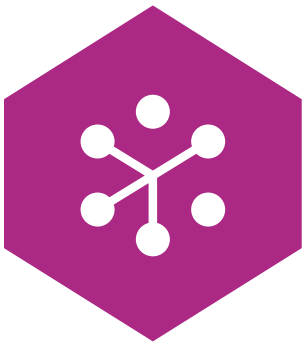

VOLUME 17 ISSUE 1

The International Journal of

Interdisciplinary Social and Community Studies

Peace, Transitional Justice, and the Purposes of Punishment

An Analysis of Colombia's Final Peace Agreement

MELBA-LUZ CALLE-MEZA

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THE INTERNATIONAL JOURNAL OF INTERDISCIPLINARY SOCIAL AND COMMUNITY STUDIES
https://thesocialsciences.com
ISSN: 2324-7576 (Print)
ISSN: 2324-7584 (Online)
https://doi.org/10.18848/2324-7576/CGP (Journal)

First published by Common Ground Research Networks in 2021
University of Illinois Research Park
60 Hazelwood Drive
Champaign, IL 61820 USA
Ph: +1-217-328-0405
https://cgnetworks.org

The International Journal of Interdisciplinary Social and Community Studies is a peer-reviewed, scholarly journal.

Common Ground Research Networks, a member of Crossref

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ABSTRACTING AND INDEXING
For a full list of databases in which this journal is indexed, please visit https://thesocialsciences.com/journals/collection.

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Peace, Transitional Justice, and the Purposes of Punishment: An Analysis of Colombia's Final Peace Agreement

Melba-Luz Calle-Meza,[1] Universidad Militar Nueva Granada, Colombia

Abstract: On November 24, 2016, the "Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace" was signed in Bogota by the Colombian government and FARC-EP (Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo) guerrillas. This Final Agreement created an SPJ or a Special Peace Jurisdiction (JEP, Spanish acronym), and a transitional justice system that privileges restoration over traditional retribution. It also established the sanctions that can be imposed on those responsible for crimes committed in the context of the Colombian armed conflict; however, the fact that these do not necessarily involve a prison sentence has given rise to an open social and political debate. This article analyzes the traditional conception and purposes of punishment in criminal law in order to establish the differences between them and the Colombian transitional justice system's sanctions and their purposes. It is concluded that the Colombian model transcends the limits of retributive criminal law and has been developed by legislation that respects the Constitution and the standards of international law and human rights while contributing to the achievement of peace with justice in Colombia.

Keywords: Peace Agreement, Colombia, Human Rights, Purposes of the Penalty, Transitional Justice

Introduction

The concept of transitional justice is used to designate both situations of conversion to democracy from authoritarian governments and processes of transition from armed conflict to peace. In a broad sense, transitional justice is as old as democracy itself, dating back to the successive restorations of Athenian democracy that brought retributive measures against oligarchs (Elster 2006). Notwithstanding, all transitional justice experiences in the strict sense are found throughout the second half of the twentieth century (Calle Meza and Ibarra Padilla 2019): in Western Europe and Japan after 1945, Southern Europe around 1975, Latin America in the 1980s, Eastern Europe after 1989, and Africa between 1979 and 1994 (Elster 2006).

The development of justice in times of transition has been classified into three basic typologies: 1) forgive and forget, which was practiced when states were absolute sovereigns and the international community was not allowed to interfere in internal affairs (Westphalia); 2) the prevalence of criminal justice as a response to state abuses (Nuremberg Trials); and 3) the exclusion of traditional criminal justice, which is replaced by truth commissions (he paradigmatic case of the latter model is the South African process that allowed serious crimes consummated during the apartheid regime to be eligible for amnesty in exchange for the full truth about the atrocities perpetrated (Calle-Meza and Ibarra Padilla 2019).

This article focuses on the Colombian transitional justice model, which privileges truth and reparation over punishment. A system that emerged from the termination of the state's armed conflict with the guerrillas of the FARC-EP—Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo (Revolutionary Armed Forces of Colombia, People's Army FARC-EP)—and materialized in the "Acuerdos de la Habana" (Havana Agreements) signed on November 24, 2016. Today, they are known as the "Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera" (Final Agreement for the Termination of the

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The International Journal of Interdisciplinary Social and Community Studies
Volume 17, Issue 1, 2021, https://thesocialsciences.com

ISSN: 2324-7576 (Print), ISSN: 2324-7584 (Online)
https://doi.org/10.18848/2324-7576/CGP/v17i01/51-68 (Article)

Conflict and the Construction of a Stable and Lasting Peace; hereinafter Final Agreement), (Huertas 2017, 13).

The Colombian internal armed conflict is almost as old as the state itself, having existed since the war of independence. In fact, with greater continuity or discontinuity, the bellicose factor to settle political differences has always been present (Calle Meza and Lacasta Zabalza 2019). The civil wars of the nineteenth century, specifically the Thousand Days' War (1899–1902), and the twentieth-century regional political–religious war in the liberal republic (1930–1938) and the undeclared civil war between liberals and conservatives, known as "La Violencia" (1948–1953), are the antecedents. However, the revolutionary war itself was declared in the 1960s, when several communist-oriented guerrilla groups emerged, such as the National Liberation Army (ELN), the Popular Liberation Army (EPL), the Manuel Quintín Lame Armed Movement, and the FARC. Later, the Partido Revolucionario de los Trabajadores (PRT) and the M-19 movement were born under the "National Front" regime (1957–1980). The latter excluded political parties other than the Liberal and Conservative from participating in power (Calle Meza 2014).

