevent, investigate,

5 *19 Merchants vs. Colombia* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2004 (Jul. 5), Serie C No. 109, paras. 258 and 259.

6 *Sánchez Massacre Plan vs. Guatemala* case, Reparations, Judgment, I.C.H.R. Rep. (I) 2004 (Nov. 19), Serie C No. 116, para. 98.

identify and punish the perpetrators of or accessories to human rights violations. In other words, any human right violation entails the State's obligation to make an effective investigation in order to identify those responsible for the violations and, when appropriate, punish them.⁷

The path followed seems to be that of limiting the issues to cases where the State has committed what the Court has called "serious crimes": enforced disappearances, extrajudicial executions, and systematic torture.⁸ This position provides clarification, in that it defines cases in which such measures can be invoked and, therefore, legitimately adopted. If we face "grave" infractions, we cannot implement measures that limit investigating them and making convictions, since otherwise they would be legitimate. This enables a worrisome issue to be resolved, namely that some would argue that all human rights violations must be criminally sanctioned, which is not reasonable, given that human rights violations may, in effect, be crimes that do not call for criminal punishment (such as violations of legislative, administrative, and judicial orders).

The consequence of this line of reasoning is that the obligation to investigate and sanction those responsible for grave human rights violations starts to be treated like a conventionally protected right rather than a mere liberality of the State. This sheds light on significant consequences of the discussion posed by Uprimny and Sánchez, given that establishing limits on this state obligation has to supersede a higher standard of scrutiny when facing a conventionally guaranteed right. In this sense, one interesting issue that the Court has dealt with is clarifying that there are certain internal obstacles that States cannot adduce in order to avoid investigating and punishing grave human rights violations. Issues relating to amnesty laws and prescription may thus not be invoked by the State as obstacles to investigating and punishing those responsible for serious human rights violations, defined as those affecting "non-derogable" rights.⁹ Moreover, the Court has held that, if necessary, the State should initiate extradition procedures when those culpable are found outside its territory, and other States are required

7 *Trujillo Oroza vs. Bolivia* case, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2002 (Feb. 27), Serie C No. 92, para. 99.

8 *Goiburú and Others vs. Paraguay* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2006 (Sep. 22), Serie C No. 153, para. 88. In the same vein, the *Massacre of Pueblo Bello* case, para. 143; *Penal Miguel Castro Castro vs. Peru* case, Background, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2006 (Nov. 25), Serie C No. 160, para. 256.

9 *Almonacid Arellano and Others vs. Chile* case, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2006 (Sep. 26), Serie C No. 154, para. 151 and 152.

to cooperate in the investigation and sanctioning process, placing those culpable at the disposal of the State conducting the investigations into grave human rights violations.¹⁰

The Court has taken on cases where an investigation does not satisfy the minimum guarantees for victims. They suffer from what the Court has called “fraudulent *res judicata*,” which does not extinguish State liability in justice. In this regard, the Court has held that “The development of legislation and international law has allowed for the examination of the ‘fraudulent *res judicata*’ that results from a trial in which the rules of due process have not been respected or when judges did not act independently and impartially.”¹¹

One interesting point that the Court has addressed concerns impunity in cases where an investigation has established partial responsibility. In these cases, the Court has been clear in stating that the investigation should be complete,¹² to the extent of determining the involvement of the intellectuals responsible for the crimes investigated, since the sole discretion of the physical perpetrators is not deemed to be sufficient.¹³ The rationale the Court used in order to reach this conclusion was the right of victims’ relatives and society as a whole to know the truth, so as to prevent these events from happening again.¹⁴

The most controversial case was the Uruguayan one concerning an amnesty law that had been ratified by two plebiscites. In this case, the Inter-American Court stated the following:

The fact that [the amnesty law] has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy ... should be considered, as an act attributable to the State that give[s] rise to its international responsibility.

The democratic legitimacy of specific facts in a society is limited by norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true

10 *Goiburú and Others* case, para. 166.

11 *Carpio Nicolle and Others vs. Guatemala* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2004 (Nov. 22), Serie C No. 117, para. 131.

12 *Mapiripán Massacre vs. Colombia* case, Judgment, I.C.H.R. Rep. (I) 2005 (Sept. 15), Serie C No. 134, para. 296.

13 *Gómez Palomino vs. Peru* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2005 (Nov. 22), Serie C No. 136, para. 228; *19 Merchants* case, para. 257.

14 *19 Merchants* case, para. 259.

democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a[n] impassable limit to the rule of majority, that is, to the forum of the “possible to be decided” by the majorities in the democratic instance, those who should also prioritize “control of conformity with the Convention.”¹⁵

This tension between the characteristics of transitional justice processes and State obligations is a constant on this matter in our region and also in Latin America, where the recent Spanish debate on the matter has again raised questions about the limits of penal liability for crimes committed during a dictatorial past.¹⁶

There are three relevant situations, for the purposes of our study: firstly, the absolute prohibition of self-amnesties, including those ratified by the citizenship, secondly, the prohibition of amnesties for serious crimes, and thirdly, the source of forgiveness measures in non-qualified cases.

The Role of Criminal Policy in Transitional Justice Processes

The question which, without doubt, remains pending is whether transitional justice processes that have served to resolve the issues that arise in cases of transition from an authoritarian society to a democratic one (vertical processes) will be equally useful for delineating transition processes where the discussion on transitional justice elements becomes part of the design for the end of the conflict (horizontal processes).¹⁷ To answer this question, it is necessary to look at the central issue, which is the role of the criminal response in transitional justice processes.

All the arguments we have reviewed allow the Court to conclude that the goal of avoiding impunity forms the basis of the State’s obligations in this field. Indeed, at the discretion of the Court, if the State failed to meet the complementary obligations to which we have referred, it would be in a situation of impunity, which violates the

15 *Gelman vs. Uruguay* case, Merits and Reparations, Judgment, I.C.H.R. Rep. (I) 2011 (Feb. 24), Serie C No. 221, para. 238 and 239.

16 Human Rights Council, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Repetition,” July 22, 2014 (UN Doc. A/HRC/27/56/Add.1).

17 On the distinction between vertical and horizontal transitional processes, see Orozco (2009).

guarantee obligation on the State regarding the individual subjects in its jurisdiction. At the end, the Court has stated the following: “impunity mean[s] the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”¹⁸

The Court has even noted that a lack of response from the State may give rise to a situation of “chronic impunity”: “More than 22 years after the massacre and 10 after the corresponding investigations were opened, the State has not investigated the facts or identified, prosecuted and punished those responsible. This constitutes a situation of impunity, which contravenes the State’s aforementioned obligation, harms the victims, and encourages the chronic repetition of the human rights violations in question.”¹⁹ The results of investigations and the punishment of persons responsible must therefore form part of a criminal trial where said persons responsible are judged and society as a whole is able to discover the truth of the crimes.

This brings us to the key issue in the Colombian situation that enables us to assess the thesis proposed by Uprimny and Sánchez, namely whether a criminal response is the only possible alternative for meeting transitional objectives. The starting point, which I share, is a document by Pablo de Greiff, in the sense that the criminal response, within the framework of transitional justice processes, should meet the following objectives: “i) to acknowledge victims, ii) to foster trust between persons, particularly within State institutions, iii) to consolidate the rule of law, and iv) to promote social cohesion or reconciliation.”²⁰

At the same time, it seems appropriate to emphasize that these measures are part of the repair process in its broadest sense, namely measures required of the State because of its international responsibility that arises from not protecting people subject to its jurisdiction in the context of an armed conflict (de Greiff 2002; Nash 2009).²¹ Therefore,

18 “Panel Blanca” (*Paniagua Morales and Others*) vs. *Guatemala* case, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2001 (May 25), Serie C No. 76, para. 173. In recent case law, in the same sense, see *Moiwana Community vs. Surinam* case, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2005 (Jun. 15), Serie C No. 124, para. 203.

19 *Sánchez Massacre Plan*, para. 95.

20 Human Rights Council, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-repetition,” Mission to Spain, July 22, 2014 (A/HRC/27/56/Add.1), para. 99.

21 UN General Assembly, Resolution 60/147, “Basic Principles and Guide-

these measures must be comprehensive and look at the victims, their immediate environment, and their significant mediate environment. Performance measures with a domestic scope help guarantee non-repetition. In this context, Uprimny and Sánchez point out that “Consequently, there is a need for each society to conscientiously define how applying criminal law norms could help promote such objectives, depending on the interests and context of its transition and the global tools employed. In doing so, reasonable objectives should be established regarding the extent to which criminal law is able to contribute to those goals, without overestimating its potential or overloading this tool.”

With this, we return to the question that forms the basis of transitional justice, namely how far context can modify the scope of the State’s obligation to protect human rights. The answer, I think, is that it may indeed be necessary to modify the scope of the obligation, but the State cannot make this measure disappear. This is the basic idea behind human rights—that they serve as a fixed limit on the cost-benefit dynamics of the State’s political decisions—and one of these benefits is, precisely, the implementation of a criminal policy in a peace process.

The authors defend their thesis behind a dangerous idea—that it has yet to be proven that criminal response is able to achieve any ends on its own. On this, Sikkink (2013) remarks: “causes and circumstances, it is difficult to say that in any specific context that criminal law or human rights tribunals would serve to achieve any one of these particular objectives.” It seems to me that this is a dangerous gamble, because it places the issue in the field of negative tests. We could argue, by the same logic, that nothing shows us that the non-use of traditional criminal instruments has facilitated achieving these goals in the transitional justice process. The Latin American experience strikes me as very relevant, precisely in the opposite sense, namely that in the absence of a satisfactory criminal response, the only thing States have achieved is to keep the transition debate open for decades (Bulygin 2003). The South African experience, meanwhile, has shown that the non-use of criminal instruments did not solve the issue of impunity. In the Spanish case, we can see that after decades of transition, society

lines on the Right of Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law to a Remedy and Reparation,” Dec. 16, 2005; UN Commission on Human Rights, “The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, M. Cherif Bassiouni,” submitted in accordance with Commission resolution 1999/33, 18 Jan. 2000 (E/CN.4/2000/62), <https://digitallibrary.un.org/record/407931?ln=en>

has returned to the subject of justice as a matter of public, political, and judicial debate, stemming from an impunity-based model.²² There are those who could quote examples to the contrary (Tomuschat 1999), but that would lead to a zero-sum debate which would not help with horizontal transitions, such as the one in Colombia.

The element we should take into consideration, I think, is that the criminal response is a culturally appropriate one in our region. Unlike other comparative legal systems where criminal justice plays a minor role in conflict resolution (the African and Asian experiences are relevant here), in our legal and cultural system, a criminal response itself is relevant as a judgment of reproach and as a reliable procedural penalty. Even in a minimum criminal law sense, avoiding excesses like the punitive *pulmino*, criminal responses for protecting core values of society, such as human rights themselves, are legitimate. In this sense, the Inter-American Court has held, regarding the criminal response, in the *Kimel vs. Argentina* case that: "In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. [...] Criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused."²³ As a trial of reproach with respect to more serious criminal behavior, the criminal response appears to be an option of last resort, but a legitimate option nonetheless. This is a broad international agreement, as expressed in the agreement that represents the Rome Statute,²⁴ the preamble to which states the following:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that, to this end, measures must be taken at the national level and by enhancing international cooperation to ensure that they are actually subjected to the action of justice.

Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.

22 United Nations, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-repetition," Mission to Spain, July 22, 2014 (A/HRC/27/56/Add.1).

23 *Kimel vs. Argentina* case, Merits, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2008 (May 2), Serie C No. 177, para. 76 and 77.

24 Rome Statute circulated as Document A/CONF.183/9, Jul. 17, 1998, as amended by procès-verbaux Nov. 10, 1998, Jul. 12, 1999, Nov. 30, 1999, May 8, 2000, Jan. 17, 2001, and Jan. 16, 2002. The Statute entered into force and effect on July 1, 2002.

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

Now, from a non-substantive and procedural point of view, truth obtained through criminal proceedings is an appropriate response. When learning the truth, which is one of the specific objectives of the transitional process, we should note that truth is not only the result of administrative procedures—truth commissions—since the truth that comes out of criminal procedures also plays an important role (Hayner 2001, 2010; Valdez 2001; ICTJ 2014). The Inter-American Court understood this role in the *Almonacid* case, when it stated the following:

Notwithstanding the foregoing, [the results of the Commission on Truth and Reconciliation and the Commission on Political Imprisonment and Torture], the Court considers it relevant to remark that the ‘historical truth’ included in the reports of the above-mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8, and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano’s death, attribute responsibilities, and punish all those who turn out to be participants.²⁵

In short, we cannot simply transfer criminal law objections in normal cases in order to dismiss the criminal response in cases of serious human rights violations (something authors such as Uprimny and Sánchez insistently do); we must give appropriate answers in cases of extraordinary violence, where the situation seems to call for a criminal response.

