The Pragmatism of Justice: On The International Lawfulness and Legitimacy of Alternative Sanctions

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Abstract: during the Colombian armed conflict, abuses against the enjoyment of human rights which amounted to international crimes were committed by the different sides in the combats with the former armed group FARC. Accordingly, the cessation of hostilities which said group has an immense positive potential in terms of the non-repetition of those abuses by that armed group, and the lessening of risks of potential harms caused in connection to hostilities with it. While peace is thus a fully desirable goal, the context in which negotiations between the former Colombian government and the FARC took place could not ignore socio-legal constructs that have been developed during the last decades in terms of demands of the fight against the impunity of crimes attributable to both State and non-State actors under human rights law. This is reflected in several provisions of the final Peace Agreement. But a thorny question that was hotly debated was whether the granting of alternative sanctions to those who appeared before the Special Peace Jurisdiction and met some conditions, instead of being imposed traditional incarceration, are in conformity with the demands of international law. This article explores why alternative sanctions may be consistent with them, considering that all criminal responses are social constructs which have changed over time, and how important goals enshrined under Inter-American standards can well be achieved by means of imposing alternative forms of punishment. However, this is not a free pass, considering that actual responses must have some proportionality in light of the specific conduct that was carried out and the harm it caused, and must also ensure that truth and reparation are provided instead of circumvented. Otherwise, sanctions would be such in name only, and res judicata would be apparent and not effective. Whether these elements are satisfied will depend to a large degree on the actual decisions of the Special Peace Jurisdiction. Considering how crucial the implementation and recognition of the effects of the Peace Agreement and its derived standards are, it is in the interest of the different parties to ensure that the respective international legal conditions are observed.

Keywords: alternative sanctions; international human rights law; transitional justice; post-conflict; fight against impunity; international crimes.

1. Introduction

In this article, I will analyse alternative sanctions in response to serious human rights violations and to international crimes are compatible with international law, considering that the agreement between the FARC and the Colombian Government provide for them. They have proven to be contentious in political terms. But in addition to this, the wording of the final version of the '*Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*' peace agreement reveals that the negotiators were aware of the fact that they were walking on thin ice in terms of the conformity with international law of the regime.

This was so as a result of the evolution of international legal practice in relation to the limitations placed on states when they decide how to treat perpetrators of conduct deemed as internationally-criminal. If there were to be a future finding that international law is contravened by the sanctions based on the agreement, the consolidation of the peace process could be jeopardized in the future, perhaps even raising the prospect of transnational litigation, International Criminal Court action, or the denial of foreign aid.

Against the backdrop of this context, the negotiators and their advisors came up with an innovative sanctions system which, if accepted, may prove to be a creative and influential tool that can help to reconcile peace and justice objectives, and to avoid deadlocks during peace negotiations. As Liu Jieyi from China said in the Security Council, for instance, the Colombian process may provide or set an "example for resolving other hot spots."[1]

The authors and defenders of the creative Colombian system claim that it observes developments from the Inter-American Human Rights System. To do so, they have invoked opinions such as that of judge García Sayán, or interpret pronouncements of the Inter-American Court of Human Rights as the one it in the case *El Mozote*, explored below, in ways that are not easily coincident with what the Court said. But this, by no means, necessarily implies that international human rights law has been flouted. In relation to this, it is useful to recall that every interaction with law, including its shaping and interpretation, and not only its 'declaration', is a legal process with potential relevance, and that human rights law itself has changed in the way it is construed. Moreover, interpretations made by Inter-American bodies may be enriched or subtly modified by dialogue with different actors in a multi-level context.

Furthermore, authors such as Louise Mallinder have argued that the general prohibition of amnesties is a jurisprudential creation that is not actually supported by *lex lata*.[2] Even if this were so, negotiators act wisely when they try to frame their agreements as consistent with international case law. This is because, even though international judicial decisions are only formally binding for the parties to the respective dispute and process,[3] international case law will undeniably be employed in future cases and its findings on amnesties, impunity and the necessity of proportionate sanctions have been and will likely be reiterated in different cases.[4] Moreover, doctrines as the "control of conventionality", present in the Inter-American system, set forth the argument that state agents must heed what the

[1] United Nations, "Security Council Decides to Establish Political Mission in Colombia Tasked with Monitoring, Verifying Ceasefire, Cessation of Hostilities", *Meetings Coverage and Press Releases*, 25 January 2015.

[2] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Portland: Hart Publishing, 2008), pp. 270-272.

[3] John. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), pp. 173-177, 256-260; Antonio Remiro Brotóns et al., *Derecho Internacional: Curso General* (Valencia: Tirant Lo Blanch, 2010), pp. 213-215.

[4] Antonio Remiro Brotóns et al., *Derecho Internacional* (Valencia: Tirant Lo Blanch, 2007), at 519; Louise Mallinder, op. cit., pp. 270-277; Human Rights Watch, *Human Rights Watch Analysis of Colombia-FARC Agreement*, 31 December 2015..

Inter-American Court of Human Rights -or other bodies, if the doctrine is transplanted to a different system- has said even in cases to which their state was not a party to.

Accordingly, negotiators and authorities neither can nor should ignore that impunity is deemed as a breach of international obligations under case law; and that it is deemed to exist if no proportionate sanctions are imposed, as is explored in this article.

Against this backdrop I will explore the intended objectives of the Colombian sanctions regime, because such objectives inform the specific punishments or alternative measures that were seen as compatible with their realization. Afterwards, I will argue why punishment as a social construction may take many forms, and that -within a spectrum- international law actually offers many possibilities, provided that limits are respected. An identification of conformity with international law in the Colombian scenario will much depend on what the Special Peace Jurisdiction decides in specific cases.

2. The influence of the objectives of the sanctions regime under the FARC-Government agreement

The objectives of the sanctions regime in the transitional justice framework with the FARC are set forth in Section III of the final peace agreement between that (former) armed group and the Colombian Government, related to procedure, bodies and sanctions of the justice component. Under it, the main objective of the sanctions is understood as seeking to ensure the effectiveness of "the rights of victims and consolidating peace", rather than punishment, pure and simple. Therefore, they are embedded in a system of restorative justice and reparative functions are emphasized. What sanctions are to be imposed are further determined by the "degree of recognition of truth and responsibility before the Justice component [...] through individual or collective declarations".[5]

The express reference to *objectives* of sanctions that are not mainly concerned with inflicting punishment is not gratuitous. There is a correlation between this objective and the concrete form that sanctions can take, depending on the collaboration of the responsible subjects. This non-insistence on punishment is allowed, and in fact required, by international human rights law. For instance, the American Convention on Human Rights states in Article 5.6 that "[p]unishments consisting of deprivation of liberty *shall have as an essential aim the reform and social readaptation* of the prisoners". These goals are not only observed by the alternative sanctions under examination, but are facilitated. In this regard, one cannot lose sight of the deplorable conditions of inmates in the Americas.[6]

[5] "Las sanciones tendrán como finalidad esencial satisfacer los derechos de las víctimas y consolidar la paz. Deberán tener la mayor función restaurativa y reparadora del daño causado, siempre en relación con el grado de reconocimiento de verdad y responsabilidad que se haga ante el componente de Justicia del SIVJRNR mediante declaraciones individuales o colectivas".

[6] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II, Doc. 64, 31 December 2011, paras. 610-630 (emphasis added).

The peace agreement stresses the importance of the reparation of victims and the achievement of peace. Reference to such objectives is also a way of legitimizing the model that was agreed upon. There is an underlying pragmatic consideration, insofar as traditional imprisonment seems to have been off the table for the FARC negotiators, who would perhaps be unwilling to give up their weapons otherwise.

The same paragraph cited above develops what sanctions may be imposed on responsible individuals, depending on when, and if, they recognize their own responsibility and reveal the truth, in this way:

a) For those who "acknowledge truth and responsibility before the Chamber of Recognition ("Sala de Reconocimiento"), in relation to certain very serious abuses, will have" sanctions that are understood to be mainly restorative and reparative, "with a minimum duration of five years and a maximum duration of eight years for complying with the reparation and restoration functions of the sanction", these sanctions encompassing "effective restrictions of liberty and rights, such as the freedom of movement, that are necessary for their execution, and with it being necessary to guarantee non-repetition". Effective restriction, in turn, entails the supervision of its observance and compliance in good faith. In this first scenario, restrictions of liberty that are "necessary to ensure the observance of the sanction" will never entail or be understood as imprisonment or equivalent punishments. This clarification, apart from indicating the exclusion of traditional imprisonment, suggests that restrictions of liberty are *a means* to achieve the "reparative" or "restorative" sanction.

b) For those who acknowledge their responsibility and reveal the truth before the Section of Trial ("Sección de enjuiciamiento") before the judgment, the sanctions to be imposed will have a function that is mainly retributive that entails deprivation of liberty with a duration between 5 and 8 years", depending on how decisive the respective conduct was. This option entails an adverse consequence for those who do not confess and reveal the truth on time, but yet benefit from a reduced sentencing when compared to those who fail to make such recognition.

c) Finally, individuals who do not acknowledge their responsibility or reveal the truth will face ordinary criminal sanctions, with a duration between 15 and 20 years for very serious conduct.