In 1990, "political peace" was achieved through the convening of a Constituent Assembly. And, with the promulgation of the 1991 Constitution, the foundations were laid for a peace based on consensus on necessary democratic reforms (more elections for public office, more mechanisms for popular participation, and a leftist third party, different from the Liberal and Conservative parties) and greater respect for human rights (an end to the abuse of exception decrees). This achieved a demobilization of great value, in symbolic terms, with the decimation of M-19, EPL, PRT, and Quintín Lame guerrillas (Lamaitre 2011).

The 1991 Constitution declared Colombia as a Social State of Law, founded on respect for human dignity, with the essential purpose of ensuring peaceful coexistence and the enforcement of a just order (Articles 1 and 2). However, this goal was not fully achieved, among other reasons, because the FARC-EP, the ELN and a dissident wing of the EPL—grouped into the Simón Bolívar National Guerrilla Coordinating Committee (Coordinadora Nacional Guerrillera Simón Bolívar)—were left out of the peace agreement in 1991. This was due to several reasons: They were militarily strong guerrillas and had funding from extortion and drug trafficking; they did not have leaders interested in negotiating the peace; the government trusted in the legitimizing power of the constituent process and in the end of narcoterrorism through criminal negotiation; and the armed forces trusted in military triumph (Lamaitre 2011).

During Juan Manuel Santos's presidency (2010–2018), peace negotiations were carried out and concluded with the signing of the aforementioned Final Agreement, which led to the demobilization of the largest and oldest guerrilla group in Latin America. And, in point five of that document ("Agreement on the Victims of the Conflict"), the "Integral System of Truth, Justice, Reparation and Non-Repetition (SIVJRNR)" was configured, composed of the Special Jurisdiction for Peace (SJP), the Truth Commission, and the Unit for the Search for Disappeared Persons (UBPD) (Huertas 2017, 171).

The SJP has the mission of administering justice and investigating, clarifying, prosecuting, and punishing serious human rights violations and breaches of international humanitarian law committed in the context of the armed conflict. Its purposes are to satisfy the victims' right to justice, truth, reparation, and non-repetition; offer truth to society; contribute to the achievement of peace; and adopt decisions that provide full legal security to those who participated in the armed conflict with respect to acts involving serious violations of international humanitarian law and human rights. The bodies that make up the SJP are the Chamber for the Recognition of Truth and Responsibility, the Tribunal for Peace, the Court for Amnesty or Pardon, the Court for the Definition of Legal Situations, and the Investigation and Accusation Unit, according to Articles 2 and 70 of Law 1957 of June 6, 2019, Statutory Law of the Special Jurisdiction for Peace (hereinafter Statutory Law).

The Tribunal for Peace is the last resort of this jurisdiction; the sanctions it may impose are of three types: (1) the sanctions of the SJP, which include effective restrictions of freedoms and rights, such as the liberty of residence and movement, for a minimum of five and a maximum of 8 years; (2) alternative sanctions consisting of custodial sentences between 5 and 8 years; and (3) ordinary sanctions that include sentences of effective deprivation of liberty for a minimum of 15 and a maximum of 20 years. The essential purpose of these sanctions is to satisfy victims' rights and consolidate peace, and they must have the maximum restorative and reparative function for the damage caused, in relation to the degree of recognition of truth and responsibility, according to Article 125 of the Statutory Law.

The restorative and reparative function is addressed here from the perspective of criminal law. In particular, the sanctions established in the transitional justice model and the changes they imply with respect to the traditional conception of punishment and its retributive purposes are analyzed. Transitional justice is, by definition, exceptional and temporary and its mechanisms must be equally peculiar. In addition, the state involved in transitional processes has the task of redesigning penalties and the purposes they should serve. However, the state must not deviate from its international obligations derived from international human rights law and international criminal law.

Thus, the following questions are posed: What are the most notable differences between the Colombian transitional justice system's sanctions and their objectives on the one hand and the traditional penalties of criminal law on the other, and are the sanctions and their objectives in accordance with the 1991 Constitution and the standards of international law?

This research hypothesizes that the Colombian transitional justice system's sanctions and their purposes involve a superiority of the retributive function typical of criminal law, but, at the same time, are respectful of the 1991 Constitution and the standards of international law.

Consequently, the methodological strategy of this research is fundamentally based on the collection, analysis, and synthesis of national and international standards and legal doctrine, to develop in a condensed manner the objectives set, from an explanatory and propositional focus.

The research carried out is of a qualitative nature. According to Perelló (1998), qualitative research aims to interpret reality from particular and concrete contexts. The current research aims to interpret the international Corpus Iuris and what is set forth by the doctrine in order to analyze the current Colombian context.

First, in order to give meaning and context to the proposed analysis, there will be a broad review of the traditional theories on the purposes of penalty in classical criminal law and their criticism; second, the criminal component will be addressed from transitional justice as a restorative and reparative mechanism [sense unclear]; third, the standards related to human rights and international criminal law will be determined; and fourth, the purposes of the penalties contemplated in the Final Agreement will be analyzed.

The Transformation of the Purposes of Punishment

The following is a brief analysis of the concept of punishment in classical criminal law, its transformation through history, and the theories on the ends of punishment and their criticism.

Punishment, Its Meaning, and Its Transformation in Criminal Law

Punishment is the most characteristic consequence of criminal law, since it is a part of its essence (Feijóo 2016), and it is imposed in accordance with the law by judges or courts on those responsible for a crime or misdemeanor (DRAE). Herlinda Rubio (2012) conducted a study on the phases of transformation of punishment according to the function it performed in each historical period. The following paragraphs present a synthesis of these changes based on Rubio's analysis.

In the "vindictive" phase, typical of primitive peoples, the "Law of Talion" predominated. This phase also included theocratic vengeance in the ancient regimes. The "expiationist" or "retributionist" phase in the function of punishment was determined by the consolidation of religious organizations that legitimized political power and the imposition of criminal sanctions based on the conscience that the offender should redeem his guilt through pain before the representatives of the divinity: king or judges.