Tension between Criminal Penalties and the Viability of Peace

The perspective assumed by Uprimny and Sánchez when looking for a solution to the issue of amnesties in the framework of a peace process is interesting. By accepting the duty to investigate, punish, and redress, yet claiming that this is not an absolute end and that it can be mediated by the circumstances of the case, the harmonization method seems right. They argue that “The basis of this argument lies in recognizing that in transitions from war to peace, States have duties that may conflict with one another and that, in these cases, the best alternative is to try to harmonize those obligations rather than opt to fully comply with one of the duties to the detriment of the others.”

25 *Almonacid* case, para. 150.

Let us briefly do a balancing exercise with conflicting principles. Weighing these principles allows us to assume that we are facing two equivalent principles in conflict. To resolve this conflict, we must ensure that our balancing exercise follows certain steps: first, that it assesses the extent to which the principle affects achieving the effectiveness to which it is opposed; second, that it chooses the method which least affects the principle that we will sacrifice for the benefit of the opposite one; and finally, if we do not achieve that objective, that it provides sufficient reasons to justify our decision (Alexy 2002). In our exercise, we have two principles that collide: the obligation to investigate and punish those responsible for serious violations of human rights, and the obligation to take effective measures (amnesties) toward achieving a viable peace agreement. This conflict could be resolved in a simple way: when a human right clashes with a diffuse social interest, the interest should give way to the right, since rights form the basis of the political agreement and, therefore, fundamental rights limit these interests. But in transitions from armed conflict to peace, this does not seem to solve the problem, because it could relativize the fact that we are facing a right to a State response to serious human rights violations (which authors like Uprimny and Sánchez insinuate) or, argue that in the case of Colombia, peace is a constitutionally recognized right.²⁶

Assuming we have a conflict between two principles of equal rank, and following the scheme of constitutional harmonization, we would have to evaluate the fact that amnesties are a measure that, in a concrete case, allow us to make a principle (pacification) that is deemed more valuable and more viable, and it will therefore be necessary to sacrifice the opposite principle, since its failure seems less serious (criminal investigation and sanctioning). Faced with this decision, we need to choose the appropriate mechanism. It is here that the problem arises with Uprimny and Sánchez' proposal (conditional amnesties), since they assume that viability implies that not only are we limiting the opposite principle, we are also nullifying it, which is not possible, following the logic of a coherent system where the principles must co-exist and not be annulled in order to benefit others (Prieto 2003).

My impression is that while the authors' thesis is built on the fact that there are principles in tension, the mechanism used is not the one of weighing principles, but rather one that looks for a "criterion of correctness" for resolving the conflict by way of Rawls' (1971, 90) imperfect, procedural justice logic. It is this correctness approach, which resolves

26 Article 22 of the Colombian Constitution states: "Peace is a right and a mandatory duty."

the conflict between the duty to investigate and punish, on the one hand, and conditional amnesties which guarantee the peace process, on the other, that makes the peace process in Colombia viable, according to the authors. The conflict is therefore not between the principle requiring the State to investigate and punish and the viability of the peace process; instead, the latter becomes the criterion for correcting the tension by nullifying the former, but not for resolving the tension. To this effect, the authors hold that “on the one hand [is] the duty to investigate and prosecute grave violations committed in the context of the conflict that the society is attempting to overcome, and, on the other hand, the duty to achieve peace and guarantee democratic stability.”

According to this logic, there is no conflict here between principles expressing rights, which would be a mistake. Indeed, if we are faced with a conflict between principles of equal rank, which is a reasonable thesis in the case of Colombia, harmonization should be on the basis of “levels” of involvement, in order to determine the proportionality of the measures, and it should not absolutely make one principle prevail over another. If it is a question of a relevant social interest (peace) and/or a constitutional right (peace), measures affecting the right to investigate and punish grave forms are justified. Moving on to Alexy (2005, 70), these serious effects can be classified on three levels (low, very serious, and extremely serious). Total amnesty for serious crimes committed by the leadership of the side fighting against the State is a measure that affects the rights of the opposing side in an extraordinarily grave way, to the extent of nullifying those rights, and it therefore needs to be ruled out as an option. Conditional amnesty without criminal sanctions seems to be a fairly serious penalty as a response to the crimes, one that is disproportionate to the role played by the criminal. Finally, conditional amnesties, but with criminal sanctions, excepting imprisonment, would be severely affective, but proportional. This makes the trial viable as a way to search for solutions that come within the constitutional context and the international commitments of the State. Therefore, if conditional amnesties without penal responses (Uprimny and Sánchez’ thesis) suffer from a disproportionate effect in resolving the tension between the principles, then they are not viable, and we need to search for an alternative.

Looking for Alternative Outlets

Here we come to the most important argument for peace processes, one that is well developed by Uprimny and Sánchez, namely alternatives for overcoming the “zero-sum” of the proposed debate.

The global proposal set forth by the authors is the following: “In both cases—the one relating to those most responsible for selected crimes, the other to those responsible for other crimes or participants with less responsibility—the concession of benefits, namely alternatives or suspended sanctions in one case and amnesties in the other, would be subject to certain conditions being met, such as surrendering arms, taking responsibility, contributing to the process of uncovering the truth, the holistic reparation of victims, freeing hostages, and the release of illegally recruited minors.” But it seems that this argument cannot be accepted. What is offered as reparations is, in reality, an act of mere cessation of the violation. It is too low a minimum in exchange for the high costs to both victims and society.

This proposal seems inadequate in the light of minimum human rights standards since, according to the authors: “Our vision implies recognizing that there is no single way to fulfill the obligation, and international law should therefore grant a certain degree of deference to democracies that implement it.” Interpreting this deference as discretionary is very questionable, in that ever since its origin, this figure has been intended as a method for inhibiting international control. Indeed, discretion is not a figure that comes within the field of implementing international standards in the domestic context. In its international application, and particularly the European one, discretion is an interpretative approach that grants States ample discretion when meeting their obligation on human rights elements (Brems 1996). This margin of discretion that States are given implies that international control over entities is qualified, and inhibited by factual and/or legal indeterminacy, assuming the correctness of the national qualification (Nash 2015). In the Inter-American system, this figure has not been reciprocated by human rights supervisory bodies like the Inter-American Commission and the Inter-American Court of Human Rights (Núñez 2012). This departure from the European trend has a normative basis, since in the American Convention, no elements to sustain international control should be inhibited from qualifying certain factual and/or relevant norms meant to protect the efficacy of human rights. This leads to entities being considered as nationally developed aspects, but the final qualification is always assessed by the international standard.

Even more complex is the fact that, without international human rights standards as a mitigating factor, this decision involves maintaining something along the lines of “this is an area where victims and future generations will not intervene; only we who have the power of negotiation and power of impunity will decide.” It does not seem like a reasonable response in a democratic society that is respectful

of human rights, particularly those of victims of serious crimes that are condemned internationally. There is therefore still a need to find a criminally satisfactory answer but one that is feasible in negotiating a peace process.

As noted repeatedly in this text, the central issue raised is the admissibility of amnesty for those responsible for serious human rights crimes. We are not talking of a “maximalist” obligation, where the trial and punishment of all criminals and for all crimes is required. In this sense, as we have seen, it is possible to think of forgiveness measures that make the peace process viable, as long as this forgiveness is associated with commitments to truth and reparation for victims. This is where the breaking point occurs with Uprimny and Sánchez’ thesis: truth and individual reparations are a part of the peace process, but not enough for excluding the criminal response. What we can then discuss are the forms of that criminal response.

Orozco’s (2009) distinction makes sense now, in that transitions from armed conflicts that correspond to symmetrical or horizontal acts of barbarity are different from vertical ones where violations come from the State. Indeed, in a transition in the context of a peace process, we are not discussing self-forgiveness in terms of the State forgiving its own crimes, where these measures would be protected. The regulatory framework in peace processes is different, because forgiveness measures with respect to third party belligerents themselves are possible, as established in Additional Protocol II to the Geneva Conventions of 1949 relating to the protection of victims of armed conflict not of an international character (1977) in the sense that: “Art. 6.5: [in] a cessation of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have taken part in the armed conflict or deprived of liberty or detained for reasons related to the armed conflict.”²⁷

In the most complex cases, namely the responsibility of commanders in charge of illegal actions (for example, the FARC hierarchy) that could be classified as war crimes or crimes against humanity, an amnesty does not seem feasible. That is, it would be the exception to the “possibility” stated in the above article. Indeed, as we have seen, a harmonization of principles system requires that none of the conflicting principles be canceled in order to ensure the validity of its opposite. Total amnesties have the effect of making it impossible to operate the principle we have mentioned, which is the international obligation

27 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DDA40E6D88861483C12563CD0051E7F2>

to investigate and punish those responsible for serious human rights violations.

Proposals that consider conditional amnesties but not criminal responses, such as that by Uprimny and Sánchez, formulate a critique of selectivity. We accept the idea that selectivity must always be present in the criminal justice system, which brings with it the obvious risk of discretion and arbitrariness. The relevant point is that this criticism formulated with respect to ordinary criminal law cannot be transferred automatically to criminal law in response to heinous crimes. In this case, selectivity is more limited, especially in the context of armed conflict (war crimes and crimes against humanity), with respect to those responsible for the main crimes.²⁸ If amnesty measures are applied with respect to these serious crimes, there is a substantive difference, compared to ordinary selectivity. In the case of ordinary selectivity, we can live with a share of impunity without this affecting democracy and the rule of law, but this cannot be the case with serious crimes. With ordinary selectivity, we are facing a problem that goes beyond the State's punitive capacity, but with serious crimes, such a punitive capacity has not been exceeded; instead, the State has decided to legitimize these crimes through impunity.

Finally, in order to make criminal sanctions possible, we think it possible to come up with a mechanism that seeks alternatives and remains in the realm of criminal response but does not necessarily imply imprisonment. Criminal sanctions, as previously argued, are the culturally appropriate response to crimes of this magnitude. Criminal sanction is accompanied by a moral reproach that is proportional to the crimes committed. Without adequate sanctions for those responsible, a sense of impunity and tolerance is illicitly generated. The reason for a criminal response is precisely to punish the most serious crimes that occur within a society. This does not necessarily imply that the criminal sanction should result in imprisonment for those responsible. Nothing in the human rights system would argue that sanctions for serious crimes must necessarily entail a prison term. The Rome Statute, which only provides for prison sanctions, explicitly states that such penalties referred to in the Statute do not prevent other internal sanctions from being established.²⁹ In the same vein, it has ruled that the Court, which must comply with the Convention, should acknowledge one important

28 We are fulfilling what is asked of us by Uprimny and Sánchez: given "the scale of public needs in times of transition, State and society actions have to be rationalized, in line with fundamental basic agreements."

29 Rome Statute, articles 77 and 80.

element: that the sentence must be proportionate to the offense committed.³⁰ In this sense, it is legitimate for a society undergoing a peace process to debate alternative forms of criminal sanctions which, on the one hand, are non-illusory and effective and, on the other hand, are able to make the peace process viable. I think this method enables us to know the facts in their entirety, to apply the respective penalties, and to simultaneously think about clemency measures. It also safeguards the issue of impunity, since the idea of leniency is different to impunity via amnesties. Here is a sanction that is qualified in practice. This allows us to impose it in the context of a democratic society. This method will eventually harmonize Colombian society's respect for human rights and the viability of the peace process and, in turn, it will make the democratic process a sound one and ensure that a lasting peace is obtained.

Conclusions

Ultimately, I think we have been able to support the proposed hypothesis that in cases of serious human rights violations (crimes against

30 In the *Rochela Massacre vs. Colombia* case (Background, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2007 (May 11), Serie C No. 163), the Court stated: "With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasize that the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrator acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined. With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention" (para. 196).

More recently—in the *Manuel Cepeda Vargas vs. Colombia* case (Preliminary Exceptions, Background, Reparations and Costs, Judgment, I.C.H.R. Rep. (I) 2010 (May 26), Serie C No. 213)—the Court stated: "Even though the Court cannot substitute the domestic authorities in determining the punishment for the crimes established by domestic law, and has no intention of doing so, an analysis of the effectiveness of criminal proceedings and of access to justice can lead the Court, in cases of serious human rights violations, to examine the proportionality between the State's response to the unlawful conduct of a State agent and the legal right allegedly affected by the human rights violation. Under the rule of proportionality, in the exercise of their obligation to prosecute such serious violations, States must ensure that the sentences imposed and their execution do not constitute factors that contribute to impunity, taking into account aspects such as the characteristics of the crime, and the participation and guilt of the accused. Indeed, there is an international legal framework which establishes that the punishments established for crimes involving acts that constitute serious human rights violations must be appropriate to their gravity" (para. 150).

humanity), amnesty is not a viable alternative to criminal sanctions, but it is possible to combine criminal alternatives with forgiveness and clemency measures to facilitate a viable peace process. If the State's obligation to investigate and punish serious human rights crimes committed in an armed conflict is to be taken seriously, a criminal response is required. This response is the one that best meets the objectives of justice and the peace process, based on respect for human rights.

