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Transitional justice: some reflections around a misunderstood notion

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Abstract: Transitional justice is a concept that, frequently, generates a huge rejection. The reason has to do with its consideration as a form of "extraordinary" justice in which, it is believed, the demands of the democracy or peace are the ones that should prevail. Consequently, it is thought that International Law does not have a role in these complex situations of transitions. However, as in the present work we are going to demonstrate, this conception of "transitional justice" is anchored in the past. In effect, nowadays, transitional justice is an integral form of justice -that applies in ambiguous "transitional" periods- and whose objective is to eradicate impunity and guarantee the rights of victims. What is more, the relation of transitional justice with International Criminal Justice is based on complementarity, due to the fact that criminal justice continues having a central role in transitional periods. In conclusion, the main objective of this work is to prove that it is erroneous to consider that transitional justice does not have a juridical basis and, as a consequence, that it only offers alternative mechanisms to deal with violations of human rights.

Keywords: transitional justice – international crimes – international justice – international criminal law – victims' rights

(A) INTRODUCTION: WHAT IS TRANSITIONAL JUSTICE?

Transitional justice is a notion that generates scepticism only by mentioning it.[1] But the truth is that are a lot of errors around what this justice really is.[2] What is more, this term is interpreted contradictorily.[3] For example: for some authors, transitional justice requires necessarily criminal measures;[4] whereas, for others, criminal justice is just the opposite from transitional justice.[5] Another intense debate has to do with the consideration of transitional justice as a "light" form of justice.[6] Even if this comparison has been critiqued by the Special Rapporteur on the promotion of truth,

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1 X. Philippe, "Les solutions alternatives et complémentaires à la justice pénale internationale : la justice transitionnelle exercée à travers les commissions vérité et réconciliation" in Institut de Sciences Pénales et Criminologie (ISPEC) et Centre de Recherche en Matière Pénal Fernand Boulan (CRMP), *L'actualité de la justice pénale internationale*, Colloque organisé par le Centre de recherche en matiere penale F. Boulan (CRMP) - Faculté de droit (Aix-en-Provence, 12 mai 2007). Sous la direction de Monsieur le Professeur Xavier Philippe et de Madame le Professeur Dominique Viriot-Barrial (Presses Universitaires d'Aix-Marseille, 2008), at 131.

2 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/HRC/21/46, 9 august 2012, point 19.

3 A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009), at 538 [doi: 10.1093/law/9780199238323.001.0001]

4 W.A. Schabas, "Truth Commissions and memory" in F. Gómez Isa and K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (Publicaciones de la Universidad de Deusto, Bilbao, 2006), at 657.

5 X. Philippe, "La justice transitionnelle : une nouvelle forme de justice *?", 14 L'Observateur des Nations Unies* (2003), at 123.

6 J.E Méndez, "Justicia de transición" in R. Escudero Alday and C. Pérez González (eds.), *Desapariciones forzadas, represión política y crímenes del franquismo* (Editorial Trotta, Madrid, 2013), at 13 - 14.

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justice, reparation and guarantees of non-recurrence (hereinafter, *Special Rapporteur*)[7] and the International Center for Transitional Justice,[8] it continues being one of the most extended error the field has to deal with. Due to these contradictions some specialists believe that the concept of transitional justice should be reconceptualized.[9] And this is the reason why the doctrine is facing an enormous debate around what transitional justice is or should be.

Taking into consideration that the field of transitional justice has been studied by experts from different disciplines,[10] that has evolved considerably[11] and that even the United Nations created the mandate of the *Special Rapporteur*[12] to promote its study, it is quite surprising that, currently, we continue without a minimally accepted definition of this term.[13] It is true that there are some great studies that have tried to delimit transitional justice. For example, it must be mentioned the Report published, in 2004, by the United Nations Secretary-General in which transitional justice is defined as:

> "(…) 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."[14]

If we analyse this definition, we can reach to some interesting conclusions: transitional justice seems to be a "range of processes and mechanisms" (that can be judicial and non-judicial) and whose objective is to "come to terms with a legacy of large-scale past abuses". However, and if we focus on the mechanisms mentioned, we can appreciate that it only enumerates those measures, but it does not specificize what kind of justice it is.[15] What is more, from a legal perspective we should asked what is the role of International Human Rights Law or International Criminal Justice in these "range of processes".

Taking into consideration that the effectiveness of transitional justice requires common interpretations of its most fundamental concepts,[16] in our opinion, the field of transitional justice should clarify, at least, its basic notions.[17] That is: it should try to reach a consensus around the

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[7] Report of the Special Rapporteur, *supra* n. 2, point 19.

[8] International Center for Transitional Justice, "What is transitional justice?", 2009, the online text can be consulted here.

[9] In this sense, it is interesting to read the volume 6, num. 3 of the *International Journal of Transitional Justice*, where the authors analyse the possibility of reconceptualizing "transitional justice". An explanation of this view is explained in: P. Riaño Alcalá, and E. Baines, "Editorial Note", 6:3 *International Journal of Transitional Justice* (2012) at 387 – 388 [doi: 10.1093/ijtj/ijs027]

[10] A great summary of this multidisciplinary works can be found at: L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice* (Cambridge University Press, Cambridge, 2013).

[11] To understand how the evolution of transitional justice has affected its conception we highly recommend the following work: P. McAuliffe, "Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transitions", 2:2 *Journal of Conflictology* (2011), at 32 – 44 [doiI: http://dx.doi.org/10.7238/joc.v2i2.1297]

[12] HRC, Res. 18/7, 29 September 2011. All the information around the mandate can be found here.

[13] The intense debates around this notion can be appreciated at: P. Arthur, "How `Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice", 31:2 *Human Rights Quarterly* (2009) at 359 [doi: 10.1353/hrq.0.0069]; P. De Greiff "Theorizing Transitional Justice" in M.S. Williams, R. Nagy and J. Elster (Eds.), *Transitional Justice* (New York University Press, New York and London, 2012), at 32.

[14] The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General, S/2004/616, 23 August 2004, point 8.

[15] A similar opinion is expressed by the followings authors: J. Bonet Pérez and R.A. Alija Fernández, *Impunidad, derechos humanos y justicia transicional* (Publicaciones de la Universidad de Deusto, Bilbao, 2009), at 98.

[16] Report of the Secretary-General, *supra* n.14, point 5.

[17] Even more, it should be differentiated from similar concepts such as "post-conflict justice" or "jus post bellum".

definition; the limits of each mechanism; the role of International Law; the relation with other international institutions such as the International Criminal Court; etc. Otherwise, transitional justice will continue being a misunderstood notion and, as consequence, the rights of victims that theoretically it guarantees will face multiple obstacles to have a total protection.

This is the reason why in the present work we have decided to focus on what we consider transitional justice should be taking into account the norms of International Law. We know that, sometimes, it is quite controversial to affirm that transitional justice must respect the Law; but, precisely because of it, it is worth saying just from the beginning that, effectively, transitional justice must respect the obligations of International Law.

In order to defend our point of view and achieve the objective previously mentioned, we will start the article by mentioning the evolution experienced by the field (due to the fact that some of the errors come from a conception of transitional justice that does not have a correspondence with the present moment); then, we will analyse what we mean by "transition" and by "justice"; and, finally, we will explore what is the role of International Law in the transitional process (analysing the rights of victims, the different mechanisms that we identify with transitional justice, its juridical basic and, at the end, the connection with International Criminal Justice). Only this way we will be capable to conclude if we are in front of a justice that promotes impunity or not and, consequently, we will be able to dismantle the errors that are around this conflictive notion.

(B) A NOTION ANCHORED IN THE PAST: THE CREATION OF THE FIELD

Even if it is difficult to identify the origins of transitional justice[18], it seems that, when the field was created, it only applied to the transitions from dictatorial societies to more democratic ones.[19] For this reason, transitional justice was sometimes defined as a field that dealt with violations of human rights committed by an undemocratic regime.[20] As such, the key question that authors set out in that epoch was the following one: "In these times of massive political movement from illiberal rule, one burning question recurs. How should societies deal with their evil pasts?".[21]

Curiously, there were two opposite answers to this question:[22] first, there was one group of specialists who believe that judgements were mandatory;[23] but, in other experts' opinion, judgments were not possible because they firmly believe that in transitional periods was necessary to forget the

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To analyse the differences between them it is interesting to compare and contrast the following materials: J. Iverson, "Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics", 7:3 *The International Journal of Transitional Justice* (2013) at 413 – 433 [https://doi.org/10.1093/ijtj/ijt019]; L. May and E. Edenberg (Eds.), *Jus Post Bellum and Transitional Justice* (Cambridge University Press, Cambridge, 2013); M. Freeman and D. Djukic, "Jus Post Bellum and Transitional Justice" in C. Stahn and J. K. Kleffner (Eds.), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (Asser Press, The Hague, 2008), at 226 – 227.

[18] C. Bell, "Transitional Justice, Interdisciplinarity and the State of the `Field' or `non-Field'", 3:1 *International Journal of Transitional Justice* (2009) at 15 [https://doi.org/10.1093/ijtj/ijn044]; R. G. Teitel, "Genealogía de la Justicia Transicional", 16 *Harvard Human Rights Journal*, (2003), at 69 – 94 [http://dx.doi.org/10.14482/dere.44.7167]

[19] N. J. Kritz (Ed.), *Transitional justice. How emerging democracies reckon with former regimes* (United States Institute of Peace Press, Washington D.C., 1995); P. Arthur, Paige, *supra* n. 13, at 325 – 326.

[20] A. Boraine, "Transitional Justice" in C. Villa – Vicencio and E. Doxtader (Eds.), *Pieces of the Puzzle. Keywords on Reconciliation and Transitional Justice* (Institute for Justice and Reconciliation, South - Africa, 2004), at 67.

[21] R. G. Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000), at 3.

[22] J. Chinchón Álvarez, Javier, *Derecho internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana*, (Parthenon, Madrid, 2007), at 280.