In the fifteenth, sixteenth, and seventeenth centuries, which were characterized by colonialist expansion toward America and Africa and the primary accumulation of capital prior to the Industrial Revolution, expiation had another modality: redemption would be achieved through work, the product of which would alleviate the damage caused to the community by the criminal conduct. Thus, the function of punishment shifted toward a culture of the rational, the fair, and the useful. The forms that criminal punishment took in this phase were the galleys, prisons, deportation, and correctional institutions. The retributionist purpose prevailed throughout the eighteenth century in the so-called correctional establishments granted by the state to private individuals, and destined for transgressors of the law, as well as for beggars, prostitutes, vagrants, homosexuals, alcoholics, and the mentally ill, all confined and forced to work for the benefit of private individuals.

In the eighteenth century, at the time of the Enlightenment, thinkers such as Voltaire, Montesquieu, Morelly, and Beccaria, among others, developed an interest in reforming judicial practice by advocating the humanization of penalties and the application of punishments proportional to the crime, thus paving the way for classical or liberal aw to consolidate in the nineteenth century. The Marquis of Beccaria defended the idea that the purpose of punishment is not to torment and afflict, nor to undo a crime already committed:

> Can a body politic which, is the calm moderator of private passions, harbor this useless cruelty, the instrument of fury and fanaticism or "weak tyrants"? Do the screams of an unhappy person revoke from time, which does not return, the actions already consummated? The purpose, then, is none other than to prevent the accused from causing further harm to his fellow citizens and to dissuade others from committing the same. Then those punishments and that method of imposing them should be chosen which, in proportion, make the most effective and lasting impression on the minds of people, and the least painful on the body of the accused. (Beccaria 2015, 33–34)

At the end of the eighteenth century, the classical or liberal school of criminal law marked the beginning of the "correctionalist" phase, in which the measurement of time was the criterion for proportionality.

In the nineteenth century, significant changes were introduced in Western Europe and the American republics as a result of the postulates of liberalism: Crime and punishment came to be considered as offenses against the social contract and society; criminals were given legal protection; and the punishment had to be proportional to the crime. Likewise, the concept of "penitentiary regime" was adopted with a therapeutic background based on medical conceptions of the criminal problem. In addition, positivist theories created criminology and the study of the criminal based on punishment considered as "medicine of the soul."

Consequently, the deprivation of liberty as the prototype of punishment took shape, and the regimes of privation of liberty were developed in Philadelphia in 1790 (permanent isolation) and Auburn, NY, in 1821 (corporal punishment). The panopticon created by Jeremiah Bentham in his 1802 work, "Treatise on Civil and Criminal Legislation," was widely accepted, especially in North America and Spain. (It was a circular building, along the circumference of which cells were located, and on a higher level was the tower from which all inmates were watched, without them being aware of it).

Sometime later, the transition from the correctionalist phase to the resocializing phase began in the United States with the "National Congress on the Discipline of Penitentiaries and Reform Establishments," which was held in Cincinnati, OH, in October 1870. Here, it was established that the primary purpose of criminal law should be the moral regeneration of the convict. From that moment onward, the thesis of resocialization became the main legitimization, and a new concept, extrapolated from medical science, was introduced: the "treatment" that should apply to the convict.

The twentieth century, thus, appeared in a context permeated by a medicalized vision of punishment and the idea of cure, which gave the prison a humanistic and generous face. It is in this context that one of the most important international documents in this field, the "Standard Minimum Rules for the Treatment of Prisoners," was formulated at the "First United Nations Congress on the Prevention of Crime and the Treatment of Offenders," held in Geneva in 1955. It was approved 2 years later and is still in use. Other international agreements that insist on resocialization as the main function of criminal sanctions are the International Pact on Civil and Political Rights of December 16, 1966, and the American Convention on Human Rights (ACHR), among others.

In the second half of the twentieth century, a theoretical current emerged that promoted the idea of prison abolitionism, in which the prison, as part of criminal law, was subjected to criticism, showing how it really worked and what the consequences of its operation were. Abolitionists claim that the prison is not good for prisoners; the duty of those who organize the "prison service" is to act in such a way that the negative effects of the prison on convicts and the people close to them are minimized (Rubio 2012, 21).

Finally, the criminal law of last resort, or "ultima ratio," whose conceptual keys can be found in Beccaria's work of more than two hundred years ago, was inspired by the idea of an alternative criminal response to the custodial sentence and is more in line with the new Social and Democratic State of Law, developed in the contemporary constitutions of countries such as Spain (1978) and Colombia (1991), among others. However, in the current risk society there is an expansion of the scope of criminal law, which goes against the principle of last ratio (Huertas 2016, 2017). The evolution of the types of punishment or penalty, described in the preceding paragraphs, has been historically complemented in this research with the development of theories on the purposes of punishment.

Retributionist and Utilitarian Theories on the Purposes of Punishment

In the retribution theory, punishment is an end in itself and "makes sense in that the imposition of a deserved evil rewards, balances and expiates the culpability of the perpetrator for the act committed" (Roxin 1976, 81–82). The utilitarian theory, on the other hand, gives punishment the ulterior purpose of preventing future crimes.

The theory of retribution has had a predominant scientific influence, thanks to its basis in or emergence from the philosophy of German idealism, which has been transcendental for the development of the history of ideas of German criminal law (Roxin 1997). As representatives of criminal retributionism, Kant and Hegel focus the penalty on the culpability of the act; therefore, the perpetrator of the crime must receive compensation in accordance with the seriousness of his illicitness (Ferrajoli 1997).

