The Aim of Punishment in a Post-Conflict Context

Wendy Carazo Méndez

Introduction

While conflicts are described as inevitable phenomena for societies, the notion of 'post-conflict' does not seem to have the same fate. Indeed, the characterisation of a society as post-conflict seems to be part of an ambivalent terrain marked by misunderstanding. There are two key reasons behind this. First, the temporary nature of post-conflict settings incites one to think of a cessation of the conflict as being analogous with the term post-conflict. In practice though, it is difficult to mark the exact beginning and end of the conflict. These two points are often the result of interacting political, social, and economic factors. Second, the nature of the post-conflict context gives rise to discrepancies, allowing this term to be misleading. Particularly because within this context, violence often continues as a result of backlash against the peace process or the abandonment of weapons. Violence tends therefore to transform itself and continue with the creation of new dissident groups.[1] As an example, Christoph Harnisch, Head of the ICRC Delegation in Colombia, described it as 'meaningless' to speak of Colombia as being post-conflict, due to the multiplicity of current armed groups in the country, 'there is not one, but at least five armed conflicts in the country […] violence […] continue[s] to affect the day-to-day life millions of Colombians'.[2] Thus, there is a tendency to prefer other terms such as post-agreement or post-war,

[1] Vicent Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, 2009; Wang, Suhrke et Tjønneland, 'Governance Interventions in Post-War Situations: Lessons learned' (2005) Chr Michelsen Institute 1.

[2] Christoph Harnisch, 'Colombia: Between war and indifference. Humanitarian challenges in 2019' (CICR, 28 March 2019) <www.icrc.org/en/document/colombia-between-war-and-indifference> accessed 9 November 2019.

to mark the need to request measures to confront the ongoing violence (as opposed to post conflict).

Despite these ambiguities, this article advocates a less radical understanding of the 'post-conflict' context by supporting a definition based on the 'total or partial overcoming of conflicts'[3] and, largely speaking, of the objective of transition to stable and lasting peace. The stability of peace, then, is presented as the implementation of a series of changes that focus both on victims and society as a whole. Consequently, it is essential to understand the process of victimisation and violations, in order to guarantee justice and reparation, as well as to provide means of reconciliation. These objectives are often sought by the State through a transitional justice system.[4] Yet, stability also requires a deeper transformational objective that involves economic, political, and social change. So, justice, peace, and democracy must be understood as mutually reinforcing imperatives.[5]

However, the articulation of each of these imperatives raises significant tensions in practice - in particular, between the response to the desire for peace, the rights of victims, the State obligations established by international law, and the willingness to restore the country. Because of these tensions, the importance of a given answer to the central question about how to deal with serious violations of international human rights law (IHRL) and humanitarian law (HL) that occurred during the conflict is crucial to determining the eventual success or failure of the transition. A balance must

[3]Universidad del Rosario, 'Experimentos sobre la reconciliación política en Colombia' <www.urosario.edu.co/jurisprudencia/jurisprudencia-reconciliacion/ur/Postconflicto/> accessed 23 April 2019.

[4]The notion of transitional justice comprises 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'. UNSC 'Report of the rule of law and transitional justice in conflict and post-conflict societies establish by the Secretary-General' (23 August 2004) UN Doc S/2004/616.

[5] ibid.

then be struck between the pillars of truth, justice, and reparation as and when they are pursued by whichever concrete mechanism that is set up by the transitional justice process in a given context.[6] The absence or lack of articulation between these pillars will jeopardise the transition, making stable change impossible.[7] Despite this, it is both difficult and undesirable to have a rigid formulation for all transition processes. Only the actual experiences of the different States are reliable instances what actually occurs. In this sense, transitional justice is presented as a set of processes and techniques adopted for a determined society to allow transition – a shift – from a dictatorial regime to democracy or conflict to peace. Such a transition, which requires a confrontation with the past to approach the future, requires very significant socio-political transformations.[8]

Based on the first cases of post-conflict experiences, where the rule was the denial of responsibility and the absence of any kind of reparation to the victims, some authors argue that 'to avoid the continuing cycle of repression, the only remedy must be the recognition of an affirmative obligation on governments to investigate and prosecute gross state-attributed human rights abuses'.[9] Following this obligation, individual accountability for serious violations of international law has been a major turning point since the end of the last century. The Nuremberg Tribunal marks the first turning point by placing the principle of personal accountability in the case of widespread or systematic violations by stating that '[crimes] against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'. This principle justified an increase in criminal prosecution for the 'most' responsible offenders of the core set of human

[6] UNSC report on transitional justice (n 4). States under transitional justice may adapt different judicial or non-judicial mechanisms according to the specificities of the conflict to provide an adequate response to violations committed.
[7] ibid.
[8] Ruti Teitel, *Transitional Justice* (Oxford University Press 1997), 3-7. See also, Ruti Teitel, 'Transitional Justice Genealogy' (2002) 16 Harvard Humans Rights Journal 69.
[9] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 452.

right violations and war crimes; this phenomenon is known as 'justice cascade'.[10] In this sense, criminal justice is perceived as a legal and moral imperative for dealing with the authors of serious violations in order to ensure the effectiveness of international law. These developments have been confirmed by the proliferation of various means of prosecution, including international courts, hybrid courts, ad hoc tribunals, and even domestic institutions.[11]

The implementation of what is also called a 'revolution in accountability', based on retributivism, requires a coherent approach between the damage done to all humanity and the punishment imposed, especially based on the gravity of the violations. Following this approach, international criminal law introduced amended the Rome statute to include the criteria of 'gravity of the crime' and 'the individual circumstances of the convicted person' to justify the proportionality of the penalty.[12] Thus, the 'extreme' gravity of these two criteria may justify imprisonment for life, this being this the maximum penalty.[13] However, this approach is often confused with the objectives and pillars of the transition process. This is particularly since post-conflict contexts is a transition that is marked by a large number of violations that encompass a significant number of perpetrators. So, proportionality in these contexts can mean an 'excessive burden' for the state, both in terms of time and budget. Thus, the well-known dilemmas are created between 'justice or peace' and 'truth or justice'.

