Transitional Justice, Complementarity, and How the Colombian Case Affected the Notion of "Justice" inside the ICC System

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Abstract: The rules governing the power of the International Criminal Court resort to a blurred concept such as that of "justice". Moreover, this problem is compounded by the fragile balance on which transitional justice processes rest, particularly those in which it is accepted that the criminal sanction may be turned down in favor of the protection of higher interests. The outcome of this framework in a concrete case like the Colombian one could not have been any different than what it has been: almost twenty years of preliminary examination, a civil war that is not over yet, and much uncertainty. This article is an attempt to demonstrate how the combination of transitional and restorative justice is not only well possible but also compatible with the Rome Statute system. The norms of the ICC statute, both national and international case laws, and doctrinal interpretations all together show that if justice does not have a proper definition, it is thus able to acquire several different meanings, one of them being a system that does not pay tribute to the past but to the reconstruction of the future. The validity of the theoretical reconstruction is strengthened by the Colombian case and its historical, political, and legal aspects. The quest for peace has been conducted through instruments like amnesties and reduced sanctions, showing that this is a possible path. The silence more than the words of the International Criminal Court contributed to this answer: transitional processes that do not have at their core a retributive vision, even excluding criminal sanctions, are compatible with the Rome Statute.

Keywords: Transition; Reconciliation; Complementarity; Colombia; Justice.

1 Introduction

The Rome Statute established a new criminal justice system, different from that of its constituent member states. The introduction of an additional punitive system raised concerns regarding its legitimacy and the effectiveness of its enforcement. In the past, the International Military Tribunal at Nuremberg and the ICTY and ICTR jurisdictions enjoyed primacy over national ones. In this case, the choice made by the drafting countries has fallen on the principle of complementarity. Hence, the International Criminal Court is only allowed to intervene in cases in which States fail to prosecute international crimes over which the Court has jurisdiction. However, problems arise in determining when a State is abdicating its punitive magisterium, as it could simply be disregarding a (perhaps excessively) retributive viewpoint, considering interests beyond those of strict punishment.

When transitional justice mechanisms come into play, these problems, or at least some of them, become even more acute.

The case of Colombia is particularly illustrative, given that the country has been subjected to an uninterrupted preliminary examination by the International Criminal Court since as far back as June 2004[1], yet without it ever resulting in substantive action. The lack of clear fundamental principles in the Court's system, such as the lack of an express indication of the purpose of its sanctions, may be the

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1. Office of the prosecutor, Informe sobre las actividades de examen preliminar (December 14, 2020), available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-col-spa.pdf (last visited November 5, 2023).

reason why the Court is perceived as not knowing what direction to pursue[2]. Trying to reconstruct such indications, albeit minimally, is the task this article is envisaged to fulfill. To achieve this assignment, firstly the notions of transitional justice and complementarity will be analyzed in their meanings and implications. Then, the interpretation of art. 53.1 (c) ICC St and the concept of justice given by the OTP, international and national case law and scholars will be discerned. Lastly, the Colombian case – in its historical, political, and legal aspects – and its impact on the notion of "Justice" inside the ICC system and on complementarity will be inspected.

2 Transitional Justice

Before attempting to navigate the interactions between national systems, the Rome Statute, and their possible frictions, an attempt

2. The absence of this reference is not something new in international criminal law. The Charter of the International Military Tribunal at Nuremberg only affirmed that The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just (Article 27, Charter of the International Military Tribunal at Nuremberg). The ICT, in the elebi i case, stated that in the determination of the sentence retribution, protection of society, rehabilitation, and deterrence shall be considered (Muci et al., Judgement, ICTY, IT-96-21-T, para. 1231-1234). Nevertheless, in the Furund ija case the Court then demanded freedom from a definitive list of sentencing guidelines, stating that The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal. Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now (Furund ija, Judgement, ICTY, IT-95-17/1-A, par. 238, later confirmed in Muci et al., Judgement, ICTY, IT-96-21-A, par. 715). Thus, the resulting scenario is a system characterized by a wide discretion and incoherence of solutions (Enrico Amati, et al., Introduzione al diritto penale internazionale at 278, (Giappichelli Editore 4th ed. 2020 [2006]). If one considers how the Yugoslavian Criminal code inspired the criteria indicated in the above-mentioned elebi i case (Muci et al., Judgement, ICTY, IT-96-21-T, par. 1230) it is evident how the ICC system, which lacks this strong national link, could not take up these indications. For a further reflection on the purpose of sanction inside the Rome Statute, see infra par. 4.3.

should be made to reconstruct what is meant by transitional justice and complementarity (see infra para. 3).

Transitional justice, in the definition given by Gabriele Fornasari, refers to "the transition of a state from a situation in which fundamental human rights are systematically violated by those in power to a situation in which respect for them is restored"[3]. The ways such a transition can occur are numerous and diverse. Due to the diversity of transitional justice methods and solutions available, it can be challenging to discuss the topic cohesively. Hence, it becomes necessary to turn to classification, as it offers guidance to a better understanding of these phenomena.

Jörg Arnold's work may serve this purpose. Arnold distinguishes between the conclusion model (Schlußstrichmodell), which entails a total renunciation of criminal sanctions, the model of criminal persecution (Strafverfolgungsmodell) in which the repudiation of certain acts and, to some extent, even of the ideology underlying them, are emphasized and the conciliation model (Aussöhnungsmodell) as in the case under examination in this article[4]. Examples and criticalities can be found for each model: in the case of the transition in Spain following the Francoist dictatorship, the population decided to close their eyes, not to look back, and to obstruct any attempt to shed light on the past; in the judgments, following the German reunification, having as defendants the guards placed in charge of guarding the Berlin Wall, to achieve justice, twists of the cardinal institutions and principles of criminal justice, first and foremost non-retroactivity, were accepted.

Arnold himself emphasized that these classifications were merely models, within which further subcategories could be identified. Since this shall not be the intent of this work and specific literature already exists[5], we can focus on how the models identified by Arnold, at a date before the entry into force of the Rome Statute, could in theory interact with the system of the International Criminal Court. The criminal

3. Gabriele Fornasari, *Giustizia di transizione e neopunitivismo: il campo di tensione tra garantismo penale e repressione delle violazioni sistematiche dei diritti umani* at 1 (2010).

4. Gabriele Fornasari, *Giustizia di transizione e diritto penale* at 12 (Giappichelli Editore 1st ed. 2013), citing Jörg Arnold, Volume I, Einführungsvortrag: Modelle strafrechtlicher Reaktion auf Systemunrecht at 11 ff. (Iuscrim, 2000).

5. See id. at 12 ff.

prosecution model seems to be the one most in line with the dictates of the Statute (and especially of the Court's Prosecutor's Office, see infra para. 4.1.), whereas that of the conclusion model is the furthest from the objectives set out in the Statute already in its Preamble[6]. The rationale behind the conciliation model may instead lead to the greatest doubts about the possibility of supranational intervention. The prospect that in these models, the threat of criminal intervention may be secondary (as in South Africa), or lacking altogether[7], would be poorly reconciled to end impunity for the most serious crimes. The lack, moreover, of a relevant practice outside of the Colombian case – which, nonetheless, still awaits effective definition – surely does not promote any clarification.

One cannot, however, investigate these aspects further without first looking specifically at how the Court intervenes.

3 Complementarity

The principle of complementarity influences the Statute in its entirety: it is found within the Preamble[8], in Art. 1 ICC St.[9], in Articles 5, 11, and 12 ICC St.[10], and likewise in the discipline of the general part of the Statute (e.g., attempt, mental element). It could be argued that a form, albeit indirect, of complementarity is also to be found in the special part of the Statute: the Court's jurisdiction would cover only the most serious crimes, of such a nature as to cause alarm in the international community as a whole, thus leaving it to the States to deal with the remaining matters; such a view would also serve as an interpretive aid for the special part provisions themselves. This, however,

6. Preamble, ICC Statute 17 July 1998, available at https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (last visited November 05, 2023), (States Parties are obliged to ensure effective prosecution of the most serious crimes established in the Statute, also through international cooperation).