In each of the three scenarios presented above, the conduct that individuals perpetrated is considered to have been serious and contrary to human dignity. However, benefits are given to those who reveal the truth and accept their responsibility, depending on how quickly they do this. This is independent of whether the individual was acting as a state agent or member of a non-state group, acknowledging that both actors can violate human rights and that every human being must be protected from any and all violations, regardless of the identity or affiliation of the perpetrator. If this initiative is followed by others, it can potentially

have an impact on customary law in relation to the responses to heinous abuses contrary to human rights.[7]

That being said, a negative development that limited the *ratione personae* scope of individuals required to appear before the Special Peace Jurisdiction arose from fact that the Constitutional Court of Colombia determined in 2017 that non-combatants, i.e. indirect participants, who are actually mentioned in the peace agreement,[8] are under no obligation to appear before this jurisdiction –created on the basis of the agreement.

According to the Court, that jurisdiction is not their "natural judge". This is a decision that weakens the transitional system, considering how multiple actors, not only combatants and those directly linked to them and their groups, contributed to abuses and the perpetuation of the armed conflict. Moreover, in my opinion no due process guarantees would be affected against non-combatants if they were required to appear before the special jurisdiction –they can even benefit from reduced or alternative sentencing and appear voluntarily.[9] Additionally, it must not be ignored that the Colombian ordinary jurisdiction has failed to effectively address many crimes perpetrated during the armed conflict, and that many indirect and non-combatant actors participated in abuses during the non-international Colombian armed conflict[10]

When evaluating transitional systems, such as the Colombian one, it is important to bear in mind that during armed conflict multiple attacks against civilians are perpetrated. They include heinous violations such as massacres, kidnappings, extrajudicial killings, attacks against protected persons and goods, among other abuses contrary to human rights and international humanitarian law.[11]

[7] Andrew Clapham, "Human Rights Obligations for Non-State-Actors: Where Are We Now?", in: Fannie Lafontaine y François Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge: Intersentia, 2016); Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life*, A/HRC/38/44, 5 June 2018, paras. 38-41.

[8] Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, 24 November 2016, section 5.1 ("Sistema Integral de Verdad, Justicia, Reparación y No Repetición"), in which it is said, among others, that "mediante el establecimiento de responsabilidades, todos los participantes en el conflicto, de forma directa o indirecta, combatientes o no combatientes, deberán asumir su responsabilidad por las graves violaciones e infracciones cometidas en el contexto y en razón del conflicto armado.

[9] Nicolás Carrillo-Santarelli, "El error (judicialmente decidido) de excluir la participación necesaria de terceros no combatientes en la jurisdicción transicional colombiana (JEP) y posibles alternativas y escenarios para remediar el entuerto", *Aquiescencia.net*, 7 March 2018.

[10] Inter-American Commission on Human Rights, *Tercer informe sobre la situación de los derechos humanos en Colombia*, op. cit., para. 20; Inter-American Commission on Human Rights, Report N° 55/97, Case 11.137, *Juan Carlos Abella vs. Argentina*, 18 November 1997, paras. 152-153; International Committee of the Red Cross, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", *Opinion Paper*, March 2008, at 3; Article 1.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

[11] Colombian Government – FARC, *Borrador Conjunto del Acuerdo sobre las Víctimas del Conflicto publicado por las partes negociadoras el 15 de diciembre de 2015*, paras. 10, 23-24, 26-27, 29; Inter-American Commission on Human Rights, *Tercer informe sobre la situación de los derechos humanos en Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IV; Human Rights Council, *Informe anual de la Alta Comisionada de las Naciones Unidas para los Derechos*

Considering this, it is worth reviewing whether international law admits a system of "alternative" sanctions that can facilitate the cessation of hostilities with a non-state group.

An analysis based on rule of law considerations suggests that not everything is allowed when pursuing noble objectives and we can find precisely one condition and limitation, in the form of a prohibition of bringing about or permitting the impunity of serious violations. During its evolution and progressive development, international law has forbidden amnesties and other statutory limitations on perpetrators and participants in serious violations, as described in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Aware of this requirement, the Colombian negotiators of the peace agreement argued that alternative sanctions do not entail a covert impunity, and actually prevent the repetition of violations, which is a goal of the proscription of impunity. These arguments, and other considerations, are examined below.

3. The legitimacy of the Colombian transitional punishment regime

Reference to political legitimacy and peace, which are but some of the factors interrelated with human rights (it is also possible to take into account public policy),[12] is certainly pertinent when exploring the peace agreement with the FARC and transitional scenarios with other groups.[13] Among others, the perception of the legitimacy and fairness of the peace process can have an impact on its future stability. Those factors have been studied by Thomas Franck and Steven Ratner and have been found to possess both substantive and procedural dimensions.[14]

Some authors have referred to the "fairness" of the content of standards. In this regard, Franck considers that a key element is the redistributive nature of a model, while Ratner deems that the respect of a core set of rights and freedoms, and of peace, determine "fairness".[15] In light of such considerations, it is possible to analyze whether a given framework and its normative content, transitional ones included, may be deemed as legitimate or not.

But the examination of fairness is not necessarily a neutral endeavor in practice. As explained by Myres McDougal and Harold Lasswell, several actors invoke and interact with international norms in order to promote policies and objectives.[16] Such interaction may amount to invoking, implementing, or otherwise

Humanos, Situación de los derechos humanos en Colombia, A/HRC/25/19/Add.3, 24 January 2014, paras. 37-41.

[12] Inter-American Commission on Human Rights, *Impact of the Friendly Settlement Procedure (Second Edition)*, OEA/Ser.L/V/II.167, 1 March 2018, paras. 247-248.

[13] Inter-American Commission on Human Rights, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II, Doc. 49/13, 31 December 2013, paras. 16, 61-76.

[14] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press - Oxford, 1998), pp. 3-24; Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015), pp. 25-65.

[15] Steven R. Ratner, op. cit., pp. 65, 91-94.

[16] Myres McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", *American Journal of International Law*, Vol. 53 (1959), pp. 1-5, 9-12,

dealing with international law, not necessarily through formal venues. Therefore, besides "coercive" implementation, other interactions may lead to the generation of expressive effects,[17] by stigmatizing or legitimating some positions based on an alleged or real support or rejection of international law.

In the Colombian case, supporters and those opposed to the agreements between the FARC and the Government have acted in the manner thus described. Their efforts can sometimes even be understood as expressions of "lawfare" or strategical uses of law.[18]

But in addition to political implications, conclusions as to the legality of alternative sanctions have legal implications that can strengthen or, on the contrary, lead to the erosion of the framework based on the agreement. For instance, were it concluded that alternative sanctions are illicit, it would be possible to argue that decisions based on the alternative punishment system were fraudulent or had a merely apparent *res judicata*,[19] and that -thus- further judicial action against suspects is possible. Otherwise, if one considers that they are permissible, the re-opening of investigations and judicial action would be barred –unlike what has happened in Argentina and elsewhere.[20] Jan Klabbers has explained how this sort of political and social confrontation based on constructions of the common language of international law often takes place in dynamics related to international legal processes.[21]

Needless to say, the interpretations that some offer may initially be contrary to what international law says but end up becoming official if others support it. This transformation may well take place with regard to transitional justice and other related regimes as well.[22]

14, 16-25, 28-29; Myres McDougal,"Some basic theoretical concepts about international law: a policy-oriented framework of inquiry", *Journal of Conflict Resolution*, Vol. IV, 1960, pp. 338-342, 345-350.

[17] Ryan Goodman and Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law", *European Journal of International Law*, Vol. 19 (2008), at 735; Mauricio García Villegas, "De qué manera se puede decir que la Constitución es importante", in: Álvarez Jaramillo *et al.*, *Doce ensayos sobre la nueva Constitución* (Medellín: Diké, 1991), at 40; Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press, 2015).