Therefore, to avoid these conflicts, the mechanisms and methodologies chosen to establish a punishment must be fully adequate to take into account the nature and extent of the conflict and the cultural, social, and political specificities. As Professor Ambos argues, the punishment practice needs a

[10] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 Journal of Peace and Research 427.

[11]The development of transitional justice understood as a change includes very significant socio-political transformations and can induce the development and change of internal institutions following international law.

[12] ICC Statue 1998, art 78 (1), also known as 'Rome Statute'

[13] ibid, art 78 (1) (b): 'A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.

modulation when it comes into tension with the other duties and purposes of the transition.[14] Yet, the admissibility of the compromise or the balance between the opposing values of justice and peace will depend on the 'sophisticated balancing of the interest of the conflict'.[15]

This article explores the aim of punishment in the post-conflict situations, based on the scope of and limits between the State's duty to prosecute and punish serious violations committed during the conflict and its consideration of post-conflict situations. The first section of this article analyses the debate surrounding punishment as an imperative. The second section looks at the conceptualisation and application of the penalty in the post-conflict phase, in accordance with the fundamental rules of international law. This section ends by outlines the impact that transitional justice has had on the design of punishment - especially through the introduction and justification of alternative penalties. exploring how these penalties have enabled a re-reading the traditional approach towards punishment.

1. Between Legality and Suitability

Punishment as an imperative?

The last century is marked by the dichotomy between the search for greater effectiveness of human rights and IHL, and a consequent increase of their violation. A major improvement in terms of effectiveness and protection took place in 1968 when the Tehran Conference crystallised respect for human rights in times of conflict. Thus, if one follows an integrationist vision, it is possible to see a fusion of these two areas of law, under the shared aim of offering more protection to specific persons.[16] This movement has

[14] Kai Ambos, 'El marco jurídico de la justicia de transición', in Kai Ambos, Ezequiel Malarino y Gisela Elsner (eds), *Justicia de Transición, con informes de América Latina, Alemania, Italia y España* (Uruguay: Georg August Universitat Gottingen y Konrad Adenauer Stiftung 2009).

[15] ibid 19.

[16] ibid. This vision is contrasted by the doctrinal conception of complementarity, which advocates coordination between protective norms to avoid gaps or the separatist who simply refuses any rapprochement between the two branches of law.

been taken up by the various United Nations bodies and the regional human rights bodies, in particular, the Inter-American Court, which brings the two branches together in their jurisprudence according to an integrationist or complementary approach, depending on the case.[17] Thus, even though more countries and societies are affected by atrocities and massive violations of human rights, a continuous effort underway to achieve its respect.

The obligation to investigate and punish is inscribed also in this vein. Even if this obligation is only explicitly stated in the 1949 Geneva Conventions, the rapprochement between the two branches has strengthened this obligation to punish through human rights in the post-conflict context.[18] In fact, this obligation was adopted in response to the practice that several States in the transition process, especially in South America, adopted in response to violations of international law (ILHR and IHL) through amnesties, during the 1970s. 'Amnesty' is understood as State decisions through which the government or ruling party decides to either prosecute or punish specific criminal conduct by past offenders, which provides 'immunity or impunity from future legal suit'.[19] The international community promptly issued a strong response to this practice. The Human Rights Committee affirmed that impunity for international violations is incompatible with the obligations contracted by a State under the Covenant on civil and politic rights and may, therefore, the 'failure to investigate the allegations of violations could in

[17] Corte Interamericana de Derechos Humanos y Comité Internacional de la cruz roja, 'Interacción entre el derecho internacional de los derechos humanos y el derecho internacional humanitario. Cuadernillo de jurisprudencia de la CIDH N 17' (2018).

[18] Geneva Conventions I and II of 1949, common articles 49 and 50, article 129 of Convention III and article 146 of Convention IV. According to the obligation to investigate and punish, the High contracting parties are obliged to 'to take all appropriate legislative measures to determine the appropriate criminal sanctions to be applied to persons who have committed, or have given an order to commit, any of the grave breaches of this Convention… and shall bring such persons, regardless of their nationality, before its own courts…or hand such persons over for trial to another High Contracting Party'.