7. Fornasari, *Giustizia di transizione e diritto penale* at 12 (cited in note 5).

8. Preamble, ICC Statute (cited in note 7) (establishing that the principle of complementarity of the ICC imposes an obligation on national courts to apply their criminal jurisdiction).

9. Art. 1, ICC Statute (referring to the principle of complementarity).

10. Artt. 5, 11, 12, ICC Statute (limiting the jurisdiction of the Court ratione materiae, ratione temporis and ratione loci, respectively).

is not complementarity in the proper sense. The principle of complementarity does not refer to all cases in which the system outlined by the Rome Statute does not intervene but stands to indicate that in cases where the Court is found to have jurisdiction – jurisdiction which thus serves as a prerequisite to this principle – its intervention is merely secondary to that of the States.

The Court is thus limited, partly for reasons of scarcity of resources and practical feasibility, to prosecuting only those facts which appear to it to be of the greatest gravity, and which are maximally intolerable in the light of the principles of international law. It cannot be ruled out that this limitation also stemmed from some States concerns about possible excessive limitations on sovereignty and illegitimate intrusions into purely domestic matters; indeed, this was precisely the reason for the break with previous experience (see supra para. 1).

Nonetheless, whenever a State decides not to intervene, the Court must step in. The latter cooperates with each State to encourage, in the first instance, the establishment of proceedings at the national level. This creates a system of indirect enforcement: if the State Party concerned does not exercise its punitive claim, the Court can, under the principle of complementarity, try the accused individuals[11]. And if this binary model, layered over several jurisdictional levels[12], were to work, the Court would hardly ever have to act[13].

However, this principle must also be coordinated with the goal of ending impunity for the most serious crimes affecting the international community (ICC Preamble St). It is to this end that Article 17.1 ICC St. intervenes, elucidating the cases in which the Court s exercise of jurisdiction is permissible. It reads as follows:

Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

11. Enrico Amati, et al., *Introduzione al diritto penale internazionale* at 31, (Giappichelli Editore 4th ed. 2020 [2006]).

12. Kai Ambos, Ezequiel Malarino, Jan Woischnik, *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma da la Corte Penal Internacional: contribuciones de América Latina y Alemania* at 489, (Konrad-Adenauer-Stiftung E.V., 2006).

13. Amati, et al., *Introduzione al diritto penale internazionale* at 32 (cited in note 12).

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

(b) The case 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.

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3.

(d) The case is not of sufficient gravity to justify further action by the Court[14].

Paragraphs 2 and 3 of the Articles define what is to be understood by "unwilling or unable" to act on the part of the State in connection with the initiation of investigations or proceedings. But even before the Court does so, it must be triggered by one of the legitimated parties referred to in Article 13 ICC St, at which point the Prosecutor, in the case of a motu proprio initiative, opens a Preliminary Examination, limited to the general context, necessary to understand whether there are grounds for the following opening of an investigation. Having done so, in considering whether to subsequently open an investigation, he proceeds to the stage referred to in Article 53.1 ICC St, which provides:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

(b) The case is or would be admissible under Article 17; and

(c) 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. If the Prosecutor determines that there is no reasonable basis to proceed and his or

14. Art 17., ICC Statute (issues of admissibility).

her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber[15].

By the settled doctrine, Article 53 governs the exercise of essential aspects of prosecutorial discretion once the Prosecutor's power to commence actual investigatory activities has been activated[16]. The prosecutor, after verifying the Court's abstract jurisdiction, must make a prognostic judgment on the admissibility of the case considering Article 17. He then verifies compatibility with subsection (c), a "relief valve" that makes the system a model of constrained discretion, somewhat between the continental model of mandatory prosecution and the Anglo-American model of full discretion, and which represents the real punctum dolens of the discipline. If the Prosecutor bases his choice not to intervene exclusively on subsection (c) or decides not to continue with the investigation for the same reason, the Pre-Trial Chamber, on its initiative, may not validate his choice[17]. Furthermore, it is not easy to give an interpretation of what is to be understood by "interests of justice". The assessment that must be made, however, runs the risk of logically overlapping with that of Article 17 and Article 53.1 (b): if the Court was created to avoid cases of impunity, and Article 17 indicates the cases in which the Court – precisely to avoid such a problem – may intervene, then whenever the intervention passes, as required by Article 53.1 (b), the prognostic judgment on its admissibility should be considered to be by the Statute's conception of justice. However, as also confirmed by the Prosecutor's Office[18], the two levels need to be split. The only interventions on this issue by the Court, rather than clarifying the proper meaning of the wording, have limited themselves to establishing what this power is not and who does

15. Art 53., ICC Statute (initiation of an investigation).

16. Otto Triffterer, et al., *Commentary on the Rome statute of the International Criminal Court: observers' notes,* article by article at 702 (Beck, München, 2nd ed. 2008).

17. See ibid. (a possibility of initiative precluded in other cases that ensures that the power is not exercised arbitrarily. In particular, this means that if the Pre-Trial Chamber has to validate the Prosecutor's decisions, it is also necessarily bound to review all such decisions of the Prosecutor).

18. James Stewart, Deputy Prosecutor of the ICC, *Transitional Justice in Colombia and the role of the International Criminal Court*, at 16 (International Criminal Court, May 13, 2015), available at https://www.icc-cpi.int/news/transitional-justice-colombia-and-role-international-criminal-court-keynote-speech-james (last visited November 5, 2023).

not have it (i.e., the Pre-Trial Chamber[19]). And it is clear how by the interpretation of this rule, passes the admissibility or otherwise, within the ICC system, of a whole range of transitional justice measures.

4 The Interpretation of Art. 53.1 (c)

The Court seems to have delegated the hermeneutic function to all men "of goodwill", who dare to confront one of the terms of law with the most controversial meaning and a more than meager application practice. However, the aim of this work is not to give an account of all the literature produced to define what justice is, among other things with philosophical disquisitions even before legal. Because of the absence of certain references, it is possible to try to interpret the norm from several aspects.

4.1 The view of the Office of the Prosecutor

On May 15, 2015, the Deputy Prosecutor of the International Criminal Court, James Stewart traveled to Bogota to address a conference organized by the Universidad del Rosario, the Cyrus R. Vance Center for International Justice, the United Nations in Colombia, the International Center for Transitional Justice and Coalition for the International Criminal Court, and other relevant stakeholders on the subject. There, the Deputy Prosecutor had the opportunity to clarify how the OTP, and not the Court or any of its Chambers, has interpreted Article 53.1 (c), while also verifying the admissibility of certain transitional justice measures in relation to that interpretation[20].

The Deputy Prosecutor starts from the premise that once a State has acceded to the Statute, that State obligates itself to accept that justice is an integral part of its conflict resolution arrangements, and especially assumes the task of investigating and prosecuting crimes that are part of the Court's jurisdiction. Stewart also points out how,

19. ICC-02/17, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan at para. 25 ff.

20. Stewart, Transitional Justice in Colombia and the role of the International Criminal Court (cited in note 19).

when a State fails to fulfill its obligations, the Court is obliged to intervene. He emphasizes the wide range of measures that can be included in transitional justice, but also how those that are taken by Colombia must be in accordance with its obligations under the Statute. At the same time, the OTP affirmed the need to monitor developments in what would later become the Peace Agreement between the Colombian government and the FARC, as well as the failure to prosecute the most responsible individuals, pointing out how this would affect the admissibility of the case before the Court.