[18] Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016), pp. 1-5.

[19] Oscar Parra Vera, "La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates", *Revista Jurídica de la Universidad de Palermo*, Año 13, No. 1 (2012), pp. 9-11.

[20] Santiago Cantón, ""Leyes de amnistía". Víctimas sin mordaza. El impacto del Sistema Interamericano en la Justicia Transicional en Latinoamérica: los casos de Argentina Guatemala, El Salvador y Perú", Due Process of Law Foundation (2007).

[21] Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), pp. 308-309.

[22] International Law Association, Committee on the Formation of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, London Conference (2000), pp. 30-31; International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14*, para. 207.

4. The prohibition of granting amnesties or pardons for gross violations of human rights

The drafters of Protocol II to the Geneva Conventions of 12 August 1949, concerned with the regulation of conduct during *some* non-international armed conflicts,[23] and mindful of the fact that attempting to punish all combatants could render transition to a post-conflict scenario unlikely due to the reluctance of participants in the conflict, included in Article 6.5 a recommendation for "authorities in power" to endeavor:

> At the end of hostilities […] to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

That *recommendation*, which could also be applicable to pardons, seeks to encourage gestures of reconciliation that contribute to the normalising of relations. However, it is not absolute and cannot be applied to those responsible for international crimes or gross human rights violations.[24] In the Agreement on Victims it was mentioned that the granting of amnesties will be resorted to,[25] but only in relation to conduct that is not internationally criminal. In other words, and as the negotiators[26] made clear, the scope of that recommendation to the granting of amnesties may include participation in the internal conflict and crimes related to rebellion but never gross violations. The agreement itself indicates that:

> There are crimes that cannot benefit from amnesties nor from pardons in accordance to paragraphs 40 and 41 of this document. It is not permitted to grant amnesties to crimes against humanity and other crimes set forth in the Rome Statute.[27]

The final peace agreement between the Colombian Government and the FARC also indicates that the granting of amnesties or pardons, or any other special treatment, does not relieve an individual from the duty to contribute to the revelation of truth,[28] which is consistent with the victim-centered approach of the

[23] Compare common? Article 3 of? (to) the 1949 Geneva Conventions with Article 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Marko Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case", *International Review of the Red Cross*, Vol. 89 (2007), pp. 380-381.

[24] International Committee of the Red Cross, 1987 commentary to Article 6.5 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); International Committee of the Red Cross, "Rule 159. Amnesty", in: *Customary IHL database*, section "Exception".

[25] Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición", incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos", pp. 27 and 28, paras. 37 and 38.

[26] Ibid., pp. 27 and 28, paras. 37 and 38.

[27] "Hay delitos que no son amnistiables ni indultables de conformidad con los numerales 40 y 41 de este documento. No se permite amnistiar los crímenes de lesa humanidad, ni otros crímenes definidos en el Estatuto de Roma".

[28] "La concesión de amnistías o indultos o el acceso a cualquier tratamiento especial, no exime del deber de contribuir, individual o colectivamente, al esclarecimiento de la verdad conforme

agreement. This requirement, along with the prohibition of granting benefits to international crimes, makes the use of amnesties lawful, provided, that is, that they are not granted in regard to international crimes or serious human rights violations. Alternative punishment will also have to meet some requirements for their legality to be upheld.

Looking at developments and contributions from different regimes,[29] both international criminal law and international human rights law forbid amnesties and other statutory limitations to serious violations,[30] even if they are decided "by the majorities in the democratic instance".[31] In light of the *Lotus* rationale,[32] amnesties and other benefits may be given in other cases.

The granting of amnesties would entail impunity, which is contrary to the rights of victims and the pursuit of non-repetition of abuses. The Inter-American Court of Human Rights and the United Nations General Assembly, among others, have considered that the investigation and sanction of international crimes are essential both to preventing their repetition and also to fostering a lasting peace.[33]

In its landmark judgment in *Barrios Altos*, the Inter-American Court of Human Rights held that self-amnesties of "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance" are "prohibited because they violate non-derogable rights", "eliminate responsibility", and "lead to the defenselessness of victims and perpetuate impunity", precluding "the identification of the individuals who are responsible" and obstructing "the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation".[34] For these reasons, amnesties of serious violations are contrary to the rights of direct and indirect victims.

The wording of the Inter-American Court of Human Rights in *Barrios Altos* could lead some to think that reference to self-amnesties implies that only they are forbidden, and that amnesties or pardons given to members of non-state groups, such as the Colombian guerrillas, instead of those given to state agents, could be

a lo establecido en este documento".

[29] International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, paras. 19, 44-45, 86, 92, 144, 257, 327, 346-349, 359-373, 389, 394, 407-432.

[30] Inter-American Commission on Human Rights, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II, Doc. 49/13, 31 December 2013, para. 269; I/A Court H.R., Case of the *Massacres of El Mozote and nearby places v. El Salvado*r. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, para. 286.

[31] I/A Court H.R., *Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, paras. 239-240.

[32] Jan Klabbers, *International Law*, op. cit., pp. 22-24; Declaration of Judge Simma in: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*.

[33] I/A Court H.R., *Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, paras. 106-114.

[34] I/A Court H.R., *Barrios Altos v. Peru*. Merits. Judgment March 14, 2001. Series C No. 75, paras. 41-44.

compatible with international human rights law, especially if they favor the ending of conflicts in which many people have suffered and many states have been affected.[35]

Such a hasty conclusion, however, would be mistaken. This is because the gravity of a violation does not depend on the identity of the actor but rather on the actual conduct and how it affects human rights. The dignity on which those rights are based is inherent and not conditional.[36] Otherwise, some victims would be discriminated against[37] and the aspiration towards universal protection of human rights, which is not only geographical but also *ratione personae*,[38] would be compromised. This consideration was somehow supported by the same Court in *Gelman* when it said that:

> *The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties,"* and the Court, more than the adoption process and the authority which issued the Amnesty Law, *heads to its* ratio legis: *to leave unpunished serious violations committed in international law. The incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect in what regards the rights".*[39]

The previous considerations are applicable to all purported statutory limitations regardless of their normative origin, including agreements with non-state armed groups. Concerning these groups, the peace agreement is correct when it considers that persons responsible for certain conduct, due to its gravity, cannot benefit from statutory limitations.

The reason why they must be sanctioned and examined by the Justice Component of the System is indicated in paragraphs 30 and 31 of Section I of the Special Peace Jurisdiction on its Basic Principles.[40] While this is what the

[35] International Committee of the Red Cross, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC (2008), at 2.

[36] United Nations General Assembly Resolution 41/120; Helsinki Final Act of 1 August 1975, Conference on Security and Co-Operation in Europe; Oliver Sensen, "Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms", European Journal of Political Theory, Vol. 10 (2011); Oscar Schachter, "Human Dignity as a Normative Concept", *American Journal of International Law*, Vol. 77 (1983), at 853; Roberto Andorno, "Human dignity and human rights as a common ground for a global bioethics", *Journal of Medicine and Philosophy* (2009); Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", *The American Political Science Review*, Vol. 76 (1982); Carlos Villán Durán, Curso de Derecho Internacional de los Derechos Humanos (Madrid: Trotta, 2006), pp. 63, 92.

[37] Jessica Almqvist, "Facing the Victims in the Global Fight against Terrorism", *FRIDE Working Paper 18* (2006), pp. 8-12; I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, paras. 97-101.

[38] Nicolás Carrillo-Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *German Law Journal*, Vol. 13 (2012), pp. 850-851.

[39] I/A Court H.R., *Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 229 (emphasis added).

[40] "30.- Los delitos no amnistiables ni indultables deben ser objeto del componente de justicia del Sistema integral de Verdad, Justicia, Reparación y No Repetición (SIVJRNR) acordado por las partes. 31.- En el componente de justicia se establecerán sanciones a los responsables en

Agreement claims, it is necessary to review whether alternative sanctions are actually sanctions or, in reality, entail impunity, and whether labelling something as a sanction implies that it is so.

5. Non-formalism and 'alternative' responses

Taking into account the object and purpose[41] of human rights standards, which has inspired evolutionary interpretation and the principle of effectiveness,[42] it is important to analyze whether the objectives sought through the prohibition of amnesties to serious violations is likely to be compromised by a system of alternative sanctions, and also if the imposition of alternative sanctions would in fact be tantamount to the granting of *de facto* amnesties or pardons. If this were so, the strategy would be unlawful. Furthermore, its legitimacy could also be questioned if one considers human rights as a criterion or standard of "justice" that stigmatizes contraventions. It is important to consider that in international law the labelling of certain acts and measures does not decisively determine their legal nature and effects, as happens with treaties and reservations, and as can be seen in Articles 2.1.a and 2.1.d of the Vienna Convention on the Law of Treaties.