[23] J.E. Méndez, "In Defense of Transitional Justice" in A. J. McAdams, (Ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame and London, University of Notre Dame Press, 1997), at 1.

past.[24] The tension between these two opposite views (sometimes represented as the justice *vs* democracy debate) characterize exactly the intense debate that impregnate the field and that, as time goes by, become one of its distinctive signals.[25]

If we analyze this debate from a legal perspective, in our opinion, the doctrinal disputes were quite surprising. In effect, the practice corroborated that the opinion that prevail was that justice had to give up in order not to put in danger the "transition" or the "democracy" and, as such, it seemed that the "restorative model" pursuit by truth commissions were the only option to deal with the systematic violations of human rights.[26] So it seems that, at least at the beginning of the field, it existed a huge discretion in order to decide which mechanism apply and, normally, the political considerations were the reasons that prevail when making that choice.[27]

However, taking into account that International Law imposed some obligations to states when human rights violations have been committed[28], the question should have been the following one: Did International Law admit this option? From a legal point of view, the answer, in our opinion, was no: it did not. But, as the practice of transitional justice demonstrates, in the first years of development of the field, the debate did not take International Law into consideration but, contrary, as we have said, the political considerations were the arguments that only prevail.[29]

If we take the Latin-American transitions as an example, we can appreciate that, generally, amnesties were widely approved and, consequently, justice processes were substituted for truth commissions[30] (this was classically represented as the truth *vs*. justice debate)[31]. The reason that prevailed to justify this option was that this decision was necessary to guarantee the "reconciliation" of the society.

Nevertheless, as it has been correctly argued, the use of words such as reconciliation can have

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[24] I. Rangelov and R. Teitel, "Transitional Justice", in M. Kaldor and I. Rangelov (Eds.), *The Handbook of Global Security Policy* (United Kingdom, Wiley Blackwell, 2014), at 342 - 345.

[25] C. Turner, "Deconstructing Transitional Justice", 24:2 *Law and Critique*, (2013), at 194 [https://doi.org/10.1007/s10978-013-9119-z]

[26] R. G. Teitel, *supra* n. 21, at 11.

[27] R. Mani, "La reparación como un componente de la justicia transicional: la búsqueda de la `justicia reparadora' en el posconflicto" in M. Minow et al, *Justicia transicional* (Siglo del Hombre, Universidad de los Andes, Pontificia Universidad Javeriana - Instituto Pensar, Bogotá, 2011), at 161. However, as it has been said, it is true that existed some kind of similarities if we compare the different transitions of this period (Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif: A/HRC/36/50/Add.1 Report to the Human Rights Council on his global study on transitional justice, 7 August 2017, points. 5 – 23).

[28] This debate is going to be analyzed in the point D) of the present work. More, we are going to explain that even if this is the point that we support, in the doctrine exists great discrepancies about what the role of International Law should be in transitional justice processes. A great summary of the debate facing in the discipline could be found at: I. Forcada Barona, *Derecho Internacional y Justicia Transicional: Cuando el Derecho se convierte en religión*, (Civitas - Aranzadi, Navarra, 2011).

[29] R. Mani, Rama, *supra* n. 27, at 159. An excellent study of the status of International Law in this period is analyse by Roht-Arriaza in the following book: N. Roht – Arriaza (Ed.), *Impunity and Human Rights in International Law and Practice* (New York - Oxford, Oxford University Press, 1995).

[30] To acquire more knowledge around this kind of transitions: J. Chinchón Álvarez, *supra* n. 22.

[31] E. Muñoz Nogal and F. Gómez Isa, "Derechos económicos y sociales en procesos de justicia transicional: Debates teóricos a la luz de una práctica emergente", 30 *Revista Electrónica de Estudios Internacionales* (2015), at 8 [doi: 10.17103/reei.30.01]. However, it is important to highlight that, as the years go by, both amnesties and truth commissions as the unique mechanisms in a transitional justice process have been condemned by the Interamerican Commission and Court of Human Rights. An excellent study to read about the contribution of the Court and the Commission to the development of transitional justice can be found at: E. Mesquita Cela, "The contribution of the Inter-American Court of Human Rights to the development of transitional justice", 14 *The Law and Practice of International Courts and Tribunals* (2015), at 457 – 475 [https://doi.org/10.1163/15718034-12341302].

contradictory meanings.[32] For example: the resolution of the Security Council that created the International Criminal Tribunal for Rwanda believed that "the prosecution of persons responsible for serious violations of international humanitarian law […] would contribute to the process of national reconciliation and to the restoration and maintenance of peace".[33] But if we look at another key case of transitional justice, the South Africa case, we reach just the opposite conclusion due to the fact that, in this process, it was the establishment of the famous Truth and Reconciliation Commission the mechanism whose objective was to reconcile the society.[34] So the question is: does justice or truth contribute to the reconciliation of the society? In the end, what these opposite cases demonstrate is that ambiguous words such as reconciliation or peace can be easily tergiversated to achieve different objectives.

To sum up, in the first years of development of the field the rights of victims of human rights were massively and systematically vulnerated[35] and, in the end, impunity prevailed.[36] So, consequently, we can draw the first conclusion of our analysis: transitional justice seemed to guarantee a situation of impunity. What is more, in this period, the role of International Law or, better said, its capacity to have an influence in the design of transitional justice was purely insignificant.[37]

The problem with this affirmation is that, in our opinion, there still is a sector that firmly believe that transitional justice continues defending an impunity situation. In another words: that this conception of justice that we have just present continues nowadays. But the truth is that the field has developed and, as such, no longer characterizes it. In order to better explain this qualitative leap, we are going to focus in the section that follows what do we understand for "transitional" and, then, what "justice", in our opinion, is or should be.

(C) BREAKING DOWN THE CONCEPT

(1)The "transition" of the field

As we have said below, in the first years of development of transitional justice, the field only seemed to apply to transitions to democracy. However, as the years go by, this model of justice started to expand to other situations. Indeed, it reclaimed its application in situations in which an armed conflict took place,[38] into what was called "historical injustices"[39] and, also, to some other contexts in which systematic violations of human rights had simply occurred[40] (these last ones sometimes are called

[32] A great comparation of the different answers given can be read at : P. Truche, "Deux réponses africaines à des crimes contre l'humanité" in J.P. Marguénaud, M. Massé et N. Poulet-Gibot Leclerc (Eds.), *Apprendre à douter: Questions de droit, Questions sur le droit* (Limoges, Presses Universitaire Limoges, 2004), p. 775.

[33] SC, Res. 955, 8 November 1994, Preamble.

[34] Article 3 of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. Online here.

[35] W. Schabas, "Transitional Justice and the Norms of International Law", for presentation to the Annual meeting of the Japanese Society of International Law, Kwansei Gakuin University, 8 October 2011.

[36] C. Collins, *Post - transitional justice: Human rights trials in Chile and El Salvador*, (The Pennsylvania State University, USA, 2010), at 19.

[37] J. Chinchón Álvarez, *supra* n. 22.

[38] A complete study around the expansion of the field can be found at: T.O. Hansen, "The vertical and horizontal expansion of transitional justice: Explanations and implications for a contested field" in S. Buckley – Zistel et al. (Eds.), *Transitional Justice Theories* (Abingdon and New York, Routledge, 2014), at 105 - 124.

[39] F. Gómez Isa, "Historical Injustices" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice*, Vol. 1, (New York, Cambridge University Press, 2013), at 285.

[40] These situations normally involved the problems face by those states that suffer the consequences of terrorism as the following authors maintain: J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 115; A. Álvarez Berastegi,

"conflicted democracies"[41]). Despite, the application of transitional justice to the classical situations of transitions to democracy continued having quite predominance[42]. More, the usage of the field also experienced some success in those states that made their transition to democracy in the past but, in those years, did not deal with the consequences of the violations of human rights committed during the dictatorship (a phenome that some authors attribute to what is called the "justice cascade"[43]).

As the *Special Rapporteur* has revealed, the contexts mentioned are very different from the original transitions to democracy.[44] What is more, it must also be taken into consideration that, when the expansion took place, the field was still developing.[45] This is the reason why the growth of the field made the concept of "transitional justice" even more ambiguous that it was before[46]. More, as it has been said, nowadays, the "transitional" concept does not make sense any longer.[47] Nevertheless, it is this word, precisely, what makes "transitional justice" so controversial.[48] In effect, there is a huge sector that believes that the justice that transitional justice offers is a "transitory" one. In another words: instead of attributing the "transition" word to the contexts, sometimes it is erroneously attributed to the justice one. Because of this, and before analysing what justice means, we consider it might be necessary to study with more detail one of the ambits of application just cited: concretely, the context of armed conflict[49], due to the fact that we are going to return to this ambit latter on.

It can be easily deduced that, in the middle of an armed conflict, a "transition" or a "political transitions" does not take place.[50] However, after the publication of a widely accepted *Inform* of the United Nations Secretary General the application of transitional justice to this kind of contexts has been widely consolidated.[51] Even more, the United Nations have promoted intensely the application

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"Justicia transicional en estados democráticos: Uso y abuso de los límites conceptuales" in R. Jimeno Aranguren (Ed.), *Justicia transicional: historia y actualidad* (Aranzadi, Navarra, 2017), at 69 – 86. However, there also are other situations that can be agglutinated in this group.

[41] F. Ní Aoláin and C. Campbell, "The Paradox of Transition in Conflicted Democracies", 27:1 *Human Rights Quarterly* (2005), at 172 – 213 [https://doi.org/10.1353/hrq.2005.0001]

[42] What is more, for some authors these ambits continue being the "orthodox case studies": T.O. Hansen, "Transitional Justice: toward a Differentiated Theory", 13:1 *Oregon Review of International Law* (2011), at 3 [https://doi.org/10.1080/13642987.2019.1624538]. An example of those ones could be the transitions occurred in some Arabic states. For more information about them: K. J. Fisher, and R. Stewart (Eds.), *Transitional Justice and the Arab Spring* (London and New York, Routledge, 2014).

[43] K. Sikkink, *La cascada de la justicia. Cómo los juicios de lesa humanidad están cambiando el mundo de la política*, (Barcelona, Gedisa, 2016).

[44] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif: A/HRC/36/50 (Advance unedited version) Report to the Human Rights Council on transitional justice in weakly institutionalized post-conflict settings, 21 August 2017. If we compare the different contexts, we can appreciate that the only common element is that all the situations mentioned deal with massive, systematic and grave human rights violations.

[45] *Ibid*. That is: the notion of transitional justice, its mechanisms, the limits of International Law, etc., were not sufficiently fixed when this expansion occurred.

[46] *Ibid*.