[19] R O'Brien, 'Amnesty and International law' (2005) 74 Nordic Journal of International law 261.

itself give rise' to a separate violation of the Covenant.[20] In this regard, the Committee has recognised that: '[…] States Parties must ensure that those responsible are bought to justice'. These obligations arise notably in respect of those violations recognised as criminal under either domestic or international law, such torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearances (articles 7 and 9, frequently 6).[21] Interestingly, the committee made it clear that these provisions apply to both branches of law (IHRL and IHL) and extend 'when committed as part of a widespread or systematic attack on civilian population, these violations of the Covenant are crimes against humanity'.[22]

Several international instruments[23] and the human rights bodies' jurisprudence, especially the Interamerican Court of Humans Rights,[24] have contributed to the development within national jurisdictions of *deber puniendi* of the State regarding serious human rights violations[25]. To this, it

[20] UNCHR 'General Comment 31 in 'Nature of General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/rev 1/Add 13.
[21] ibid.
[22] ibid.
[23] For a further overview of these resolutions see Comisión Colombiana de Juristas, *Principios internacionales sobre impunidad y reparaciones. Copilación de documentos de la Organización de las Naciones Unidas* (2007) <www.coljuristas.org/documentos/libros_e_informes/principios_sobre_impunidad_y_reparaciones.pdf> accessed 12 August 2019.
[24] On the obligation to sanction and punish, it is worth highlighting among the most important Inter-American Court of Human Rights cases: *Velásquez Rodríguez v. Honduras* (1988); *Durand and Ugarte v Peru* (2000); *Barrios Altos v Peru* (2001); *Myrna Mack Chang v Guatemala* (2003); *Black River Massacre v Guatemala* (2012); *Mozote Massacre and Nearby Places v El Salvador* (2012); *Santo Domingo Massacre v Colombia* (2012).
[25] The *deber puniendi* was developed on the basis of the *ius puniendi* of the State, considered as a negative power of the State. Indeed, the ius pudiendi is presented as a limit, the state's has 'the right to punish criminal offenses pursuant to its law within the limits on the international law', see A Fellmeth and M Horwitz, *Guide to latin in International Law* (Oxford University Press 2009). The *deber puniendi*, in the contrary, is presented as the positive duty, the result of HRL. Thus, this obligation embodies the State's obligation to investigate, judge and punish serious human rights violations. See J AE Vervaele, 'Graves violaciones de derechos humanos y

has also added the principle of *aut dedere aut judicare*: to extradite or prosecute – which aims to ensure that haven will not be granted to those who commit crimes under international law.[26]Yet, despite these important developments and the 'increasing tendency in international law' to investigate, prosecute, and punish serious crimes or violations, two great debates have arisen: First, a debate on the content and the form of satisfying this obligation under international law; and, second, on the imperative nature of this obligation. [27]

Some scholars argue that each convention refers to the specific violations they protect and therefore it is not possible to state that there exists a general obligation to investigate and punish.[28] In accordance with its view, the same argument is produced under article 38(1)(b) of the International Court of Justice Statute that refers to 'international custom' as a source of international law. As Ambos argued, 'it is difficult to argue a State practice to this effect, and recourse to the latter is open to criticism since it apparently seeks to overcome the lack of State practice or even a contrary practice by simply ignoring it'.[29] This point is confirmed by the remarkable absence of the two elements necessary to establish a custom in international law, namely state practice and opinio juris. Specifically, despite the increasing existence and development of the 'justice cascade', the practice of the amnesties in the human rights violations remains constant.[30] Mallinder demonstrates that there is a widespread practice of granting amnesties in

delitos internacionales: Del ius (non) puniendi del Estado-Nación a un deber puniendi imperativo de ius cogens?' (2013) 1 Inter-American and European Human Rights Journal 104.

[26] Naomi Roht-Arriaza, 'Combating impunity: some thoughts on the way forward' (1996) 59 Law & Contemporary Problems 93.

[27] Kai Ambos, 'El marco jurídico de la justicia de transición' (n 14).

[28] Rodrigo Uprimmy, Luz María Sánchez and Nelson Camilo Sánchez: *Justicia para la paz. Crímenes atroces, derecho a la justicia y paz negociada*, (Colección De Justicia 2014).

[29] Kai Ambos, 'El marco jurídico de la justicia de transición' (n 14).

[30] T Olsen, A Payne, A Reiter, 'Transitional justice in the world, 1970-2007: Insights from a new dataset' Journal of Peace and Research 804.

cases concerning international crimes – 420 since the end of the Second World War.[31]

Similarly, the implicit character of the obligation to investigate and punish certain human rights conventions or criminal conventions has also been strongly criticised.[32] Apart from the International Humanitarian Law Conventions, that, as Adobe mentioned, incorporated this obligation in an explicit way in their conventions.[33] Indeed, international law stipulates that duties can be imposed only on States that have been expressly established and accepted them.[34] That is, the Rome Statute, firmly rooted in consensualism, establishes in its sixth recital that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for the international crimes'.[35] Despite, it is worth noting that as Wouters, quoting Tomuschat, argues, 'a mere reference in the Preamble would not suffice to derive any legally binding duty'.[36]

Moreover, the Rome Statute did not achieve unanimous acceptance of the relevant crimes. Two explanations can explain this phenomenon. First, the establishment of this positive law concerns only those parties who ratify the Statute. So, based on a dualist application of international law, the absence

[31] ibid, L Mallinder quoted in this article.
[32] The Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the Rome Statute, in this case the 'obligation' appears in the preamble, even if this obligation is not explicitly established.
[33] Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948, articles I, IV and VI ; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article 4.b; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 4, and International Convention for the Protection of All Persons from Enforced Disappearance, December 2006, articles 6.1, 20.
[34] Rodrigo Uprimmy, Luz María Sánchez and Nelson Camilo Sánchez, *Justicia para la paz* (n 27).
[35] ICC Statue art 78 n (12)
[36] Jan Wouters, 'The obligation to Prosecute International Law Crimes' (2005) College of Europe <www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf> accessed 12 April 2019.