Thus, in international law, as in some domestic labor laws, there is a "principle of reality", according to which the substance of acts determines their legal nature instead of their labelling. The practice of bodies such as the Inter-American Court of Human Rights confirms that the respect of rights and guarantees is more important than formalities,[43] thus highlighting the importance of looking at the content instead of at form, especially when human rights are at stake.

Accordingly, if it is found that an alternative 'sanction' does not imply any actual punishment at all, it could be argued that, under some circumstances, it amounts to a concealed amnesty or pardon. If the sanction is not proportionate in light of the gravity of the violation it is meant to punish, there will also be a breach of international law.

When a violation is committed, additional rights of direct and indirect victims emerge, and new obligations for responsible parties arise under the legal consequences of an internationally wrongful act. Some rights and obligations emerging from responsibility can be deemed correlative, in the sense that some duties aim to make the rights of those affected effective. Obligations also seek other goals (e.g. punishing and ensuring non-repetition), and states are under an obligation to diligently strive to make all those consequences effective.[44]

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aquellos casos en los que se determine que no los alcanza la amnistía o el indulto."

[41] Article 31 of the Vienna Convention on the Law of Treaties; Jan Klabbers, op. cit., p. 53; Antonio Remiro Brotóns et al., *Derecho Internacional: Curso General*, op. cit., pp. 373, 382

[42] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, paras. 58, 114; I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No.17, paras. 21, 66.

[43] I/A Court H.R., *Gangaram Panday v. Suriname.* Preliminary Objections. Judgment of December 4, 1991. Series C No. 12, paras. 18, 24.

[44] Concurring Opinion of Judge Diego García-Sayán to: I/A Court H.R., *Massacres of El Mozote*

International case law has upheld that states are under an obligation to prevent, investigate and sanction violations of human rights, even when they are perpetrated by non-state actors, as a consequence of the obligation to ensure the exercise and enjoyment of human rights.[45] Indeed, the European Court of Human Rights has found that the right to an effective remedy includes the possibility of demanding the investigation and sanction of responsible subjects.[46]

The different consequences and duties of those that perpetrate internationally wrongful acts include, among others, a duty *to fully repair*, which in turn may include components of satisfaction, restitution, if possible, and compensation. This obligation automatically arises if there is responsibility for an internationally wrongful act and harm,[47] and is confirmed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).

Paragraph 15 of the Basic Principles and Guidelines stipulates that there may be cases in which "a person, a legal person, or other entity, is found liable for reparation to a victim". As argued by Theo van Boven, this is a recognition that non-state actors participating in human rights violations can have legal responsibility.[48] It is important to recall that international humanitarian law and international criminal law clearly impose obligations on non-state actors and their members,[49] and that having those obligations does not change their word missing or legitimize or grant them rights, as made clear in common Article 3 to the Geneva Conventions of 1949, doctrine and case law.[50]

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and nearby places v. El Salvador. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, para. 26.

[45] I/A Court H.R., *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, paras. 166, 172, 174.

[46] Louise Mallinder, op. cit., at 273.

[47] International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, Articles 28 and 31; International Law Commission, "Draft articles on the responsibility of international organizations", *Yearbook of the International Law Commission, 2011, vol. II, Part Two*, Articles 28 and 31; International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, para. 2 of the commentary to Article 28 and commentary to Article 31; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006), pp. 234, 238.

[48] Theo Van Boven, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", *United Nations Audiovisual Library of International Law* (2010), at 3.

[49] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), pp. 40-41; Robert Dufresne, "Review of: Liesbeth Zegveld. *The Accountability of Armed Opposition Groups in International Law*", *European Journal of International Law*, Vol. 15 (2004), pp. 227-228; common Article 3 to the 1949 Geneva Conventions; Elements of Crimes, Assembly of States Parties to the Rome Statute of the International Criminal Court, footnote 6; European Court of Human Rights, Grand Chamber, *Kononov vs. Latvia*, Judgment, 17 May 2010, paras. 158-159, 236, 244; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2003), at 59.

[50] Common Article 3 to the Geneva Conventions of 1949; Inter-American Commission on Human Rights, *Tercer informe sobre la situación de los derechos humanos en Colombia*, op. cit., para. 18 of Chapter IV; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford

Furthermore, it will often be the case that the reparations cannot be full unless non-state participants in violations provide them, at least partly. For instance, if state investigations are fruitless in spite of the best efforts of state agents, non-state revelation of the whereabouts of their victims or their remains will be essential, and apologies are meaningful if perpetrators offer them.

Whenever a non-state actor commits a wrongful act, which presupposes that it breaches an obligation of its own through conduct attributable to it, the actor will automatically have the duty to repair the harm it caused, cease any ongoing violations, provide assurances of non-repetition that are called for, and do other things that are *automatically* required as a consequence of responsibility.[51] Non-state actors do have obligations to respect, at the very least, peremptory law, to not contravene international criminal law and to respect international humanitarian law and any standard and norm of which they are addressees.[52]

The duty to repair is, however, but *one* of the legal consequences of internationally wrongful acts. International human rights law operates as a *lex specialis* and can therefore enshrine other consequences in addition to those found in general international law, even in relation to non-state actors.[53] Developments in that regime have led to the conclusion that there is a state obligation to prevent impunity and sanction those who are responsible for violations.

Thus, punishment and reparations are distinct consequences of responsibility. It cannot be ignored, however, that some developments in the case law of international supervisory bodies support the conclusion that a certain flexibility is admissible, for instance in the form of permitting alternative sanctions, as long as there is proportionality between the seriousness of the sanction and the conduct.[54] The obligation to prevent impunity is confirmed in international criminal law. In this regard, the Preamble of the Rome Statute of the International Criminal Court mentions the determination "to put an end to impunity for the perpetrators" of international crimes "and thus to contribute to the prevention of such crimes", without distinguishing between perpetrators who are state agents and those who are not.

In international criminal law, reparations and punishment are also distinguished: in the operation of the International Criminal Court there may be a reparation for victims but there must always be a sanction of those who are

University Press, 2006), pp. 51-53.

[51] International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, Articles 1 through 3; International Law Commission, "Draft articles on the responsibility of international organizations", *Yearbook of the International Law Commission, 2011, vol. II, Part Two*, articles 3 through 5.

[52] Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010), pp. 166-167, 273-274, 280.

[53] International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, Articles 55 through 58; International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, para. 3 of commentary to article 28.

[54] Louise Mallinder, op. cit., pp. 270-277.

responsible.[55] Additionally, the Basic Principles and Guidelines distinguish between "[j]udicial and administrative sanctions against persons liable for […] violations", on the one hand, and guarantees of non-repetition, rehabilitation, satisfaction, compensation and restitution, on the other, as gleaned from paragraphs 19 to 23, especially in paragraph 22.f.

In sum, having a nature that is different from and complementary to other consequences of wrongful conduct, contemporary international law determines that neither duties to repair and prevent, nor the appropriate and proportionate response to violations, including adequate sanctions, can be ignored. If those who implement a peace agreement do not clearly ensure the application of all consequences of the wrongful acts of responsible individuals, but rather seem to mistakenly conflate them, it could be considered that there is impunity due to the absence of real sanctions.

That being said, restrictions can serve different goals and it may be that they are used as a form of inflicting punishment. Therefore, it is important to stress that while sanctions as rights-restrictions may serve to ensure that reparations are provided, as the peace agreement suggests,[56] for instance by making sure that responsible persons work in a given location in order to obtain the means to provide reparations in relation to the harm they previously caused during the armed conflict. Such an effect may certainly complement the objective of sanctioning.

Thus, there may be an intention of punishing through a rights-restriction even if the reparation of victims and non-reparation guarantees are given priority, which is permissible for states if they ensure that the required consequences are in place. Therefore, the limitations on the freedom of movement in the Colombian transitional justice system may be deemed to be a punishment. Whether such a sanction is proportionate, as is required, is another question that has to be explored on a case by case basis in light of the concrete limitation and the crimes.

Some have seemed to confuse sanctions and other consequences. For example, the Spanish lawyer for the FARC once said that, under the Agreement, the idea of "repairing sanctions" had to be accepted.[57] It is worth noting that the Agreement on Victims enshrined the idea that sanctions that *could* be imposed on those who timely

[55] "Five essential elements for ICC victims reparations", *#globalJUSTICE*, 17 March 2015; Rome Statute of the International Criminal Court, Articles 75 through 79; International Criminal Court, Appeals Chamber, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Judgment, *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012*, 3 March 2015, paras. 87-228.