[47] J.R. Quinn, "Whither the `transition' of transitional justice", 8:1 *Interdisciplinary Journal of Human Rights Law*, (2014-2015), at 63 – 80 [https://doi.org/10.1080/01419870.2019.1615629].

[48] L. Bickford, "Transitional Justice", in D.L. Shelton, (Ed.), *The Encyclopedia of Genocide and Crimes Against Humanity Vol. 3*, (USA, Macmillan, 2004), at 1045.

[49] The reason why we are going to choose the armed conflict one is just because, in the last years, this ambit has become the most important one. What is more, it is the context that, precisely, links transitional justice with International Criminal Justice (as we will explain at the end of the work).

[50] H. Van der Merwe and J. Brankovic, "Transitional Justice and Human Rights", in A. Mihr and M. Gibney, (Eds.), *The SAGE Handbook of Human Rights, Vol. 2*, (Thousand Oaks, CA, SAGE Publications, 2014), at 896.

[51] Report of the Secretary-General, *supra* n.14.

of the mechanisms of transitional justice to the situations of armed conflict,[52] irrespective of the completion or not of it. What is more, the recent transitional justice process created in Colombia (that took place in the middle of the armed conflict) made the application of this kind of justice to these ambits indisputable.[53]

Once it has been accepted that transitional justice also applies to situations of armed conflict, it is important to put special attention to the particularities of this kind of contexts. The reason is quite simple: it is relevant to take into consideration that, if we apply transitional justice while the armed conflict continues, it will be particularly difficult to demand, for example, the application of "justice" measures.[54] These difficulties can arise, among others, in the middle of peace negotiations. In effect, in these negotiations, the parties will be highly distrusted to accord the obligation to judge those ones who have committed crimes during the armed conflict; and this, precisely, is the reason why, in some experts' opinion, "at first glance, ongoing conflict and transitional justice seems conflictive concepts".[55]

In conclusion, the problem with transitional justice in the last years is that "accountability for past wrongs is being demanded in situations where there is no clear or consolidated political transition".[56] However, in our opinion, due to the relevance of the notion and the popularity that it has achieved we should continue using this concept in order to guarantee the rights of the victims of international crimes. Furthermore, it is important to highlight that the United Nations and other international organizations also use this word constantly.[57] So the problem should not be what a "transition" is but, instead, what we mean by "justice". A question that we are going to try to respond in the next section.

(2)The complex challenge of "justice" in transitional situations

As we have said at the beginning of the present work one of the most frequent errors in the field of transitional justice is to consider it like a "light" form of justice.[58] It is undeniable that transitional justice is a type of "justice" that applies in "transitional" periods. But, what kind of "justice" it is? Does it include criminal justice or it is just an alternative type of justice?

First of all, it must be said that the type of justice that transitional justice offers has created an intense doctrinal debate and, nowadays, there is impossible to find a consensus around what "justice" is or should be in the ambiguous periods of transition.[59] However, if we take into consideration that

[52] For example, from 2006 on, the United Nations published the "Rule of law tools for post-conflict states", that can be consulted here.

[53] However, at the beginning -that it is, when the concept of "transitional justice" started to apply to the Colombian case-, some experts mistrusted its used. For wider information of this case and the debates that generated its application: R. Uprimny y M.P. Saffon, "Usos y abusos de la justicia transicional en Colombia", 4 *Anuario de Derechos Humanos*, (2008), at 176 – 183 [doi:10.5354/0718-2279.2011.13511].

[54] J.E. Méndez and C. Cone, "Transitional justice", in S. Sheeran and S.N. Rodley (Ed.), *Routledge Handbook of International Human Rights Law* (London and New York, Routledge, 2013), at 771.

[55] K. Ambos, "Conflict (Ongoing) and Transitional Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 151 - 152.

[56] R.G. Teitel, *Globalizing transitional justice. Contemporary essays* (New York, Oxford University Press, 2014), at xiv.

[57] For example, it is interesting to analyzed the context in which the following resolutions apply: HCR, Res. 21/15, 27 September 2012, point 13. The same context can be appreciated in the following resolution: HRC, Res. 12/11, 1 October 2009.

[58] J.E. Méndez, *supra* n. 6, at 13 - 14.

[59] S. Vandeginste and C.L. Sriram, "Power Sharing and Transitional Justice: A Clash of Paradigms?", 17:4 *Global Governance*, (2011), at 490 [https://doi.org/10.1163/19426720-01704006]. In our opinion, one of the most recent study around the notion of transitional justice and one of the best one is: D.N. Sharp, *Rethinking Transitional Justice for the*

"different cultures have different understandings of what justice is, as well as different understandings of the relativity of justice modalities in post conflict situations"[60], the difficulties that this work entails are quite comprehensive.[61]

If we make a comparative study of what has been written about this topic, we can deduce one main conclusion: it is not only that the authors differ in the defense of what justice should be, but also that the positions that they maintain are completely contradictory and, as consequence, this has had an effect on the effective implementation of the transitional justice process.[62] For example: there is a clear doctrinal division between those who believe that transitional justice is an ordinary justice[63] and those who affirm without doubt that it is an extraordinary justice.[64] In our opinion, the debate around the ordinary or extraordinary nature of transitional justice is not relevant for the field. Instead, what can have some kind of significance is to elucidate if the justice that we can obtain from the mechanisms of transitional justice is retributive or restorative.[65] Only this way we will be able to concluded if transitional justice does vulnerate or not the obligations that derivates from International Law.

It is worth saying that, in the doctrine[66], it has surged with special intensity a clear claim: transitional justice should focus less in criminal matters and, instead, it should pay attention to local[67],

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Twenty-First Century: Beyond the end of history (Cambridge University Press, Cambridge, 2018).

[60] M.C. Bassiouni, "Editorial", 8:3 *International Journal of Transitional Justice* (2014), at 336 [https://doi.org/10.1093/ijtj/iju020]. In similar terms: G. Dancy, "Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice", 4:3 *International Journal of Transitional Justice*, (2010), at 355 [doi:10.1093/IJTJ/IJQ016].

[61] *Ibid*., at 367.

[62] The different points of view around the debate can be consulted at: P. De Greiff, *supra* n. 13, at 58 – 65; M. Phillips, "Justice - Seeking in Settler States: A Model for Thinking about `Justice' in Transitional Societies" in C. Corradetti, et al. (Eds.), *Theorizing Transitional Justice* (England, Ashgate, 2015), at 81 – 92; J. Webber, "Forms of Transitional Justice" in M.S. Williams, et al. (Eds.), *Transitional Justice* (New York and London, New York University Press, 2012), at 98 – 128.

[63] E.A. Posner and A. Vermeule, "Transitional Justice as Ordinary Justice", 40 *University of Chicago Public Law and Legal theory Working Paper* (2003), at 4. Online at: http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf

[64] M. Kamto, "Réflexions sur la notion de justice transitionnelle" in C. Mottet and C. Pout (Ed.), *La justice transitionnelle : une voie vers la réconciliation et la construction d'une paix durable*, Conference Paper 1/2011, Dealing with the Past - Series, at 33. Online here.

[65] Along with restorative justice, there are some other kinds of justice that have been created last years. Such as reparatory justice (R. Ursachi, "Reparatory Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 288), structural justice (K.K. Thomason, "Transitional Justice as Structural Justice" in C. Corradetti et al. (Eds.), *Theorizing Transitional Justice* (England, Ashgate, 2015), at 71 – 80), distributive justice (M. Bergsmo et al. (Eds.), *Justicia distributiva en sociedades en transición* (Oslo, Torkel Opsahl Academic EPublisher, 2012) or transformative justice (R. Mani, *supra* n. 27, at 201 – 202).

[66] The United Nations have also recognized that it is necessary to take into account the contexts and the local forms of justice. However, as it has been added, they must be compatible with the norms of International Law. For more information about it: Report of the Secretary-General, *supra* n.14, point 36; GA, Res. 40/34, 29 November 1985, point A.7; Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Mapping the Justice Sector, New York and Geneva, United Nations, 2006 (HR/PUB/06/2), at 18. The relevant International Center for Transitional Justice does also apply the same point of view: International Center for Transitional Justice, *supra* n. 8.

[67] R. Shaw and L. Waldorf, (Ed.), *Localizing transitional justice: interventions and priorities after mass violence*, Stanford (Stanford University Press, 2010); K. McEvoy and L. McGregor (Eds.), *Transitional Justice from Below. Grassroots Activism and the Struggle for Change* (Oxford and Portland, Hart Publishing, 2008); D.N. Sharp, "Transitional justice and `local' justice" in C. Lawther et al. (Eds.), *Research Handbook on Transitional Justice*, (Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, 2017), at 142 – 158; N. Roth – Arriaza et al. "Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty", *19 Whittier Law Review*, 325 (1997), at 343 – 344 [doi: https://doi.org/10.1017/CBO9781139026406.002].

traditional[68] or alternative[69] strategies to deal with massive human rights violations. This "alternative" strategies are being assimilated to the justice given by Truth and Reconciliation Commissions and to the "traditional justice" of some communities.[70] In the end, what these positions reclaim is that justice should be adapted to the needs of each society[71] because, it is added, only this way can transitional justice have some legitimacy.[72] The truth is that this doctrinal revindication has had such a huge acceptation that has even been considered the "fourth generation of transitional justice".[73]

The consequences that derivates from the acceptance of this "fourth generation of transitional justice" or simply from the acceptance of alternative restorative methods to deal with human rights violations is that criminal justice can be put on hold. This is an option that seems quite probable due to the fact that, in some experts' opinion, "criminal justice is not, of course, the only form of accountability for atrocity".[74]

In "ordinary" criminal matters "restorative justice"[75] is having quite a great welcome. But if we translate the debate to the field of transitional justice the situation changes a bit. The main reason is that in transitional justice contexts the crimes that, normally, are committed are international crimes, that it is: genocide, crimes against humanity and war crimes. So, first, obviously, the crimes and their magnitude are different; and, second, the context in which the justice has to apply differs considerably

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[68] R. Nagy, "Centralizing legal pluralism? Traditional justice in transitional contexts" in C. Sriram et al. (Eds.), *Transitional justice and peacebuilding on the ground: Victims and ex-combatants* (Routledge, London and New York, 2013), at 81 – 99; P. Manirakiza, "Customary African Approaches to the Development of International Criminal Law" in J.I. Levitt (Ed.), *Africa: Mapping New Boundaries in International Law* (Hart Publishing, Oxford and Portland, 2008), at 44 - 48; C. Brems and Schotsmans (Eds.), *International actors and traditional justice in Sub-Saharan Africa: Policies and Interventions in Transitional Justice and Justice Sector Aid* (Intersentia, Cambridge-Antwerp-Portland, 2015); B. Bennett et al. (Eds.), *African perspectives on tradition and justice* (Intersentia, Cambridge-Antwerp-Portland, 2012); M.O. Hinz and C. Mapaure (Eds.), *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, (Namibia Scientific Society, Windhoek, 2010); L. Huyse and M. Salter (Eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International IDEA, Sweden, 2008).