It is at this point, that interest in such discourse is maximized, as Deputy Prosecutor Stewart decides to explicitly answer a question of no small importance: "What mechanisms can be put in place to ensure that those most responsible for the most serious crimes are held accountable, in accordance with Colombia's obligations under the Rome Statute?"

For the Court to not intervene, the Deputy Prosecutor replies that the person allegedly responsible must be affected by genuine proceedings, and these cannot be considered as such if the conditions of Article 17.2 ICC St. are met[21]. Considering this, the content outlook of the Peace Agreement discussed at the time can be analyzed. The suspension of the execution of sentences already imposed would, in effect, mean that convicted individuals would not serve any time. This would be incompatible with the Statute, and the Deputy Prosecutor points out that he had already warned the Colombian authorities of this incompatibility so that similar measures would not be included in the Peace Agreement. Reducing sentences might be compatible with the Statute, but this would depend in practice on whether this is accompanied by other measures typical of transitional justice, such as disqualification from public office and admission of responsibility. The compatibility of alternative measures to imprisonment depends on several factors, such as possible mitigating circumstances, proportionality to the seriousness of the crime, and so on. The possibility of not prosecuting individuals other than those considered "the most

21. Art. 17(2), ICC Statute (requirements imply cases in which the proceedings serve to remove the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, those in which the trial has been unjustifiably delayed, and cases in which the trial was not conducted independently, impartially or inconsistently with the purpose of bringing the person concerned to justice).

responsible" instead seems to strike a void within the Court's work[22]. Indeed, while there is no express provision to this effect in the Statute, the established practice, partly considering obvious practical limitations, is for the Office of the Prosecutor to prosecute only top-level figures or particularly notorious middle-level figures. But, in a coda that almost reads like a warning[23], the Deputy Prosecutor says that "the differences between the ICC's mandate and that of national judicial systems means, however, that ICC prosecutorial strategy cannot be taken as authority for how national jurisdictions should determine whom to investigate or prosecute."[24] On the other hand, with regard to amnesties, Stewart simply states that on those about "political offenses" the Office of the Prosecutor expresses no view, as they are crimes outside the Court's jurisdiction[25]. He does not comment specifically on possible amnesties for crimes under Art. 5 ICC St. "Amnesty for conduct that amounted to Rome Statute crimes would raise very different issues". Again, just enough of a veiled threat to direct the behavior of the Colombian state[26].

The Deputy Prosecutor then provides the interpretation given by the Office of the Prosecutor of the notion of "interests of justice". With a rigidly literal approach, it is stated that the elements that are taken into consideration are only the interests of the victims and the seriousness of the crime, as only these are mentioned within the Statute, while considerations of peace and security will ordinarily fall outside the scope of the interests of justice formula in the Rome Statute, partly because the States Parties to the Rome Statute created the ICC as a judicial institution and not as a peace-making institution. Peace-making is the responsibility of other bodies, such as the United Nations Security Council[27]. Despite this, one must consider how the gravity of the crime and the interest of victims are criteria present in

22. Kai Ambos, et al, *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição no* Brasil, Coleção Forum de Direitos Humanos at 85-86 (Editora Fórum, 2010).

23. See ibid (although it is not quite clear what, if any, response tools would be provided by the Prosecutor's Office.).

24. Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court* at 15 (cited in note 19).

25. See ibid.

26. See ibid.

27. See id. at 16-17.

the Article's wording only to acknowledge the existence of factors that might outweigh them[28].

Nevertheless, the interpretation and attitude taken by the Office of the Prosecutor are reprehensible in two respects: the first is the almost total lack of reflection on such a central phenomenon as amnesties, without even wishing to consider any differentiations such as those made by some authors between self- or hetero-concessions, conditional and unconditional amnesties[29]. The world of amnesties, like that of transitional justice, turns out to be tremendously broad[30], so much so that the former is one of the princely instruments of the latter. A categorical, general rejection and one that does not suffer from exceptions turn out to be contrary to that weighing, that "balancing" which is at the basis of the term "justice". In doing so, one becomes excessively unbalanced in the protection of certain interests protected by law, while sacrificing those that undeniably come to be protected by amnesties. Amnesties which, it should be remembered, are an institution that is present in the vast majority of national legal systems and that has been, is, and will be used by those systems[31]. The second objectionable aspect is a limitation that the Prosecutor imposes on himself, even claiming it expressly. Indeed, the Deputy Prosecutor states: "I acknowledge that the question raised has much wider implications for Colombia and the Colombian people. However, I confine my remarks, as I must, to the narrower issue of what the Prosecutor must do in discharging her responsibilities under the Rome Statute"[32]. But the concept of justice in international criminal law cannot – nor generally has it – ignore broader implications and interests other than the mere execution of punishment[33].

28. Triffterer, et al., *Commentary on the Rome statute of the International Criminal Court: observers' notes,* article by article at 709 (cited in note 17).

29. Fornasari, *Giustizia di transizione e diritto penale* at 171 ff. (cited in note 5).

30. See ibid.

31. Kai Ambos et al., *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição no* Brasil, Coleção Forum de Direitos Humanos at 35-36 (cited in note 23).

32. Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court* at 8 (cited in note 19).

33. Kai Ambos et al., *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição* no Brasil, Coleção Forum de Direitos Humanos at 29 (cited in note 23).

4.2 The Perspective under International Criminal Law

There are numerous occasions in the history of international criminal law where the retributive instance has not been central to the concept of justice. The present work will address two instances considered maximally explanatory, whether before an international court or a domestic one, to show how the concept of justice is (or at least can be) different from that which is too often found in domestic systems, which are extremely devoted, even at times contrary to their constitutional dictates, to the retributive instance[34]. Interests too large and too foreign to the ordinary come into play in international criminal law, forcing one to disregard common tools and the usual pattern of reasoning.

The first case pertains to the context of the Rwandan genocide of 1994. This mass-scale conduct that only took months to execute could have not been carried out without the contribution and adherence of the population and the institutions at all levels. One of these contributors was Sylvestre Gacumbitsi, who was tried before the ICTR. Former mayor of the Rusumo municipality, he was convicted of genocide and crimes against humanity. The Trial Chamber determined that Gacumbitsi had used his position to meet with prominent elements and perpetuate a genocidal policy against the Tutsi population, receiving weapons and distributing them among the population, instigating the killing of Tutsis themselves and the rape of women[35]. Gacumbitsi was consequently sentenced to life in prison. There is, however, a part of the sentence that brings with it some reflections:

The preamble to the United Nations Security Council resolution 955[36] establishing the Tribunal emphasized the need to further the goals of deterrence, justice, reconciliation, restoration, and maintenance of peace.

34. Stefano Natoli, *Dei relitti e delle pene: giustizia, giustizialismo, giustiziati: la questione carceraria fra indifferenza e disinformazione* at 85 ff. (Rubbettino, 2020), (the author shows that in Italy non-custodial sanctions and measures are either non-existing or not functioning).

35. ICTR-2001-64-T, Trial Chamber III, The Prosecutor v. Silvestre Gacumbitsi at 8 ff.

36. Preamble, UN Security Council Resolution 995, 8 November 1994, available at http://unscr.com/en/resolutions/doc/955 (last visited November 05, 2023).

In deciding the sentence to impose on the Accused the Chamber will take into account all the factors likely to contribute to the achievement of the above goals. Given the gravity of the offenses committed in Rwanda in 1994, it is of the utmost importance that the international community condemn the said offenses in a manner that will prevent a repetition of those crimes either in Rwanda or elsewhere. The Chamber will also take into account reconciliation among Rwandans to which, under the same resolution, the Tribunal is mandated to contribute[37].

Two aspects of this brief passage are worth considering.