This criminal response can and must be adjusted to suit the context of the Colombian process, in which an armed conflict is still occurring. The criminal response must therefore be reserved for the most serious cases, for which there can be no forgiveness, although there can be measures of clemency. The way Colombian society defends respect for human rights and the viability of the peace process will mark the strength of its democratic process and the profundity of the peace obtained.

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5. The Duty to Prosecute and the Role of Victims' Rights*

Tara L. Van Ho

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It is quite difficult to respond to a paper with which I find myself largely in agreement. It is perhaps appropriate, then, that I briefly start with where I find myself in unquestioned agreement with Nelson Camilo Sánchez and Rodrigo Uprimny Yepes. Is there a duty to investigate, prosecute, and punish serious criminal breaches of international human rights or international humanitarian law? Yes. As Sánchez and Uprimny point out, the duty to investigate, prosecute, and punish is outlined in several treaties and has been read into several more. It is explicitly provided for in the United Nations Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Convention on the Prevention and Punishment of the Crime of Genocide, and the International Convention for the Protection of All Persons from Enforced Disappearances, all of which require States to undertake to investigate, prosecute, and punish, through “appropriate penalties” or “effective penalties,” the crimes defined in those treaties.¹ It is also provided for in the four Geneva Conventions of 1949 and their Additional Protocol I of 1977, which require the investigation, prosecution, and punishment of war crimes specified in each treaty (see also Henckaerts and Doswald-Beck 2009, Rule 158).² Furthermore, the Rome Statute of the International

1 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, Jun. 26, 1987 (UNCAT), arts. 4–7; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, Jan. 12, 1951, arts. 4–5; International Convention for the Protection of all Persons from Enforced Disappearance, UN Doc. A/61/448, 2715 U.N.T.S., Dec. 23, 2010, arts. 4–7.

2 [Geneva] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, Oct. 21, 1950, art. 49; [Geneva] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, Oct. 21, 1950, art. 50; [Geneva] Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Oct. 21, 1950, art. 129; [Geneva] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S.

Criminal Court carries an expectation that States Parties will investigate, prosecute, and punish war crimes, crimes against humanity, and genocide, granting the Court jurisdiction only where the State is “genuinely” unable or unwilling to carry out these obligations.³ Most of these treaties require States Parties to employ universal jurisdiction, when necessary, as a means of combatting impunity for international crimes where the territorial State fails to prosecute those responsible (see also Henckaerts and Doswald-Beck 2009, Rule 157).⁴ The duty has also been read into the human right to effective and adequate remedies.⁵ Because Sánchez and Uprimny have covered this issue extensively, I will not elaborate further on the legal standards that underpin the duty to investigate, prosecute, and punish.

The next question, of course, is whether this obligation can ever be excused. Here, I again agree with Sánchez and Uprimny in their assertion that States can, in unusual circumstances and with adequate safeguards, be justified in not fully pursuing prosecutions and punishments as normally required by international law. Generally, amnesties are prohibited,⁶ but when undergoing post-conflict and post-authoritarian transitions, the duty to prosecute may be carried out in a different manner, due to the State’s particular context (Lambourne 2009, 35). While the texts of the treaties each carry an expectation of individual investigations, prosecutions, and punishments for each violation, the international community has long accepted minor deviations during periods of transitional justice (Roht-Arriaza 1990, 509). Such prosecutions may be impossible, practically speaking, or may undermine other

287, Oct. 21, 1950, art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I to the Geneva Conventions), 1125 U.N.T.S. 3, Dec. 7, 1978.

3 Rome Statute of the I.C.C., 2187 U.N.T.S. 3, Jul. 1, 2002, art. 17.

4 See, e.g., Convention against Torture, art. 5(2); Convention on Enforced Disappearances, Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention 4, art. 146; Additional Protocol I to the Geneva Conventions, art. 85. See also, *Prosecutor vs. Tadic*, I.C.T.Y., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), Case No. IT-94-1 (1995), para 62.

5 See, e.g., *Yasoda Sharma vs. Nepal*, H.R.C., No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006 (2008), para. 9, citing *H.C.M.A. vs. The Netherlands*, H.R.C., No. 213/1986 (1989), para 11.6; *Vicente et al. vs. Colombia*, H.R.C., No. 612/1995 (1997), para 8.8.

6 See *Barrios Altos vs. Peru*, Judgment (Merits), I.-A.C.H.R., Ser. C No. 75 (14 Mar. 2001), para. 43; *La Cantuta vs. Peru*, Judgment (Merits, Reparations and Costs), I.-A.C.H.R. Ser. 6 No. 162 (Nov. 29, 2006), paras. 188–189; *Prosecutor vs. Kallon*, Special Court for Sierra Leone, Case No. SCSL-2004-15-PT, Decision on Challenge to Jurisdiction (13 Mar. 2004), 82.

State goals, such as reconciliation, and victims may desire truthful confessions over disputed prosecutions (see van Zyl 1999, 652–654). But even when the state has a legitimate interest in pursuing other goals, international law does not currently accept a full amnesty. As Sánchez and Uprimny recognized, international law operates under the belief that “even if a transition is unable to take a maximalist stand with regard to criminal justice and punishment, it must be guided by minimum standards of individual accountability derived from criminal proceedings.” Consequently, the international community has accepted, and sometimes even reacted favorably to, limited amnesties under certain circumstances. It nevertheless appears that international law prohibits the granting of amnesties, even in exchange for truthful testimony, to those who bear the greatest responsibility for past abuses, such as commanders or political leaders who ordered the commission of grave crimes.⁷

Understanding when and how the duty to prosecute can, or should, be limited is a complex calculation. Empirical research suggests that setting aside prosecutions only in favor of truth commissions may lead to an unstable peace. Two quantitative studies on the impact of truth commissions found that in certain circumstances, truth commissions had a positive impact on democracy, but probably only when coupled with other forms of transitional justice (Olsen, Payne, and Reiter 2010, 999; Wiebelhaus-Brahm 2010, 138–142). One of the studies focused exclusively on truth commissions and found that they worked better in some circumstances than others, but did not provide a conclusion as to why the results are inconsistent (Wiebelhaus-Brahm 2010, 138–142). The other study concentrated on the impact of pairing truth commissions with other transitional justice (TJ) mechanisms, finding that it was this multipronged approach that led to positive changes (Olsen et al. 2010, 996). Olsen determined that “none of the transitional justice mechanisms on their own reduce human rights violations or improve democracy” (996). Instead, truth commissions can have a statistically significant impact only when paired with other mechanisms. “Using truth commissions alone to resolve past violence is likely to harm, rather than improve, human rights compliance” (996). A range of mechanisms was needed to stabilize the State, both in terms of democracy and in terms of human rights compliance. As Olsen et al. concluded, “Accountability without stability simply cannot advance

7 See, e.g., Inter-American Commission on Human Rights, “Colombia Country Report: Truth, Justice and Reparation,” OEA/Ser.L/V/II, Doc 49/13. 31 (2013), para. 353–354, <http://www.oas.org/es/cidh/docs/pdfs/Justicia-Verdad-Reparacion-es.pdf>

human rights and democracy objectives. Similarly, stability without accountability also fails to achieve those goals" (997). A choice to limit prosecutions seemingly has a legitimate function only if it operates as part of a broader and more comprehensive scheme that includes other efforts aimed at reparations and accountability.

Up to this point, I have largely agreed with Sánchez and Uprimny in their assessment of the law and current practice. I also agree that a primary criterion for evaluating the adequacy of a State's response should be the context in which that State operates. But part of that context must be how victims understand and react to any grant of amnesty that occurs through a negotiated peace process. This is the basis of my one major critique of Sánchez and Uprimny's position paper: the role of victims in securing peace, and in participating in or agreeing to a peace process, needs more attention. My response is therefore aimed at considering an appropriate understanding of victims' rights when it comes to deciding whether or not to limit the duty to prosecute.

It is necessary to note at the outset that when I discuss amnesties I am focused on the notion of amnesties for international crimes, including violations of international humanitarian law and gross violations of international human rights law (IHRL). Generally, this would mean that these reflections do little to challenge the accord struck in the Colombian peace process, particularly Point 5 on Victims, which allows for amnesties for political crimes (i.e., domestic crimes) but not for international ones. However, one other point on which I disagree with Sánchez and Uprimny is on the issue of adequate punishment. The duty to prosecute and its related reparatory function are not simply about the prosecution, but also about the punishment, which generally requires "appropriate" or "adequate" penalties.⁸ The UN Committee against Torture has offered significant jurisprudence on the understanding of appropriate penalties under its treaty (Nowak and McArthur 2008, 241, 230). The jurisprudence of the Committee against Torture suggests that determining the appropriateness of the penalty involves a two-pronged analysis: (i) does the penalty *prima facie* punish torture as a grave offence? (239–241); (ii) is the penalty equivalent to that imposed for other serious crimes? (241–242). Under the first prong, the Committee has indicated that the crime requires at least "a few years" of jail time for those convicted of torture, and that prison sentences of five to seven years are likely insufficient (241). Under the second prong, the Committee has determined that torture needs to receive a punishment

8 See, e.g., Convention against Torture, art. 4(2); Convention on Enforced Disappearances, art. 7.

equal in severity to the most serious crimes under the State's domestic law (241–242). While there is other jurisprudence, which Sánchez and Uprimny have covered, that suggests the duty to punish is not absolute, the Committee against Torture's jurisprudence suggests that the State must adopt a standard for prosecutions and punishments which indicates that the act of torture is a serious and grave crime and deserves to be punished as such. Therefore, when considering the State's choice to mitigate its duty to prosecute,⁹ we must discuss not only limited prosecutions, but also limited punishments following a successful prosecution. Both limited prosecutions and limited punishment will be collectively discussed as amnesties, because at least a portion of the State's duty and a portion of the perpetrator's criminal accountability are excused or set aside.

The remainder of this response is divided into four parts. Part 1 explores the notion of "good victims" and "bad victims" and the impact this has on the discussion of victims' rights and on the duty to prosecute. Part 2 considers prosecution and the rights of victims focusing on individual violations. This background information may prove familiar to those involved in transitional justice or criminology, but Part 3 of this paper develops the discussion in the context of peace processes while assessing the legal and social need for victim participation in any peace negotiations that include amnesties. It suggests that one criterion for evaluating the legitimacy of a State's negotiated peace, at least when that peace includes waiving or limiting the duty to prosecute, should be the good-faith participation in the peace negotiation of victims' groups and representatives from diverse backgrounds and ideologies. Finally, Part 4 concludes that victim participation and satisfaction are critical elements when evaluating amnesties, including those conditional on truth or in which the prosecution is not followed by a prison sentence. While individual victims may not have a right to demand the prosecution of individual perpetrators, a peace negotiated exclusively by the elites of the parties participating in the conflict is an inappropriate abridgment of victims' rights and is legally unsound.

Part 1: "Good Victims," "Bad Victims," and the Potential Impact on Amnesty Discussions

Early on in their paper, Sánchez and Uprimny argue that, "Just as a peace process that does away with victims' rights does not seem either

9 As Sánchez and Uprimny do, I sometimes use the shorthand "duty to prosecute" to refer to the duty to investigate, prosecute, and punish.

legally or politically viable, a conceptualization of victims' rights that impedes a peace process is not legally viable." While I suspect I both understand and probably agree with what Sánchez and Uprimny have to say on the appropriate "conceptualization of victims' rights," they do not elaborate on what they mean. Appropriately understanding victims' rights is a fundamental issue for striking the appropriate balance between the duty to prosecute and legitimate negotiations for peace. To understand the role of victims, it is important to understand how societies and victims' rights advocates can define "good victims" and "bad victims," emphasizing the needs and rights of some over others based on their response to past abuses. In this part, I briefly set out the conceptualization of "good victims" and "bad victims," and consider how these descriptions can impact a State's peace negotiations.

