

UNIVERSITEIT UTRECHT
European Master's Degree in Human Rights and Democratisation
A.Y. 2017/2018

Restorative Justice in the context of Transitional Justice: Case study of Colombia.

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ABSTRACT

How is it possible to reach peace and social reconciliation in a country that has normalized the violence? This is the question that politician, States, local and international organization are continually asking in context of transitions. Even though the social claim for the investigation and prosecutions of the perpetrators is a permanent constant, the retributive trials do not seem to be enough to address the aims of peace and reconciliation in scenarios of mass victimization. The peace agreement signed between the government of Colombia and the FARC-EP brings hopes to finally deal in a comprehensive way the armed conflict by incorporating restorative justice principles within the transitional justice process. Nevertheless, the concept of restorative justice remains in debate, and its suitability in the context of transitional justice is debatable. The thesis seeks to contribute on the debate by arguing that restorative justice seems to be the alternative paradigm of justice that humanize the conflict by promoting peace, truth, reconciliation and social restoration in the context of mass atrocities.

ACKNOWLEDGEMENTS

Abbreviations

ACR	Alta Consejería para la Reintegración
AUC	Autodefensas Unidas de Colombia
CNRR	Comisión Nacional de Reincorporación y Reconciliación
CSTJNR	Comprehensive System of Truth, Justice, Reparation and Non-Repetition
CSTJNR	Comprehensive System for Truth, Justice, Reparation and Non-recurrence
DDR	Disarmament, demobilization and reintegration
ECCC	Extraordinary Chamber in the Court of Cambodia
ELN	Ejército de Liberación Nacional
ELN	Ejército de Liberación Nacional
EPL	Ejército Popular de Liberación
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia –Ejército del Pueblo
HRW	Human Rights Watch
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JPL	Justice and Peace Law
LGBTI	Lesbians, Gays, Bisexual, Transgender, Intersexual
M-19	Movimiento 19 de Abril
NGO	Non-Governmental Organization
PRVC	Programa de Reincorporación a la vida Civil
RJ	Restorative Justice
SJP	Special Jurisdiction for Peace
TJ	Transitional justice
UN	United Nations
VORP	Victim-Offender Reconciliation Programs
TCNRC	The Truth, Coexistence and Non-Repetition Commission

SJP	The Special Jurisdiction for Peace
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1.

INTRODUCTION

Colombia is a country generally known for its significant history of armed confrontation and its massive human rights violations. The growing business of the drug trafficking, the emergence of left-wing guerrilla organizations during the 60's, the involvement of corrupt political leaders in the conflict and the illegal cooperation between the state's armed forces and self-defence "paramilitaries" organization, are some of the factors that prolonged the scenario of violence for more than 50 years¹. As a consequence of the ongoing confrontation between different armed actors, the conflict has left more than 8 million of victims, including 6.8 million people internally displaced since 1985². However, in 2016, after years of intricate negotiations³, the president of Colombia, Juan Manuel Santos and the leader of the FARC-EP, the oldest guerrilla organization of the continent, Rodrigo Londoño, signed the "*final agreement to end the armed conflict and build a stable and lasting peace*" with the purpose of putting an end to an armed conflict and guarantee social restoration. This agreement is perceived for a significant portion of the Colombian society as an opportunity to achieve peace and justice after more than five decades of mass victimisation and war crimes committed not only by this guerrilla organization but also by all the armed actors involved in the conflict. Nevertheless, for a society that has normalized the armed confrontation as part of its daily life, the challenges that involve the restoration of the social harm and the construction of peace arises many concerns. These concerns are mainly related with the way of how a state should approach the crimes committed and what type of justice addresses better the legacy of crimes occurred during the armed conflict.

¹ GUEMBE, María José & OLEA, Helena (2006) "No justice no peace, discussion of a legal framework regarding the demobilization of non-state armed groups in Colombia" p122. Transitional Justice in the Twenty-First Century. Edit Naomi Roht-Arriaza & Javier Mariezcurrena. Cambridge University Press.

² Humans Rights Watch Report on Colombia. Available at: <https://www.hrw.org/world-report/2017/country-chapters/colombia>

³, The negotiation between the Colombian government and the guerrilla organisation started in 2012 as is going to be further explained in chapter 3.

The *final agreement to end the armed conflict and build a stable and lasting peace* is a complex agreement between the Colombian government and the FARC-EP guerrilla group seeking to solve the causes that originated the oldest armed confrontation of the American continent and restore the harm caused to the victims. In consequence, what is more relevant about this agreement is the implementation of a particular agenda dedicated to the right of the victims to achieve restoration, truth and justice through the creation of the '*Comprehensive System of Truth, Justice, Reparation and Non-Repetition*'⁴. According to the agreement, this complex system will be structured by judicial and non-judicial mechanisms such as: the truth, coexistence and non-repetition commission; the special unit for the search for missing persons in the context of the armed conflict; and the special jurisdiction for peace, created to administer justice and investigate, clarify, prosecute and punish serious human rights violations and infringements of international humanitarian law⁵. Furthermore, this comprehensive system is a combination of judicial and extra-judicial mechanism aimed to clarify the truth of what happened, to search for loved ones who have disappeared and providing reparations for the harm and injury caused to individuals, groups and entire territories⁶. Nevertheless, what is more relevant about this ambitious - comprehensive system is that it will find its foundation on the application of the paradigms of restorative justice, which according to the agreement, seeks for the restoration of the harm caused, and the reparation of the victims of the armed conflict⁷.