To begin with, the first paragraph points out that behind the establishment of the Tribunal was not only the need for justice but also for deterrence, reconciliation, restoration, and peacekeeping. If the Tribunal needs to satisfy several different needs, then more than one notion of justice is possible. Secondly, and perhaps more importantly, the Tribunal seems to suggest a relationship between the purposes of deterrence and reconciliation, as would also appear from the fact that the remaining purposes are dealt with in a separate paragraph. The judgment does not seem to give any clues as to the causal direction of this relationship: that is, whether it is through deterrence that reconciliation can be achieved or if reconciliation itself has a deterrent effect, making it possible to avoid, even narrowly, recourse to the sanctioning instrument[38].

The domestic case is that of Miguel Osvaldo Etchecolatz, Commissioner General of Police accused in 1986 of kidnapping and enforced disappearance, who had benefited from the laws (only improperly called amnesties) Obediencia debida[39] and Punto final[40]. In 2005, in

37. ICTR-2001-64-T, The Prosecutor v. Silvestre Gacumbitsi at para. 335-336 (cited in note 36).

38. See also Uprimny Rodrigo and Maria Paula Saffon. *Transitional justice, restorative justice and reconciliation: Some insights from the Colombian case. Coming to Terms with Reconciliation*. Working Paper Library (2006).

39. Ley de obediencia debida, 8 June 1987, n. 23 521 (the Ley de Obediencia debida established a presumption regarding crimes committed by members of the Armed Forces, who were not punishable for having acted under the so-called "due obedience").

40. Ley de punto final, 24th December 1986 (the Ley de punto final established the suspension of judicial proceedings against those accused of being criminally responsible for the crime of enforced disappearance of persons during the dictatorship).

the Simón case, somewhat controversially, the Corte Suprema de Justicia de la Nación decided, feeling bound by the Barrios Altos ruling of the Corte Interamericana de Derechos Humanos[41], for the unconstitutionality of the two laws[42]. Thus, on September 19, 2006, the Tribunal Oral en lo Criminal Federal No. 1 de La Plata convicted Etchecolaz of kidnapping, torture, and murder as crimes against humanity[43]. Brief reflections on the legitimacy of retroactive disapplication of such laws are more than adequate for this article: it suffices here to echo Fornasari's expression that "the rule of law cannot afford to play the three-card game"[44]. More in-depth considerations deserve to be made about the qualification of the facts ascribed to Etchecolatz. Officially qualified as crimes against humanity, the judge, while not changing the indictment, exploits the sentence for a historical reconstruction of the conduct as acts of genocide, without changing anything at the level of the quantum of punishment[45]:

It is on this point that of central importance is the consideration of events that occurred as genocide. The validity of the Convention in this matter is beyond question, as is that of the other human rights conventions contained in Article 75(22) of the National Constitution. Considering the cases under consideration in this way - genocide - and under this transcendental legal umbrella will allow us, in my opinion, to place the facts under consideration in the proper context, thus fulfilling the obligation contained in the famous Velazquez Rodriguez ruling to investigate seriously and not as a mere formality. All of this is also part of the reconstruction of collective memory and will make

41. Corte Suprema De La Naciòn, June 14, 2005, no. 17.768 at 115. (José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczic and their eight-month-old daughter, Claudia Victoria Poblete, were kidnapped on November 28, 1978, and sent to the Clandestine Detention Center "El Olimpo". The Court considered that the "Obediencia debida" and "Punto final" laws are contrary to the American Convention on Human Rights and the International Covenant on Civil and Political Rights to the extent that they hinder the clarification and effective punishment of acts contrary to the rights recognized in said international treaties).

42. See id. at 240.

43. Tribunal Oral en lo Criminal Federal N 1 de La Plata, September 19, 2006. no. 2251/06 at 5-6 (Los hechos).

44. Fornasari, *Giustizia di transizione e diritto penale* at 180 (cited in note 5).

45. Tribunal Oral en lo Criminal Federal N 1 de La Plata, 2006, no. 2251/06 (cited in note 44) at 106.

it possible to build a future based on knowledge of the truth, which is the key to preventing further massacres. As already mentioned, all these facts constitute crimes against humanity committed as part of the genocide that took place in the Argentine Republic between 1976 and 1983[46].

International practice further sustains the possibility of disregarding the retributive instance. Indeed, no custom sanctions the illegitimacy of amnesties for international crimes. When the Pre-Trial Chamber went the other way in the Libyan case[47], establishing the configurability of such a custom, the Appeals Chamber promptly refuted it, arguing that the issue was still evolving in international law and configuring the assertion as obiter dictum.

Lastly, the Appeals Chamber finds that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were obiter dicta. [...] For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties[48].

In the words of Christine Bell, there is a "largely undefined middle ground that is constantly shifting as the predominance of one or other poles asserts itself and is contested"[49].

4.3 The Purpose of the Sanction inside the Rome Statute

The reconstruction of the notion of "interests of justice" must contend with a serious gap in the Rome Statute: the lack of any indication of the purpose of punishment. Motivating this absence is not easy, also considering the centrality that such an indication assumes[50].

46. Ibid.

47. Despite the differences between the Libyan and the Colombian case, the opinion of the Court pertains to the inexistence of an international custom and is thus relevant for both cases. See Benedetto Conforti and Massimo Iovane, Diritto internazionale, 12. ed, Manuali per l'università at 46 (Napoli: Editoriale scientifica, 2021 [1976]).

48. ICC-01/11, Appeals Chamber, Situation in Libya, Prosecutor v. Saif Al-Islam Gaddafi at para. 96.

49. Carsten Stahn, et al., J*us Post Bellum: mapping the normative foundations* at 187 (Oxford University Press, 2014).

50. Amati, et al., *Introduzione al diritto penale internazionale* at 279 (cited in note 12).

As Fronza correctly pins down, "the criminal sanction delineates the structure of the system and the physiognomy of the general principles of criminal law, and not vice versa. It is also well known how, depending on the purposes assigned to the sanction, one may tend to accommodate one model of justice or another"[51]. Devresse and Scalia consider such omissions to be a direct consequence of public expectations and the seriousness of international crimes: the defendants thus, end up being considered "monsters" (one need only to recall the trial of Adolf Eichmann, in which Attorney General Gideon Hausner, in his opening remarks, addressing the defendant, stated that the latter «has committed horrendous crimes, and no longer deserves to be called a man[52]), and this makes theoretical elaboration on punishment unnecessary[53].

In the awareness of this gap, two reconstruction approaches have led to elucidations on these purposes, with opposing outcomes. The first, by Fronza herself, starts from a distinction, indeed necessary, between the functions of punishment and the purposes of international criminal jurisdictions, under which justice, the investigation and dissemination of truth, reconciliation, and peace fall. The former would be considered a means for the realization of the latter. Through such configuration criminal justice could possibly be considered as a mere instrument of peace and reconciliation, thus deeming concurrent solutions to criminal sanction, such as truth commissions, amnesties, and pardons, to be permissible. The reasoning behind this interpretation is that:

Outside the context of each State, there is a very different geometry of interests and actors than that which, at the domestic level, designs the relationship between state and citizens. Even the conception of punishment and the basis of this for international crimes are

51. See ibid.

52. See Gideon Hausner's opening statement, available at https://collections.ushmm.org/search/catalog/irn1001031 (last visited November 8, 2023).

53. Marie-Sophie Devresse, Damien Scalia, *An outsider's view from inside the experience of Acquittals before International Criminal Tribunals*, Volume 17, Journal of International Criminal Justice at 184-189 (2019).

inevitably affected by the web of axiological hierarchies, ethical-legal conceptions, and diverse political priorities[54].

The second approach, pursuing the goal of ending impunity for perpetrators of international crimes, was instead followed by the judges in the Katanga judgment. There the Court stated that the sentence would have two functions: punishment of the perpetrator as a testimony to social disapproval, and deterrence as a means of dissuasion of other possible perpetrators from carrying out such conduct.

When determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members. It, therefore, considers that the role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose[55].

Despite that, the Court later contradicted its own opinion in the Gbagbo and Blé Goudé cases: both in the view taken by the ruling, which would like to see a positive general-preventive purpose[56] and in the opinion of dissenting judge Herrera Carbuccia, who looks to the ascertainment of truth and the prevention of all forms of historical revisionism as the main purposes[57]. Hence, the case law seems unable to become the beacon that lights the Court's way.

54. Amati, et al., *Introduzione al diritto penale internazionale* at 264 (cited in note 12).

55. ICC-01/04-01/07, Trial Chamber II, The Prosecutor v. Germain Katanga at para. 38.

56. ICC-02/11-01/15-1263, Trial Chamber I, Situation in the Republic of Côte D'Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, para. 2040 (stating that the acquittal of the perpetrators shall not be interpreted as denial of the crimes and suffering inferred).

57. See id. at para. 6 (preventing revisionism and establishing the truth have always been the goals of the criminal justice system. If we allow impunity for crimes against humanity, we fail to comply with the values and purposes enshrined in the Rome Statute espoused by the international community).

4.4 Ronald Dworkin and iuris Analogy

If practice returns a picture with more shadows than lights, the doctrinal interpretation will seem to appear clearer and more straightforward.

One of the most appreciable attempts, which also includes an analysis of the Colombian case, maybe that of Javier Sebastián Eskauriatza, professor at Birmingham Law School[58]. The starting point of his reconstruction is the excessive number of gaps and interpretive issues present in international law if one interprets it from an overly positivist perspective. The answer to these issues would be Ronald Dworkin's "constructive interpretation", which would enjoy further legitimacy because of its similarities to Hernsh Lauterpacht's methodology: both authors are reluctant to an overly positivist conception of international law because of the normative gaps the latter would create[59]. The first step in Dworkin's theory requires finding the object of interpretation[60]. In this case, there may be two different sources: the Rome Statute and customary international law. However, the failure to come up with customary law on amnesties (see supra para. 4.2.) forces us to limit ourselves to the former. At this stage, however, several interpretations would still be possible. It is at this point that the concepts of "fit" and "justification" intervene: the interpretation must be consistent with what has happened up to that point, such as any precedents, and with the principles of the community, a morality external to the text of the norm itself and resolved in the personified community[61], in this case, the international community. It is through this approach that it can be argued that, although the Rome Statute does not make explicit choices on some points, such as amnesties or

58. Javier Eskauriatza, *The jus post bellum as "integrity": Transitional criminal justice, the ICC, and the Colombian amnesty law*, Volume 33, Leiden Journal of International Law 189 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4269038 (last visited November 11, 2023).

59. Patrick Capps, Lauterpacht's Method, 82 British Yearbook of International Law 248, (2012), available at https://academic.oup.com/bybil/article/82/1/248/276344 (last visited November 11, 2023).

60. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1997 [1977]).

61. Ronald Dworkin, *Law's Empire* at 45 and 167 (Hart Publishing Ltd 2006 [1986]).

the purposes of sanction, it still cannot be considered "silent". Thus, through interpretation, it is possible to verify whether these kinds of measures comply with the ICC system principles – and are therefore viable to the Member States – or not, even in the absence of relevant case law.

Two principles have been identified for interpretation: the principle of peace and the principle of "local ownership"[62]. The former would be behind the introduction in the Rome Statute of Articles 16 and 53. Article 16 ICC St. allows for the so-called "deferral", which is the possibility for the UN Security Council – by virtue of its role as the one responsible for maintaining international peace and security – to interrupt, through a resolution adopted based on Ch. VII of the UN Charter, the Court's activity on a given case[63]. The principle of peace would also inform Article 53.1 (c). While it is not quite clear, in fact, what is to be understood by "interests of justice" and thus when this rule can be applied, its more general meaning is clear: there are some cases in which the Court's intervention would be inappropriate and it is, therefore, necessary for the Court to remain a few steps behind. In the pages of Vol. 18 of Human Rights Quarterly, an anonymous person put it this way:

Accusation [...] comes more easily than making peace. The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow [...] Thousands of people are dead who should have been alive – because moralists were in quest of the perfect peace. Unfortunately, a perfect peace can rarely be attained in the aftermath of bloody conflict. The pursuit of criminals is one thing. Making peace is another[64].

It is therefore inevitable that issues of peace fall within the logic of the International Criminal Court, also keeping in mind how Article 4 of the UN Charter recites that "membership in the United Nations

62. Javier Eskauriatza, *The jus post bellum as "integrity"* (cited in note 59).

63. Art. 16, UN Charter 24 October 1945 (functions and powers, the General Assembly. The whole text of the Charter is available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf, last visited November 11, 2023).

64. Anonymous, Human Rights in Peace Negotiations, 18 Human Rights Quarterly 249 (1996), available at https://www.jstor.org/stable/762504 (last visited November 11, 2023).

is open to all other peace-loving states"[65] and how peace can also fall, as in Colombia, within constitutional charters. Transitional justice mechanisms and restorative justice also have constitutional value in Colombia through Articles 22 and 95[66].

The principle of local ownership, found, among other things, also in the UN Charter in Article 2.7[67], which would be behind Article 17 ICC St, might justify the claim of Colombia and Colombian citizens to be themselves, and not the international community, protagonists of their transitional justice process, within the limits of what the Statute establishes. This, however, must be subject to one important clarification: justice that must be achieved in Colombia for the Court not to intervene, does not have to be perfect, but respectful of the international obligations that Colombia undertook by ratifying the Rome Statute.

5 The Colombian Case

Since theoretical reconstruction cannot go beyond what has been said above, all that remains is to turn to the analysis of the Colombian case, probably the only concrete example available to us of a conciliation model of transitional justice within the Rome Statute system with a certain degree of disregard to punitive instances. This analysis must not resolve itself into a mere theoretical exercise but must verify compatibility with the theoretical premises set forth above, to check their validity, and consider the possibility of it becoming a landmark for any further cases that may come before the International Criminal Court.

65. Art. 4, UN Charter (membership).

66. Art. 22, Colombian Constitution 4 July 1994 (la paz es un derecho y un deber de obligatorio cumplimiento) and art. 95 (son deberes de la persona y del ciudadano [...] Propender al logro y mantenimiento de la paz).

67. Art. 2, para. 7 UN Charter (nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state).

5.1 Historical Aspects

The element that perhaps characterizes the Colombian experience the most, in comparison to other South American epiphanies, is the ongoing nature of the conflict that has enveloped the country. As validated by Fornasari, "There is not a past, politically outdated, with which to settle accounts, but a present to be overcome"[68]. The first tensions came with "La Violencia", a period of clashes at the turn of 1948-1958 that claimed some 200,000 lives[69]. After the election of Jorge Eliécer Gaitán, candidate of the Liberal Party, the countryside began to become the scene of several violent episodes, which exploded with the killing of Gaitán himself by Juan Roa Sierra, who, although initially sheltered in a pharmacy by the local police to avoid reprisals, was consequently lynched by the crowd, and his mauled body was left naked in front of the Palacio Presidencial[70]. From there began the Bogotazo, a day of riots in the capital and other cities, in which all buildings thought to have ties to the Conservative Party were stormed and between 500 and 3,000 people died. As conservative President Ospina came into government, the tone of the confrontation became increasingly heated, and the pajaros, gangs supporting the conservative government, organized a series of massacres, with the approval of the police and the government. The liberals, in response, sought to impeach the president, but he countered by declaring a state of siege, assuming full powers, and instituting a policy of repression, later followed by his successor Laureano Gómez. At that point, there was no choice but to organize into guerrilla groups, and self-defense crowds, later known as Autodefensas campesinas, were created by the communist camp as well.