[56] The Final Agreement says: "El Sistema Integral hace especial énfasis en medidas restaurativas y reparadoras, y pretende alcanzar justicia no solo con sanciones retributivas"; and also that "uno de los paradigmas orientadores del componente de justicia del SIVJRNR será la aplicación de una justicia restaurativa que preferentemente busca la restauración del daño causado y la reparación de las víctimas afectadas por el conflicto, especialmente para acabar la situación de exclusión social que les haya provocado la victimización. La justicia restaurativa atiende prioritariamente las necesidades y la dignidad de las víctimas y se aplica con un enfoque integral que garantiza la justicia, la verdad y la no repetición de lo ocurrido".

[57] "No hablo de impunidad para las Farc; hablo de sanciones que se cumplan: abogado", *W Radio*, 27 July 2015.

confess before the Chamber of Recognition of the Special Peace Jurisdiction, would have "repairing and restoration functions" (para. 60 of that Agreement).

It is thus arguable that if such functions are *complementary* to the appropriate punishment dimensions of those "sanctions", the Colombian model could be deemed admissible under international law, provided that there is proportionality between the punishing dimension and the respective conduct it seems to respond to. In other words, the notion of "sanctions" under the agreement seems to encompass both reparations and punishing effects, and the latter can and *must* fulfil the requirement to adequately punish found in international human rights case law.[58]

Moreover, the Agreement on Victims also indicates that those who participate before the Chamber of Recognition of Truth and Responsibility could present projects of "restorative and repairing activities."[59] In this context, it is curious that the responsible subject may have a say in the nature of the "sanction" to be imposed on him. The Final Agreement confirmed this when saying that those who appear before the Chamber of Truth and Responsibility may present a "detailed individual or collective project on the execution of the repairing and restorative works or activities."[60]

This possibility is plausible insofar as the individual in question may propose how he or she thinks reparations may be better achieved, and the Colombian authorities will have to determine if proposals are appropriate and sanctions' conditions are satisfied. In fact, this may lead to dialogue with victims if properly channeled. Those authorities must not shy away from the required foreseeable[61] punishment of a serious infraction.[62] The final agreement clearly states that the "Integral System especially focuses on restorative and repairing measures, and seeks to achieve justice not only through retributive sanctions". This seems to suggest that sanctions as such are not excluded but are not the main concern of the system, which may explain the stress on the cessation of ongoing violations, reparations, and the objective of restricting rights to ensure that reparations take place.

Due to certain ambiguities in the broad language and terms of the agreement, some have expressed concern that the Special Peace Jurisdiction may overextend the reach of its powers in regard to suspects[63] or fail to make the state meet its

[58] The Inter-American Court of Human Rights has said that "States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation", distinguishing between punishment and reparations, and indicating that the former is also required, as indicated in: I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166.

[59] The Agreement indicates that those who appear before the Chamber of Recognition of Truth and Responsibility (Sala de Reconocimiento de Verdad y Responsabilidad) may present projects of "actividades reparadoras y restaurativas".

[60] "Los comparecientes ante la Sala de Reconocimiento de Verdad y Responsabilidad podrán presentar un proyecto detallado, individual o colectivo, de ejecución de los trabajos, obras o actividades reparadoras y restaurativas", in: *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, p. 172.

[61] European Court of Human Rights, Grand Chamber, *Kononov vs. Latvia*, Judgment, 17 May 2010, paras. 185, 235-236, 241.

[62] International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Anto Furundžija*, Sentencia, 10 December 1998, paras. 154-157.

[63] ""La JEP se extralimitó en el caso Santrich": Hernán Penagos", *Semana*, 17 May 2018; "JEP

international obligations. To avoid this in relation to sanctions, it is important that jurisdictions observe the control of conventionality, for instance to make sure that, through their conduct, international human rights obligations of the state are observed.[64] The list of sanctions that may be imposed on those who confess in a timely manner and reveal the truth include participation in reparations, environmental, construction, development, agricultural, infrastructure, public services, and security programs or participation in the eradication of explosives or anti-personnel landmines, which seek to guarantee personal integrity.

These measures are certainly important and necessary, and without them the state would risk breaching its obligations, but they do not clearly entail a punishment. Furthermore, someone could think that due to the principle of legality it would not be lawful to impose other "sanctions". However, there is the idea that restrictions of rights that entail actual punishments are to be imposed to ensure participation in those activities, in which case the notion of "sanctions" under the list could be regarded as misplaced, since they would not be the actual punishments but activities to repair.

If it is considered that there is impunity under the *nullum crime sine jure* principle, permitting the condemnation and sanction of conduct forbidden by international customary or treaty law, where the state fails to properly sanction those responsible, third parties could be empowered to do so and act representing the international society by implementing *erga omnes* obligations.[65] Additionally, the idea that restrictions of rights are necessarily and always sanctions is not true either because they can serve other functions under international human rights law.[66] However, under this system, restrictions adopted for such purposes may well be regarded as sanctions, and they certainly affect those addressed by them.

Much will depend on what the Special Peace Jurisdiction decides, and this is a reason why a Sword of Damocles will always hang over the Agreement and the system based on it, since if it is considered that serious conduct has not been appropriately sanctioned others may regard domestic decisions as void from the perspective of international law, and believe that third parties can act in furtherance of international legal interests and based on universal jurisdiction.[67] In relation to these possibilities, it is necessary to remember that the International Criminal

extralimitó sus funciones sobre Santrich", *El Nuevo Siglo*, 24 May 2018; Jaime Castro, "Estas son las implicaciones de la Jurisdicción Especial para la Paz", *El Tiempo* (Colombia), 25 February 2016.

[64] Inter-American Court of Human Rights, "Control de convencionalidad", *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*, No. 7.

[65] Spanish Audiencia Nacional, Criminal Chamber, Sección Tercera, *Judgment No. 16/2005*, "Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo", 19 April 2005; European Court of Human Rights, Grand Chamber, *Kononov vs. Latvia*, Judgment, 17 May 2010, paras. 236, 244; International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Anto Furundžija*, Judgment, 10 December 1998, paras. 155-156.

[66] I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 35-50.

[67] Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting", (*dédoublement fonctionnel*) in International Law", *European Journal of International Law*, Vol. 1 (1990), pp. 228-231

Tribunal for the Former Yugoslavia held that:

> Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act [...] One of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction [...] This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.[68]

The same Tribunal also held that:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision [...] would not be accorded international legal recognition.[69]

Considering that it is not possible to consent to excluding the effects of peremptory law,[70] the Special Peace Jurisdiction will have to make sure that its interpretation of broad clauses is made in a way that ensures state observance with its international commitments, since as a state agent it can engage Colombia's responsibility.[71] Even if it is accepted that the alternative sanctions in the Colombian transitional system are actual punishments, other conditions must be satisfied for them to be deemed lawful, lest the state breaches its duty to ensure "the identification and punishment of those responsible",[72] as explored below.

6. Conditions that must be satisfied for alternative sanctions to be internationally admissible

Imprisonment is not necessarily the only admissible punishment for serious human rights violations. Concrete forms of punishment are social constructions, which may

[68] ICTY, Furundžija (IT-95-17/1), Sentencia del 10 de diciembre de 1998, párrs. 155-156.
[69] ICTY, Furundžija (IT-95-17/1), Sentencia del 10 de diciembre de 1998, párr. 155.
[70] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, para. 10 of commentary to Article 20, at 74; Preamble to the Universal Declaration of Human Rights; Thomas Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor", updated version of an essay first published under the same title in the Leiden Journal of International Law 18 (4) 2005: 717-745) Symposium on 'Cosmopolitism, Global Justice and International Law', pp. 11-13; Heidi Rajamäe, *Legality of a Contractual Waiver of Human Rights in the European context*, Lund University, pp. 1, 10-20.
[71] International Law Commission, "Articles on the responsibility of international organizations", *Yearbook of the International Law Commission, 2011, vol. II, Part Two*, article 4.
[72] I/A Court H.R., Case of Barrios Altos v. Peru. Merits. Judgment March 14, 2001. Series C No. 75, para. 44.

be unwise in specific circumstances, for example if they fully prevent hostilities from ending or if their circumstances entail the violation of human rights of those condemned.