of translation into domestic law affected its applicability in national courts.[37] Second, there is a lack of consensus on a core group of crimes, that is: core delicta gentium. Despite the consensus on the grave nature of certain violations and the awareness of how these crimes affect all humanity and 'offends the conscience and law of all nations; there is still a divergence between the violations that are part of the multiplicity of sources of international law.[38] That being said, this multiplicity, has given rise to a differentiated interpretation, especially in the fields of prescription and liability.[39] However, despite the existing debate, it can be established that through the struggle against impunity and the expansion of human rights, especially as regards the hardcore of human rights,[40] crimes committed in a generalised and systematic manner are subject to the protection of human rights.[41]

The debates take on a more interesting dimension concerning the content of the obligation. Like the debate on its binding character, the content of this duty finds some obstacles. The first obstacle is the multiplicity of sources, especially regarding the duty to punish. Even though prosecuting and punishing stands out as a constant in the reading of different sources of this duty, must punishment be strictly enforced through criminal law and a

[37] Marko Novakovic, 'Basic Concepts of Public International Law – Monism & Dualis' (2013) University of Houston Law Center 244.

[38] John AE Vervaele, 'Violations graves des droits de l'homme et crimes internationaux, Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens' (2014) 3 Revue de science criminelle et de droit pénal comparé 487.

[39] ibid.

[40] Which includes the right to life, to personal integrity, to the prohibition of slavery and servitude, the prohibition of discrimination, the right to legal personality, and protection of the family and the rights of the child.

[41] As example the case of the Inter-American Court of Humans Rights, this obligation has been deduced from the systematic interpretation of articles 8.1 and 25.1 in relation to article 1.1 of the American Convention of Humans Rights, namely the judicial Guaranteed and Judicial Protection, in relation to the general obligations contained in the article 1.1. In the same way, the International Criminal Court, deduce this obligation from the items 4 to 6 and 10 of its Preamble. In this sense, if States do not satisfy this obligation, whether due to their lack of will or their lack of capacity to do so, the International Criminal Court has the subsidiarity to judge these crimes.

custodial sentence?[42] The answer seems to be, at first sight, yes as it is possible to focus on the very definition of amnesties, which creates a parallel between the absence of an investigation 'with a view to their indictment, detention, prosecution and, if found guilty, sentencing to appropriate penalties'.[43] This, especially concerning proportionality, leads us to think that the retributivism system that allows a 'measurability of the prism of the gravity of the fact' is the only solution.[44] However, upon reading Orentlicher's 2005 updated principles against impunity, it is stated: 'that States must adopt a range of measures to combat impunity'.[45] The reference to a whole range of measures then makes us move away from the premise of prison penalties as the sole appropriate approach. The question is why punishment remains attached to the idea that prison is the only solution in the context of massive and/or systematic violations of human rights. This persistent idea could be explained by the symbolism of the sentence and the link between its absence and impunity.

The symbolism of punishment

From earlier developments, it can be assumed that justice has a predominantly retributive character, which was applied through practices of prosecution and punishment. Thus, following the retributivist vision, to

[42] The Genocide Convention, art 4, art 3 Geneva conventions : 'bring such persons [the persons alleged to have committed, or to have ordered to be committed the crimes] before its own courts or hand such persons over for trial to another Hight Contracting party'; The International Convention against Enforced Disappearance 'prosecuting those responsible', the Rome Statute refers 'duty of States to exercise their criminal jurisdiction' Preamble: 'obligation of the State to initiate criminal investigations in order to determine the corresponding responsibilities' ; See also : *Massacres of El Mozote and Surrounding Places v El Salvador. Merits, Reparations, and Costs* (25 October 2012) Series C No 252 [298]; *Contreras et al v El Salvador* (31 August 2011) Series C No 232, [135]; See also: *Gomes Lund et al (Guerrilla do Araguaia) v Brazil* (24 November 24 2010); *Radilla Pacheco v Mexico* (23 November 2009); Series C No 209 [179]; *Anzualdo Castro v Peru* (22 September 2009) Series C No 202 [180]; *Massacre of the Two Erres v Guatemala* (24 November 2009) Series C No 211 [232].

[43] UNCHR 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher' (2005) UN Doc E/CN 4/2005/102/Add1.

[44] Andrew Von Hirsch, 'Proportionality in the philosophy of punishment' (1992) 16 Crime and Justice 55.

[45] UNCHR 'Report of the independent expert' (n 43).

correct the moral wrongdoing is necessary to offset the moral imbalance caused by the crime.[46] In this sense, if serious violations of human rights are understood as the most heinous deeds man can commit, as result of 'a deliberate imposition of underserved suffering, which is considered an unconditionally forbidden evil', it is stated that the punishment must follow the principle of proportionality.[47] However, the requirement of proportionality of the punishment - that 'the proper amount of punishment to be inflicted upon the morally guilty offender is the amount that fits, matches, or is proportionate to, the moral gravity of the offence'[48] - cannot always be reached, nor can it always be desired in post-conflict context. In fact, as Malarino establishes '[even] if one assigns punishment a major role in the preservation of peace, one should not rely more on its best when its application, instead of ensuring peaceful social life, brings it into play and thereby brings into play the primary reason for criminal law. Therefore, it is possible to argue that whenever the use of criminal law frustrates the basic purpose it is called upon to fulfil, then it is no longer justified'.[49]