Sociologists and political scientists have increasingly focused on this division of victims, particularly in the context of transitional justice, where States choose how to define victims during both peace negotiations and transitional justice processes (Meister 2002, 96; Madlingozi 2007, 110). This occurs through the construction of legal definitions, the provision of reparations, decisions over prosecutions, and the inclusion of testimony in truth and reconciliation reports. Often, these definitions are used to narrow down the list of those recognized as having a legitimate interest in defining the rules for a negotiated transition.

The distinction between victims is tied to issues of resistance to the dominant view—both during the conflict and afterwards—and has several different forms and origins. First, "victims" are often conceived of as "the binary opposit[e]" of perpetrators (Madlingozi 2007, 109). This makes them "deserving" of sympathy and social intervention, in contrast to the "wickedness of a perpetrator" (McEvoy and McConnachie 2012, 531–532). Consequently, "The 'innocent' victim is placed at the apex of a hierarchy of victimhood and becomes a symbol around which contested notions of past violence and suffering are constructed and reproduced" (McEvoy and McConnachie 2012, 532). Those who resisted oppression, both through violence and through political activity, are therefore often excluded from that pinnacle place. They may not even consider themselves to be victims. In South Africa, many victims who resisted apartheid did not self-identify as victims to the Truth and Reconciliation Commission because "they felt that they were heroes who had fought for a just liberation and thus did not associate themselves with the notion of victimhood" (Madlingozi 2007, 111). The insistence on "innocence" can undermine legitimate claims by those who resisted oppression.

Second, following widespread conflicts, a State may provide access to reparation schemes to only certain types of “victims.” In South Africa, for example, the Human Rights Violations Committee limited the notion of “victim” to include only those individuals who “suffered gross violation[s] of human rights, in the form of killing, abduction, torture, or severe ill-treatment” (Madlingozi 2007, 109). As a result, not all those who suffered directly from apartheid were treated as victims. Often, this limited understanding of victimhood is promoted as a necessary evil, because “all are victims” or “all have suffered” (Borer 2005). But “not all victims are the same, because not every individual (nor all communities, for that matter) suffer[s] equally from human rights abuses. Claiming ‘we are all victims’ [of a conflict] serves to hide the unequal distribution of human rights abuses across population groups and communities” (Borer 2005). Arguing that victims’ groups do not have a particular interest in the outcome of a peace negotiation can serve to reduce the voice of those who have suffered, in favor of those who benefit from a reconciliatory approach to transitional justice. This latter group includes perpetrators who would benefit from amnesties for crimes that would otherwise demand significant penalties. Applying a hierarchical approach to victimhood has its own problems, but the equivocation of all suffering through a negotiated peace has the potential to leave serious violations unaddressed. This has been the situation in South Africa, where advocates, notably the Khulumani group, have continued to challenge the State’s exclusive reliance on the Truth and Reconciliation Commission, rather than on a combination of mechanisms including prosecutions and comprehensive reparation programs, specifically because the notion of victimhood failed to account for different kinds of victims (McEvoy and McConnchie 2012, 532).

Finally, during and after the transitional justice process, victims are often treated as “good” or “bad” based on how they respond to the negotiated transition and the “lessened” form of justice reserved solely for situations in which States are emerging from conflict or authoritarianism. Victims are often presented with agreements brokered by leaders of the disputing parties—individuals who are potential beneficiaries of any limitation on the duty to prosecute—only after an agreement is fully settled. The victims are then told that they should “simply accept [that] the moral victory was enough” (Madlingozi 2007, 113). “Good victims” are those who accept the negotiated peace agreement; they are often praised publicly by the State and held up as an example to others of the power of forgiveness and the importance of a moral response (Madlingozi 2007, 111–114). “Bad victims” are those who resist

by demanding either individualized compensation or a larger notion of “reparation” that includes greater accountability (Norval 2009, 317–318). By refusing an arrangement that offers them little sense of justice, “Bad victims are a thorn in the side of the new government” (Madlingozi 2007, 112–113).

One of the clearest examples of how the good victim/bad victim dynamic can play out comes from post-apartheid South Africa. Khulumani group members have challenged the State’s failure to provide reparations to all victims and have chosen to pursue civil claims against corporations that benefitted from apartheid and failed to meet the conditions for an amnesty. In doing so, they “challenged the dominant (and politically convenient) political discourse that the past had been ‘settled’ by the Truth and Reconciliation Commission” (McEvoy and McConnchie 2012, 532). Those demands changed the relationship between victims and society as a whole, but particularly the relationship between victims and government. While Khulumani victims used to enjoy respect or solidarity from members of the State’s post-apartheid elite, their push for additional means of reparation, including via a lawsuit in the United States targeting corporations complicit in apartheid practices,¹⁰ led to a fissure between the State and the victims (McEvoy and McConnchie 2012, 532). Ultimately, the Khulumani group appears to have lost the U.S. lawsuit, although at the time of writing an appeal is still pending before the Supreme Court, more than two decades after South Africa’s transition.¹¹ Their efforts were not without some success, however. US automobile giant General Motors settled out of court, reportedly for \$1.5 million in company shares (in the post-bankruptcy restructured corporation; see Davis 2012). The Khulumani case represented a challenge to the State’s negotiated post-apartheid standard and the insistence that “reconciliation” and “truth” had been reached specifically because the State chose not to fully address victims’ claims.

I suspect Sánchez and Uprimny are not advocating for a focus solely on the response of “good victims,” but are instead suggesting a more nuanced approach to the concept of “victims’ rights” than that often proffered by certain human rights lawyers who have suggested that “good victims” are those unwilling to forgive and forget, instead forcing the state to reassess reparation programs or amnesties. When

10 See, e.g., *In Re South African Apartheid Litigation*, Order and Opinion, 02 Civ. 4712 et al., U.S.D.N.Y. (2014); *Balintulo vs. Ford Motor Co.*, U.S.C.A. 2nd Cir., Case 14-4104 (Jul. 27, 2015).

11 *Balintulo vs. Ford Motor Co.*

considering whether a State can or should grant amnesty in exchange for truth, the range of victims and victimhood needs to be considered. The elite negotiating the peace accord, society as a whole, and the international community may be inclined to favor “good” victims over “bad,” the “good” being those willing to accept peace without justice. Doing so can leave unresolved issues that prevent the process from being sustainable in the long term. Victims who feel their legitimate concerns about justice have been shrugged off by those who benefit most from a finalized agreement are unlikely to help realize the goals of that agreement.

By understanding “good” and “bad” victims, this section establishes both the range of likely responses to a negotiated peace agreement that contains an amnesty provision and also the potential for a peace agreement to create new tensions within the society, from the victim’s perspective. But the dynamics of victims and victimhood are more indicative of the social appropriateness of a peace agreement than the legal conditions by which that peace agreement can be reached. The next section considers the legal rights of victims, in terms of the duty to prosecute.

Part 2: The Rights of Victims in the Duty to Prosecute

As Sánchez and Uprimny note, some authors have criticized the duty to prosecute as creating “a fundamental right held by victims that enables them to demand the criminal punishment of third parties” (Orozco, 2014). I have two issues with this assertion. The first may appear to be one of semantics, but I think it is actually about substance: it is inappropriate to describe a torturer or rapist as a “third party” in relation to the victim and the victim’s right to adequate remedy. The second issue is that this description does not reflect the current legal understanding of the role and rights of victims. In this part, I elaborate on each of these issues before considering what rights victims have on an individual basis when it comes to the duty to prosecute. Part 3 expands this discussion to consider the role of victims in a peace negotiation.

Part 3: Re-focusing Relationships in the Duty to Prosecute

The role of victims in the duty to prosecute is problematic, because the State’s relationship to the victim and to the perpetrator intervene in the direct relationship between the victim and the perpetrator. IHRL does

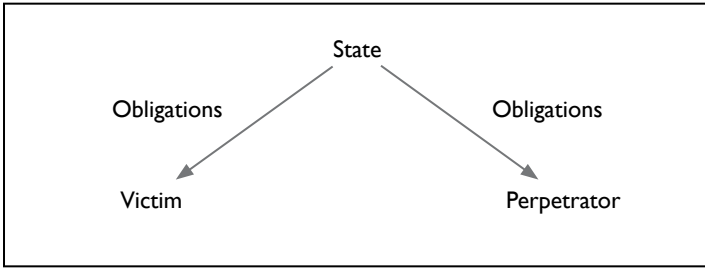
this primarily because of the law's state-centric focus, but also because there are legitimate reasons for the State to sanction a perpetrator on behalf of the community at large, rather than on behalf of a particular individual. In IHRL, horizontal relationships are treated through the lens of State responsibility, giving rise to the State's obligation to investigate, prosecute, and punish. Human rights-related crimes are addressed through vertical relationships between the State and the victim, on the one side, and between the perpetrator and the State on the other (see Roht-Arriaza 1990). The State has a human rights obligation to the victim to investigate, prosecute, and punish, and a separate obligation to the perpetrator to ensure that the trial is fair, impartial, and does not violate the perpetrator's human rights. The obligation to the victim tells the State when the duty to prosecute is triggered and the minimum expectations regarding how that duty is to be pursued. The obligation to the perpetrator indicates the limits of what a State can do when pursuing that prosecution (i.e., not torture or coerce a confession; not abuse the right to a fair trial).

Under the traditional state-centric approach, the relationship between perpetrator and victim is broken (see O'Hara and Robbins 2009). The victim is not a central part of the state-based prosecution process, even where a victim serves as a witness, because the State determines what evidence to present, how the story is framed, and what charges should be brought. Similarly, the relationship between perpetrator and victim is broken by the State's presence, as the State now has a duty to the victim to undertake an investigation, prosecute, and impose a punishment, but the duty does not require the perpetrator to cooperate or to provide reparations to the victim. A representation of the relationships and obligations is depicted below, in Diagram 1. This bifurcated, state-focused relationship allows authors to suggest that the perpetrator is a "third party" to the victim, and that the victim should not have a right to push for the prosecution and punishment of the accused. This is a false narrative. It is more appropriate to recognize the State as the third party; the primary, relevant relationship is that of perpetrator and victim, while the State merely steps into the middle of that relationship.

When arguing for new conceptions of justice, advocates for transitional justice, transformative justice, and restorative justice have attempted, for decades in domestic settings, to connect the victim and the perpetrator, advocating for a triangular understanding of justice rather than the disconnected nature of the state-centric approach. Transitional justice programs have utilized these other forms of justice, or other justice mechanisms, to develop victim-centric approaches aimed

DIAGRAM I

Representation of Relationships in the Duty to Prosecute



at reconciling communities while providing a sense that the perpetrator has repented (e.g., Sánchez 2013, 119; Daly 2002, 73; see also Auckerman 2002). Restorative justice takes a victim-centered approach where the focus is not on the perpetrator's punishment but on empowering the victim and other stakeholders to "come together to resolve collectively how to deal with the aftermath of the [crime] and its implications for the future." (Marshall 1996, 37, cited in Latimer, Dowden, and Muise 2005, 128). Restorative justice allows victims to waive criminal prosecution in lieu of other forms of sanction (e.g., Luna 2003, 228–229). Transformative justice, on the other hand, is premised on the belief that reconciliation should be at the heart of the justice process (Daly 2002, 92–93). In the transitional justice context, transformative justice has been used to advocate for the "transformation of social, economic and political structures and relationships" through the use of "various cultural approaches that coexist with the dominant western worldview and practice" (Lambourne 2009, 30). In these conceptions of justice, the victim is more than simply a witness to their own abuse; the victim has a place in deciding not only whether a perpetrator should make amends, but also how.

A victim-centered focus represents a more honest portrayal of the relationships surrounding a crime. While a State's *laws* are violated by criminal behavior, the State *itself* is generally not; the consequence of the abuse sits principally with the victim and secondarily with the community (Foley 2014, 10). As a victim's statement in the United States recently explained, the perpetrator is the cause but the victim is the effect (Baker 2016). The State plays a significant role in arbitrating claims and in ensuring that each side is protected from the other. It is disingenuous, however, to treat the criminal proceedings as a relationship solely or principally between the perpetrator and the State. By focusing on the underlying relationships, the *true* relationships at issue in criminal prosecutions, IHRL may better develop criteria for determining when

and how the duty to prosecute may be waived or mitigated in the light of competing social interests and as a consequence of negotiated peace.