Certainly, the specific nature of criminal punishments has been contingent and has changed historically, which is the reason it can and must be critically evaluated in light of humanitarian and other considerations. This explains why it is necessary to condemn inhuman, cruel or degrading treatment and punishments[73] and why there has been theoretical and practical evolution on the criminal responses of states, sometimes prompted by arguments such as those of Cesare Beccaria.[74] Likewise it is important to consider authors, such as Natalie Sedacca, who have argued, from an international legal perspective, that criminal justice foundations are not restricted to punitive or retributive considerations, and that it should be possible to consider other:

> [C]onceptions based on forward looking or consequentialist aims, such as maximising future happiness and/or preventing future crime and the rectification of harm 'to victims and communities'. As Teitel explains, contrary to the 'largely retributive' aims often attributed to criminal justice, its goals in transition are communal rather than solely individually based, meaning there is a longstanding recognition that conceptualisation of punishment may vary following mass atrocity.[75]

That being so, to prevent the Colombian measures from being seen as void, alternative *punishments* must be punishments indeed, not only measures of reparation, and must meet the condition of proportionality in relation to the wrongful acts that are examined. If so, *forum non conveniens*[76] or complementarity[77] arguments can be raised before third parties that attempt to act.

In sum, alternative sanctions that differ from traditional criminal punishments are not forbidden as such and can certainly be useful tools in transition scenarios. Likewise, placing an emphasis on reparations without attaching priority to "retribution", as has happened with the Colombian Government-FARC Agreement, is not as such contrary to international human rights law. In fact, Article 5.6 of the American Convention on Human Rights attaches more importance to reform and social re-adaptation as goals of criminal sanctions. Neither that article nor the Final Agreement exclude the punitive function of sanctions, which can complement the

[73] Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment indicates that "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment".
[74] Cesare Beccaria, *Tratado de los delitos y de las penas* (Madrid: Universidad Carlos III de Madrid, 2015).
[75] Natalie Sedacca, "The 'turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement", *Human Rights Law Review*, Vol. 19, 2019, pp. 316, 328.
[76] Ronald A. Brand, "Forum non conveniens", *Max Planck Encyclopedia of Public International Law* (2013).
[77] Articles 1 and 17 of the Rome Statute of the International Criminal Court; Darryl Robinson, "The Mysterious Mysteriousness of Complementarity", *Criminal Law Forum*, Vol. 21 (2010).

so-called general and special positive and negative aims of criminal sanctions.[78] What should be asked in practice is whether the Agreement excludes or excessively reduces the retributive function to such a degree that it renders it nonexistent.

Accordingly, and considering that sanctions and reparations are different legal concepts, both of which must be satisfied, as the triad of truth, justice and reparation[79] indicates, it cannot be said that *any* punishment whatsoever is sufficient to meet the conditions set forth under international law. Instead, some conditions must be met. Indeed, in transitional justice scenarios it is possible for states to opt to lower the intensity of sanctions. The Inter-American Commission on Human Rights has said that:

> While inter-American case law has established the non-derogability of the obligation to investigate serious human rights violations committed in a conflict, such as extrajudicial executions, torture, forced disappearances or forced displacements, it has also acknowledged, for example, the possibility of softening the State's punitive authority, specifically by applying lighter sentences. In this regard, in the case of the *La Rochela Massacre* the Inter-American Court emphasized the importance of considering the principle of proportionality where it wrote that "the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the affected rights [...] which in turn should be established as a function of the nature and gravity of the events.[80]

According to the Commission there are two limitations on the use of alternative sanctions. First, investigating and punishing serious violations cannot be waived by states.[81] 'First, the duty to investigate and punish serious violations cannot be renounced by states.' Second, there must be proportionality between the actual punishment and the wrongful act and the legal goods it affected.[82]

Two aspects of proportionality should be considered in this context. First, according to the Inter-American Court of Human Rights, elements related to culpability and the gravity of the conduct in question, insofar as punishment is concerned, "should be proportional to the rights recognized by law and the culpability with which the perpetrators acted". Second, it is, however, possible to take into account elements related to other objectives that are pursued by the design of a specific form of punishment, such as transition to a post-bellum scenario; the IACHR has indeed said that, "[e]very element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention."[83]

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[78] Ulfrid Neumann, "The 'Deserved" Punishment", in: Ap Simester et al. (Eds.), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing, 2014), at 79; Klaus Roxin, "Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment", in: Ap Simester et al. (Eds.), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing, 2014), pp. 29-32.

[79] Inter-American Commission on Human Rights, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II, Doc. 49/13, 31 December 2013, para. 50.

[80] Ibid., para. 255.

[81] Ibid.

[82] Ibid.

[83] I/A Court H.R., Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs.

Both elements are to be considered in conjunction, which is the reason why although it may be legitimate to 'soften' or be 'flexible' in the punishments meted out in order to facilitate a transitional scenario, the gravity of the conduct and its impact on the enjoyment of human rights cannot be ignored. Likewise, such seriousness is not necessarily the only element to consider, since exceptional legitimate objectives may permit some proportionate flexibilization of the sort described.

In fact, such an approach permits integration of aspirations from complementary regimes, such as international criminal law, if non-repetition is promoted and some form of punishment is imposed, thus preventing allegations of impunity or pardons, as well as those of human rights law and IHL, insofar as the cessation of hostilities may lead to, or promote, the ceasing of certain ongoing abuses contrary to them.

Furthermore, this approach permits accommodation of a context-dependent local decision based on the social construction of justice in the society concerned that permits lasting conflict to be overcome but nonetheless takes into account universal principles which, by means of their broadness, offer some leeway in their interpretation. Thus, while ensuring formal institutions on peremptory law are taken into account, the Colombian example may show other societies confronting potential post-bellum scenarios that the law is not a barrier to achieving peace yet requires conditions to avoid impunity, thereby balancing universal and local aspirations in accordance with subsidiarity political considerations.[84]

It seems that Judge García-Sayán's position, described below, echoes some of these considerations. Likewise, it is consistent with the idea that justice is a concept that includes both legal (institutional) and extra-legal elements, and that the interests of justice may require taking into account reasonable and non-arbitrary efforts to overcome a situation of internal strife. In this sense, International Criminal Court judge Mindua has argued that:

> Many other factors may weigh in favour of a decision not to prosecute on the basis of the 'interests of justice'. Among them, we have procedural considerations such as [...] the necessity of peace negotiations or an alternative justice mechanism [...] It is then obvious that the 'interests of justice' could not be confined only to legal considerations *stricto sensu*. This phrase refers to both legal and 'non-legal' factors.[85]

If it is permissible to lower the intensity of the sanctions imposed on those responsible it is also possible to impose sanctions that differ from traditional sanctions in a state, as long as pertinent international substantive and procedural requirements, such as their being regulated by law,[86] are satisfied. In that regard,

Judgment of May 11, 2007. Series C No. 163, para. 196.

[84] Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", *American Journal of International Law*, Vol. 97 (2003).

[85] Concurring and Separate Opinion of Judge Antoine Kesie-Mbe Mindua to: Pre-Trial Chamber II of the International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan of 12 April 2019, para. 39.

[86] I/A Court H.R., The Word "Laws" in Article 30 of the American Convention on Human

Louise Mallinder, when studying the case law of international human rights bodies, argued that while the existence of a duty to impose appropriate sanctions is presented in the decisions of these bodies, it is not specified that those sanctions imposed must necessarily have a criminal nature[87] or a specific form.

As to the condition that sanctions should be proportionate to the seriousness of the wrongful conduct, it is important to note that the Inter-American Court of Human Rights Court has addressed what the Colombian Constitutional Court, state agents and the Inter-American Commission on Human Rights have argued vis-à-vis the lawfulness of sanctions concerning proportionality. The Commission asserted that "in the investigation of grave violations of human rights it is impossible to reconcile soft or illusory punishment, or punishments which represent the mere appearance of justice with the American Convention."[88]

The Inter-American Court, in turn, held that regarding the duty to properly investigate, try and sanction human rights violations, states must, among other things, guarantee the principle of "the proportionality of punishment",[89] which according to the Court requires:

> [T]hat the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined.
>
> With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention.[90]

The transitional system with the FARC does respond to the objectives of preventing future hostilities and ceasing acts against civilians and others, thus seeking to ensure the enjoyment of human rights and answering to international human rights objectives, as the Court requires.