Subsequent presidencies, however, did not respond in the same way to the acts of the two sides: while tools such as amnesties were used for the liberal groups, for the communist ones the policy was that of an iron fist and repression. The end of La Violencia is identified with the agreement that gave birth to the Frente Nacional, a system

68. Fornasari, *Giustizia di transizione e diritto penale* at 153 (cited in note 5).

69. Doug Stokes, *America's Other War: Terrorizing Colombia* at 68 (Zed Books 2004).

70. Nathaniel Weyl, *Red Star over Cuba the Russian Assault on the Western Hemisphere* at 17-19 and at 34-35 (The Devin-Adair company 1962).

that provided for alternating power between the Liberal and Conservative Parties for 12 years[71]. It was during this period, however, that paramilitary groups such as the FARC (Fuerzas Armadas Revolucionarias de Colombia) and the ELN (Ejército de Liberación Nacional)[72], which are still part of the conflict today, began to form from communist self-defense groups, and with their emergence, early periods of armed guerrilla warfare also began[73]. In response to the violence perpetrated by such groups, through Decree 3398[74], the government de facto legalized the formation of paramilitary and self-defense groups among citizens for "organizing national defense". These groups then merged, in 1997, into the AUC (Autodefensas Unidas de Colombia). As a part of an initial attempt at a peace agreement, the paramilitary groups were being suppressed, only to be reauthorized in 1994[75]. The communist fighter groups, having never effectively ceased guerrilla activities, also successfully drove the drug cartels out of rural areas and gained control of a part of the narcos' business[76]. The paramilitary groups, which were very strong locally, gained control of part of the political circuit, giving rise to the para-political scandal[77]. But, in

71. Comisión Interamericana de Derechos Humanos, Contexto: origen y caracteristicas del conflicto armado interno en Colombia, available at http://www.cidh.org/countryrep/colombia04sp/informe3.htm (last visited October 20, 2023).

72. Camilo Torres, *Acerca de Camilo,* available at http://pensamiento.unal.edu.co/cp-camilotorres/acerca-de/camilo-torres/ (last visited November 7, 2023) (which even counted among its leading figures a priest, Camilo Torres, an exponent of liberation theology).

73. Medina Gallego Carlos, *Farc-Ep y Eln una historia política comparada* (1958-2006) at 121 ff. available at https://scholar.google.es/citations?view_op=view_citation&hl=es&user=DiRMOOcAAAAJ&citation_for_view=DiRMOOcAAAAJ:-Se3iqnhoufwC (last visited November 8, 2023).

74. Artìculo 25, Decreto 3398 de 1965, available at https://www.comisiondelaverdad.co/legalizacion-de-la-autodefensa (last visited October 19, 2023).

75. Decreto 356 de 1994 (estatuto de vigilancia y seguridad privada), available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=1341 (last visited November 11, 2023).

76. Caso 65 / Enfrentamientos entre ELN y FARC-EP en Arauca, available at https://www.comisiondelaverdad.co/caso-65-enfrentamientos-entre-eln-y-farc-ep-en-arauca (last visited November 7, 2023).

77. Jemima García-Godos and Knut Andreas O. Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia*, 42 J. Lat. Am. Stud. 487 (2010), available at https://doi.org/10.1017/S0022216X10000891 (last visited November 3, 2023).

late 2002, the AUC declared a cease-fire, a precondition dictated by the government for entering negotiations, which were formalized in 2003 with the Pacto de Santa Fe´ de Ralito, intended to create a political project that promised to "rebuild the country, create a new social pact, and build a new Colombia"[78]. The effects of the first peace agreement[79] between the government and the AUC were immediately evident: kidnappings with ransom demands decreased by 87%, terrorist attacks by 76.5%, and murders by 45.2%[80].

Meanwhile, due to the killing of several of their leaders and due to the policy of close fighting against them, carried out by newly elected President Alvaro Uribe, the FARC, which had not been demobilized, were increasingly weakened, but not definitively defeated. Thus, peace negotiations began a few years later in Havana with the Colombian government. After a reform of the constitutional text in 2012, whose purpose was to "establish a constitutional framework for the transitional justice strategy that will facilitate the achievement of a stable and lasting peace in the future"[81], the agreement was squared and submitted to a popular referendum in 2016. However, this accord did not pass: the "No" party won by a slim 50.2 % majority. Despite the initial defeat, President Santos decided not to give up, calling himself "guarantor of Colombia's stability"[82]. FARC leader, Timochenko, also said that he was willing to continue working towards an end to

78. De la Espriella: *Fui puente entre Uribe y Auc para negociación de Ralito* https://verdadabierta.com/de-la-espriella-y-pineda-eran-el-enlace-de-los-paras-con-uribe-mancuso/ (last visited November 3, 2023).

79. Ley 975 de 2005 (this is executed by Law 975, known as Ley de Justicia y Paz), available at https://www.mais.com.co/images/pdf/ley_975_de_2005_0.pdf (last visited November 11, 2023).

80. Colombia y el Examen Periódico Universal de Derechos Humanos (EPU) ante el Consejo de Derechos Humanos de las Naciones Unidas: Experiencias, avances y desafíos, available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session3/CO/Colombia_UPR.pdf (last visited November 3, 2023).

81. Artìculo 1, Acto Legislativo 31 July 2012, no. 1, available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=48679 (last visited November 6, 2023).

82. Colombia's President Santos keeps up push for Farc peace deal, available at https://www.bbc.com/news/world-latin-america-37548493 (last visited October 19, 2023).

the conflict[83]. Santos thus initiated negotiations with the Democratic Centre members reformed the agreement by incorporating the latter's objections, and signed, on November 24, 2016, the Teatro Colon agreements. The signature, in the hopes of many, should have meant the end of a conflict that has taken, so far, the lives of an estimated 450,664 people[84]. But the answer given by history has unfortunately turned out to be a different one. With the new presidential elections and the victory of conservative President Duque, one of the biggest opponents of the peace agreement, its execution has been very slow, particularly in the implementation of land reform. While wanting to continue to hold out a faint hope, the impression is that the peace may, at any moment, founder.

5.2 Legal Framework

The Ley de Justicia y Paz represents the Colombian government's first attempt to reach out to paramilitary groups. The purpose of the law is "to facilitate peace processes and the individual or collective reintegration into civilian life of members of illegal armed groups, guaranteeing the victims' right to truth, justice, and reparation"[85]. Military and law enforcement groups, although found guilty of serious crimes in the conflict, are not included in the scope of the law. This was aimed at demobilizing paramilitary groups, which each did independently and at their own pace[86]. The demobilization considered a wide group of interests, including "the victims' right to truth, justice and

83. See ibid.

84. See generally Hallazgos y recomendaciones de la Comisión de la Verdad de Colombia, June 28, 2022, available at https://www.comisiondelaverdad.co/sites/default/files/descargables/2022-06/Informe%20Final%20capítulo%20Hallazgos%20y%20recomendaciones.pdf (last visited on November 3, 2023).

85. Art. 1, Ley 975/2005 (Principios y definiciones).

86. Sergio de León, El Presidente Uribe asegura que en Colombia "hoy no hay paramilitarismo", (the last demobilisation took place in 2006, with President Uribe stating, whether hastily or in bad faith, that in Colombia "hoy no hay paramilitarismo"), available at https://www.semana.com/el-presidente-uribe-asegura-colombia-hoy-no-paramilitarismo/87204-3/ (last visited November 11, 2023).

reparation and respect the accused's right to due process and judicial guarantees"[87].