In this regard, Teitel asserts, the concept of justice is far from being a static concept. In her article on transitional justice, she argues that the conception of justice that is established in post-conflict situations is partial and contextual and has to be adjusted by the relevant limiting political and legal conditions.[50] Justice in post-conflict contexts can therefore be detached, depending on their context and specificities, from the traditional conception of retribution. On the one hand, the punishment of violations of international law reject the classical conception of *lex talionis*, 'eye for an eye, tooth for a

[46] J L Mackie, 'Morality and the Retributive Emotions' (1982) *Criminal Justice Ethics* 377. See also, CL Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London: Frank Cass 2004).
[47] Sharon Anderson-Gold and Pablo Muchnik (eds), *Kant's Anatomy of Evil* (Cambridge University Press 2010).
[48] Joel Feinberg, 'The Classic Debate' in *Philosophy of Law* (Boston, MA: Cengage Learning 2004).
[49] Ezequiel Malarino, 'Transición, Derecho penal y Amnistía. Reflexiones sobre la utilización del derecho penal en procesos de transición' (2013) Revista de derecho penal y criminología 205.
[50] Ruti Teitel, *Transitional Justice* (n 8).

tooth', that is punish to the same extent that one harmed the victim.[51] Indeed, imposing equal treatment would lead to reducing the sanction to a new violation, that is, the victim would become an executioner. Similarly, the systematic application of punishment that could come closer to revenge is rejected. In the second place, the specificity of post-conflict situations allows States to adequately state the notion of proportionality by articulating the objectives of transition - truth, justice, and reparation.[52] For example, there may be reductions in sentences if ex-combatants are involved in the truth or reparation process.

Considering the nature of the post-conflict context, achieving proportionality in criminal law in the face of the atrocities committed may seem almost impossible. In this sense, the will to promote justice, hand in hand with penitentiary fetishism, at all costs, remains present in the transitional scenario, even though this may threaten peace. Rather, punishment must be weighed with other principles sought by accountability such as peace, 'security and well-being of the world'[53], to deter future violations,[54] or to reinforcing and elaborating global human rights.[55] In this way, punishment is framed in multiple and diverse targets – mentioned above - that seek to remedy the breakdown of societal structures as a result of mass violence.

[51] This follows the Kantian vision: 'whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself', see Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996).
[52] See introduction.
[53] ICC Statute (n 12).
[54] In this way, some scholars have established that deterrence is the inhibiting effect of sanctions on the criminal activity of people other than the sanctioned offender, see H Kim and K Sikkink, 'Explaining the deterrence effect of human rights prosecutions in transitional countries' (2010) 54 International Studies Quarterly 939. They establish also that deterrence can join the function of prevention because the actual punishment can influence the behaviour of future perpetrators.
[55] CL Sriram, *Globalizing justice for mass atrocities: A Revolution in accountability*, (Routledge 2005).

In this regard, it seems inevitable to return to the vision of Arendt on the existence of crimes 'which the men can neither punish nor forgive'.[56] According to her, and based on Kant, these crimes are not only immeasurable in terms of their horror but also in terms of the motives of their perpetrators, particularly because she wonders, 'Is it possible to do evil [...] in the absence [...] of any motive, any incentive by interest or volition?'.[57] If this vision is taken as a starting point, a penalty given without an understanding of the subject's motive in a context of massive violations would mean no repercussion for criminal and would not serve the mission of criminal law, which is partly to allow the reintegration of the offender . Thus, Arendt establishes the difference between the perpetrator and the criminal himself. This places crime in an unforgivable hierarchy, and it places its perpetrator or criminal agent in a category that can be forgiven. This distinction is possible 'insofar as, having regained his capacity to think and remember, he will be able to repent, and will no longer be what he was, because he has once again become someone who, and he is no longer, and because, in retrospect, he did not contribute to the coming of the unforgivable'.[58]

Considering these premises on the morality of punishment, an important question arises: to what extent should peace and justice weighting be compromised? According to Mark Freeman, transitional contexts 'does not call for retroactive justice at any cost' and call, to the contrary, for a balance between addressing the past violations and the need for peace, democracy, equitable development and the rule of law.[59] In other words, and as Malarino argues, there must be '…as much justice as peace permits…'.[60] Malarino

[56] Hanna Arendt, *The Origins of Totalitarianism*, 3rd ed rev (New York: Harcourt, Brace Jovanovich 1968) 591.
[57] Hanna Arendt, 'Quelques questions de philosophie morale' in *Responsabilité et jugement*, trad. JL Fidel, (Paris, Payot 2005).
[58] Claudia Hilb, 'Des crimes que l'on ne peut ni punir ni pardonner' Penser avec Arendt. Dans le débat sur le passé récent en Argentine' (2002) <http://lcsp.univ-paris-diderot.fr/Arendt/pdf/hilb.pdf> accessed 15 April 2019.
[59] Marc Freeman, 'What is transitional justice?' (2003) ICTJ, quoted in Eric Sottas, in 'Transitional justice and sanctions' (2008) 870 International Review of the Red Cross 371.
[60] Ezequiel Malarino, 'Transición, Derecho penal y Amnistía' (n 49).

establishes, correctly, that the optimal punishment under normal situations 'loses strength in borderline situations in which punishment -or its intents- would jeopardise peace and this the life and essential rights of citizens'.[61]

Several major implications from this analysis. First, a balance must be operated in a causal manner and only if the conflict between interests demonstrates that both cannot be achieved at the same time. Second, this balance cannot translate into a total absence of accountability. Therefore, international law demonstrates that the total renunciation of persecution or total amnesty for gross violations of human rights and certain international crimes such as genocide, crimes against humanity and crimes of war, are outliers.[62] This point brings us closer to the third implication: the modulation of the punishment - or the alteration from its essence based on a holistic approach to transition. Thus, Teitel establishes that the punitive approach seems to always return one way or another to the retributive vision with the desire to make the criminal pay. The assessment of the role of punishment must begin with a distinction between the process and the punishment. If legal proceedings in transitional contexts have a necessary function that is difficult to substitute, punishment can have a secondary role. In this sense, the punishment might take different forms that would include alternative or suspended penalties, and, in this case, there would be non-compliance with international standards.