Based on the previous considerations, international law does permit an alternative or more lenient response to wrongful acts when compared to traditional criminal responses, as long as the sanction has some proportionality with the rights and legal interests that were affected, and circumstances, including the attempt to put an end to a lasting and cruel armed conflict. These criteria are pertinent in

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Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 14, 28-37; European Court of Human Rights, *The Sunday Times vs. United Kingdom*, Judgment, 26 April 1979, paras. 47-49, 59, 62, 67.

[87] Louise Mallinder, op. cit., at 274.

[88] I/A Court H.R., *Rochela Massacre v. Colombia.* Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para 191.

[89] Ibid., para. 193.

[90] Ibid., para. 196.

transitional justice scenarios, and the Colombian case can become an example or guide on what can be done.

Although many have claimed that in its decision in *Massacres of El Mozote and nearby places v. El Salvador*, the Inter-American Court of Human Rights gave *carte blanche* to transitional processes, the Court actually held that even in transitional justice scenarios it is mandatory to investigate and sanction those who are responsible for serious human rights violations to prevent impunity.[91] That being said, based on other pronouncements and reports, as argued above, this does not exclude proportionate alternative sanctions from being admitted.

This position was supported by Inter-American Court Judge Diego García-Sayán. After examining both the regional and universal human rights developments on the prohibition of amnesties and impunity for serious violations that amount to international crimes and the duty to impose proportionate sanctions in light of the seriousness of violations, he argued that, considering the difficulties of responding to numerous violations in an armed conflict, it is possible to make a balanced and harmonic analysis in such a way that permits criminal responses not being "fully" satisfied as long as the components of truth and justice are not disproportionately affected.

This is precisely possible, the argument goes, so as not to compromise the possibility of reaching peace and is grounded in the understanding that there may be particularities and concrete circumstances in the materialization of those components that prevent a state from being:

> [I]n a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of others disproportionately.[92]

This is a persuasive argument that supports the granting of amnesties or abandonment of criminal persecution in regards to conduct that does not amount to an international crime or a serious violation, as enshrined in the Final Agreement in relation to political crimes and related domestic crimes.[93] Furthermore, the

[91] I/A Court H.R., *Massacres of El Mozote and nearby places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, paras. 283-296, 300-301.

[92] Concurring Opinion of Judge Diego García-Sayán to: I/A Court H.R., *Massacres of El Mozote and nearby places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, paras. 23, 27, 33, 38.

[93] The Final Agreement says: "A la terminación de las hostilidades la amnistía para los rebeldes únicamente estará condicionada a la finalización de la rebelión de las respectivas organizaciones armadas y al cumplimiento de lo establecido en el Acuerdo Final, sin perjuicio de lo dispuesto en los puntos 23 y 27. La finalización de la rebelión a efecto de acceder a la amnistía o indulto, se definirá en el Acuerdo Final [...] A la finalización de las hostilidades, de acuerdo con el DIH, el Estado colombiano puede otorgar la amnistía "más amplia posible". A los rebeldes que pertenezcan a organizaciones que hayan suscrito un acuerdo final de paz, según lo establecido en el numeral 10, así como a aquellas personas que hayan sido acusadas o condenadas por delitos políticos o conexos mediante providencias proferidas por la justicia, se otorgará la más amplia amnistía posible, respetando lo establecido al respecto en el presente documento, conforme a lo indicado en el numeral 38 [...] La Constitución permite otorgar amnistías o indultos por el delito de rebelión y otros delitos políticos y conexos [...] Hay

imposition of alternative sanctions that are not meaningless or merely illusory is essential, otherwise the condition of proportionality would be breached. Curiously, the Colombian case can be seen as the result of a pragmatic decision that ends up paving the way for future and transitional justice scenarios, thus making political reality shape legal understandings, as is often the case.

As to proportionality, it can never entail the annulment, full denial or disregard of any of the principles, values or rights that are being weighed,[94] for the reason that, if it is considered that there is *de facto* impunity or that there are sanctions that have no proper proportionality in relation to the gravity of the wrongful acts, the concrete decision to impose alleged "punishment" will not be valid.

Still, the European Court of Human Rights noted in *Marguš v. Croatia* that, even though an increasing number of pronouncements found in the *corpus juris* of international human rights law indicate that amnesties of serious violations are inadmissible, those who participated in the proceedings argued that measures of that sort could exceptionally be permitted if they were necessary to bring an end to armed conflicts, even if some small measure of impunity exists.[95] What should we make of this?

Perhaps the key is ensuring that there is no "full impunity", thus permitting some flexibility through alternative or more lenient sanctions that are not illusory or meaningless. Therefore, one may disagree with the idea that amnesties may be granted to those who perpetrate serious violations because this would entail the absence of any punishment whatsoever. Conversely, it would be exceptionally allowed, if necessary,[96] to employ alternative sanctions or mechanisms, as long as there is no full impunity and truth revelation and reparations are ensured. In other words, it may be perfectly legitimate to attach greater importance to reparations, without fully ignoring other requirements and goals. That said, theoretically and normatively it is important to distinguish reparations from punishment: reparations do not word missing that there is no impunity. Flexibility may allow a lower degree of punishment in a proportionate way, but may never fully eliminate it in relation to serious violations.

In that sense, Deputy Prosecutor of the International Criminal Court James Stewart has argued that while the fight against impunity is mandatory in transitional justice systems, under the framework of the Rome Statute some flexibility is given to states that seek to bring about justice in post-conflict scenarios.[97] In this situation there are limits according to whether the alternative

delitos que no son amnistiables ni indultables de conformidad con los numerales 40 y 41 de este documento. No se permite amnistiar los crímenes de lesa humanidad, ni otros crímenes definidos en el Estatuto de Roma".

[94] Rita Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff Publishers, 2009), at 239.

[95] European Court of Human Rights, Grand Chamber, *Case Marguš vs. Croatia* (Application no. 4455/10), Judgment, 27 May 2014, paras. 111-113, 129-140.

[96] I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 46.

[97] James Stewart, Deputy Prosecutor of the International Criminal Court, "La Justicia

sanctions that are employed and actually imposed are compatible with the real interest of making the respective individuals appear before justice, and according to whether there is proportionality with the gravity of the crimes.[98]

Due to the relevance of the object and purpose in a teleologic interpretation, required by the general rule of interpretation, it is necessary to consider what the goals sought by the prohibition of the impunity of serious violations are. This is because, in order to ascertain if alternative sanctions and their implementation are compatible with international law, it is necessary to consider the reasons why amnesties are held to be contrary to it.

If it is concluded that alternative punishment possibilities in a specific model do not contravene the elements on which such reasons are based, then their imposition may be lawful. These ideas underlie the position found in the 2017 Report on Preliminary Examination Activities issued by the International Criminal Court's Office of the Prosecutor when, in regards to the possibility of serving sanctions while participating in politics, it was expressed that:

> [W]ith respect to the implementation of sentences involving "effective restrictions of freedoms and rights" referred to in transitory article 13 of the Legislative Act 01, the Office has noted that the effectiveness of such sentences will depend on the nature and the scope of the measures that in combination would form a sanction and whether, in the particular circumstances of a case, they adequately serve sentencing objectives and provide redress for the victims. Fulfilment of those objectives would also depend on an effective implementation of the restrictions of freedoms and rights, a rigorous verification system, and whether their operationalisation with activities that are not part of the sanction, such as participation in political affairs, do not frustrate the object and purpose of the sentence.[99]

To conduct the analysis on the goals of sanctions and how the Colombian model, as enshrined in the Government-FARC agreement, responds, it is useful to look at what the Inter-American Court of Human Rights held in *Barrios Altos v. Peru*. This is so because the analysis provided in that decision on the guarantees that are affected by the granting of amnesties to conduct that amounts to a serious breach permits the identification of which objectives and legal interests must be respected by the decision to respond by means of alternative sanctions. In pertinent passages, that Court said that:

> [A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights [...] Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for

Transicional en Colombia y el papel de la Corte Penal Internacional", 13 May 2015, at 19.

[98] Ibid., at 14.

[99] International Criminal Court, The Office of the Prosecutor, *2017 Report on Preliminary Examination Activities*, para. 148.

> human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation [...] Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases.[100]

The Court's arguments permit the conclusion that some of the pertinent objectives are the absence of impunity (because it is contrary to access to justice and engenders risks of repetition),[101] the revelation and knowledge of the truth, and effective and full reparations. These last two objectives are satisfied in the Final Agreement, which actually refers to them and legitimately attaches priority to them. These objectives are encouraged through the benefits granted to those who reveal the truth in a timely manner, and the harsher response to those who lie or do not willingly reveal the truth and acknowledge responsibility.