[69] S. Kemp, "Alternative Justice Mechanisms, Compliance and Fragmentation of International Law" in L. Van den Herik and C. Stahn (Eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden-Boston, Martinus Nijhoff Publishers, 2012), at 261 – 263.

[70] A. Tiemessen, "Judicial versus Nonjudicial Methods", in L. Stan and N. Nedelsky (Ed.), *Encyclopedia of Transitional Justice, Vol. 1* (Cambridge University Press, Cambridge, 2013), at 206.

[71] A.A. An-Na'im, "Editorial Note: From the Neocolonial `Transitional' to Indigenous Formations of Justice", 7:2 *International Journal of Transitional Justice* (2013), at 199 [https://doi.org/10.1093/ijtj/ijt012].

[72] P. Lundy and M. McGovern, "Whose justice? Rethinking Transitional Justice from the Bottom Up", 35:2 *Journal of Law and Society* (2008), at 291 – 292 [doi:10.1093/ijtj/ijm029]. A similar opinion is expressed by: C. Duggan, "`Show me your impact': Evaluating transitional justice in contested spaces",35:1 *Evaluation and Program Planning*, (2012), at 205 [https://doi.org/10.1016/j.evalprogplan.2010.11.001].

[73] D.N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice", 26:1 *Harvard Human Rights Journal*, (2013), at 152 [doi:10.1163/2210-7975_hrd-9944-3005].

[74] W.A. Schabas, and R. Thakur, "Concluding remarks: The question that still remain" in E. Hughes, et al. (Eds.), *Atrocities and international accountability: beyond transitional justice* (Tokio-New York- Paris, United Nations University Press, 2007), at 281. Even if it is true that justice is not just criminal justice, it is undeniable that criminal justice continues having a central role in transitional justice (P. Seils, "La restauración de la confianza cívica mediante la justicia transicional", in J. Almqvist and C. Espósito (Coords.), *Justicia transicional en Iberoamérica* (Centro de Estudios Políticos y Constitucionales, Madrid, 2009), at 21; M. Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge University Press, Cambridge, 2006), at 10).

[75] But what is restorative justice? Even if, as it has been said, there is not a unique definition of restorative justice (C. Hoyle, "Can International Justice Be Restorative Justice? The Role of Reparations" in N. Palmer et al. (Eds.), *Critical Perspectives in Transitional Justice* (Cambridge - Antwerp - Portland, Intersentia, 2012), at 193; J. Phoenix, "Restorative Justice" in N.J. Young (Ed.), *The Oxford International Encyclopaedia of Peace, Vol. II* (Oxford University Press, Oxford, 2012), at 636) we can take as an example the definition given at the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSO, Res. 2002/12, Annex: Principios básicos para la aplicación de programas de justicia restitutiva en materia penal) that can be consulted here.

too. Just to put an example: maybe, after a war, the country has not had a well stablished judicial system able to manage all the juridical demands.

Noteworthily, the specialists that have studied the application of "restorative justice" to transitional scenarios seems to assume that the difficulties that these societies faces are exactly the same (but, as we know, they are not[76]). Nevertheless, there are only a few studies that focuses on the vicissitudes that cause the application of restorative measures to this kind of situations.[77] The rest of them, as previously said, only studies the mechanisms that we can identify with restorative justice.[78] Not to say that there are those who automatically put on the same level both modalities of justice; in other words: there is a tendency to assume that transitional justice and restorative justice are just synonyms.[79]

Even if the origins of transitional justice and restorative justice are not the same [80] and, consequently, it is not right to take both concepts as synonyms, the truth is that there is a wide doctrinal consensus when it comes to affirm that, in these contexts, justice has to pay attention to the reparation of victims and society.[81] What this positions mean is, consequently, that the punishment of the perpetrators is not so important and what really matters is to discover the true and to achieve reconciliation.[82] However, this is not only a doctrinal debate. In effect, like the recent case of Colombia demonstrates, the "restorative model" has started to have its place in transitional justice initiatives.

Actually, when the Peace Accord was signed, the parties to it accorded that the Especial Jurisdiction of Peace should apply restorative justice.[83] It is well known that, during the conflict of Colombia, international crimes were committed[84]. So, the question is the following one: it is possible to exclude criminal justice when international crimes have been committed? Does International Law allow that exclusion? We are going to answer to this question in the following point. But, first of all,

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[76] K. Clamp and J. Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings", 12 *International Criminal Law Review* (2012), at 340 [doi: 10.1163/157181212X648824].

[77] The following studies could be particularly interesting to acquired more knowledge around this topic: JJ. Llewellyn and D. Philpott (Eds.), *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press, Oxford, 2014); K. Clamp , *Restorative Justice in Transition* (London-New York, Routledge, 2014); S. Parmentier et al., "Dealing with the legacy of mass violence: changing lenses to restorative justice" in A. Smeulers and R. Haveman (Eds.), *Supranational criminology: towards a criminology of international crimes* (Intersentia, Antwerp-Oxford-Portland, 2008), at 335 – 356; C. Villa-Vicencio, "Transitional justice, restoration and prosecution" in D. Sullivan and L. Tifft (Eds.), *Handbook of Restorative Justice: A Global Perspective* (Routledge, London and New York, 2006), at 387 – 400.

[78] A critique of this comparison can be read at: G. Musila, *Rethinking International Criminal law: Restorative Justice and the Rights of Victims in the International Criminal Court* (LAP Lambert Academic Publishing, Germany, 2010), at 19.

[79] J. Sarkin, "Enhancing the legitimacy, status, and role of the International Criminal Court globally by using transitional justice and restorative justice strategies", 6:1 *Interdisciplinary Journal of Human Rights Law*, (2011 – 2012), at 88 [doi: 10.1163/22131035-00901001].

[80] R. Uprimny y M.P. Saffon, "Justicia transicional y justicia restaurativa: tensiones y complementariedades" in A. Rettberg (Comp.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional* (Bogotá, Ediciones Uniandes, 2005), at 217.

[81] A. Buti, "Restorative justice", in M.C. Bassiouni, (Ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post - Conflict Justice, Vol. 1* (Intersentia, Antwerp-Oxford-Portland, 2010), at 701.

[82] S.C. Carey et al., "Rebuilding society in the aftermath of repression", S.C. in Carey et al. *The Politics of Human Rights: The Quest for Dignity* (Cambridge University Press, Cambridge, 2010), at 213.

[83] Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, signed 24 of November 2016, at 144. It is interesting to read also the articles 3 and 13 of the Ley No. 1957, de 6 de junio de 2019, "Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz".

[84] The preliminary examinations of the International Criminal Court have repeated it incessantly. All of them can be consulted here.

it would be interesting to study what does the International Criminal Court think about restorative justice (due to the fact that, as we will explain latter below, there is an undeniable link between transitional justice and International Criminal Court when international crimes have been committed).

It is true that International Criminal Court gives more attention to victims[85] that previous international criminal tribunals. In this way, it guarantees in some parts of the process (even with some limits)[86] their right[87] to participate in the proceeding[88], as well as their protection[89] and reparation.[90] What is more, the Court stablishes some organs whose function is to attend the demands of the victims.[91]

Taking into consideration the position of the victims in the Rome Statute, it has been affirmed that the recognition of victims' rights is central to the Rome Statute.[92] What is more, it has been considered a recognition of restorative justice in the work of the Court.[93] But, as some experts have correctly said, the justice that the International Criminal Court offers is predominately a retributive one (even

[85] The definition of victims can be found at the Norm 85 of the Norms of proceedings and proof of the International Criminal Court. To deepen the knowledge around the concept to victim and their position at the International Criminal Court we highly recommend the following works: E. Orihuela Calatayud, "¿Justicia restaurativa para las víctimas? El papel de la Corte Penal Internacional", in J. Soroeta Liceras, (Ed.), *Conflictos, Nuevos Colonialismos y Derechos Humanos en una Sociedad Internacional en crisis*, (Anuario de los Cursos de Derechos Humanos de Donostia- San Sebastián, Aranzadi, Navarra, 2013), at 42 – 58; H. Olásolo and A. Kiss, "El Estatuto de Roma y la jurisprudencia de la Corte Penal Internacional en materia de participación de víctimas", 12-13 *Revista Electrónica de Ciencia Penal y Criminología*, (2010), at 5 – 13.

[86] E. Orihuela Calatayud, *supra* n. 85, at 23 - 81.

[87] We must insist that the participation of victims, as it has been said, is a right recognized in the Rome Statute, and not a privilege (Report of the Court on the strategy in relation to victims of the Assembly of States Parties of the ICC, ICC-ASP/8/45, point 45). The Rome Statute was approved in Rome, 17 July 1998; and enter into force 1 July 2002, in accordance with article 126 [United Nations, Treaty Series, vol. 2187, p. 3; depositary notifications C.N.577.1998]. Actually, 137 states have firmed the Treaty and 123 are parties to it. All the information can be consulted here.

[88] Article 68 of the Rome Statute, Norms 89 - 93 Rules of procedure and evidence, Rules 86 and 87 of the Regulation of the Court; Report of the Court on the strategy in relation to victims, *supra* n. 87; ICC-OTP, Policy Paper on Victims' Participation, April 2010; RC/Res.2: The impact of the Rome Statute system on victims and affected communities (Adopted at the 9th plenary meeting, on 8 June 2010, by consensus). The result that the Court has reached has been described at: "Court's Revised Strategy in Relation to Victims", ICC-ASP/11/38, 5 November 2012; Report of the Court on the Revised strategy in relation to victims: Past, present and future, Assembly of State Parties, Eleventh session The Hague, 14-22 November 2012, ICC-ASP/11/40. What is more, an illustrative recompilation of the participation of the victims at the process is been realized at: Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo. Judgment pursuant to Article 74 of the Statute. ICC-01/05-01/08-3343, 21 March 2016, at 16 – 21; Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo. Judgment pursuant to Article 74 of the Statute. ICC-01/04-01/06-2842, 14 March 2012, at 15 - 22.