The Duty to Prosecute as a Form of Remedy and the Role of Victims

According to the Inter-American Court of Human Rights, the objective of the obligation to prosecute “is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages.”¹² The Committee against Torture has made it clear that “the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate in relation to the gravity of the violations committed against them.”¹³ The prosecution therefore serves as a form of reparation. It does not, however, create a right for victims to demand the prosecution of an individual. The Human Rights Committee has explained that individual victims do not have “the right to demand of a State the criminal prosecution of another person, [but] the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations” of violations, but also to prosecute and punish those responsible.¹⁴ This means that while there is an *obligation* on the State as part of its responsibility to remedy the victim, the victim does not enjoy the right to force a prosecution. This limited understanding of the role of victims in the prosecution process reinforces the traditional, bifurcated nature of the obligations set out above. The obligation to provide an adequate and effective remedy is an automatic consequence of the breach of a previous obligation, which requires the State to restore the victim to the place s/he would have enjoyed but for the breach (Shelton 2006, 51, 10). If the purpose of a prosecution is to remedy the victim, and the remediation is to be tailored to the needs of the victim, why does the victim not have a significant say in whether or not the prosecution happens? This section briefly sets out the difficult legal understanding of the role and rights of victims in the duty to prosecute. Given the

12 *Velásquez-Rodriguez vs. Honduras*, Judgment (Merits), I.-A.C.H.R., Ser. C No. 4 (Jul. 29, 1998), para. 134.

13 See Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3 (2012), para. 6.

14 *Yasoda Sharma vs. Nepal*, H.R.C., No. 1469/2006, UN Doc. CCPR/C/94/D/1469/2006 (2008), para. 9; *Vicente et al. vs. Colombia*, H.R.C., No. 612/1995 (1997), para. 8.8.

extensive discussion in Sánchez and Uprimny's paper, this section is limited to the most significant issues with respect to the victims' roles.

The right to an adequate remedy under IHRL includes both a procedural and a substantive aspect. It is only necessary to discuss the substantive part. The State has a responsibility to restore victims to the position they would have enjoyed but for the violation of their rights (Shelton 2006, 10). The Van Boven/Bassiouni Principles identify the following forms of reparation that can help accomplish this restoration process: "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."¹⁵ Some suggest the duty to prosecute is intricately linked to the need to establish "truth" (Orentlicher 1991, 2542).¹⁶ That is perhaps one of the functions of criminal trials, but as Sánchez and Uprimny note, criminal trials are not the most effective mechanism for establishing truth. Using criminal trials as a means of realizing victims' right to truth is inappropriate. Instead, the duty to prosecute serves victims better when it is considered not only as a form of censure for the actions of the perpetrator but also as a means of recognizing the inappropriateness of the victims' suffering (e.g., Daly 2001). In that sense, prosecutions and punishments can function as both a form of satisfaction and a means of social rehabilitation. Satisfaction involves the public acknowledgment of wrongdoing, usually coupled with an apology (Shelton 2006, 54–55). Rehabilitation is the "process of restoring the individual's full health and reputation after the trauma of a serious attack on one's physical or mental integrity" (Shelton 2006, 275).

Unfortunately, little has been written on the notion of the social rehabilitation of victims as part of the purpose of transitional justice (as opposed to the rehabilitation of perpetrators), and much less has been written on the relationship between social rehabilitation and the other elements of transitional justice, including justice. The inadequacy of criminal trials for ensuring truth, reconciliation, or victim participation has often been outlined, but as some restorative justice scholars have acknowledged, criminal trials can allow for a public and official recognition of the wrongfulness of the victim's suffering, not just of the perpetrator's actions (Foley 2014, 15). In post-conflict States, criminal trials have the added advantage of not requiring an "innocent" victim,

15 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (2005), Principle 18.

16 Note that, amongst other benefits, trials allow states to "lay bare the truth about violations."

in the sense discussed in Part 1 above, to secure a conviction and a finding that the suffering endured was wrong (Foley 2014, 11, 14–15). Consequently, criminal trials can serve as a form of reparation where, otherwise, transitional justice States might ignore victims considered to not be “innocent” enough.

The need for criminal trials and their role in social rehabilitation can perhaps best be explained through the development of truth commissions. When they were first utilized, truth commissions were not considered an ideal alternative to trials, but rather a necessary and inadequate substitution, because trials were unavailable; what victims wanted—a sense of justice—could not be achieved through negotiated transitions (e.g., Roht-Arriaza 2006); Orentlicher 1991, 2546, n. 32; Orentlicher 2007, 11). Truth commissions were deemed an adequate means of providing victims with a state-sanctioned process for documenting and formally acknowledging past abuses (Hayner 2011, 20). This was seen as a necessary element of a transition because “Even though the human rights violations ... were usually common knowledge, there was a huge gap between knowledge and acknowledgement” (Roht-Arriaza 2006, 3). Supporters of the responsible parties continued to deny the existence of harm (see Kritz 1995, xix, xxvi). Truth commissions were seen as a means of helping to absolve the perceived guilt of those whose rights had been abused, while also providing answers for families of individuals who had disappeared or were killed during the predecessor regime (Hayner 2011, 20). By expressing recognition of the wrongfulness of past suffering, truth commissions can serve as forms of satisfaction and social rehabilitation, but they do not necessarily represent a *better* way of doing this than criminal prosecution (see O’Hara and Robbins 2009; Daly 2001). The strength of verdicts obtained through criminal prosecutions versus truth commission findings is likely to vary in importance depending on social conditions and contexts, including how both victims and society as a whole viewed the legal system before and during the conflict and the legitimacy of each process after the conflict. But since social rehabilitation is ultimately about ensuring that the victim feels restored as a member of society, their perception of the mechanisms and their adequacy in restoring them within a society should be taken into account.

Unfortunately, the relationship between the duty to prosecute and punish and victims’ social rehabilitation is under-developed both in jurisprudence and in scholarship. Sánchez and Uprimny recognize that criminal prosecutions serve a reparative function, but argue that criminal trials do not offer the best chance of complete reparations, while also involving significant resources. Where resources are a problem, they

argue, the State should pursue alternative ways to remedy and redress victims. While I generally agree with the first part of their assertion, I would attach a significant caveat: since the purpose of the reparation process is to restore the victim, the victim must be part of the central consideration as to when, how, and in what circumstances a truth commission actually provides the same function of rehabilitation and satisfaction. To set aside victims' perceptions of the value of either truth or prosecution is to undermine the purpose of the remedial process.

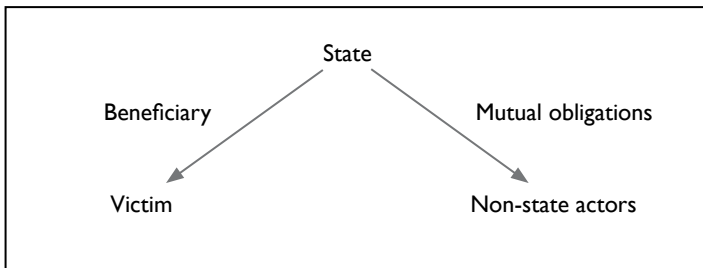
Sánchez and Uprimny appropriately note that the duty to investigate, prosecute, and punish is "not an absolute duty, but rather one that must be balanced against other values that it comes into tension with, such as other legal principles." One of those principles, however, must be how alterations to adequate punishment affect the social rehabilitation of victims. By excusing punishment for certain crimes, particularly those associated with an armed conflict, the State has to understand that it is creating a victim hierarchy based not on the kind of suffering the victims endured but on when and at whose hands they endured it. Those who were kidnapped, murdered, or abused by neither the State nor members of a non-state armed group remain entitled to full reparation, but victims of the conflict are forced to accept less than full reparation. This adds to the complexity of victimhood outlined in Part 1, above, and raises an important question about how States balance the needs of victims against the desire of perpetrators to avoid significant punishment for international crimes, in order to further peace. I believe a balance can be struck that alleviates the State's obligation to adequately punish, but I think it can only happen under two conditions: (i) that the other transitional justice processes adequately meet the social rehabilitative needs of the victim through public acknowledgment of the wrongfulness of their suffering (as opposed to only the wrongfulness of the perpetrator's actions); (ii) that victims are able to contribute meaningfully to the discussions and peace negotiations. The next section will pick up on these conditions and suggest that while States can mitigate, limit, or set aside their duty to investigate, prosecute, and punish adequately, one condition must be considered: the impact of the State's duty regarding the right to reparation and social rehabilitation for victims.

Part 4: The Need for Victim Participation in Peace Negotiations

Understanding the duty to prosecute as part of the obligation to remedy victims suggests that victims should have a role in any peace

negotiations that limit the State duty to prosecute. Failure to do this has the potential to again subordinate the relationship between victim and perpetrator to that of perpetrator and State in a way that could harm victims' rights to remediation, particularly the rights to social rehabilitation and satisfaction. As explained in Part 2, IHRL considers that the duty to prosecute includes two distinct sets of obligations emanating from the State—one aimed at the victim's rights and the other at the perpetrator's rights. This approach ultimately breaks the relationship between perpetrator and victim, which is the basis of the crime. The victim's voice and understanding of events are lost, and the potential social rehabilitation of the acknowledgment of the wrongfulness of their suffering, as opposed to only the wrongfulness of the perpetrator's actions, is also lost. Peace negotiations often replicate this by focusing on the relationship and obligations of the State and non-state groups, without including victims in the process. Instead, the interests of victims are again supposedly represented by the State, as depicted visually in Diagram 2.

DIAGRAM 2
Standard Relationships in Peace Negotiations



The authority of the State to represent victims in such negotiations loses legitimacy when the State and its supporters are accused of committing international crimes and therefore benefit from any mitigation of the duty to prosecute included in a negotiated peace. Here, the victim's right to remediation becomes particularly acute. Should the State be able to determine for victims the need for prosecution as a form of social rehabilitation? What should the legal limits of this be? To date, there is no solution to the issue and there is nothing to give definitive guidance on the limits of the State's role, or the need for a victim's role, in determining when, how, or under what conditions the duty to prosecute can be set aside for the benefit of a sustainable peace or alternative social good, such as truth and reconciliation. Like Sánchez and Uprimny, I believe we know that States *can* use alternatives to

prosecution, or limit conducting prosecutions, but that there are necessary conditions for this. I submit here that the nature of the obligation to provide remediation and reparation for victims, and use of the duty to prosecute to serve this goal, suggest that victim participation in the peace process and negotiation is a prerequisite for this.

There is no perfect mechanism for how victims should participate. Full participation as a partner in the negotiations might undermine any peace negotiations by requiring the consent of too many parties. Alternatively, allowing victims to give testimony or to voice concerns has the potential to allow victims to participate robustly, but they risk having their opinions ignored by those negotiating the peace. Consequently, a level of deference to State decisions is probably appropriate but, in turn, the State needs to ensure meaningful participation by victims in the discussion and the decisions. Victims groups should be included in the discussions and be allowed to submit position papers to those involved in the peace negotiations. These position papers may not be fully incorporated, but the parties to the negotiations should be expected to respond to them, delineating their understanding of the legal and social issues and the relationship between the different TJ mechanisms.

DIAGRAM 3
Proposed Relationship for Peace Negotiations

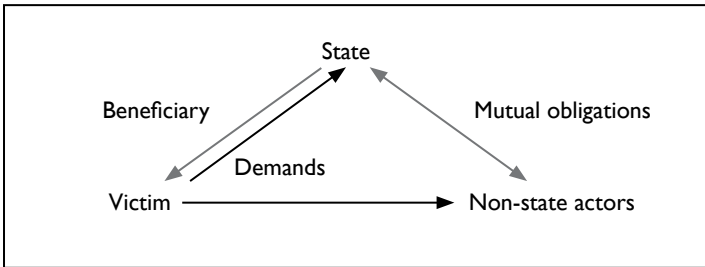


Diagram 3 provides a visual representation of the conditionality of victim participation, recognizing that victims groups may make demands that the State and non-state negotiating partners need to be responsive to, even if that response ignores some recommendations because of the complexity of the situation. When considering victim participation, the “good victims” and “bad victims” notion presented in Part 1 should be remembered. If the State, the non-state armed group, or their guarantors solicit victim participation, there is a need to ensure the representation of a proportionate range of victims. If only victims groups predisposed to the notion of a mitigated duty to prosecute are

included, listened to, or responded to, then international courts should be skeptical of the choices made by the negotiating parties.

Rather than showing a high level of deference to the State in terms of outcome, courts should scrutinize the process of the peace agreement, in order to determine whether victims' rights and interests were adequately accounted for. Courts should consider not only the motive of the negotiating parties but also how well they considered and addressed victims' demands and statements of need. Consideration should be given to whether the State reached out to victims, or whether the burden was on victims to find a means of participating. States should be prepared to explain clearly to victims groups which recommendations were taken on board and why, and which were refused and why. "Necessity" on its own would be insufficient, but by referencing the totality of a project and the limited resources available, the State may be able to justify a mitigation of the responsibility to prosecute, as long as the needs and desires of victims are otherwise accounted for, recognized, discussed, and part of the negotiation. When mitigating the duty to prosecute, the process of the peace agreement may be as important as its outcome for determining its legitimacy.