The following issue becomes under which criteria can a differential treatment be applied to the perpetrators of these crimes. This addresses the traditional debate between the retributionists and preventionists. The certain social costs of attempting to apply penalties for a purely intimidating purpose far outweigh the future and hypothetical benefits pursued for that purpose.[63] In other words, in cases of transition, it seems inadmissible to jeopardise the hypothetical benefits of the penalty against concrete and real risks. Even less so when the benefits are as high as the end of the internal conflict. It should also be borne in mind, as stated above, that 'the ideal of

[61] ibid.
[62] IACHR, *Massacres of El Mozote and Surrounding Places v El Salvador. Merits, Reparations and Costs* (25 October 25) Series C No. 252.
[63] Ezequiel Malarino, 'Transición, Derecho penal y Amnistía' (n 49).

punishment, which can be shared in normal situations, loses its strength in extreme situations'.[64]

This conclusion reflects the fact that the adjustment of punishment through reduced sentences, or other alternative measures, can be accepted in certain contexts. With the growing recognition of the importance of these balances when punishment is articulated, as mentioned above, with other imperative conditions such as 'the abandonment of weapons, recognition of responsibility, contribution to the clarification of the truth and the comprehensive reparation of victims, the release of abductees and the release of illegally recruited miners'.[65] To focus on this is possible if one takes into account that the norm establishing the duty to investigate, prosecute and punish serious violations of human rights is a principle, not a rule.[66] Therefore, the punishment does not need to entail the characteristic of the deprivation of liberty and may be weighed against other concerns. This weighting should be rejected only in cases where impunity is the ultimate objective.

2. From commitment to the establishment

Following the previous arguments, punishment in post-conflict transition contexts calls for a reconsidering on its purpose. Its purpose must be separated from the retributive doctrine, from evil claims to evil, that is, to give a penalty equivalent to the harm caused, without regard to the morality of the individual, the proportionality of the penalty, the respect of general procedural guarantees, or even opting for a prison to life without guaranteeing the basic rights needed to survive and sustain a reasonable way of life. Therefore, justice would be inscribed in criminal fetishism and

[64] ibid 211.

[65] Rodrigo Uprimmy, Luz María Sánchez and Nelson Camilo Sánchez, *Justicia para la paz* (n 27).

[66] Principles are understood as mandates of optimisation 'that order that something is done to the greatest extent possible according to factual and legal possibilities'. In contrast to the norm that requires 'full compliance and, to that extent, can always be only breached or complied with. If a rule is valid then it is mandatory to do precisely what its commands, no more and no less'. See A Robert, *Theoria de los derechos fundamentales* (Centro de Estudios constitucionales de Madrid 2003).

punishment in vengeance. The model of judicialisation and full punishment then becomes inappropriate, a system of total and unconditional amnesties.[67] Accordingly, the responsibility of the perpetrators joins the sine qua non imperative to re-examine past violations as a condition for establishing a solid basis for the reconstruction of the State. In this sense, the establishment of responsibility under all the guarantees and conditions of the criminal process tends to be perceived – even when there is no proportional punishment – as 'a unique ordering effect of a reality which would otherwise be incomprehensible and unbearable'.[68]

In this regard, the priority of the punishment may follow three theoretical approaches.[69] First, the maximalist approach, which claims retributive justice and claims that an exemplary punishment under the requirements of proportionality is the only way to ensure that these violations are not repeated and that the law is enforced - two essentials conditions to a successful transition.[70] This argument is embraced by the defenders of retribution, setting out moralistic vision of violations. In this sense, the atrocity and the hateful nature of these acts are so harsh, that their unquestionable rejection must be translated into an exemplary punishment for the individual or 'enemy' of the peace that broke the system. In other words, the maximalist view of the 'necessity' of punishment with exemplary penalties is perceived by some sectors of society as the only logical and thinkable consequence of the acts committed. This view responds to the function of punishment, known as negative general prevention.[71] According to this theory, the purpose of the penalty would be to deter the perpetration

[67] Kai Ambos, 'The legal framework of transitional justice: a systematic study with a special focus on the role of the ICC' in Kai Ambos et al (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Berlin: Heidelberg 2009).
[68] Rodrigo Uprimmy, Luz María Sánchez and Nelson Camilo Sánchez, *Justicia para la paz* (n 27) 106.
[69] Tricia D Olsen, Leigh A Payne and Andrew G Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 Human Rights Quarterly 980.
[70] See introduction of this paper.
[71] Anselm V Feuerbach, *Tratado de derecho penal* (Zaffaroni, Eugenio Raúl, Irma Hagemeier [trs], Hammourabi 2006).

of future violations through instillation of the norm. However, there is little evidence of this view's effectiveness, especially with regard to serious crimes.