[89] Article 68 of the Rome Statute, rules 87 y 88 of the Rules of procedure and evidence, Regulation 41 y 42 of the Regulations of the Court.

[90] Article 75 of the Rome Statute; Rules 94 - 97 of the Rules of procedure and evidence, Regulation 88 of the Regulations of the Court.

[91] The organs are the following ones: Trust found for victims (art. 79 of the Rome Statute; ASP/1/RES.6: Establishment of a fund for the Benefit of victims of crimes within the jurisdiction of the Court); Victims Participation and Reparations Section (art. 43 of the Rome Statute); and the Office of Public Counsel for Victims (Rule 16.1b) c) of the Rules of procedure and evidence; Regulation 81 of the Regulation of the Court; Regulations 114-117 of the Regulation of the Registry).

[92] ICC-ASP/15/Res.5, 26 November 2016: Strengthening the International Criminal Court and the Assembly of States Parties, at 38.

[93] We highly recommend the declarations of Mr. Ban Ki-Moon, United Nations Secretary-General around this topic: "Una era de rendición de cuentas". Discurso ante la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, Kampala, 31 May 2010. If interested, it is also interesting to read the following study: S. Kendall, "Restorative justice at the International Criminal Court", 70/2 *Revista Española de Derecho Internacional*, (2018), at 217 – 221 [http://dx.doi.org/10.17103/redi.70.2.2018.2a.02].

if we can find some components of restorative justice).[94]

Nevertheless, this is not the vision that the Court has of itself, due to the fact that it has made some affirmations where puts in valour its restorative function. Just as an example we should mention that it has been declared that "ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes".[95] Fernández de Gurmendi has also said that the Court offers a hybrid system[96] or even Von Habel has affirmed that it guarantees restorative justice to thousands of victims.[97] More, in some of the Decisions and Judgements of the Court it has been recognized its restorative function.[98] In conclusion, there seems that restorative and retributive justice have an important role to play in the work of International Criminal Court[99] and, in consequence, "under the Rome Statute, victims are actors of international justice rather than its passive subjects".[100] But, obviously, and as those declarations confirm, this does not mean that criminal justice can be excluded from the work of the Court.

So, if we take into account that even the International Criminal Court can offer a slight combination between retributive and restorative justice, the point is: Can we reach the same conclusion in the controversial field of transitional justice? To answer this question -and, consequently, to dilucidated the type of justice that transitional justice is-, we are going to analyze in the section that follows what is the role of International Law in the field. By completing this research, we are going to be able to conclude if retributive justice must always be part of a complete transitional justice strategy or not.

(D) THE RELEVANCE OF INTERNATIONAL LAW IN TRANSITIONAL JUSTICE

(1) The multiple rights of victims and the correspondence with transitional justice mechanisms

[94] E. Orihuela Calatayud, *supra* n. 85.

[95] ICC-OPT, ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes", Press Release: 11 December 2012, ICC-CPI-20121211-PR860. Online at: https://www.icc-cpi.int/Pages/item.aspx?name=pr860. In a similar sense it is interesting to read the words said by Fernández de Gurmendi: "Justice for atrocity crimes, both retributive and restorative – taking into account the interests of the victims and affected communities – is an important factor for long-term stability in post-conflict societies" (ICC-OPT, International Criminal Court: 'Justice is key to durable peace', Press Release: 21 September 2015, ICC-CPI-20150921-PR1152. Online here).

[96] ICC - OTP, Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, "International Criminal Court Today: Challenges and Opportunities", Keynote speech at Seminar "International Criminal Court – the Past, the Present and the Future", 9 June 2016, Helsinki, Finland. Online here.

[97] ICC - OPT, Herman von Hebel, Registrar, Remarks to the 15th session of the Assembly of States Parties, The Hague, 21 November 2016, at 11. Online here.

[98] Just to put an example, we can mention the following one: ICC - OTP, Dissenting Opinion of Judge Eboe-Osuji, ICC-01/09-02/11-863-Anx-Corr 27, November 2013.

[99] C. Van den Wyngaert Hon, "Victims before International Criminal Courts: Some views and concerns of an ICC trial judge", 44:1 *Case Westerns Reserve Journal of International Law* (2011), at 475 – 496; ICC - OTP, Assembly of State Parties, Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, Twelfth session, The Hague, 20-28 November 2013, ICC-ASP/12/41; ICC Newsletter, Victims before the ICC, October 2004, at 7. Online here; Report of the Court on the strategy in relation to victims, *supra* n. 87.

[100] OTP, Strategic Plan 2019-2021, 17 July 2019, at 23.

One of the most distinctive features of transitional justice is that it offers a justice for victims.[101] For this reason, the mandate that created the figure of the *Special Rapporteur* also adopted a perspective that centre its work on the victims[102] (a line that has also been followed by some of the organs of the United Nations[103]).

So, it is without doubt that the current stage of transitional justice situates the victims at the centre of the process and guarantees its participation and protection.[104] The reason why the victims are just in the middle of the process of transitional justice is because of the rights they own.[105] Effectively, as the Special Rapporteur has affirmed:

> "What is indispensable, and what transitional justice measures seek to accomplish, is to recognize that the victim is the holder of rights. This entails not only the right to seek for avenues of redress that can assuage suffering but also to restore the victim's rights that were so brutally violated and affirm her or his standing as someone who is entitled to make claims, on the basis of rights, and not simply as a matter of empathy, or any other type of consideration".[106]

It has been recognized unanimously that victims have the right to justice, to know truth, to obtain reparation and guarantees of non-repetition.[107] If we analysed these multiple rights, we can reach to a simple conclusion that is shared by the majority of experts that work in the field: one action hardly will be sufficient to guarantee all of them. In another words: if the state, for example, investigates, judges and sanctions the responsible of the commission of the crimes, that action will not be sufficient because the victims own other rights that must be satisfied too.[108]

This is the main reason why it is said that, in transitional justice processes, the strategy must be "integral" or complete in order to satisfy all the rights previously mentioned.[109] That means that it is necessary to adopt a wider notion of "justice" that takes into consideration criminal justice but, also, does not exclude the restorative justice one.[110] Because of this, transitional justice should try to

[101] J. E. Méndez, "Victims as Protagonist in Transitional Justice", 10:1 *International Journal of Transitional Justice* (2016), at 1 – 5 [https://doi.org/10.1093/ijtj/ijv037].

[102] The Resolution that creates the mandate of the *Special Rapporteur* mentions this question and it has also been revendicated by this special procedure as can be seen at: Report of the Special Rapporteur, *supra* n. 2, points 54 – 57.

[103] The following documents, among others, justify the centrality of victims in transitional justice: Report of the Secretary-General, *supra* n.14, point 18; Guidance Note of the Secretary - General: United Nations Approach to Transitional Justice, point 6.

[104] To know more about the participation of victims in the process of transitional justice the following works can be consulted: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/34/62, 27 December 2016. And, in the doctrine, we highly recommended the following study: T. Bundschuh, "Enabling transitional justice, restoring capabilities: the imperative of participation and normative integrity", 9 *International Journal of Transitional Justice*, (2015), at 10 – 32 [https://doi.org/10.1093/ijtj/iju030].

[105] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/67/368, 13 September 2012, point 61; it is interesting to read also the following studies of the Special Rapporteur: A/68/345, 23 august 2013, points 37 – 38 y 65 – 67; Report of the Special Rapporteur, *supra* n. 2, points 29 – 31.

[106] Report of the Special Rapporteur, *supra* n. 2, point 29.

[107] One of the strategics of the Special Rapporteur has been to make a deep study around each of the mechanisms of transitional justice and, specially, its juridical basis. The great results achieved by the Special Rapporteur can be consulted here.

[108] Report of the Special Rapporteur, *supra* n. 2, point III.D.22 – 23.

[109] *Ibid*.

[110] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/HRC/39/53, 25 July 2018, point 31.

achieve a holist justice[111], an integral justice[112] or, in the end, a wide notion of justice.[113] The main reason lies in that "the holistic approach to transitional justice affords a genuine opportunity for at least some accountability, some truth, some reconciliation and healing, some transformation and some reparations for victims".[114]

Nevertheless, it is important to highlight that even if we adopt a wider notion of justice the criminal justice must be included[115] (otherwise, and as we are going to see later, the state could violate International Law). In effect, as Odio Benito has affirmed, the restorative justice mechanisms are welcome, but it does not mean that the impunity of perpetrators ought to be guaranteed.[116] Therefore, transitional justice must try to reach to a combination of restorative and retributive justice all together.

In our opinion, this is precisely one of the most positive aspects of transitional justice and the main reason why we support its application: because the justice that transitional justice offers includes retributive and restorative justice and, in the end, it can guarantee a better response when human rights violations have been committed. Because of this, we agree with the definition given by Pablo de Greiff when he considers transitional justice as:

> "a strategy for the achievement of a familiar conception of justice to which countries in the area have adhered as manifested by their ratification of international instruments that ground and express rights to truth, justice, reparation, and guarantees of non – recurrence".[117]

As we have said at the beginning of the work, transitional justice incorporates different measures (judicial and extrajudicial[118]) in order to guarantee all the rights mentioned before. Even if the enumeration of mechanisms can differ considerable,[119] in our opinion, after the creation of the *Special Rapporteur* is correct to cite mainly four: justice measures, truth and reconciliation commissions, reparation programs and multiple measures whose objective is to guarantee the non-repetition of the violation of victims' human rights.[120]

All these measures should be applied complementarily. Put in other words: a transitional justice process should interrelate all the measures cited.[121] The reason resides in that each of the mechanisms

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[111] A.L. Boraine, "Transitional Justice: a holistic interpretation", 60:1 *Journal of International Affairs* (2006), at 17 – 27; Y. L. Sooka, "The Politics of Transitional Justice" in C. L. Sriram and S. Pillay (Eds.), *Peace versus justice? The dilemma of transitional justice in Africa* (James Currey, UK-US, 2010), at 38.

[112] R. Mani, "Balancing Peace with Justice in the the Aftermath of Violent Conflict", 48:3 *Development* (2005), at 27.