Conclusions

The development of an obligation to investigate, prosecute, and punish was not an accident or a natural result of state concern. It was the result of hard-won efforts by victims of relevant international crimes, and it is now tied repeatedly to the right of victims to an adequate and effective remedy. It was also a duty undertaken in full recognition and knowledge of how widespread these crimes can be in conflict-affected or authoritarian States, and how difficult it can be when those States transition. The Convention against Torture was adopted in 1984, in the midst of regimes such as Augusto Pinochet's authoritarian rule in Chile. The Convention on Enforced Disappearances was drawn up after the Argentinian transition, when victims groups continued to face hurdles in getting answers from States that systematically engaged in the practice. The use of truth commissions was seen as a secondary choice, a limited replacement for the better form of reparation available through prosecutions. This was despite the fact that the obligation to investigate, prosecute, and adequately punish for the convenience of parties accused of IHRL and humanitarian law violations, or for the convenience of a society that has not suffered direct violations, should not be taken lightly since it raises significant issues about the right to remedy and reparation for victims.

While the duty to prosecute can be limited, doing so limits the normal expectations of victims in terms of full remediation. The duty to prosecute is normally attached to each criminal violation and operates to protect victims while recognizing the wrongfulness of both the perpetrator's actions and the victim's suffering. It also normally requires at least a few years in prison as a means of adequate punishment. Any alteration to that standard functions as a form of amnesty. In transitional situations, where resources are limited, demand is great, and the need to balance a variety of interests alongside the future stability of the State are at play, the State may be able to justify this, but only after taking account of the rights of victims to full reparation, including social rehabilitation.

The use of truth commissions arose specifically because transitional justice States recognized that without a means of acknowledging the wrongfulness of suffering, victims could not be fully restored to the social environment. Unfortunately, limited work has been done on the issue of the social rehabilitation of victims and how the use of "truth" without "justice" can influence the social treatment and rehabilitation of victims in the post-transition period. However, it is likely that truth commissions and judicial sanctions will lead to different outcomes for victims in some States, when it comes to the social impact of the findings. Since States have a general duty to restore victims to the position they would have enjoyed but for the violation of their rights, victims should be part of the process that determines what action is necessary for their social rehabilitation and satisfaction.

This text stops short of requiring consent from victims, but it does suggest that limitations on the duty to investigate, prosecute, and punish should occur only if victims' rights have been clearly accounted for. This means that accounting for victims' rights should at least be a matter of process, if not of outcome. States and their non-state negotiating partners must create opportunities for victims to meaningfully participate in the discussion. When doing so, they should ensure that they are hearing from a range of victims, not only those who agree with their policy aims for limited prosecutions, or those deemed "innocent" enough to be "worthy" victims. Only if this condition is met can States legitimately claim a right to determine the appropriate balance between the duty to prosecute, including the duty to punish adequately, and the interest of the State and the community in general in securing peace.

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6. Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges*

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During the first 21 years of its existence, the Inter-American Court of Human Rights (hereinafter, “the I/A Court HR”) did not rule on serious human rights violations and amnesties. This ended in 2001, with the famous *Barrios Altos* case. It has been argued that earlier members of the I/A Court HR would perhaps not have taken a step like the one they took in that judgment, which declared so-called “self-amnesties” non-conventional, and that efforts to submit a transitional justice case to the court would therefore have been in vain. It also tends to be said that there had been no case prior to that time that allowed such a step to be taken, or that no institutional, political context existed in the Inter-American System for international reviews to be conducted of transitions taking place in the region.

Nowadays, the I/A Court HR is extensively involved in amnesties and transitions, and critical analyses of Inter-American Commission and Court reports and decisions on the subject have become deeper and more complex with the passing of time. Analysis has progressed from emphasizing the legal and political scope of specific decisions (Engstrom 2011; DPLF 2007) to a much more critical appraisal of certain problems associated with the possibility that the Commission and Court might have failed to understand the specific challenges that transitions imply (Acosta-López 2015; 2016).

A number of authors had already expressed certain reservations about the scope of Inter-American jurisprudence in this field in the past. Claudio Nash (2009), for example, was of the opinion that in the *Goiburú* case, the Court “should have made it clear whether the specific context of transition-to-democracy processes in any way modifies” the obligation to judge and penalize; in other words, whether this obligation can imply acceding to “certain minimum penalties” or “a certain threshold when judging responsibilities,” and hence whether all responsible parties should be prosecuted. A similar concern was raised by José Zalaquett (2007), when he pointed out insufficiencies in the

Almonacid case relating to the need to establish clearer foundations on how to understand the imperative obligation to prosecute war crimes or crimes against humanity in transitional contexts.

Fabricio Guariglia (2001), meanwhile, has pointed to a number of “grey areas” in a decision such as the *Barrios Altos* ruling, in particular because it could imply an absolute obligation to prosecute and penalize everyone responsible in transition situations, where “criminal prosecution of all cases of human rights violations is simply impossible.” Binder (2011) and Crema (2013) have also concentrated on specific problems in dealing with the subject of amnesty in inter-American jurisprudence, in particular due to the fact that this jurisprudence is insensitive to the different political and institutional contexts surrounding each transition.

The text by Nelson Camilo Sánchez and Rodrigo Uprimny in this book is an important contribution to this critical literature, containing as it does a constructive invitation to reflect on the way in which standards or criteria are drawn up by international human rights organizations and on how treaties on the subject are interpreted. In the text in question, as well as in an earlier book on the subject (Uprimny, Sánchez, and Sánchez 2014), the authors point to how some cases, such as *Barrios Altos*, related to situations where self-amnesties were mostly granted directly by the military government in charge, or as a result of “fictitious” discussions in the legislative sphere, such as the one-day discussion that preceded the Peruvian self-amnesty by a Congress that was formed after Fujimori himself had closed the previous one. Similarly, Sánchez and Uprimny stress the importance of the distinction made in the Court’s jurisprudence—in the *Massacres of El Mozote vs. El Salvador* case—between self-amnesties and amnesties granted after peace processes that bring armed conflicts to an end.

In this brief text, I would like to concentrate on some preliminary ideas about these questions that arise from the analysis by Sánchez and Uprimny. In particular, I will analyze the following questions: What should the Inter-American Court and Commission, as well as other human rights entities, do in order to ensure that standards relating to transitional justice can be drawn up in a better way? How can they apply a proportionality principle and the balancing approach in a dogmatically acceptable manner with respect to conflicting principles in a specific transition? What methodology should international courts use when they are reviewing deliberations that have been conducted internally? How should debates on the margin of discretion be reworded in the context of these discussions?

A specific analysis of these questions will enable me to draw conclusions about the contributions made by these inter-American decisions, the obstacles in their path, and the challenges they raise when it comes to dealing with the principal dilemmas inherent in transitional justice.

Institutional Design and “Litigation Context” Underlying Inter-American Standards on Amnesties

In this segment, I look at the arguments proposed by Sánchez and Uprimny from the perspective of certain aspects of the institutional design of the procedure before the said Tribunal and before the Inter-American Commission. I also develop a number of arguments about the explanatory value of the type of litigation conducted by the parties and the type of evidence heard by the Court, in order to understand the scope of the standards it produces. I am interested in highlighting the relevance that Sánchez and Uprimny place on debates about the empirical basis for the standards established from a human rights perspective. What empirical evidence could there be for and against an assertion that not penalizing serious human rights violations could lead to their being repeated? If there is some type of evidence to the contrary, does this affect the scope of the standard? In what way? How should the inter-American procedure be organized in order to ensure that it gathers the best evidence available for drawing up more sustainable standards? What role could the Commission and the Court best play in these tasks?

This emphasis on certain aspects of the lawsuit is associated with implications of the dialectic relationship and the tensions that exist between supranational entities eager to fine-tune their role and impact, on the one hand, and on the other hand, internal bodies which, on some occasions, converse fluently and constructively with these international supervisory bodies yet at other times are a major obstacle to their projection at the internal level. The history of these systems is also the history of how victims have succeeded in being heard and have been the driving force behind institutional reforms and progress in the field of jurisprudence at both local and international levels, and the history of institutional actors who have occasionally drawn up a joint agenda on this with victims, and sometimes against them.

This starting point means that Inter-American Court jurisprudence needs to be thought of on various levels, not just in terms of the legal standards it has drawn up. As a judicial entity, the Inter-American

Court is limited by certain procedural and substantive rules that the narrative it constructs fits in with.

In effect, every case ends up being a universe in itself. In every case, the victims are different, they are represented differently, and State agents differ and, on occasions, can even represent various governments as time passes. Additionally, concrete evidence and specific procedural acts (such as whether an estoppel rule is applicable) mark the progress of what is said or not said through international judicial channels. Two relatively similar situations in the same country—such as two different massacres in a particular period of time and in a similar context of mass, systematic violations—could lead to different judicial decisions, if the litigation, the controversy between the parties, and the internal investigations conducted in each case differ. The involvement of State institutions and agents representing the State also has a bearing. If the facts are acknowledged in one of the cases but rejected in the other, the scope of what can be said, in procedural and substantive terms, could differ, despite those facts being similar.

These procedural, litigation, and evidence subjects are no minor issues. As I have said, the history of the Inter-American System is one of tension and interaction between national and international spheres, one that varies as time progresses. Two examples illustrate this point. In the case of Guatemala, governments prior to 2012 were noted for fully admitting to various atrocities perpetrated during the armed conflict. In cases like the *Massacre of the Dos Erres* or the *Sánchez Plan Massacre*, the facts and the responsibility of the State were never in dispute. But the Guatemalan government's position before the Court changed radically when Otto Pérez Molina came to power. On occasion, faults in internal investigations were acknowledged. But it got to the point where the government denied the existence of "scorched earth" policies, which described the type of massacres that the Court had analyzed previously. At one stage, the government even rejected the Court's very competence to declare that forced disappearances had occurred in some cases. The possibilities about what the Inter-American Court can state when faced with these different government scenarios therefore differ. In the second scenario, the burden of proof is greater for the victims, and the possibility of reaching a more thorough determination of international responsibility becomes more complicated.

Another interesting example on this matter relates to the various changes of strategy and institutional design by the Colombian State in cases heard by the Inter-American Court.¹ For example, in the 19

1 For details of changes in, and debates about, the Colombian State's litigation strategy before the Inter-American Court, see Acosta-López (2016).

Merchants case, State litigation concentrated heavily on denying any links between paramilitary groups and the Colombian army. In a very similar case, the *Massacre of La Rochela*, the State's strategy focused on alleging that the Court was not competent to judge the context of what had happened, and the State accordingly refrained from presenting evidence to contradict what was alleged by the Inter-American Commission and representatives of the victims with respect to that context. In subsequent cases, such as *Yarce and Others*, the State made a detailed defense of every fact cited in relation to both the case and the context. The State has disputed not only the sources of evidence but also the arguments related to it. The point I want to stress here is that a case where the State refrains from presenting evidence about the context allows the I/A Court HR to make more probable inferences about what happened. It is a different matter if the State specifically argues every factual component of a case, since this transfers an enormous burden of litigation to the representatives of victims, which is sometimes essential to understanding the full magnitude of a particular case.

I am of the opinion that these elements allow significant weight to be given to the position adopted by States in each case relating to amnesties analyzed by the Court to date. In the *Barrios Altos* case, for example, the State not only accepted its responsibility for the facts but also asked the Court to make a pronouncement that would offer tools, at the internal level, for dealing with procedural and substantive obstacles inherent in the self-amnesty that had been adopted.² This type of request paves the way for a broader, more proactive, more far-reaching inter-American intervention than in cases where a breach of the Convention has been rejected.

Similarly, in the *Gelman* case, the Uruguayan State did not object to the claims made by the representatives of the victims. To some extent, this means that a certain degree of consensus between the government and the representatives can be inferred about the fact that using a referendum to ratify the amnesty had been a problem, and that that problem needed to be remedied. The Uruguayan government did not put up a vigorous defense either of State sovereignty in this issue or of the alleged possible political legitimization of the amnesty through the two referenda held. Nor is it clear that the Court was presented with detailed information about the type of public deliberation that

2 "[T]he State reiterates its willingness to be able to initiate a direct dialogue in order to reach an effective solution ... to attack the validity of procedural obstacles which impede the investigation and penalization of those responsible in the case subject matter of the present hearing, in particular [...] the so-called amnesty laws," said the State delegation.

took place within Uruguay about these matters. If this information had been available, it would perhaps have allowed for a deeper analysis of “majority rules,” plebiscite mechanisms for democratic participation, and inter-American standards.³ The Uruguayan Supreme Court had also pronounced in a similar manner against submitting validation of the State’s Punitive Claim Expiration Law to a referendum, based on arguments that included inter-American jurisprudence in cases like *Barrios Altos*.