In the case of Kant, the end of punishment is absolute and consists in the satisfaction of justice, which, in turn, means the unconditional result of any action contrary to the practical law (Lesch 2000). Kant (1989) defended the ideas of retribution and justice as inviolably valid laws against all utilitarian interpretations: "The penal law is a categorical imperative and woe betide him who crawls through the windings of the doctrine of happiness to find something to exempt him from punishment ... For if justice perishes, it is no longer of any value that men should live on earth" (Kant 1989, 166).

Hegel agrees with Kant; however, he replaces Talion with the idea of the equivalence of crime and punishment: "The annulment of crime is retribution as far as this is, conceptually, an injury of injury" (Hegel 1931, 101). The merit of the theory of retribution lies in the fact that it set a limit to the punitive power of the state by providing a gradation for punishment that had to correspond to the magnitude of guilt.

Notwithstanding, it can no longer be sustained scientifically because retribution also demands a penalty where it would not be rigorously necessary and thus loses its social legitimacy. Moreover, retribution has undesirable consequences for social policy because the execution of punishment, by pursuing the imposition of an evil, does not contribute to solving the social causes of crime and is therefore not suitable for fighting crime (Roxin 1997). Another criticism of retributionism is based on the incompatibility between the idea of absolute justice and institutions such as "parole, statutes of limitation, amnesty, pardon, pardon of the offended" (Córdoba Angulo and Ruiz López 2001, 57).

For their part, relative theories consider punishment as a means to a legal end (Lesch 2000), and they justify punishment by affirming that the harm imposed on the party responsible can only be legitimate if it is possible to obtain useful consequences in some sense. These ideas about punishment have been bequeathed to us by classical philosophers such as Plato, who, in his "Dialogues," revives Protagoras's reflection: "For no one punishes a bad man merely because he has been bad, ... he who punishes rightly punishes, punishes, not for past faults, ..., but for faults that may ensue, so that the culprit may not relapse and serve as an example to others of his punishment" (Platón 1871, 36). The theories of general prevention and special prevention are two strands of the relative theories on the purposes of punishment.

According to the theory of special prevention, the purpose of punishment is prevention directed at the individual (special) perpetrator. Its foremost representative was F. V. Liszt (1851–1919), who pointed out three ways of implementing special prevention: confinement, intimidation, and correction of the offender. This theory follows the principle of resocialization and fulfills very well the task of criminal law in terms of the protection of the individual and society, in addition to the fact that it seeks to reintegrate the offender and thus meets the requirements of the social state. Its most serious shortcoming is that it does not provide a scale for punishment; rather, it would lead to retaining the convicted person for the necessary time until he is resocialized, that is, a sentence of indeterminate duration that would limit the freedom of the individual more radically than is permissible in a liberal State of Law (Roxin 1997).

The theory of general prevention places the purpose of punishment in the influence it should produce on society. By means of criminal threats and the execution of punishment, individuals should be instructed about legal prohibitions and kept away from their infringement. It was developed by Feuerbach (1775–1833), considered as the founder of the modern science of German criminal law. This doctrine is essentially a theory of the criminal threat and a theory of the imposition and execution of punishment since the effectiveness of the threat of this approach depends on this. The criticisms refer to the excess in which they incur in seeking to obtain an intimidating effect on the community in order to achieve the reduction of punishable conducts, since they have not achieved real effectiveness, and on the contrary, they pose a dilemma as to for which behaviors the state can or cannot exercise intimidation (Roxin 1997).

The purposes of punishment in traditional criminal law, as described earlier, differ substantially from the purposes of the penalties and sanctions of transitional justice. Here, we will study the penalties and sanctions contemplated under transitional justice in general, as well as their relationship with standards of international law. Finally, we will approach this issue in the Colombian transitional justice model.

Punishments and Their Purposes in Transitional Justice

Transitional justice is that which operates in the transition from a political regime of exception, or in an institutional situation of systematic violation of guarantees and freedoms and war, to a democratic system of full protection of fundamental rights and peace. And, since its main objective is to guarantee the rights of the victims, it cannot be more repressive than ordinary jurisdiction, but must constitute a process of seeking the truth, because knowing the truth of what happened to their detriment is the first interest of the victims. This is a sociological fact that has been verified in many cases, such as in Spain, Peru, or Colombia (Lacasta-Zabalza 2021).

The Spanish philosopher José Ignacio Lacasta-Zabalza (2021, 4) has expressed the nature of transitional justice as being related to the "criminal award law" and as denoting a hybrid coercive-premial aspect:

> Transitional justice is related at its core to a smaller and more terse procedural parcel known as criminal award law; where the possible immunity of the accused in exchange for his truthful testimony is studied in institutions such as the anglo-Saxon "Crown Witness," and procedures such as the privileged treatment of the testimony of "repentants" in the fight against organized crime in Italy, a pioneer in this area due to the presence of the Mafia, but also in Colombia and Peru on the occasion of the illicit acts of drug trafficking.