[113] A. Boraine, *supra* n. 20, at 67.

[114] A. L. Boraine, *supra* n. 111, at 28.

[115] R. Uprimny and M.P. Saffon, *supra* n. 80, at 228.

[116] E. Odio Benito, "Posibles aportaciones del Estatuto de Roma a los procesos judiciales en las sociedades en transición", in J. Almqvist y C. Espósito (Coords.), *Justicia transicional en Iberoamérica* (Centro de Estudios Políticos y Constitucionales, Madrid, 2009), at 252.

[117] P. De Greiff, "Some Thoughts on Transitional Justice", 4 Middle *&* *East – North Africa e-bulletin* (2013), published by the Association for the Prevention of Torture (APT), at 4.

[118] Report of the Secretary-General, *supra* n.14, point III.8.

[119] However, the enumeration of measures of transitional justice is not always the same. For example, if we analyse the informs published by different organs of United Nations, we can achieve one unique conclusion: there are innumerable different measures to guarantee victims' rights. As an example, we can mention the following ones: Report of the Secretary-General, *supra* n.14, point III.8; HRC, *supra* n. 57, point 1; SC, Res. 1894 (2009) 11 November 2009.

[120] It must be highlighted that the name of the Special Rapporteurs makes reference to the four mechanisms of transitional justice. What is more, the expert has explained the basis of its mandate and the strategy that he will follow to apply it. The report in which this information is given is the following one: Report of the Special Rapporteur, *supra* n. 2.

[121] L. Moreno Ocampo, "Building a Future on Peace and Justice: The International Criminal Court" in K. Ambos et al. (Eds.), *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin, Springer - Verlag, 2009), at 12; N.J. Kritz, "Progress and Humility: The Ongoing Search for Post - Conflict Justice" in M.C. Bassiouni (Ed.), *Post - Conflict Justice* (New York, Transnational

have its own limits and, consequently, complementarity is the key.[122] So, as it has been said, "each mechanism need not be taken as a whole. Rather, a portion of one or more may be used and combined with others".[123]

Even if it is some consensus around the necessity to achieve complementarity between the different measures the question, as it has been said, is how.[124] Nevertheless, there seems to be an acceptance around the impossibility to found a formula that applies to all the different scenarios in which transitional justice is demanded[125], due to the fact that the particularities of each state are unique.[126]

However, in our opinion, there are some common aspects that every state should respect. Effectively, as we are going to study in the following section, the juridical fundament of the mechanisms is founded in the obligations that comes from International Law[127] and, as consequence, the particularities of each state could not be taken as an argument to limit the application of International Law.

(2)The juridical basis of transitional justice

As we have said at the beginning of the present work, in the origins of the field, International Law did not play a significant role in transitional justice processes. However, the evolution of the field changed the attitude of promotors of transitional justice towards their legal obligations. And, nowadays, in our opinion, it is indisputable that there are a number of legal norms that must be respected and guaranteed in transitional justice.

There have been a lot of aspects that changed considerably the role of International Law in the application of transitional justice measures. However, and taking into consideration that it is not possible to analysed all of them, we would like to highlight just three relevant aspects: the creation of the International Criminal Court[128], the labour that United Nations did in the field,[129] and the relevant work made by the Inter-American System of Human Rights.[130] All of these organs have said

Publishers, 2002), at 59 - 60; C. Stahn, "La geometría de la justicia transicional: opciones de diseño institucional" in A. Rettberg (Comp.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional* (Bogotá, Ediciones Uniandes, 2005), at 81 – 142; P.B. Hayner, *Verdades silenciadas: la Justicia transicional y el reto de las Comisiones de la Verdad* (Barcelona, Bellaterra, 2014), at 42. However, a contrary position can be read at: R. Friedman and A. Jillions, "The Pitfalls and Politics of Holistic Justice", 6:2 *Global Policy*, (2015), at 141 – 150 [https://doi.org/10.1111/1758-5899].

[122] P. De Greiff, "Algunas reflexiones acerca del desarrollo de la Justicia Transicional", *Anuario de Derechos Humanos* (2011), at 24 – 25 [doi: 10.5354/0718-2279.2011.16994].

[123] M.C. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, (Martinus Nijhoff Piblishers, Leiden - Boston, 2013), at 954.

[124] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[125] Report of the Special Rapporteur, *supra* n. 2, point IV.A. 49; HRC, *supra* n. 57, point 14; The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, S/2011/634, 12 October 2011, point 16; Guidance Note of the Secretary – General, *supra* n. 103, point 3.

[126] C.L. Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (London and New York, Frank Cass, 2004), at 220; Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Reparations Programmes, New York and Geneva, United Nations, 2008, at 2 (HR/PUB/08/1).

[127] J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 13 – 30; I. Forcada Barona, *supra* n. 28, at 25 – 29; A. Bisset, *Truth Commissions and Criminal Courts* (Cambridge, Cambridge University Press, 2012), at 12.

[128] This point is going to be analyzed with great detail latter on in the part 3 of the present work.

[129] Report of the Secretary-General, *supra* n. 125, point 19, at 7. In a short work like this it is not possible to analyzed in great detail the relevant work made by the United Nations in the field. However, we would like to mention the great job made by the *Special Rapporteur*, due to the fact that he has systematized the work of the Organization. To learn more, we highly recommend to visit the official website of the Special Procedure here.

[130] International Center for Transitional Justice, *supra* n. 8. In a similar sense: M. Freeman, *supra* n. 74, at 9; Special

it simple: impunity must finish when human rights violations have been committed. But what is impunity?

The truth is that, sometimes, impunity goes in hand with the absence of criminal justice. But, actually, impunity does not arise uniquely if there is not criminal justice, due to the fact that impunity has a wider application.[131] In effect, we must take into consideration the definition provided in the "Updated Set of principles for the protection and promotion of human rights through action to combat impunity"[132]:

> "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations".[133]

So, along with the bringing the perpetrators to justice, it is necessary to ensure the right to know the truth, to provide reparations to victims and to guarantee the non-repetition of the human rights violations. What is more, all the obligations are "mandatory, interrelated, non-hierarchical".[134]

Moreover, as the studies that have been made around the *Updated Set of principles* stress, transitional justice process should also follow the same objective.[135] Then, we can say that one of the most important conclusions that arises from this definition of impunity is that there is a plane coincidence between it and the measures that transitional justice offers.[136] In another words: as it has been concluded, the juridical basis of transitional justices lies in the different international conventions that continue being in force in transitional scenarios.[137] This is the reason why it is

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Rapporteur, A/HRC/24/42, 28 august 2013, point 19.

[131] Principle 1. General obligations of States to take effective action to combat impunity.

[132] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 february 2005. An excellent study around these principles can be found at: T. Van Boven, "Preamble" en F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018).

[133] Principle 1. General obligations of States to take effective action to combat impunity.

[134] N. Roht-Arriaza, "Principle 1: General obligations of States to take effective action to combat impunity" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 47.

[135] Definition C): "Restoration of or transition to democracy and/or peace". A deep study around the different definitions that offer the Set of Principles can be read at: S. Krähenmann, "Definitions" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 40 - 41.

[136] F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018).

[137] Cassese, *supra* n. 3, at 538 – 540. If we focus on the international obligation that imposes to States the duty to investigate, prosecute and punish human rights violations it should be noted that it can be deduced from various sources. On the one hand, there are several international treaties of universal scope that contain it. Thus, we can mention the Convention on the prevention and punishment of the crime of genocide (arts. 1, 5 and 6), the Convention against torture and other cruel, inhuman or degrading treatment or punishment (art. 2, 6.2, 12 and 7.1), the International Convention for the protection of all persons from enforced disappearance (art. 3, 10.2 and 11) or, in the field of International Humanitarian Law, the Additional Protocol I to the Geneva Conventions (art. 85.1). On the other hand, if we turn to International Human Rights Law, it is true that the conventions that make up this sector do not expressly refer to the obligation to investigate and prosecute the human rights violations that they regulate. However, this obligation derives from victims' rights to have an effective remedy that is provided, among others, in the Universal Declaration on Human Rights (arts. 8 and 10), the International Covenant on Civil and Political Rights (art. 2), the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 13), the American Convention on Human Rights (art. 25) or the African Charter on Human and Peoples Rights (arts. 1, 7 and 26). To sum up, the instruments cited contain, either directly or indirectly, an obligation that imposes on the States the duty to carry out investigations when human right violations have been committed. Nevertheless, as we would see latter on, this interpretation of international regulations is not unanimously

important to highlight that International Law is always applicable in transitional justice processes.[138] As a result, we firmly consider that transitional justice (when apply taking into consideration the standards of International Law) can be an excellent instrument to combat impunity.[139]

But, to reach that ambitious objective, it is essential that transitional justice combines the mechanisms cited and that each of them respects the standards stablished by International Law. Accordingly, the state must investigate, judge and sanction the persons responsible for the commission of human rights violations; must give reparations to victims; and, finally, must adopted guarantees of non-repetition.[140] However, the fundamental question is how to guarantee all of them.[141]

Before anything else would be recommendable to add that, even if this is the opinion that we partage, there are some experts that believe that there do not exist those obligations or that there must be some kind of flexibilization when they are applied to transitional justice scenarios[142] (sometimes arguing that what really matter is the achievement of peace[143]). In this way, it is also added that in transitional justice contexts "criminal justice often has to give way to broader peace interests."[144] Even if the debate between peace or justice should have ended a long time ago,[145] the truth is that, as these

defended.

[138] Office of the United Nations High Commissioner for Human Rights, Transitional justice and economic, social and cultural rights, New York and Geneva, United Nations, 2014 (HR/PUB/13/5), at 5. Consult also the international documents mentioned at note 147.

[139] This position has had a great acceptance in the United Nations, as these documents demonstrates: S/PRST/2004/34, 6 October 2004; SC, Res. 1674 (2006) 28 April 2006, at 3; Office of the United Nations High Commissioner for Human Rights, *supra* n. 138, at 7; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362, 4 September 2013, point 93. We also highly recommended the work of: J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 15 – 92.

[140] All those obligations cited are excellently analyzed in the reports published annually by the *Special Rapporteur*. In effect, the Special Rapporteur has made an incredible work in order to dilucidated the juridical basis of a transitional justice process. Due to the fact that it is not possible to analyze in a short work like this the reach of each international obligations, we must refer to the extend reports mentions that could be consulted at the Official website of the *Special Rapporteur* previously mentioned (*supra* n.129). Also, we would like to add that, in the doctrine, two of the more complete works in which the international obligations are analyzed are: J.E. Méndez, *supra* n. 6, at 13 – 30; J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15.