In the *Gomes Lund* case, on the other hand, the Brazilian government defended the “transition without transitional justice” that had taken place in the country, and also the political discussions that preceded the amnesty. Similarly, a few months before the Inter-American decision, the Supreme Federal Tribunal had declared the constitutionality of this amnesty, among other reasons because of the “historic moment” when it was established, to support the political transition. As can be seen, unlike Uruguay and Peru in the cases mentioned, the Brazilian government and the country’s highest court refused to apply the inter-American standards that had been drawn up.

These litigation nuances could be said to have little relevance to Inter-American jurisprudence, if it is remembered that, with certain exceptions, the Inter-American Court’s response was relatively similar in both the *Gelman* and the *Gomes Lund* cases: amnesties for serious violations of human rights were totally prohibited. Despite litigation differences, the narrative is very similar—a reconstruction of statements by international entities and comparative law tribunals—and, a

3 Here I agree with some of the criticisms made by Roberto Gargarella (2013) about the *Gelman* case, particularly the way in which democratic participation in matters like this is analyzed. However, some of the arguments about the anti-democratic nature of the I/A Court HR intervention need to be balanced against the circumstances and context of the litigation before the Court. In fact, the Court held no evidence as to the type of democratic, public deliberation that had taken place in connection with the 2009 referendum. In the nine pages that make up the substantive part of the State’s response, where it accepts its international responsibility in the case, the State limited itself to mentioning that there had been a referendum and a plebiscite, and did not put forward any arguments relating to the defense of any citizen support there might have been for the Expiration Law. Notwithstanding the foregoing, it is true that in view of the exposure this decision had among the Inter-American public, the I/A Court HR might have been expected to investigate this specific subject *ex officio*. The problem here is that it would have been difficult for the I/A Court HR to investigate without showing even a minimal amount of bias in a specific matter. In other words, the I/A Court HR is required to decide on the specific controversy that is submitted to it by the parties, with the evidence and pleas presented by the litigants, but in some cases, due to the relevance of the subjects, it should be an international tribunal that concentrates on collecting all necessary evidence for a higher court in order to specify the type of Inter-American standard that it is drawing up in the best way possible.

special feature of the *Gelman* case, the addition of considerations about plebiscites and referenda and the role they play in restricting rights. However, it could be asked whether a closer evaluation of the political contexts would have justified a more thorough and differential narrative about international obligations in the respective transitions.

Meanwhile, it is important to stress that the consequences of a particular decision differ, depending on the political, institutional, and historical circumstances in a given country. The I/A Court HR rulings on amnesties in Chile, El Salvador, Brazil, and Uruguay were made more than twenty or thirty years after the political conditions that prevailed when the legal instruments governing amnesties were enacted. In the case of Peru, President Fujimori was already out of the country, criminal proceedings had been filed against him, and there was sufficient internal political power in favor of leaving the self-amnesty aside, and ineffective. As can be seen, the institutional costs associated with the ability of an inter-American decision on these matters to destabilize a society are minimal, considering the type of political changes that have occurred in these countries and the distance in time from when the amnesty provisions were adopted. It can even be said that inter-American standards proved highly beneficial to these societies, and helped to empower not only the victims but also State institutions determined to fight against impunity.

If the I/A Court HR decision in the *Gelman* case had been made in 1986, would it ultimately have endangered the political transition process aimed at preventing more political violence? And if so, how can the institutional costs of an inter-American decision be evaluated in a hypothetical scenario of this kind? These types of question are relevant, from the standpoint of the consequential effects of judicial decisions, given that since the I/A Court HR has acquired more power as a result of doctrines like conventionality control, its argumentative responsibility should increase and the institutional consequences of its decisions deserve a more detailed appraisal. It is understandable that for judicial independence reasons, a judge should not be bound by all the consequences of his decisions. However, the institutional and contextual scope of certain decisions should be carefully considered, so that decisions can be made that are both appropriate and legitimate.

This also applies to the Inter-American Commission on Human Rights (IACHR), whose appraisal of decisions made during a transition process, in the form of thematic or country reports, can have more immediate impacts than ones associated with cases, which take much longer to reach the Court.⁴ It should be stressed that the functions

4 For example, in its fourth report about the human rights situation in Co-

conferred on the IACHR under various Inter-American System regulations mean that the organization has a better institutional design, and this enables it to conduct a better review of a transitional justice process. In effect, the Commission does not depend on a single case when appraising a structural situation. Making on-the-spot visits, crosschecking information and evidence in various cases and holding various hearings on the subject, irrespective of whether there has been a previous hearing, are but some of the alternatives it has at its disposal for conducting a better appraisal of a situation.⁵ It should be stressed that when the IACHR is resolving a particular case, it uses the contexts and patterns it established in its structural appraisal of the situation.

The I/A Court HR, on the other hand, has more problems when it comes to crosschecking information, although as a general rule it has accepted the type of contextual framework that the Commission has provided it with. However, a holistic view of transitional justice that combines truth, justice, and reparation dynamics using different mechanisms will always be difficult to analyze in the light of a concrete case. In fact, the possibilities and limits of the mechanisms used in this coordination process should be analyzed globally, with many more elements than those associated with what is proposed in an isolated case.

These ideas are useful, because they show why the institutional design of the procedure before the Court and that relating to the drawing-up of reports by the IACHR are relevant when it comes to understanding and construing the scope of inter-American standards. As a general rule, the Court, in fact, gathers facts exclusively from the litigation between the parties. It is not common practice to freely incorporate material that is not part of the controversy, or facts mentioned by third parties through *amici curiae*. This third-party intervention is only taken into account on law issues, not with facts. This explains

lombia in 2013, the IACHR pronounced against some points in the so-called "Legal Framework for Peace," notably selection methods and not investigating serious human rights violations. This type of Inter-American intervention affected the position adopted by certain actors, either in favor of or against the peace process, prior to the October 2, 2016 referendum.

5 For example, in 2017 alone, the IACHR held two hearings about Colombia's Special Jurisdiction for Peace. The March 2017 hearing concentrated on the initial implementation of a number of regulations that allow benefits for the armed forces and police. Various human rights organizations and State institutions took part. The July 2017 hearing concentrated on the parole that was being granted to persons responsible for serious human rights violations. In March the spokesman for the State was the Minister of the Interior, while in July it was the Minister of Justice and Law. The high profile of these participants illustrates the importance that the Colombian State places on these events where the Inter-American Commission begins to think about its appraisal of the Special Jurisdiction for Peace.

why a controversy exists over how “Inter-American public order” aspects are discussed in the context of judicial cases decided in San José. Should relevant information about a comparative situation in relation to a specific controversy be presented to the I/A Court HR? Has this comparative information been validated by any entity, as the Venice Commission to the European Court of Human Rights does, to a certain extent?

It is true that the I/A Court HR brings rigorous comparative law arguments into many of its judgments.⁶ However, in cases like the *Massacres of El Mozote*, a vital aspect like the special way that amnesties granted after a peace process that end an armed conflict could be handled is discussed without significant interventions by *amici curiae* or institutions and organizations anywhere in the region. A general discussion is held, based on the specific case, which could be problematic when it comes to drawing up sound standards based on “Inter-American public order.”

Authors like Ariel Dulitzky (2010; 2015) have accordingly proposed an “integrated Inter-American constitutional model” where mechanisms are established for consulting the Court about pending cases with national tribunals and for expanding justification for requesting advisory opinions from the Court, from Supreme and/or Constitutional Courts or Tribunals, from national parliaments and congresses, and from national human rights institutions. Dulitzky also proposes that one or more judges involved in a specific case at public hearings should be summoned to appear as witnesses, and that formal, voluntary channels be established for interacting with national judges in all States, with all supreme Latin American courts being invited to submit opinions as *amici curiae* and to request information about jurisprudence on the corresponding issue.

This redefining of interventions and dialogue relating to drawing-up standards is crucial to reinforcing the legitimacy and quality of those standards. This is important, because all I/A Court HR decisions have an impact on public policy, whether through the type of judicial standard created or through direct orders that modify various spheres of internal law. However, in some specific cases, litigation in the Inter-American System involves positions being adopted that are in favor of, or go against, a particular institutional design adopted by a State for drawing up its justice system, its health system, or its reparation system or policy, etc.

6 For example, among other cases, see *Artavia Murillo et al. vs. Costa Rica*, the *Castañeda Gutman vs. Mexico* case, and the *Liakat Ali Alibux vs. Surinam* case.

In this type of situation, in my opinion, the I/A Court HR should work in a procedurally different manner. It is true that the San José Court should conduct a thorough, rigorous appraisal of the evidence in all cases. Nevertheless, litigation against institutional designs justifies criteria being introduced through regulatory reforms that enable procedural stages to be managed differently.

An initial issue relates to a necessary separation of the merits and reparation stages in cases with special institutional impact. In fact, if public or written hearings on reparation matters were separated from texts and hearings on merits issues, more deliberation would be possible on remedies, because what the Court established as proven facts and what it considered a breach of Inter-American instruments would be clear beforehand.⁷

Secondly, the type of documentary and expert evidence presented in connection with these designs should be subjected to a thorough appraisal, with various stages where the Court itself, and not just the parties, compares and contrasts information and arguments. Interested third parties should also be able to participate, as *amici curiae*, in this comparison of evidence, something that is not possible today under current rules, since these only allow *amici curiae* to take part where legal matters are concerned. It is true that it can be very difficult for the I/A Court HR to pronounce on countless third-party interventions relating to various issues, although the greater the impact on institutional designs, the greater should be the impetus for public participation in the Inter-American discussion, and the greater the argumentative burden on the Court when responding to interventions. Hence the importance of modifying rules governing public access to evidence submitted by the parties, so that third-party interventions are as informed as possible.

A re-evaluation of Inter-American jurisprudence on amnesties shows that approaches of this kind would, for example, have enabled similar conclusions about how certain amnesties were incompatible with the American Convention, but based on different reasoning. In particular, there would have been no need to impose a total ban on all types of amnesties, or to draw up an absolute right for a prison sentence to be given. The alternative route could have been developed around the absence of any other way to protect victims' rights beyond criminal proceedings, or global insufficiencies both in institutional

7 Similar concerns about the need for public hearings to be more thorough in terms of producing and evaluating relevant evidence can be seen in Cavallo and Brewer (2008).

design and in the deliberation, public participation, accountability, and judicial control carried out internally.

Balancing Inter-American Jurisprudence with Transitional Justice

Sánchez and Uprimny develop various arguments for construing the right to justice as a principle, in the context of a theoretical appraisal—in particular, in the light of Robert Alexy’s theory—of the difference between rules and principles. The authors use Constitutional Court jurisprudence to support this idea, and point to how the I/A Court HR has used the deliberation-of-principles methodology when resolving some cases.

I agree with this Sánchez and Uprimny appraisal, and it seems relevant to mention a number of debates that have taken place about using the deliberation methodology in some cases in the Inter-American sphere.

One general criticism of this type of approach relates to the alleged transformation of the rule banning amnesties, even conditional ones, related to serious human rights violations, into a principle (Cerqueira 2014). These criticisms maintain that a rule is being distorted in order to transform it into a principle that would necessarily clash with other principles and, similarly, would establish the need for deliberation that would otherwise not be applicable if it were a rule. This approach highlights the fact that what is therefore needed is a change in jurisprudence which converts the earlier rule into a new one, especially in scenarios where the I/A Court HR has not conducted specific deliberations and, on the contrary, has tended to take sides, using rules that avoid deliberations. Meanwhile, the discussion arises as to whether the ban on unconditional amnesties could be considered a rule, while the ban on conditional ones could be construed as a principle.

In my opinion, many of the decisions made by the I/A Court HR that are worded in the form of “rules” should be construed as the fruit of explicit or implicit deliberations. Inter-American entities would contribute to better discussions on this point if they set out in greater detail how they arrive at this type of implicit deliberation. This would make it possible for the regulatory and empirical arguments used to be debated.

One example of explicit balancing on the subject of transitional justice can be found in the *Operación Génesis* case, where the Court stated the following:

470. With respect to reparation measures, the Court stresses that International Law provides for the individual legal entitlement to the right to reparation. Notwithstanding the foregoing, the Court states that in transitional justice scenarios where States are required to assume the duty to redress large numbers of victims far in excess of the capabilities and possibilities of domestic courts, administrative reparation programs are one legitimate way to satisfy the right to reparation. In such contexts, those reparation measures should be construed in conjunction with other truth and justice measures, provided that they meet a series of requirements related, among other things, to their legitimacy, especially that they are based on victim consultation and participation, their having been adopted in good faith, the level of social inclusion that they permit, the reasonableness and proportionality of pecuniary measures, the type of reasons put forward for making reparations by family group rather than individually, the type of criteria for distribution among members of a given family (order of succession or percentages), parameters for ensuring a fair distribution which take into account the position of women in the family, or other differentiating aspects such as whether there is collective land ownership or are other means of production.