Combatants would record their names, and their level of participation in the organization, and indicate whether they had committed serious violations. In the absence of such violations and pending criminal proceedings against them, they were granted immunity and the opportunity to participate in programs designed to reintegrate them into civil society[88]. For "postulados" – that is, those who had admitted their responsibility or had pending proceedings against them – the pathway began with declarations of admission of their responsibilities: the so-called versiones libres[89]. These were followed by audiencias, in which the Prosecutor's Office questioned the accused about the crimes charged against them. In the audiencias, great prominence was given to the figure of the victims, who had the right to follow the trials in person, question the accused through their legal representatives, and help in defining events related to the proceedings, such as the site of any mass graves. Victims and their representatives could also request a separate hearing, the audiencias de incidente de reparación integral, meriting the reparation measures due them. The accused could decide, at the end of their audiencia, whether to accept the charges against them. Refusal, however, entailed the applicability of the ordinary procedure, and the disadvantage becomes apparent as soon as one looks at the sentencing range for the offenses in question: five to eight years in the case of proceedings through audiencia, 20 to 60 in ordinary proceedings[90]. After serving the sentence, there was a period of probation, equal to half the prison sentence served[91], during which the offender had to avoid committing new crimes and had

87. Art. 4, Ley 975/2005 (Derecho a la verdad, la justicia y la reparación y debido proceso).

88. Decreto 128 de 2003, January 2022, available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7143 (last visited November 11, 2023).

89. Articulo 17, Ley 975 de 2005 (Versión libre y confesión).

90. Jemima Garcia Godos and Andreas Knut O. LID, *Transitional Justice and Victims' Rights before the End of a Conflict: the unusual case of Colombia*, 42 Journal of Latin American Studies 487 (2010), available at https://www.cambridge.org/core/journals/journal-of-latin-american-studies/article/abs/transitional-justice-and-victims-rights-before-the-end-of-a-conflict-the-unusual-case-of-colombia/29C196E8C4A1AB34FAFBA9A4975F7912 (last visited November 11, 2023).

91. Artìculo 29, Ley 975 de 2005 (pena alternativa).

to inform the authority of his or her movements. If these conditions were not met, the alternative regime would no longer apply. The Colombian Constitutional Court, when questioned about the validity of the provisions, decided, in ruling C-370/2006, for general conformity of the regulation with the constitutional dictate, but requested that it be interpreted and implemented differently in part[92]. The criminal sanction was thus placed on the sideline, but it seems difficult to say that there was no justice, at least in the form of an attempt.

The 2016 Peace Accord covers more areas: it has a six-point structure, ranging from a much-needed agrarian reform to a form of political participation and reintegration[93] for combatants[94]. Central, however, turns out to be the fifth point of the peace agreement, the so-called Acuerdo Sobra las Victimas del Conflicto, which provides for the establishment of jurisdictional and non-jurisdictional mechanisms, including the Jurisdicción Especial para la Paz (JEP); the Comisión de la Verdad, Convivencia y la no repetición; the Unidad de Búsqueda de Personas dadas por Desaparecidas (UBPD); and a system of reparations and guarantees of non-recidivism[95]. This, by being somewhat between restorative and retributive instances, seemed likely to make all parties happy, leading then-Prosecutor Fatou Bensouda to say that "any genuine and practical initiative to end the decades-long armed conflict in Colombia, while paying homage to justice as a critical pillar of sustainable peace, is welcome by her Office"[96]. Amnesties were officially granted only for political crimes and not also for those within

92. Corte Constitucional de Colombia, May 18, 2006, Sentencia C-370/06, available at https://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm (last visited November 5, 2023).

93. Suffice it to say that Julian Gallo Cubillos, a former FARC combatant, is now part of Colombia's Senate. https://senado.gov.co/index.php/component/sppagebuilder/?view=page&id=4321 (last visited November 6, 2023).

94. Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, available at https://www.cancilleria.gov.co/sites/default/files/Fotos2016/12.11_1.2016nuevoacuerdofinal.pdf (last visited November 5, 2023).

95. Marco Zupi, *La Colombia e il processo di pace*. CeSPI, Centro Studi di Politica Internazionale n. 72, available at https://www.cespi.it/it/ricerche/la-colombia-e-il-processo-di-pace (last visited November 5, 2023).

96. Office of the Prosecutor, Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, available at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conclusion-technical-visit-office-prosecutor (last visited November 5, 2023).

the jurisdiction of the International Criminal Court; despite this, frictions still emerged between the international and state levels[97] (see infra para. 5.3.).

One should not, however, gloss over the importance of agrarian reform and the urgency of its implementation: in Colombia, 1% of the population owns 60% of the land, and 50% of the peasants have no title over the land they cultivate[98]. Pope Francis' first apostolic exhortation, the Evangelii Gaudium, thus comes to mind:

Today in many places we hear a call for greater security. But until exclusion and inequality in society and between peoples are reversed, it will be impossible to eliminate violence. The poor and the poorer peoples are accused of violence, yet without equal opportunities the different forms of aggression and conflict will find a fertile terrain for growth and eventually explode. When a society – whether local, national, or global – is willing to leave a part of itself on the fringes, no political programs or resources spent on law enforcement or surveillance systems can indefinitely guarantee tranquillity. This is not the case simply because inequality provokes a violent reaction from those excluded from the system, but because the socioeconomic system is unjust at its root. Just as goodness tends to spread, the toleration of evil, which is injustice, tends to expand its baneful influence and quietly undermine any political and social system, no matter how solid it may appear. If every action has its consequences, an evil embedded in the structures of a society has a constant potential for disintegration and death. It is evil crystallized in unjust social structures, which cannot be the basis of hope for a better future. We are far from the so-called "end of history" since the conditions for sustainable and peaceful development have not yet been adequately articulated and realized[99].

97. Annika Björkdahl, Louise Warvsten, *Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC,* International Journal of Transitional Justice 636 at 652 (2021), available at https://academic.oup.com/ijtj/article/15/3/636/6335777 (last visited November 5, 2023).

98. See generally https://www.land-links.org/country-profile/colombia/#1528464011915-6f6e82e5-9a53 (last visited 19 October, 23).

99. Vatican Publishing House, Evangelii Gaudium, Chapter II, part I, par. 59, available at https://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (last visited November 5, 2023).

5.3 The Interpretation in the Colombian Case

The picture thus outlined could hardly leave the Office of the Prosecutor of the International Criminal Court indifferent. Not only that, but this affair also seems to have contributed to the delineation of the notion of "justice" in the Court's system and the margins of admissibility of the Prosecutor's Office's intervention. It would be erroneous, however, to think that the restoration work was influenced only by the ICC and the Colombian government, as there were far more actors at play. At the domestic level, there was the FARC, which categorically refused to allow any form of political exclusion and detention to be included in the agreement, and the Colombian Constitutional Court, which always vigilantly monitored the constitutionality of the agreement and its implementation; at the international level, in addition to the International Criminal Court, the jurisprudence of the Inter-American Court of Human Rights must be kept in mind[100]. While the peace agreement seemed to have everyone in consensus, the Office of the Prosecutor, in 2017, was again intervening in the Colombian peace process, outlining four critical issues it had identified in the system[101]. Of particular interest here is the second critical issue identified, namely, in the definition of serious war crimes: that is, while Colombia had well accepted the possibility of granting amnesties only for political crimes and not for those within the Court's jurisdiction, there was no agreement on the line between the two. The problem stemmed, rather than from issues inherent to the Colombian case itself, from uncertainties pertaining primarily to the interpretation of the Statute. Indeed, the contextual element of Art. 8 ICC St. recites that the court's jurisdiction over war crimes is to be enjoyed "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes"[102]. The problem lies in the possible, not consequence-free, classifications that are made of this

100. See generally Corte Suprema De La Naciòn, June 14, 2005, no. 17.768 at p. 115 (cited in note 42) (development resulted from the Barrios Altos case in the Simón ruling).