[141] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[142] One of the most incredible aspect in the literature of transitional justice is the position maintained by some authors in which this "flexibility" is defended. For example, the following works can be compare and contrast: K. Ambos, "El marco jurídico de la justicia de transición", in K. Ambos et al. (Eds.), *Justicia de transición: Informes de América Latina, Alemania, Italia y España* (Berlín, Konrad Adenauer Stiftung, 2009), at 23 - 129; C. Bell, "The `New Law` of Transitional Justice" in K. Ambos et al. (Eds.), *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin, Springer - Verlag, 2009), at 105 - 126; N. Dimitrijevic, "Normative Change and Transitional Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 224 - 230; N. Turgis, *La justice transitionnelle en droit international* (Bruxelles, Bruylant, 2014), at 365.

[143] R. Uprimny Yepes et al., *Justicia para la paz. Crímenes atroces, derecho a la justicia y paz negociada* (Bogotá, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2014), at 81; K. Ambos, "Principle 19. Duties of States with Regard to the Administration of Justice" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 209 – 210; W.A. Schabas, (Chair), 'Truth Commissions, Accountability and the International Criminal Court, Commentary by William A. Schabas', in W. van Genugten et al., *Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference : proceedings of the eighth Hague Joint Conference held in The Hague, the Netherlands, 28-30 June 2007* (The Hague, TMC Asser, 2009), at 132.

[144] K. Ambos, Kai, *supra* n. 143, at 205 – 206.

[145] However, the United Nations have recognized that the debate is already over: Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Amnesty, New York and Geneva, United Nations, 2009, (HR/PUB/09/1), at V. In the same line: Report of the Secretary-General, *supra* n.14, point II.2.

affirmations show, justice still has to face a lot of obstacles to find its place in transitional justice processes.

However, and as we have said above, the most recent studies and practice[146] make it clear that international obligations exists and, as multiple international instruments have stressed, they are also applicable in transitional justice scenarios.[147] What is more, these obligations are the same and must be applied equally in transitional processes.[148] Nevertheless, the question, as we have said before, is how,[149] due to the fact that the field has to deal with massive, systematic and grave human rights violations.[150] In effect, even if we admit that International Law must be respected in transitional justice processes, we are aware of the difficulties that surge and that, in some way, limits its absolute application.[151] For this reason, it is important to maintain a creative mind in order to offer the best juridical solutions that the complex transitional justice scenarios demand[152].

For all the reasons mentioned in this section, we believe that is fundamental to insist on two points: first, the main idea that we will like to highlight is that transitional justice does not go against International Law; contrary, it respects it and guarantees its application. And, secondly, transitional justice is based in a combination of mechanisms (whose juridical basis, as we have said, resides in International Law) in order to guarantee a broader response to combat impunity.[153] Consequently, states cannot decide which mechanism apply, due to the fact that compensation between mechanisms is not allowed.[154] To sum up, the relevance of transitional justice consists on the interrelated combination of the measures that it offers and that, in the end, make possible that states guarantee the observance of International Law. What is more, as we are going to explain in the last point that

[146] In this sense, it is important to highlight the Colombian case that it is going to be mentioned latter on. The importance of this case is that it is considered the most relevant transitional processes at the moment. What is more, it is fixing the legal basis that a transitional justice processes should respect. To learn more about this case the following study can be consulted: J. Loyo Cabezudo, "La justicia transicional en Colombia: ¿Un instrumento creado para erradicar la impunidad?", *Anuario Iberoamericano de Derecho Internacional Penal*, Vol 5, 2017 [doi: https://doi.org/10.12804/revistas.urosario.edu.co/anidip/a.5669].

[147] Report of the Special Rapporteur, *supra* n. 44, point 97; Report of the Special Rapporteur, *supra* n. 2, point 61; Report of the Secretary-General, *supra* n.14, points 9 - 10, p. 6; Office of the United Nations High Commissioner for Human Rights, *supra* n. 138, at 5.

[148] The following studies demonstrated that the international obligations continue being the same (even if the state is involved in a transitional justice process or not): J.E. Méndez, *supra* n. 6, at 14; T. Rincón, *Verdad, justicia y reparación, La justicia de la justicia transicional*, (Editorial Universidad del Rosario, Bogotá, 2010), at 25; J. Chinchón Álvarez, "Derecho internacional y `transformaciones del Estado': Del desuso, uso y abuso del ordenamiento jurídico internacional cuando de ciertas transformaciones que afectan a la forma de gobierno se trata" in J. Soroeta Liceras, (Ed.), *La eficacia del Derecho Internacional de los Derechos Humanos*. C*ursos de Derechos Humanos de Donostia-San Sebastián. Volumen XI* (Bilbao, Servicio Editorial de la Universidad del País Vasco/Euskal Herriko Unibertsitatea, 2011), at 86; N. Turgis, *supra* n. 142, at 547.

[149] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[150] Report of the Special Rapporteur, *supra* n. 44, points 56 – 58; Guidance Note of the Secretary – General, *supra* n. 103; ICTJ briefing, "Transitional Justice in the United Nations Human Rights Council", at 2.

[151] Some of those limits are mentioned in: "Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119" E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, point 48.

[152] To read more about the possible juridical solutions or alternatives that multiple transitional justice processes demand: J. Loyo Cabezudo, *Estudio de la Justicia Transicional desde el prisma del Estatuto de la Corte Penal Internacional: Especial referencia a las cuestiones de admisibilidad*, (Navarra, Aranzadi, 2020).

[153] Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by professor Diane Orentlicher (E/CN.4/2004/88) 27 February 2004, at 2.

[154] Report of the Special Rapporteur, *supra* n. 2, point III.D. 27. An idea that it is repeated in: Report of the Special Rapporteur, *supra* n. 105, points 60 y 81.

follows, even the International Criminal Court has accepted this wider vision to combat impunity[155] and, consequently, has finally adopted a favorable position towards transitional justice.

(3) International Criminal Justice and transitional justice

At first sight, it might sound quite rare to affirm that the relation between International Criminal Justice and transitional justice is a complementary one.[156] But the truth is that it is. The reason why these two ambits overlap is the following one: the contexts that "activated" the application of transitional justice are, normally, also the ones where international crimes have been committed[157]. Consequently, in theory, the International Criminal Court could exercise its jurisdiction[158] if the state concern does not investigate, judge and sanction the person responsible of committing them.[159] This is the reason why Schabas has argued that:

> "the Rome Statute of the International Criminal Court is today at the centre of the legal debate concerning transitional justice (…). The consequence is that it is now impossible for States to assess the transitional justice options that are best suited to their own needs, political context and historic development without taking into account the possibility that the Court will decide to involve itself based on a different evaluation of priorities and regardless of their concerns."[160]

It is not only that these two ambits overlap, but also that they need each other due to the limits that they both have. Effectively, the Court itself has recognized that its resources are limited and that is the reason why it has accepted that it is necessary a broader approach to combat impunity.[161] In the last years[162] it has also recognized that there exist complementary measures to criminal justice that can contribute to achieve this goal.[163] Concretely, the Court has made the following thought-provoking declarations:

> "As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.
>
> "The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap. The Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a

[155] International Criminal Court, Paper on some policy issues before the Office of the Prosecutor, September 2003 (ICC-OPT 2003), at 3.

[156] M.A. Drumbl, "The future of International Criminal Law and Transitional Justice" in W.A. Schabas et al., (Eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (England, Ashgate, 2013), at 531 – 545; S. Essomba, "Quelle complémentarité entre la justice transitionnelle et la justice pénales internationale?", 84 *Revue internationale de droit pénal*, (2013), at 181 – 204.

[157] As it is well known, the International Criminal Court is "a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions" (art. 1 Rome Statute).

[158] Read article 17 of the Rome Statute.

[159] This connection between the two has been revendicated by several organs of the International Criminal Court. Due to the fact that the concrete declarations are going to be cited latter on, we refer to the reader to the documents cited at notes 161 – 176 in order not to repeat them. In the doctrine it is also interesting to read the following works that sustain this position: J. Chinchón Álvarez, "El Derecho penal internacional en contextos transicionales" in A. Gil Gil and E. Maculan (Dirs.), *Derecho penal internacional*, (Dykinson, Madrid, 2016), at 465; H. Olásolo Alonso, *Derecho internacional penal, justicia transicional y delitos transnacionales: dilemas políticos y normativos*, (Tirant lo blanch, Valencia, 2017), at 303.

[160] W. Schabas, *supra* n. 35, at 11.

[161] ICC-OTP, *supra* n. 155, p. 3; Assembly of States Parties, tenth session, New York, 12-21 December 2011: Report of the Court on complementarity. ICC-ASP/10/23, 11 November 2011, at 8, point 35.

[162] The recognition of this combination of measures has followed the following years. For example, if interested it is relevant to consult: Resolution ICC-ASP/16/Res.6, 14 December 2017: Strengthening the International Criminal Court and the Assembly of States Parties.

[163] ICC-OTP, Policy Paper on the Interest of Justice, September 2007, at 7 – 8.

 DOI: 10.17103/sybil.25.3

comprehensive approach."[164]

It is interesting to verify that, when the Rome Statute Review Conference took place, complementary measures to criminal justice were also debated.[165] Concretely, it was considered that extrajudicial mechanisms (such as truth and reconciliation commissions or reparative measures) could be excellent complements to criminal justice.[166] But it is important to highlight that we are talking of "complements", not "alternatives" measures.[167] Nowadays, this concrete point of view has been confirmed by the recent practice of the International Criminal Court.[168]

In effect, the Court has made it clear that the Rome Statutes imposes an obligation to investigate, judge and sanction the persons responsible for committing international crimes and, as it has been added, during the transitional justice process this obligation has to be respected too.[169] So, actually, political arguments seem to have no place at the International Criminal Court, even if the state is implementing a transitional justice process.[170]

As it is well known, it has been the Colombian transitional justice process the initiative that has joined together the work of the International Criminal Court and the measures of transitional justice. Concretely, when the Colombian peace process was taking place, some organs of the Court made some of the most interesting declarations about this topic.[171] For example, it was said that transitional

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[164] *Ibidem*.