Although it is true that this precedent has been subject to a number of criticisms because of the way it limits the right to comprehensive reparation and its insufficient appraisal of criticisms of the administrative victim reparation program (Sandoval 2017), I stress, in methodological terms, that the I/A Court HR attempts to take into account the dilemmas faced by a reparation policy aimed at millions of victims in a context where resources are scarce. The Court also refers specifically to the dilemmas facing transitional justice in terms of redressing systemic, mass violations, and proposes a number of criteria that can be considered when weighing up conflicting principles.

A further example of recent deliberations on transitional justice matters can be seen in how the I/A Court HR, in the *Maldonado* case, analyzed whether the 50-year confidentiality restriction placed on Valech Commission files (National Political Imprisonment and Torture Commission during the Chilean dictatorship) constituted a violation of the right to conduct investigations with due diligence.

The deliberation process carried out by the Court is interesting. After verifying the legality and purpose of the measure, the Court analyzed the necessity requirement and concluded that it had not been proven that there would have been any other way of getting evidence, were it not for the confidentiality measures. As far as strict proportionality (balancing) is concerned, what the Inter-American Court did was place on the representatives of the victims a significant burden of argumentation respecting the extent to which the rights involved had been

affected. In effect, the fact that an exception to the confidentiality measure existed when people who had given evidence decided, of their own free will, to hand their statement over to third parties was taken into consideration, since it showed that the sacrifice inherent in the restriction was exaggerated or excessive in comparison to the advantages provided by the restriction and achieving the sought-after goal. The Court also took into account the fact that the representatives failed to explain why the interested parties did not authorize their statements to be divulged to the Valech Commission, or why they did not repeat them to the judicial bodies carrying out investigations into cases of torture against them. In short, the representatives failed to explain clearly why they could not have obtained the information contained in the Commission's files by other means.

In both the *Operación Génesis* and *Maldonado* cases, conflicting rights were dealt with by analyzing how a right was affected, individually, in relation to the collective implications of the measure, taking sufficiently sound reasons into account.⁸ This means assuming that the rights involved are optimization mandates that can be weighed against other principles and do not constitute rules; in other words, they are regulations that apply under all-or-nothing rules. These jurisprudence trends are thus in line with the approach used by Sánchez and Uprimny to defend deliberation methodology as a strategy for redefining the scope of certain rights in transition contexts.

The Margin of Discretion and the Inter-American System Review of Internal Deliberations⁹

The Sánchez and Uprimny text introduces a number of elements about how the debate over the extent to which the margin of discretion that States have will be relevant for justifying the level of involvement of international entities that protect human rights in a transitional justice process such as the one in Colombia.

One of many relevant questions here relates to the extent to which an international tribunal like the Inter-American Court can review a decision that has been made, and arguments that have been put forward, by a tribunal, court or constitutional court relating to deliberation on diverse conflicting principles in transitional justice. Is it a review that arises when internal deliberation has been incomplete?

8 The IACHR used the ban on regression in social rights following this logic in Report No. 38 of 2009.

9 Some components of this section are based on Parra and Huber (2012).

Who could determine whether that deliberation has, in fact, been incomplete, and how?

It should be stressed here that in some cases heard by the Inter-American Court, certain States have claimed a “margin of discretion” when deciding on conflicting rights of this type. This margin of discretion doctrine has been developed by the European Court of Human Rights since the time of the *Handyside vs. United Kingdom* case¹⁰ in relation to the ban on publishing a book deemed to be obscene. In that case, and in some of the earliest rulings on the subject, the European Court’s discussion revolved around stating that, on certain subjects relating to restrictions and sanctions associated with moral issues which explained some restrictions on the freedom of expression, States were in a better position than an international judge to evaluate differing national viewpoints on the subject.

With the passing of time, this doctrine has come to play a leading role in cases involving sensitive issues connected with moral and ethical debates, and also on questions relating to such issues as the extent of private life, freedom of expression, the non-discrimination principle, and sexual and reproductive rights. Factors taken into account when applying the margin of discretion doctrine include such things as whether there is a consensus among Council of Europe member states about the importance of the interests at stake or the best way to protect them.¹¹ The instrumental value of the margin of discretion for offering the proportionality principle a complementary role has also been suggested (Agha 2016).

“Margin of discretion” has had various meanings in doctrine and when used in jurisprudence, and it has been criticized for offering “a European level of review which is less profound than the type of review that the Court is entitled to conduct on the basis of its ‘full jurisdiction’” (Callewaert 2000, 149). This doctrine has been criticized in some instances because the European Court has used it to decide on cases where the facts are similar, but with a different standard. Recent doctrine has closely evaluated the scope of this case analysis methodology, basing its possible legitimacy and suitability on certain circumstances (Legg 2012).

The Inter-American System has generally rejected this theory, either specifically or sometimes implicitly, although a number of

10 *Handyside vs. United Kingdom* case (Application No. 5493/72), Dec. 7, 1996, paras. 48, 49.

11 *A, B and C vs. Ireland* case (Application No. 25579/05), GC, Dec. 16, 2010, para. 232.

precedents materially imply use of the margin of discretion. Some criticisms stress that, in certain instances, the Inter-American Court has imposed a “consensus” that did not exist in the region or in a specific country at the time the events occurred. Thus, for example, in cases like the *Barrios Altos* massacre, the Court decision went against the practice in various States of tolerating certain types of amnesty for serious human rights violations. In other cases, such as the *Furlan* case, the Court analyzed the impact on a disabled child and his family of a delay in a civil suit that ended in 2002. Among other aspects, it used the “social disability method” established in the 2007 United Nations Convention on Disability. A list detailing a much broader range of examples could be drawn up.

Meanwhile, in cases like *Castañeda Gutman vs. Mexico*, the Inter-American Court implicitly adopted the idea of a tacit margin of discretion when it took the view that States can design different regulation models for a right by taking into account the particular circumstances of the country in question (historical aspects, number of inhabitants, the public financing system for political parties, etc.) as well as the applicable comparative law.¹² Similarly, in the *Herrera Ulloa vs. Costa Rica* case, when studying the right to bring an appeal against the judgment, the Court expressed the view that even though States have a “margin of discretion” when it comes to regulating the exercising of this right, they cannot stipulate restrictions or requirements that go against the very essence of the right to appeal against a judgment.¹³ The appraisal carried out in the *Liakat Ali Alibux* case of the right to bring an appeal against a judgment in constitutional exemption cases included an analysis of comparative law relevant to determining minima on the subject. The level of deference to internal decisions in other cases has been considerable, and it has been recognized that some local authorities can be in a better position to make certain evidence-related decisions.¹⁴

I am of the opinion that the Court’s practice of establishing the interpretation most favorable to human rights, as per the state of the

12 I/A Court HR, *Castañeda Gutman vs. Mexico* case, *Excepciones Preliminares, Fondo, Reparaciones y Costas*. Judgment dated Aug. 6, 2008. Ser. C No. 184, para. 138–205.

13 I/A Court HR, *Herrera Ulloa vs. Costa Rica* case, *Excepciones Preliminares, Fondo, Reparaciones y Costas*. Judgment dated July 2, 2004. Ser. C, No. 107, para. 161.

14 See the *Manuel Cepeda Vargas vs. Colombia* case, where the decision relating to the scope of the pecuniary reparation made by Colombia’s State Council was respected; I/A Court HR. *Manuel Cepeda Vargas vs. Colombia* case, *Excepciones Preliminares, Fondo, Reparaciones y Costas*. Judgment dated May 26, 2010, para. 246.

discussion in international and comparative law at the time when a given case has to be decided on, is the correct one. Bearing in mind the critical human rights situation in the region, it is both legitimate and convenient that the Inter-American Court should adopt an important, leading position on matters relevant to reverting structural problems, such as discrimination. This leadership can justify the Court establishing certain minima that should be taken into account by local authorities, provided that the argument is as strict and thorough as possible.

Nevertheless, there is a need for nuances in terms of the sphere in which the margin of discretion should be applied. One such scenario relates to the discussion on the scope and extent of the rights of vulnerable minorities that have been historically discriminated against. In these cases, I believe that the Court should establish principles when there is no specific consensus in the region. To this end, it should use concepts, definitions, and decisions that exist in other protection systems and decisions made by high courts on comparative law that reflect the most favorable interpretation of conflicting rights. This is what happened in the *Atala Riffo and girls vs. Chile* case, when the Court conducted a comparative law analysis and established a clear trend in the last 20 years toward the need to expand the protection afforded to sexual minorities.

A different matter entirely is the scenario where the issues discussed relate to ending an armed conflict that has lasted several decades and where there is no regional “consensus” as to the type of deliberation needed for peace negotiation and construction processes. The prudent thing for the State to do would be to adopt an important margin of discretion, with a non-negotiable minimum: open up channels to guarantee the rights of victims wherever possible in the context of the deliberation required for achieving a stable, lasting peace.

The Sánchez and Uprimny text proposes a basis for supporting preliminary elements of what could be an Inter-American margin-of-discretion doctrine in transitional justice cases that treat victim rights seriously.¹⁵ In particular, the text illustrates the scope and limits of human rights standards drawn up in relation to the right to justice in peace processes and specific controversies, and this provides some justification for granting a certain deference to internal institutional strategies that attempt to treat all conflicting rights seriously, or allowing these to prevail. On the other hand, they illustrate the relevance and the possibility of carrying out controlled deliberations which place

15 Arguments in favor of an Inter-American margin of discretion on this issue can also be seen in Acosta-López (2016).

considerable importance on the rights of victims. The transition in Colombia illustrates how margin-of-discretion doctrine could contribute to a more legitimate, more suitable Inter-American System intervention, one that concentrates on interventions aimed at strengthening and complementing internal deliberation, rather than destroying it or making it unviable.

Final Considerations

The Sánchez and Uprimny text is an extremely important contribution to the idea of giving serious consideration to the differences that exist between transitions from a dictatorship to a democracy and transitions from a war to a political solution to an armed conflict. The argument put forward by the authors contains elements to justify a rethinking of how Inter-American standards are constructed in this particular type of transition associated with building a stable and lasting peace.

This is particularly relevant at a time when the Inter-American System has no specific precedents for peace processes that aim to treat the rights of victims seriously but must meet the demands of a negotiated peace. Here, because of the impact that Inter-American decisions can have on a peace process, Inter-American System entities should refine their methodologies for resolving tensions between conflicting rights in transitional justice scenarios. Inter-American entities must analyze the institutional consequences of their decisions more closely; they cannot ignore the fact that when certain rights are fully met, this could be to the detriment of others. Nor can they overlook the specific challenges associated with the end of an armed conflict.

Hence the importance of the I/A Court HR and the IACHR conducting analyses on a more empirical basis and adopting a more interdisciplinary approach to tasks associated with the drawing-up of Inter-American standards and the handling of certain suppositions and dilemmas associated with transitional justice. The Sánchez and Uprimny text is an important contribution to making this possible.

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Beyond the Binary

Securing Peace and Promoting
Justice after Conflict

Discussions on the meaning and scope of concepts such as justice, accountability, and victim satisfaction continue to be fervent topics in specialized circles of what is now known as “the transitional justice field,” and in societies suffering from mass violence. Instead of solving the practical and theoretical dilemmas of these interpretative disputes, the experience and knowledge accumulated over the more than three decades that this field has been in existence have served only to deepen the debates and to adapt more of these discussions to new and constantly-changing scenarios and contexts.

The main objective of this collection of articles is to place on record the need to formulate answers to the question of the role that criminal action and punishment should play in negotiated political transitions from war to peace. There are two reasons for our making this observation. On one hand, given the institutional, legal, and political challenges facing societies that nowadays attempt to take this step, there is a need for the issue to be analyzed. On the other hand, the conclusion reached from an initial analysis is that the academic and practical discussion seems to be trapped into a polarizing discussion between those who defend a legal interpretation of the duty to investigate, prosecute, and punish, which appears to threaten the possibility of achieving negotiated transitions, and those who, in order to prevent that risk, deny or resent the existence or consolidation of such a principle.

The central purpose of this book is to initiate a conversation on how to resolve difficult dilemmas. We appreciate that some of the proposals may come across as controversial, but what we are looking for is, precisely, to open up the possibility of thinking in innovative ways about how to confront these challenges.

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