In this way, following the path of Norberto Bobbio (1990), it is worth noting that transitional justice has surpassed the repressive function typical of law in general as a mechanism of social control:

> From a perspective of the legal techniques of social control…it can be affirmed that all this transitional justice has overcome, to not a small extent, the hegemonic repressive function typical of Law. It has used mechanisms typical of award law to encourage…promote…remove (obstacles), guarantee…to put into action the protective and encouraging function of the law. (Lacasta-Zabalza 2021, 4)

In addition, the transition implies obligations for the state that are very different from the traditional punishment of those responsible for crimes. In the Colombian transition, for example, these obligations include the guarantee of pluralism and political participation, whose structural absence has been identified as one of the historical causes of the internal armed conflict (Calle Meza 2014). This is also stated by Professor Lacasta-Zabalza:

> But not everything is criminal law, far from it; for example, in the Transitional Agreements between the FARC and the Colombian State, the latter commits to guarantee deliberative and public dialogue" and to "guarantee the recognition, strengthening and empowerment of all social movements and organizations" (Huertas 2017, 67). It is thus recognized that democratic fragility, the absence of political and ideological pluralism, and the lack of channels for political participation have been some of the root causes of the Colombian armed conflict. But, at the technical level, it is in turn a new normative logic, of serious kinship or similarity with the law created by the social State, sometimes also called Welfare State (somewhat misleading expression), which no longer uses only prohibitive rules for its purposes but, writes Manuel Calvo in the same cultural wake of Norberto Bobbio (Calvo 2005, 9), these rules: "seek to encourage, promote and ensure certain values and social interests through the establishment of obligations for public authorities and the legalization of social relations. (2021, 4–5)

In this way, transition processes require the taking of extrajudicial and judicial measures. The former aim at the creation of policies, instances, and nonjudicial institutions and the latter aim at holding accountable the actors of human rights and international humanitarian law violations within a judicial process.

However, transition models vary from country to country and from period to period. A useful classification (Uprimny Yepes 2006), made according to the criminal content of the different formulas adopted, is as follows: 1) "amnesic" pardons or general amnesties, which do not include criminal proceedings, as in Spain, where in the transition from dictatorship to democracy (1978) the imperative of justice was ignored; 2) "compensatory" pardons, as in Chile (1990) and El Salvador (1992), which included general amnesties, truth commissions, and reparations to victims but did not include criminal proceedings in the strong sense; 3) "responsibilizing" pardons, such as the end of the apartheid regime in South Africa (1994), which achieved a balance between justice and pardon through general amnesties, truth commissions, reparations, individual pardons, and the requirement of full confession of crimes and criminal responsibility for some crimes; and 4) punitive transitions, in which tribunals are created to punish those responsible, as in Nuremberg (1946), Rwanda (1993), and Yugoslavia (1994). These types of processes impose heavy penalties on the perpetrators of human rights violations and therefore favor the imperative of justice, but hinder reconciliation (Calle Meza and Ibarra Padilla 2019).

Transitional justice overcomes the tripartite judicial scenario of the traditional criminal process, starring the judge as the highest authority, the prosecutor, and the accused. In transitional processes, a circular system is built without hierarchical relationships (Tonche and Umaña 2017). In South Africa, the Zwelethemba model was developed, which focused on mediation, with the participation of victims and perpetrators, with the aim of finding the truth.

Transitional justice involves the imposition of sanctions and penalties, but its main purpose is not retributive but restorative. Kai Ambos (2009) points out that the penalties imposed within the framework of transitional justice are the object of attention in conflict and post-conflict societies and their success depends on the degree of contribution they make to authentic reconciliation and consolidation of the democratic order.

Likewise, punishment in a transitional process that pursues peace must have reconciliation, collective reparation, and reincorporation as its final objective. That is to say, first, the search for forgiveness, as well as the recovery and reconstruction of the social fabric. Then, the guarantee of the rights of the victims through the reparation of the damages caused collectively and as a group, and finally, the reintegration of the actors of the war into civilian life (Hernández 2017).

Punishment in transitional processes should also have a reforming and communication purpose that allows for the involvement of all relevant social actors. The center of the transitional process is not the perpetrator of the crimes but the victim and the entire society, which seeks the reaffirmation of its values. As a result of the process, society can learn which behaviors need to be reformed to achieve peace (Seils 2015).

In summary, the purposes of punishment in transitional justice, unlike the purposes of punishment in ordinary criminal justice, are broad and varied. Taken together they comprise truth, restoration, reparation, reconciliation of society, consolidation of democracy, collective reparation, and reintegration. In addition, they have a reforming and communicative purpose that involves society as a collective and seeks to ensure a peaceful social order. Moreover, punishment with exclusively retributive purposes in a transition process is ineffective: first, because it is limited to the imposition of a punishment and forgets the victim, which can give rise to resentment in society, and second, because although it may serve to fulfill the imperative of justice, given the weaknesses demonstrated in the effectiveness of criminal law, absolute punishment does not have the capacity to contribute to the restoration of democracy after a dictatorship or to the achievement of peace after an armed conflict. In addition to the difficulties

involved in such an ambitious task, transitional justice must rigorously meet the requirements of international law regarding the rights of victims to truth, justice, and reparation.

Human Rights Standards and the Purposes of Punishment in the Transition to Peace

Transitional justice must seek formulas to reconcile the tension between the values of justice and peace and may mean the primacy of one of these values (Uprimny Yepes 2006). Notwithstanding, there is a limit to reconcile this tension established in the standards of international criminal law and international human rights law.

The State's Obligations of Investigating, Prosecuting, and Sentencing

With regard to transitional justice, each state has the autonomy and the power to design a model and negotiate for peace as a final end. However, states cannot disregard the standards of guarantee of human rights, nor those of international humanitarian law, nor can they overlook their international obligations.

States have an international responsibility and obligations regarding the commission of these crimes: to investigate, prosecute, and punish to guarantee the rights of the victims to truth, justice, reparation, and non-repetition. And the state that has signed international treaties, such as the Treaty of Rome, cannot waive compliance with these obligations even if it is in a transition process (Cortés Rodas 2018). The content of these obligations is therefore based on the international Corpus Iuris.