In practice, this need for an exemplary punishment may represent an obstacle to transition. For instance, in the Colombian transition, 50.2% of respondents rejected the peace agreement in 2006, arguing that prison must be the way out and that the actual agreement will result in impunity for the FARC.[72] However, several criticisms can be made of this response. First, the very high abstention of 62.59% must be criticised given the importance of the plebiscite: 'Do you support the final agreement for the end of the conflict and the construction of a stable and lasting peace?' Second, the fact that the 'NO vote' obtained a 'victory' with less than a 1% difference. Third, the fact that the populations and areas most affected by the conflict voted for themselves almost unanimously.[73] In other words, here there is support for the retributive process, as opposed to the certain benefits of the peace treaty. As Erika Guevara-Rosas, Americas Director at Amnesty International argues, 'although imperfect, the agreement represented a concrete way forward for peace and justice'. This result is the consequence of an oversimplification in the public debate on the aims and limits of criminal justice.[74] In this sense, Molano states that 'the culture of justice in Colombia seems to continue to be dominated by an instrumental conception of justice in which revenge takes precedence over effective satisfaction and rational arbitration of rights'. It should also be noted that 'punitive populism' is largely gritted by the upper classes of society, who suffered indirectly or are alien to the conflict, as the

[72] Several central points were raised so that the capitals will vote for the first no. Fist, big publicity (cheat that was sanctioned, with the idea that he was going to give the country to Farc among others.) in which he tried to convince that the peace accords were contrary to the values considered essential for Colombians. There was also a focus on the expected low prison sentences.

[73]Registraduria nacional del Estado Civil, official results of the plebiscite (2 October 2016) <https://elecciones.registraduria.gov.co/pre_plebis_2016/99PL/DPLZZZZZZZZZZZZZZZZ_L1.htm> accessed 10 April 2019.

[74] Andrés Molano-Rojas, 'Justicia para el posconflicto: viejos y nuevos problemas en escenarios complejos' in Andrés Molano-Rojas (ed), *El posconflicto en Colombia. Reflexiones y propuestas para recorrer la transición* (Konrad Adenauer Stiftung 2015).

plebiscite showed. Moreover, support for the retributive process (exemplified in the Colombian case study) as opposed to the certain benefits of the peace treaty, goes against the will of the victims of the conflict. The vote has led, in recent years, to great uncertainty about the peace process, with important consequences for direct victims, ex-guerrillas and society in general. Similarly, this vision of the effective execution of punishment can generate an obstacle to the real resocialization of ex-combatants, creating more isolation and stigmatisation[75].

The second approach is 'the moderate approach', based on the need for some kind of attribution of responsibility, but the approach responds more to concepts of restorative justice. Its purpose is 'creat[ing] peace in communities by reconciling the parties and repairing the injuries'.[76] The aim is to repair society as a whole, allowing for a reconstruction process based on face-to-face encounters between the victim and the offender, to discuss the gross violations, their consequences and the means of reparation.[77] In this method, the practise of truth-telling, official apologies and events are all seen as means of accountability.[78] This approach would respond to general positive crime prevention, where punishment even if it is minimal, seeks to re-establish confidence in the community about the importance of respect and the 'ethical-social value' of human rights.[79]

The third approach adopts a holistic method. This approach asserts that the retributive or extrajudicial approach is insufficient. An articulation of these two mechanisms then becomes necessary to establish an effective and satisfactory response to the conflict. The holistic approach represents a

[75] Rodrigo Uprimmy, Luz María Sánchez and Nelson Camilo Sánchez, *Justicia para la paz* (n 27), 113-115.
[76] Howard Zehr, 'Restorative Justice: The Concept' (1997) 59 Corrections Today 68. See also Elmar Weitekamp and Stephan. Parmentier, 'Restorative jstice as healing justice: looking back to the future of the concept' (2016) 4 International Journal 141.
[77] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War,* (Cambridge: Polity, 2002). See also E Kiss, 'Moral Ambition Within and Beyond Political Constraints' PUP (2000).
[78] Rodrigo Uprimmy, Luz María Sánchez, and Nelson Camilo Sánchez, *Justicia para la paz* (n 27)107.
[79] ibid 113-115.

comprehensive approach that allows 'the disintegration of dichotomies' between truth and justice.[80] Indeed, the rejection of purely retributive and restorative forms of justice allows not only for a complete approach to the post-conflict situation, but also, a return in the primary sense of the term, to responsibility, which finds its Latin roots in *respondeo*, that is giving an answer to the impact of their actions. This approach is crucial in the case of complex transitions, with the multiplicity of perpetrators and violations, since it allows us to understand accountability in terms of retribution. More importantly, it allows for a broad understanding of the conflict and thus the realisation of broader objectives such as reparation, reconciliation and healing. In the same way, Pablo de Greiff, in his first annual report in 2012 as the Special Rapporteur on the promotion of truth and justice, stated that reparation and guarantees of non-recurrence establish:

> That practice has shown that isolated and piecemeal prosecutorial initiatives have not quelled the claims for forms of justice other than mere prosecution. There is nothing unusual about criminal justice in this respect. The same is true of all other measures under the mandate; truth-seeking exercises, even thorough ones, when implemented on their own, are not taken to be coterminous with justice, for adequate redress is not exhausted by disclosure. Justice is not merely a call for insight but also requires action on the truths disclosed. Similarly, reparations in the absence of prosecutions, truth-seeking or institutional reform can easily be seen as an effort to buy the acquiescence of victims. Finally, measures to reform institutions, such as vetting, in the absence of the other mechanisms, will be both inadequate to respond to the violations to which they seek to respond and insufficient to guarantee non-recurrence.[81]

In other words, the post-conflict situation must address major challenges that cannot be addressed by mere condemnation of the offender. The severity of the punishment is not correlative to the success of the transition.