[165] Review Conference of the Rome Statute of the International Criminal Court Kampala, 31 May – 11 June 2010, RC/9/11, at 5.

[166] Review Conference of the Rome Statute of the International Criminal Court Kampala, 31 May – 11 June 2010: RC/9/11, Annex V b): Stocktaking of international criminal justice Peace and justice, point 7.

[167] *Ibid*., point 33.

[168] First of all, it is relevant to say that, in the doctrine, a number of experts have studied the application of article 17 of the Rome Statute to alternative measures. However, due to the fact that it is impossible to study in detail all the juridical arguments that have been highlighted to support this point, we would like to refer to the following work where the debate is explained: J. Loyo Cabezudo, *supra* n. 152 (specially chapter 4). At this point, we just considered necessary to add that the Court has also analyzed this debate and has declared that if a State implements alternatives measures, the situation would be admissible: Pre-Trial Chamber II: Situation in the Islamic Republic of Afghanistan. Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, point 79; Pre-Trial Chamber III: Situation in the Republic of Burundi. Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X–9-US-Exp, 25 October 2017. ICC-01/17-9-Red, 9 November 2017, point 181; Situation in the Republic of Côte d'Ivoire. Request for authorization of an investigation pursuant to article 15. ICC-02/11-3, 23 June 2011, point 51; Situation in the People's Republic of Bangladesh/Republic of The Union of Myanmar, Request for authorization of an investigation pursuant to article 15, ICC-01/19-7, 4 July 2019, point 233.

[169] Keynote speech by James Stewart, Deputy Prosecutor of the ICC: "La justicia transicional en Colombia y el papel de la Corte Penal Internacional". Conferencia organizada por: La Universidad del Rosario, El Tiempo, el Centro Cyrus R Vance para las Iniciativas de Justicia Internacional, la Fundación Hanns Seidel, las Naciones Unidas en Colombia, el Centro Internacional para la Justicia Transicional y la Coalición por la Corte Penal Internacional. Bogotá, Colombia, 13 de mayo de 2015; Mr. James Stewart, Fiscal Adjunto de la Corte Penal Internacional: "El rol de la CPI en el proceso de justicia transicional en Colombia", Conferencia organizada por el Instituto Max-Planck de Derecho Público Comparado y Derecho Internacional en Friburgo, la Universidad Externado en Bogotá y la Universidad EAFIT en Medellín. Bogotá y Medellín, Colombia, 30 - 31 de mayo de 2018.

[170] It is important to add that references to the "political" or "complex" situations that face the states are common in the doctrine. In another words: there are a high number of experts that interpreted that articles 16 and 53 of the Rome Statute could open the door to political considerations in the practice of the International Criminal Court. However, once more, the Court has simply declared that these arguments have no place in the Rome Statute, like the following documents corroborated: ICC-OTP, *supra* n. 163; ICC-OTP, Documento de política general sobre exámenes preliminares, 2013, pp. 18 – 19; Speech of Mrs Fatou Bensouda, Prosecutor of the International Criminal Court, Seminar Hosted by the Attorney General of the Federation and Minister of Justice of Nigeria: International Seminar on the Imperatives of the Observance of Human Rights and International Humanitarian Law Norms in International Security Operations. Abuja, Nigeria, 24 February 2014, p. 6.

[171] It worth saying that the Colombian process has been praised by some authorities of the Court. For example: James

justice must respect the Rome Statute,[172] due to the fact that the obligations that it imposes cannot be suspend or ignore because of opportunity reasons.[173]

However, the Court, obviously, is a criminal tribunal and, for this reason, it only focuses on the justice component of each transitional justice process.[174] Expressed differently: The Court only activates its jurisdiction if a state does not apply correctly the justice measures inside a wider process of transitional justice[175]. This does not mean that the rest of the mechanisms are not relevant, it just means that it is not the main focus of the Court.[176]

These declarations confirm what we have defend along this work: transitional justice does not go against International Law (or even International Criminal Law). What is more, criminal justice continues playing a central role in each and every transitional justice process. Otherwise, as we have seen, if international crimes have been committed, the International Criminal Court could activate its jurisdiction, even if the State applies effectively the rest of transitional justice mechanisms. In conclusion, International Law (and, specially, International Criminal Law) has a relevant role to play in transitional justice processes.

(E) FINAL REMARKS

As we have said at the beginning of the present article, transitional justice is a notion that, still, generates considerable misunderstandings among its objectives. Furthermore, the fact that we do not have a wide approved definition of it generates perhaps too much speculations about what really this ambiguous concept entails. Not only that, but it is important to take into consideration that the definitions around this kind of justice, more often than not, are even contradictory. This is the reason why, in our opinion, it is time to specify juridically what transitional justice really is.

As we have also highlighted, this uncertainty is hard to understand, due to the fact that transitional justice accumulates years of experience and, as we have seen, there also exist a special procedure in the core of the United Nations: the *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*. So, the question we should ask ourself is why. In another words: why there are so many misunderstandings, indeterminacies and vagueness around what transitional justice is or should be? In our opinion, the answer may be quite simple: maybe there is not a political or practical intention to limit the contours of transitional justice.

Effectively, it is interesting to remember that, at the beginning of the field, states owned a huge discretion in order to decide which mechanism should be applied in transitional justice processes. More, International Law did not play such a big role in the election of the mechanisms and, for this reason, normally, criminal justice was simply avoided. Instead, truth and reconciliation commissions or even reparative measures took up its place. To sum it up all: the political considerations were the reasons that prevailed in the election of the form of transitional justice and, as such, it was correct to affirm that, in the end, transitional justice guaranteed a situation of impunity.

Stewart, *supra* n. 161, point 209.

[172] Keynote speech by James Stewart, *supra* n. 169, at 18 – 19.

[173] James Stewart, *supra* n. 169, point 68.

[174] *Ibid*., points 46 – 49.

[175] *Ibid*.

[176] *Ibid*.

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However, the evolution experienced in International Law does not permit this comparison any longer. And, as consequence, nowadays, transitional justice processes must respect the limits impose by International Law. Then, why the experts that work in the field of transitional justice seems so cautious to accept the actual juridical basis of transitional justice? Maybe the truth just is that states - and, in the end, the promotors of transitional justice- feel more "comfortable" if they do not have to deal with the limits impose by the Law. But, if we admit this situation, we are negating the rights of millions of victims that have suffered massive, systematic and grave human rights violations. What is more, we are tolerating perpetrators of this violations to simply enjoy an idle situation of impunity. Last but not least, we are implicitly recognizing a step back in the eradication of impunity; an objective that, in theory, was strongly welcomed in 1998 with the creation of the International Criminal Court.

For all the reasons mentioned, we have offered another angle to study the concept of transitional justice. One that, in our opinion, is based on International Law and, consequently, on the respect and guarantee of the rights of victims. From this perspective, we firmly believe that transitional justice cannot be a kind of "extraordinary" justice in which the Law has not a role to play and where the rights of victims must be "compensated" with the needs of the "transition" or even the "peace". This kind of "transitional justice", in our opinion, could go against the norms impose by International Law and, consequently, if adopted, the state concern could incur in international responsibility.

Therefore, we consider that transitional justice could by qualified as a "type" of justice whose objective is to eradicate impunity. The reason why we attribute this capacity to it is because it offers an integral combination of mechanisms (judicial and extrajudicial) that, if apply successfully and respecting International Law, can offer the most satisfactory answer when massive, grave and systematic human rights violations have been committed. Moreover, it is interesting to remember that the definition of impunity offered by the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* contemplates this comparison and, more, the studies that experts have made around them also support this position.

Effectively, as it has been highlighted, when we are in "transitional" periods, the violations that the judicial system has to dealt with are characterized for them gravity and systematicity. For this reason, it is easy to understand that the judicial system is not going to investigate all the violations. It is from this point of view that we defend that the juridical response must be completed in order to guarantee all the rights victims own (due to the fact that they are, basically, one of the pillars of transitional justice). But, of course, criminal justice must continue being one of the core mechanisms of an integral transitional justice process. Because of it, it is important to insist that retributive justice and restorative justice must go hand in hand in transitional justice processes. Therefore, it is important to put an end to those trends that consider that transitional justice and restorative justice are just synonyms.

Furthermore, as it has also been explained, all the mechanisms of transitional justice have its juridical basis in International Law. So, consequently, we can conclude that if we applied them respecting the norms impose by this sector of the legal system, transitional justice is not against the Law. What is more, maybe, in the future, it will contribute to reach the reconciliation of the society.

To sum up, transitional justice is not restorative justice, it is not an extraordinary justice and it is not an area that is against the Law (in general) and against International Law (in particular). Taking into consideration the ample sectors that firmly believe that International Law can be ignored or that it simply becomes more "flexible" in these contexts, it is important to emphasize that this is no longer

an option. Quite the contrary: transitional justice is a form of justice that combines multiple mechanisms (criminal justice, truth and reconciliation commissions, reparatory measures and guarantees of non-repetition) and whose legal basis is in International Law. If apply correctly, its objective could be the eradication of impunity, while it guarantees satisfactorily the rights of millions of victims that have suffered massive, systematic and grave human rights violations.

As we have just said, transitional justice has a firm commitment with the eradication of impunity and, for this reason, in recent years it has also had the approval of the International Criminal Court. This is one more reason that helps us to maintain, first, our bet in favor of the benefits that derives from an integral transitional justice process; and, second, helps us to defend that transitional justice does not oppose to International Criminal Justice. To put it simple: when international crimes have been committed, probably, the ambit of application of transitional justice and International Criminal Justice will overlap. So, sometimes, the situations the International Criminal Court is going to deal with could be define as transitional justice processes (as the Colombian cases probes). In these situations, the obligations imposed by the Rome Statute must be respected and, consequently, transitional justice could not guarantee a "legal haven".

However, we must recognize that, especially in transitional justice periods, criminal justice has its limits. So, it is time to open our minds and try to find more creative and effective ways to, in the end, guarantee the rights of victims. Only this way (and not by empty words) the International Community is going to prove that is committed with them and will recognized that, as the Preamble of the Rome Statute says, "have been victims of unimaginable atrocities that deeply shock the conscience of humanity". We know that transitional justice it is not going to be the panacea, but, maybe, it can offer a more satisfactory response when it comes to dealing with these complex situations.

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