Standards of International Criminal Law and the Inter-American Human Rights System

International standards have been developed in the treaties, resolutions, and jurisprudence of international organizations and courts, and in the universal system for the protection of human rights and from regional systems. However, here it is especially interesting to review the standards applicable to Colombia as a signatory to the Treaty of Rome (July 1, 2002) (UN General Assembly 1998) and the ACHR (July 18, 1978) (Organización de los Estados Americanos [OEA] 1969).

Article 1 of the Rome Statute establishes the International Criminal Court (ICC) as a permanent institution empowered to "exercise its jurisdiction over persons with regards to the most serious crimes of international transcendence" in accordance with the said Statute. ICC was created to complement national criminal jurisdictions.

In Article 7 the crime against humanity is defined as "any of the following acts when it is committed as part of a generalized or systematic attack against a civilian population and with knowledge of said attack," the following are listed: murder; extermination; slavery; deportation or forced transfer of the population; imprisonment or other serious deprivation of physical liberty in violation of fundamental norms of international law; torture; rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or other sexual abuse of comparable gravity; persecution of a group or collectivity with its own identity, based on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognized as unacceptable under international law; forced disappearance of people; the crime of apartheid; and other inhuman acts of a similar nature that intentionally cause great suffering or seriously threaten physical integrity or mental or physical health.

Regarding the possibility of criminal prosecution of these crimes, in 1968 the international community adopted the Convention on the Imprescriptibility of War Crimes and Crimes against Humanity, which establishes the need to repress both crimes and their imprescriptibility (European Union 2004).

Also, Article 25 of the Treaty of Rome regulates individual criminal responsibility and establishes that "the Court will have jurisdiction over natural persons," so that whoever commits a crime within the jurisdiction of the Court will be individually responsible and may be punished. The Rome Statute is, consequently, an international instrument that, for the states that have signed it and therefore are obliged to comply with it, such as Colombia since July 1, 2002, establishes the "norms to determine crimes, the forms of criminal attribution, and the procedural conditions for said attribution" (Acosta and Idárraga 2019, 65).

Article 77 of this Statute establishes the deprivation of liberty for up to 30 years as the maximum penalty and, in turn, allows the imposition of accessory measures to the main penalty, which is the deprivation of liberty in a penitentiary center. However, Article 80 states that ICC decisions must not bias national laws on the imposition of sanctions. Therefore, the states are not obliged to impose the same penalties as those established in the Statute.

On the other hand, this treaty establishes the standard of imprescriptibility of the penalties to be imposed, which corresponds to the traditional purposes framed in the Kantian and Hegelian retributionist ideal and only denotes an approach related to general prevention and social prevention. However, the deputy prosecutor of the ICC, James Stewart, points out that penalties can be set for purposes beyond retribution, such as "deterrence, recognition of the suffering of the victim and communication of public condemnation," and that states can apply alternative punishments to custodial sentences (El Tiempo 2015, para. 8).

In short, the Treaty of Rome requires obligations from the states parties but does not establish or limit the sanctions that must be imposed. It does not deal with alternative sanctions that can be implemented in transition contexts or the purposes they should pursue, nor does it deal with the elements necessary to ascertain that the obligation of states to investigate, prosecute, and punish has been fulfilled. Therefore, the states parties have a wide margin of autonomy without being able to ignore, however, the imperative of the materialization of justice.

Standards of the Inter-American Human Rights System

The Inter-American Human Rights System (IHRS) comprises the standards established by the ACHR (signed on November 22, 1969, in San José, Costa Rica; in force from July 18, 1978), specifically in Articles 1.1., 8, and 25, where it is stated that states parties have the duty to guarantee human rights and the obligation to investigate with due diligence violations of human rights and of international humanitarian law, with the purpose of satisfying the rights of the victims. However, as in the Rome Statute, sanctions and purposes are not determined.

Likewise, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on December 10, 1984, in force from June 26, 1987) obliges the states party to typify the crime of torture in its criminal legislations and to punish the said crimes with adequate sentences according to their gravity (Article 4.2). Nevertheless, there is no development on what must be understood as "adequate"; therefore, it is the state's duty to define the proportionality and suitability of sentences.

Meanwhile, the IHRS only tangentially deals with internal armed conflicts. The sentences of the Inter-American Court of Human Rights in contexts of internal armed conflicts are very few; however, one of the most representative ones has been the sentence of *Masacres de El Mozote y lugares aledaños vs. El Salvador*, in which the Court magistrate, Diego Garcia, noted that an armed conflict and its negotiated settlement opens several conundrums and brings up great legal and ethical demands in the search for harmony between criminal law and negotiated peace; he also emphasized the necessity of "finding routes for alternative punishment … taking into account both the degree of liability in grave crimes, as well as the degree of the criminal's acknowledgement of their own liability" (ICHR Sentence October 25, 2012, para. 30) This sentence supports the thesis that it is not a sine qua non condition that the most severe penalties

are imposed in order for a State to fulfill its obligation of condemning criminal acts that occurred during the armed conflict (García-Sayán and Giraldo Muñoz 2016).

The Purposes of Punishment in the Final Agreement

According to the Colombian Constitutional Court, the state fulfills its obligations of procurement of justice and strengthening of the social state of law if it takes all possible action in order to investigate, prosecute, and sentence the grave violations of human rights and international humanitarian law. Besides, it must undertake a serious, impartial, and effective investigation, which must be carried out within a reasonable time and with the participation of the victims, and whose sanctions must consist of a proportional and effective penalty (Corte Constitucional 2016). Likewise, although the state has autonomy and a high appreciation margin to determine the type and duration of punishment, these must fulfill adequate objectives, such as the public condemnation of criminal conduct, recognition of the suffering of the victims, and dissuasion from future criminal conduct (Corte Constitucional 2017).