[80] Ruti Teitel, *Transitional Justice* (n 8).

[81] UNCHR 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence Pablo de Greiff' (2012) UN Doc A/HRC/21/46.

On the other hand, the different accountability mechanisms established and the open participation of the different actors in the conflict, which call into question oblivion and impunity, can be important factors in determining success.[82] The holistic system appears as the appropriate answer since it allows it to develop an adequate response for each situation, taking into account the specific context, which is crucial in a negotiated settlement of conflict. This approach makes possible the 'disintegration of dichotomies' between truth and justice. Likewise, Nino argues for a 'permissive retributivist' system. He holds that 'a past wrong makes the criminal lose his immunity from punishment, but whether the state is morally obligated to punish him depends on the consequences of that punishment'.[83] In other words, for him, moral condemnation of the past wrong is the most important element, but this does not necessarily translate into punishment in the form of deprivation of liberty.

Punishment then takes a broader sense and pursues the objectives of social reconstruction, as well as regenerating the destroyed social fabric, and guaranteeing a sufficient symbolic effect in terms of reaffirming human rights and citizen confidence.[84] In other words, these objectives will be ensured by establishing the truth in the broadest possible sense, leading to the establishment of clear patterns of violations and responsibilities, informing the victims and society. So, it is clear that 'the truth constructed through the judicial, extrajudicial and social mechanisms would be a more complete, integral, global, profound, relevant, victim-sensitive, inexpensive and agilely produced truth'.[85]

The complementary relationship between judicial and extrajudicial mechanism is highlighted against actual practices, in which truth

[82] M Minow, *In Brown's Wake. Legacies of America's Educational Landmark* (University Press 2011).
[83] CS Nino, 'The Duty to Prosecute Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 The Yale Law Journal 2620.
[84] J Tamarit-Sumalla, 'Comisiones de la verdad y justicia penal en contextos de transición' (2010) 100 Revista para el análisis del Derecho 3.
[85] R Uprimny, and MP Saffon, 'Verdad judicial y verdades extrajudiciales: la búsqueda de una complementariedad dinámica' in Justicia transicional: teoría y praxis (Universidad del Rosario 2006).

commissions were presented as an alternative to criminal proceedings. In fact, in the beginning, these truth commissions arose in the context where criminal prosecution might have jeopardised the transitions to democracy or peace, presenting themselves as means of providing a degree of accountability for the past human rights violations in cases.[86] However, since there is no single model to follow, such a commission's composition will depend on the context and practical needs of each state in transition. For instance, in the Colombian transition, according to their context and needs, the State established an integrated system based of truth, justice, reparation and non-reparation with three institutions: The Special Jurisdiction for Peace, which the judicial body responsible for prosecuting the most atrocious crimes; The Truth Commission; and the Special Unit for Finding Missing Persons.[87] This system represents the most holistic, wide-ranging effort to address the root causes of conflict and fulfil victims' rights in actuality.[88] However, as Orozco rightly points out, transitional justice is always contextual, no matter how much they fuse universal values.[89] Punishment in post-conflict situations should not, therefore, respond in a disconnected manner to the specificities of the State or to the proportionality between the seriousness of the crimes based on a maximalist view. In this sense, Professor Ambos is right in that a model of judicialisation and full punishment is as inappropriate as one of total and unconditional amnesties. A balance must be made between the real pros and cons and from this, a system must be created that responds in the best possible way to the post-conflict objectives.

---

[86] UNSC 'Report of the rule of law and transitional justice' (n 4)

[87] For more information: Government of Colombia and FARC, *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera,* signed on 24 November 2016, available online at <www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> accessed 12 June 2019. At present, this Agreement has not officially been translated into the English language.

[88] ICTJ, 'Background: After Decades of Conflict, Cementing Peace and Securing Justice for Victims in Colombia' <www.ictj.org/our-work/regions-and-countries/colombia> accessed 12 June 2019.

[89] I Orozco, 'Lineamientos de política para la paz negociada y la justicia posconflicto'2012 *Fundación Ideas para la Paz Working Paper*.

Conclusion

Post-conflict situations are subject to major social, cultural, legal and economic challenges to redressing their situation and ensuring the resolution of the conflict. In these processes, the punishment of the perpetrators of serious violations is presented as a social imperative, to prove that the behaviour carried out is unacceptable and, in turn, a legal imperative. However, these imperatives can create problems by placing their legality and suitability in conflict. It is for this reason that the holistic approach to addressing serious violations during conflict is crucial to properly achieving transition objectives. This approach offers the advantage of being able to establish, depending on the context of each society, a balance between the scope and limitations of as well as making an adaptation or balance between the needs of the victims, the state's obligations and the realities of the state. The notion and functionality of punishment are also subject to controversy, underlining, the conflicts of a classical conception, the criminal fetishism, as well as the oversimplification of its notion and questioning its necessity and usefulness in cases of transition. In that sense, this article demonstrated that punishment in a post-conflict process does not lead to an imperative [that requires imprisonment] but allows for punishment that can be achieved through other mechanisms. It responds to the imperatives necessary for transition, both for victims and for society. To this end, the sanction must be subject to balance, mitigation or suppression, provided that there are more important principles to protect and the imperatives permit this.