As to the first objective, flexibility is allowed to favor the reaching of an actual agreement and the cessation of hostilities, provided that the core of no impunity is respected. To do this, there must be some proportionate response to serious conduct, and not exclusively a requirement of reparations. As to the necessity that the whole truth is revealed, the following consideration in the Final Agreement is essential:

> Whenever the recognition of truth and responsibility is deemed to be incomplete, [The Chamber of recognition of truth and responsibility and for the finding of facts and conduct] will ask those who declare to complete it, indicating the conduct that would be referred to the Unit of Investigation and accusation if the full truth about it is not revealed, for it to decide if there are merits for referral to the Trial Chamber.[102]

It is important for the state and participants in abuses to strive to help victims to deal with and cope with their suffering in psychological and emotional terms, to know the truth about what happened and why. This certainly requires those responsible, whether they belong to non-state armed groups or the state, to provide a full and effective account of what happened without concealing anything or blue-washing their narrative.

Otherwise, the impact of their participation in the transitional system's process would be greatly reduced and would endanger the possibility of an effective satisfaction from being reached. Satisfaction requires apologies, as the Basic

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[100] I/A Court H.R., *Barrios Altos v. Peru.* Merits. Judgment March 14, 2001. Series C No. 75, paras. 41, 43-44 (emphasis added).

[101] I/A Court H.R., *Almonacid Arellano et al. v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 106.

[102] "Cuando el reconocimiento de verdad y responsabilidad se valore incompleto, requerir a los declarantes para que puedan completarlo, con indicación de las conductas que en caso de no aportar verdad plena sobre ellas, serían remitidas a la Unidad de Investigación y acusación, para que esta decida si hay mérito para ser remitidas a la Sala de enjuiciamiento. El requerimiento a los declarantes deberá indicar los aspectos concretos que habrán de ser completados".

Principles and Guidelines themselves indicate.[103] This requirement is logical because, absent apologies, some accounts of the facts could be interpreted as justifying abuses, the suffering of victims could increase, and thus the accomplishment of certain objectives of the transitional system would be imperilled.

Notwithstanding this, and while apologies must be sincere to be meaningful, it is somewhat disappointing to find that the Final Agreement does not include a condition of apologizing to victims to gain the alternative sanction benefits. Instead, the Agreement mentions that the Colombian Government will support acts of recognition in which the different parties to the conflict publicly acknowledge their collective responsibility and apologize, and that the Commission for the Finding of Truth, Coexistence and Non-Repetition will have, among its functions, the generation of spaces in which those who participated directly or indirectly in the armed conflict may recognize their own responsibility and ask for forgiveness. It remains to be seen whether the authorities of the Special Peace Jurisdiction interpret norms in ways that find that a condition to give satisfaction in order to qualify for alternative punishment exists –states are required to ensure full reparations, after all.

The fact that a system was brought about by means of the implementation of an agreement is not soundproof from an international legal perspective. After all, even treaties must respect peremptory law, which includes certain human rights and international criminal law standards.[104] Hence, *jus cogens* is a limit to be observed by agreements entered into by state or non-state actors.[105] Considering that measures bringing about the impunity of international crimes are accordingly deprived of legal effects –as would happen with measures that prevent minimally-proportionate sanctions.

This is the result of the fact that international crimes cannot benefit from amnesties or statutory limitations or other measures that entail the lack of effective and practical justice that states must meet. Additionally, it is mandatory that the rights of victims, including but not limited to their right to know the truth, are ensured, as recalled in Principles 2, 4, 19 and 24 the Updated Set of principles for the protection and promotion of human rights through action to combat impunity. They also indicate that states must ensure "that those responsible for serious crimes under international law are prosecuted, tried *and duly punished"* (emphasis added).

[103] Principles 18 and 22 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[104] Antonio Gómez Robledo, *El* ius cogens *internacional. Estudio histórico-crítico* (Universidad Nacional Autónoma de México, 2003), pp. 169-170.

[105] Article 53 of the Vienna Convention on the Law of Treaties; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundžija* (IT-95-17/1), Judgment, 10 December 1998, para. 155; Nicolás Carrillo-Santarelli, "La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados", *RJUAM*, No. 18 (2008), pp. 58-63; Nicolás Carrillo-Santarelli, "An International Legal Agreement between the FARC guerrilla and the Colombian Government?", *Opinio Juris*, 19 May 2016.

7. Conclusions

The long and cruel Colombian conflict must come to an end. Otherwise, many more will be exposed to suffering and the risk of (re-)victimization. It cannot be ignored that the conflict has not fully ceased as a result of the agreement with the FARC, since there are other previous armed actors and splinter groups[106] from the main guerrilla group itself.[107] The killing of human rights defenders and others in contemporary Colombia is a poignant and sad reminder of this. This is why the absence of hostilities with an armed group as strong as the FARC is most word missing. But it cannot, legally or politically, come at any cost. Otherwise, apart from justice considerations, the very stability and effectiveness of the peace process could be imperilled. If international law is perceived as being contradicted –e.g. in relation to the rights of victims and state obligations to investigate and respond to abuses—, decisions based on an understanding of alternative punishment under the transitional system may be later eroded by litigation –transnational or otherwise. In the end, much will depend not only on the text of the agreement itself, but also on the actions of Colombian authorities, including, but not limited to, those of the judges and members of the Special Peace Jurisdiction.

The Colombian case can certainly provide an example and set a precedent, contributing to the acceptance and recognition that there may be flexibility in terms of what punishment is acceptable under international law in transitional scenarios – thus facilitating negotiations not politically possible otherwise. If endorsed in practice and by decisions, it would signal that states have a limited, but not-so-limited, margin.[108] Additionally, the underlying rationale of the system designed under the peace agreement has the benefit of highlighting the undeniable importance of reparations, given the centrality that victims must have in transitional justice frameworks. International law currently requires a core of effective sanctions that are proportionate to the gravity of the crimes and are effective.

From a pragmatic point of view, it is understandable that different actors seek to promote their agendas in relation to the peace process through legal and extra-legal, domestic and transnational, initiatives and strategies, including legal interpretations.

Those with an interest at stake in relation to the transitional system also seek support in formal or informal, local or transnational networks, and seek to transmit understandings with a human rights language that seeks to impact decision-makers in ways favorable to them. Narratives and political confrontations must take place

[106] Ellen Nohle, "Drawing the line between armed groups under IHL", *Humanitarian Law & Policy*, 22 July 2016; 30th International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Document prepared by the International Committee of the Red Cross* (2007), pp. 23, 47.

[107] "Ecuador pide a la CIDH una comisión para investigar el secuestro de los periodistas", *Agencia EFE*, 8 May 2018; "CIDH anuncia equipo para caso periodistas asesinados en frontera", *Caracol Radio*, 11 May 2018; "Colombia apoyará investigación por crimen de periodistas ecuatorianos", *El Tiempo*, 16 May 2018; "Interpol confirma que alias 'Guacho' está con difusión roja", *El Universo*, 5 June 2018.

[108] James Stewart, op. cit., pp. 13, 18.

in good faith, and always considering the requirements of respecting and protecting victims and their rights, which can be achieved with the intersection of two goals: the end of armed conflict –i.e. the peace that has been so elusive in Colombia— and the respect of basic human rights. Both components are essential for justice and the legitimacy of processes that claim to be based on international law, and reflect the idea that human beings must be protagonists in legal analyses.[109] Ignoring or contravening international standards would open the way for future criticisms, thus rendering the stability and validity of the transitional model with the FARC uncertain.

Decisions made by Colombian authorities implementing or reforming aspects of the peace agreement and the transitional system based on it must consider aspects of a lawful implementation that respects the rule of law and ensures the rights of victims and the state's international duties. Moreover, guerrilla members and those who are accused have a right to the principle of legality and due process guarantees. Victims, in turn are entitled to full reparations and participation in processes against perpetrators. Needless to say, non-repetition must also be promoted. Curiously, this latter objective is perhaps easier to achieve through flexibilization when powerful groups refuse to be subjected to domestic traditional criminal punishment. But such pragmatic considerations are not sufficient: the system must be perceived as, and actually be, fair and legitimate, respecting the human rights of victims and the obligations of states. to effectively respond to serious abuses such as international crimes. The margin they have to do so may be somewhat broader than some prior decisions suggest, but is by no means, and should not be unlimited. Pragmatism has its limits, even for pragmatic considerations in light of potential political and legal backlash.

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[109] Concurring Opinion of Judge A.A. Cançado Trindade to: I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No.17, para. 19.