The Colombian system of transitional justice is composed of three main instruments: 1) granting of pardons or amnesties, 2) renunciation of criminal prosecution, and 3) imposition of sanctions. The first one is applicable to members of FARC-EP and civilians for political and related crimes, and the second is applicable to agents of the state (individuals ineligible for amnesty) for crimes that do not constitute grave human rights violations. These share two essential elements: Both extinguish action and criminal sanction, and none of the two can be applied in case of great human rights violations (Comisión Internacional de Juristas 2019).

Likewise, the Colombian transitional model, n SIVJRNR, established in the Constitution through the constitutional reform No. 1 of 2017 develops a sanctioning regime that ensures the prevalence of the restorative and reparative components of the punishments over the retributive component (Artículo transitorio 13).

The Statutory Law regulates in Article 125 the purpose and the functions of the sanctions of this transitional justice. Its essential purpose is to satisfy the rights of the victims and to consolidate peace. Its function is to repair and restore, at the highest possible degree, the damage caused, as related to the degree of acknowledgment of truth and liability in the individual or collective declarations to the JEP. Likewise, the Statutory Law develops a typology of sanctions divided into three modalities: own, alternative, and ordinary sanctions.

Own sanctions are the main corrective measures of the Colombian transitional system; they proceed when the actors contribute to the truth and acknowledge their liability in a full and exhaustive manner. They consist of community work, work toward the reparation of structures, and integral compensation to the victims. They involve effective restriction of liberties and rights, such as freedom of residence and movement, necessary for their execution. Effective restriction needs adequate mechanisms of monitoring and supervision to guarantee the fulfillment of these measures. The duration is a minimum of 5 and a maximum of 8 years for the totality of the imposed sanctions, even in the case of concurrence of offences.

Alternative sanctions are applied when the actors contribute to the truth and acknowledge responsibility fully and exhaustively but belatedly, after a sentence is imposed before the indictment section. They have a retributive function and consist of intramural deprivation of freedom. Their duration is a minimum of 5 and a maximum of 8 years.

Lastly, ordinary sanctions are applied when the actors do not contribute to the truth and/or acknowledge responsibility. They consist of deprivation of freedom in a prison or jail, and their duration is a minimum of 15 and a maximum of 20 years (see Table 1).

Table 1: Types of Sanction to Be Imposed by JEP

Types of Sanction			
	Own Sanctions	*Alternative Sanctions*	*Ordinary Sanctions*
When Do They Apply?	Acceptance of truth and liability in a full and exhaustive manner	Acceptance of truth and liability in a full and exhaustive way, but belatedly	Does not contribute to the truth and/or does not acknowledge liability
What Is Their Duration?	Minimum: 5 years Maximum: 8 years	Serious infringements: Minimum: 5 years Maximum: 8 years Other crimes: Minimum: 2 years Maximum: 5 years	Serious infractions: Minimum: 15 years Maximum 20 years
What Do They Consist of?	Community work, work for the reparation of structures and territories, and full compensation of the victims	Intramural deprivation of liberty	

Source: Calle and Rodriguez

Own sanctions are described in the sections below.

In Rural Areas

1. Participation/Execution in effective repair programs for displaced peasants
2. Participation/Execution of environmental protection programs in reserve zones
3. Participation/Execution of programs for the construction and repair of infrastructure: schools, roads, health centers, homes, community centers, municipal infrastructure, and so on
4. Participation/Execution of rural development programs
5. Participation/Execution of waste elimination programs in areas in need of it
6. Participation/Execution of programs to improve electrification and connectivity in communications in agricultural areas
7. Participation/Execution of substitution programs for illicit crops
8. Participation/Execution of environmental recovery programs in areas affected by illicit crops
9. Participation/Execution of construction programs and improvement of road infrastructure necessary for the commercialization of agricultural products from areas of substitution of illicit crops

In Urban Areas

1. Participation/Execution of infrastructure construction and repair programs: schools, public roads, health centers, homes, community centers, municipal infrastructure, and so on
2. Participation/Execution of development programs
3. Participation/Execution of programs for access to drinking water and construction of energy and communication networks, and sanitation systems

Cleaning and Eradication of Explosive Remnants of War

1. Participation/Execution of programs for the cleaning and eradication of explosive remnants of war and unexploded munitions
2. Participation/Execution of programs for the cleaning and eradication of antipersonnel mines and improvised explosive devices (Gobierno Nacional and FARC-EP 2016, 173)

Thus, three types of sanctions have been contemplated in the Final Agreement. However, only own sanctions involve jail. The other two types of sanctions (i.e., alternative and ordinary) entail deprivation of liberty.

Consequently, own sanctions have a restorative purpose and respond to the raison d'être of the Final Agreement in terms of the construction of the truth and the recognition of full responsibility as elements of a stable and lasting peace. They are therefore an innovative component because they include repair as the central axis, implying that the individuals prosecuted by the JEP are necessarily involved in compensating and restoring activities for territorial development, improvement of the economy, land restitution to the victims, return of the victims to their lands, and improvement of the social fabric in Colombia (Galaviz 2018).

Regarding ordinary sanctions, it can be said that they entail a retribution-centered purpose for those who do not meet the restorative purpose, by not contributing to the truth or acceptance of liability. In what pertains to alternative sanctions, these would allow, on the one hand, the compensative purpose by the acceptance of truth and liability. However, if it happens belatedly the purpose of the sanction will be retributive as well.

The Constitutional Court has explained that the alternative punishments of the JEP will be so conditioned that the prosecuted "recognizes the whole, detailed and exhaustive truth, depending on the moment that such acknowledgement was made and provided that the other conditions of the system regarding the satisfaction of the rights of the victims to compensation and non-repetition are met" (Corte Constitucional 2017).