101. Office of the Prosecutor, "Report on Preliminary Examination Activities," 2017., available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Colombia_ENG.pdf (last visited November 5, 2023).

102. ICC Statute, Article 8 (war crimes).

element. The two alternatives, contextual element or mere guideline for the Prosecutor, lead the norm to cover a very different number of cases. Hardly commendable, however, is that such interpretative difficulties should come to "vent" on a case of such critical sensitivity. The Prosecutor's Office was also pointing out that, under the definition of command responsibility that had been adopted, the most responsible parties were in danger of being exempt from any form of liability. Despite this, for almost twenty years now, the Prosecutor's Office has never opened an investigation. Thus, the impression is that this impending threat hanging over the heads of Colombian citizens is good for neither the legitimacy nor the credibility of the Court, so much so that the Colombian system has enjoyed wide discretion in the management of the peace process[103]. By failing to intervene, the Prosecutor's Office has essentially accepted that the justice of the Colombian case complies with the Rome Statute.

5.4 Criticism and Considerations

A system in which such large interests come into play could certainly not meet with everyone's approval. The first critical issue that comes to be identified pertains to the very compatibility between transitional justice and restorative justice mechanisms, based on the different contexts in which the two have developed and thus the inadequacies of the two to solve their respective problems. Uprimmy and Saffon state that:

Transitional justice takes place in exceptional political and social circumstances, and it faces crimes that go against the most essential content of human dignity. In contrast, restorative justice was designed to face small-scale criminality in peaceful societies. Thus, whilst for the latter cases it is plausible to use forgive and forget as efficacious strategies for overcoming crime, for the former cases that strategy seems politically and legally impossible, as well as ethically questionable[104].

103. Björkdahl, Warvsten, *Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC* at 654 (cited in note 98).

104. Uprimny Rodrigo, and Maria Paula Saffon. *Transitional justice, restorative justice and reconciliation: Some insights from the Colombian case* at 5 (cited in note 39).

But such an argument – deliberately deciding to ignore cases in which the combination of transitional and restorative justice has been successful, such as the South African case[105] – takes the form of a petitio principii rather than a critique.

Another reproach leveled against the model would be its lack of democratic character. Starting from Crocker's theory of "democratic reciprocity" according to which citizens should be able to express themselves freely and on equal terms, the criteria for assessing the democratic nature of the transition would be first the degree of citizens' participation and then the degree to which citizens' rights are protected[106]. From these premises, which are certainly supportable, the authors derive Animal Farm-like consequences, stating that there would be "some democratic models that are [...] more democratic than others"[107]. Thus, episodes such as the 1989 referendum in Uruguay would be undemocratic because they result in the granting of amnesties[108]. The problem with this approach is that it does not consider the degree of peace and stability resulting from amnesties themselves as a right of citizens and, therefore, assessable under the second criterion. The impression is almost as if the degree to which transitions are democratic ends up depending on how much one likes the outcome resulting from them and not on actual democratic participation. Wanting, however, to analyze in detail the democratic nature of the Colombian transition, one must first start with the referendum numbers, which saw the Peace Accord being rejected by a very narrow margin. The "No" campaign was focused on the granting of amnesties, which would have led to impunity for individuals guilty of the most serious crimes. However, the distribution of votes does not seem to be consistent with that narrative. As reported by BBC[109], the votes for "No" were for the vast majority in urban centers, little affected by

105. See id. at 11 (it is the authors themselves who refuse to consider it, regarding it as an "exceptional" hypothesis).

106. David Crocker *Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation*, 5 Buffalo Criminal Law Review at 528 ff.

107. Uprimmy, Saffon, *Transitional justice, restorative justice and reconciliation*. Some insights from the Colombian Case at 8 (cited in note 105).

108. Referendum econfirmed by a further one in 2009 https://www.electionguide.org/elections/id/150/ (last visited November 6, 2023).

109. See Colombia referendum: voters reject Farc peace deal, available at https://www.bbc.com/news/world-latin-america-37537252 (last visited November 11, 2023).

the civil conflict when compared to rural areas, where the "Yes" vote reached an overwhelming majority. In Choco, one of the provinces hardest hit by the conflict, 80 % of voters were in favor; in the town of Bojaya, where at least 119 people were killed when the FARC attacked a church with mortar fire, 96% of residents voted "Yes"; in the province of Vaupes, where members of the security forces have been held hostage by the FARC for 12 years, 78% of voters were in favor. Here, then, are the two sides of criminal law: on the one hand an instrument at the service of legal practitioners who are aware of its nature as a double-edged blade and therefore well disposed of, in some cases, to give it up; on the other, a mean servant of political interests and of a law-and-order system, which feeds on and is fueled by fear, in a dimension in which criminal law and criminality take on a mediatic dimension and the offender, demandingly, comes to be fully identified with the crime.

If we want, however, to question the democratic nature of a referendum in which only 37.4% of the eligible voters participated, we must remember that the Peace Accord was not approved through the referendum itself, but through an act of Parliament; a solution that also had the full support of the Colombian Constitutional Court, which expressed itself almost unanimously (eight votes in favor and only one against)[110].

Finally, the presence of a system of amnesties is blamed for the inability to adequately stigmatize the political project that made possible the commission of atrocities, a capacity that one would like to see present in a system of criminal proceedings instead. However, it is not clear how a criminal prosecution, which ascertains individual responsibility, can lead to the condemnation of an ideology unless we burden it with expectations and tasks that are not inherent to it. As expressed by the District Court of Jerusalem in the Eichmann case:

"It is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to meet out due punishment to him. Everything that requires clarification for these purposes may be achieved, must be determined at the trial, and everything foreign to these purposes must be eliminated from the court procedure.

110. Zupi, *La Colombia e il processo di pace* at 8 (cited in note 96).

Not only is any pretension to overstep these limits forbidden to the court - but it would also certainly end in complete failure"[111]

6 *Conclusions*

An assessment can now be made concerning the tasks set in para. 5, relating to the verification of the validity of the theoretical reconstruction and of the possibility for Colombia to become a landmark case (see supra para. 5). Consistent with the conceptual premises identified, Colombia enjoyed wide discretion in constructing its model of peace, going out of its way to fill with its point of view the shadowy areas in which the Prosecution could well have lurked, with substantial reductions in sentences and the granting of amnesties, in a model that preferred to give centrality to victims rather than retributive demands. With the awareness, however, that if the theoretical premises were to change (e.g., with the final formation of a custom regarding amnesties), the results would be, in the future, quite different. Regarding the possibility of the Colombian system becoming a relevant case law, although the hope is that there will be no need to use the Colombian model, other States, should they find themselves in the same situation, will demand to be granted the same margin of flexibility. However, before Colombia can become a landmark, it would be necessary for the model itself to be brought to completion. The Peace Agreement is a long way from being executed, and equally far away appears, sadly, the peace itself. The impression remains that, in such a delicate framework, well capable of foundering on its own as it did, the intervention of a supranational tribunal represents a deeply inappropriate involvement[112], capable of extinguishing a small fire of peace ignited after more than 70 years of civil war, more than 600,000 dead and 7 million displaced persons. A system that aims at conciliation rather than punishment need not be the solution, nor does this position reflect that of the writer of these pages. Unacceptable, however,

111. District Court of Jerusalem, Criminal Case n. 40/61 at p. 2.

112. Kai Ambos et al. at 84, (cited in note 23) (the authors claim that it is inconceivable that the ICC intends to overrule the decision of an entire nation that seeks peace and justice by alternative means).

is that such a system should not come to be seen as one of the possible solutions. The fetish for a retributive approach often stems from a "good guys versus bad guys" narrative that is not reflected in reality. As if the interests of all victims could find satisfaction in the realization of violence foreclosed to them firsthand.