Ordinary and alternative sanctions are similar in their purposes to ordinary criminal justice; however, the quantum of the penalty is significantly lower because they cannot ignore the objectives of transitional justice.

To sum up, this is how the purposes of the sanctions constitute a hybrid formula, which can be represented as follows (Figure 1):

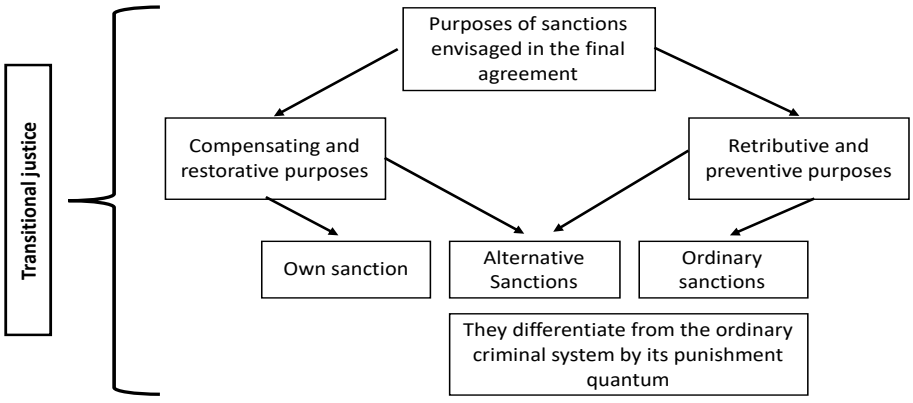

Figure 1: Purposes of Sanctions Envisaged in the Final Agreement
Source: Calle and Rodriguez

Having reviewed the typology of sanctions, the analysis of the purposes of punishment is focused on the main sanctions of transitional justice—own sanctions—which leads to the question of their adequacy. The Corte Constitucional (2016) has defended the implementation of a moderate criteria of technical adaptation of punishment in order to establish whether the chosen means lead to the desired result. In the case of transitional justice, the means are own sanctions and the purposes are peace and justice. These purposes are constitutionally legitimate inasmuch as they are envisaged in the Constitution of 1991. Constitutional Articles 2 and 22 establish peace as a purpose of the state and a right/must of obligatory fulfillment. Transitional justice was also incorporated into the Constitution in the Constitutional Reform 1 of 2017.

Thus, the question to be answered is as follows: In which way do the own sanctions of transitional justice contribute to the achievement of peace and justice? Regarding peace, the answer lies in the context of the internal armed conflict, that is, the sanctions of transitional justice are punishments in conformity with the Final Agreement—mechanisms to end war and violence (Blanco 2019)—for those punishments that do not include imprisonment encourage ex-combatants to give up arms. They also facilitate ex-combatants and others liable for the conflict, such as agents of the state, to tell the truth and acknowledge their liability in committing grave crimes and violations of human rights of a highly unbearable level, to quote Radburch (1974). Crimes in recent history that, otherwise, would have been very difficult for the victims and Colombian society in general to know (Calle Meza 2014). Thus, own sanctions contribute to guarantee the victims' right to truth, compensation, and justice, which would not have been possible without the negotiations and the Final Agreement, for the liable in every aspect would have continued to hide the truth and evade justice (Blanco 2019).

Conclusion

Transitional justice has gone beyond the retributionist limits of classical criminal law, but this does not mean that it is contrary to international criminal law or international human rights law. In fact, the signatory states of the Treaty of Rome are autonomous in the fulfillment of their obligations to investigate, judge, and sanction in transition processes, such as the Colombian one. The purposes of punishment in transitional justice, unlike the purposes of punishment in ordinary criminal law, are wide and varied. As a whole, they comprise truth, compensation, restoration, the reconciliation of society, the consolidation of democracy, collective reparation, and reintegration. Besides, the punishment has a reforming and communicating purpose that involves society as a whole and works to guarantee a peaceful social order.

The penalties and the purposes form an original system of justice with fundamentally restorative purposes. Restoration is highly compatible with an ultima ratio criminal law, inspired by the idea of an alternative punitive response to the deprivation of liberty, and is more coherent with the principle of a Social and Democratic Rule of Law of the Constitution of 1991. However, this transitional model also includes a degree of retributive punishment that contributes to the achievement of the imperative for justice and to the construction of a stable and long-lasting peace.

The sanctions of the Colombian transitional system are suitable and adequate because they contribute to the achievement of peace and guarantee the victims' right to justice, truth. and compensation. Because the punishments of this model did not include jail, the ex-combatants felt encouraged not only to give up arms but also to tell the truth and to assume their responsibility in the grave crimes committed, which would not have been acknowledged without the negotiations and the Final Agreement.

That said, the objectives of justice and peace of the transition must be conditioned by a necessary sociopolitical transformation. The solution of local problems does not exclusively depend on the labor of judges. Besides the prosecution of and sanction against those mainly liable for the massive and systematic violation of human rights during the armed conflict, it is

vital to transform wide sectors of the political establishment that are excessively corrupt. It is necessary that those who take charge in the next decades allocate public funds to the satisfaction of the basic needs of the people, and not to unjustly enrich themselves. In fact, this is envisaged by the constitutional principle of the Social Rule of Law, founded in respect of human dignity (Article 1). This way, social injustice will start reducing in Colombia, which, in 2020, had reached—according to the Regional Development Index for Latin America (Idere Latam)—the shameful title of the most unequal of Latin America (Forbes Staff 2020).

Acknowledgement

This article is the product of the research project code IMP DER 2928, funded by the Vice-Rector's Office for Research of the Nueva Granada Military University, valid for 2019. The collaboration provided by the research assistant Yenifer Rodríguez Castillo for the preparation of this article is acknowledged.

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ISSN 2324-7576