The peace agreement was incorporated to the Colombian legal framework through the Legislative Act 01 of 2017⁸. Its article 1 stipulates that restorative justice specifically attend the needs and dignity of victims and is applied with an integral emphasis that guarantees justice, truth and non-repetition of past violence⁹. Nevertheless, on the domestic level, a significant proportion of the Colombian society considered the use of

⁴ Final agreement to end the armed conflict and build a stable and lasting peace: Chapter v: Victims agreement. P 132.

⁵ Ibid, p 131

⁶ Ibid, p9

⁷ Ibid, p132

⁸ "*Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación de conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones*". Article 1.

⁹ Free translation.

retributive criminal trials to prosecute and punish the members of the guerrilla as the best way to restore the harm caused to the society and to know the truth about the conflict¹⁰. Furthermore, on a regional level, the jurisprudence of the Inter-American Court of Human Rights has reinforced the State's obligation to investigate, conduct criminal trials and punish for crimes that constituted severe violations of human rights committed during the confrontation¹¹. In consequence, the traditional adversarial criminal system based on retributive approach seemed to be the most efficient and legitimate mechanism to peruse the re-establishment of the rule of law and the promotion of reconciliation through the prosecution and punishment of the perpetrators of gross human rights violations.

1.1.The problem

In the context of transitional justice and based on previous experiences, the application of the retributive justice paradigm is facing many critics. For instance, according to some authors, retributive justice seems to be more focused on the sanctions as a feeling of social revenge against the offender rather than understanding the causes of the offences¹². Furthermore, retributive justice is centred on providing the proportionate punishment rather than thinking about the role of the offender in society and its future reincorporation¹³. Finally, retributive justice does not give the victim and the community the right to play a more active role within the criminal trials to seek for reparation and achieve the collective truth about the crimes committed in the past¹⁴. Among others, the establishment of criminal tribunals in transitional contexts is considered expensive, takes long time to prosecute only a few perpetrators and can only achieve the judicial truth of the conflict. Therefore, for some restorative justice advocates like Marshal, Zehr, Clamp

¹⁰ Centro de Memoria Histórica. The general report "Basta ya!: memories of war and dignity". 2016 available at <http://www.centrodememoriahistorica.gov.co/en/reports>

¹¹ In this regard, the Inter-American Court of Human Rights has developed the mentioned rule in the following cases: Barrios Altos V. Perú 2002; La Cantuta V. Perú 2006; Case Cantoral-Humani & García Santa Cruz Case V. Perú, 2008, among others.

¹² ZEHR, Howard 2002. "The Little book of restorative justice" p20.

¹³ DIGNAN, James "Understanding victims and restorative justice". 2006

¹⁴ MCGONIGLE, Brianne 2011. "Procedural Justice? Victim Participation in International Criminal Proceedings" p30.

and Parmentier, to secure peace and justice after situations of armed confrontation, transitional justice systems needs to be implemented by using restorative justice principles as an alternative paradigm of justice with the purpose to guarantee an active participation for all the actors involved in the conflict, including victims and the wider community¹⁵.

In this scenario, restorative justice appears in the field of transitional justice as an alternative paradigm to face mass criminality. Therefore, far from the retributive approach of justice that is focused on accomplishing accountability and punishment for the offender, restorative justice promote the involvement of all the stakeholders affected by the offence, in order to collectively understand the causes and the consequences of the crime and create the adequate measures to restore, as much as possible, the harm caused to the victim¹⁶. Therefore, after situations of armed conflict, some countries like South Africa,¹⁷ Rwanda¹⁸ and Sierra Leone¹⁹, have implemented restorative justice measures through the creation of truth commissions that, based on their traditional practices, played an essential role on the seeking for truth, reconciliation and social restoration of the countries. Therefore, based on the results given in these past experiences, some authors have concluded that restorative based truth commission was more successful in dealing with mass atrocities than criminal courts²⁰. Even scholars such as Parmentier, Bueno and Weitekamp²¹ are currently considering the convenience of implementing restorative justice as the dominant model for the transitional justice process towards construction of a "restorative transitional justice". However, this conclusion within transitional justice literature is far from being pacific. According to some scholars such as Uprinmy & Saffon²², restorative justice has had limited use in transitional justice and should not be

¹⁵ CLAMP, Kerry: *Restorative justice in Transitional Settings*. Routledge 2016.

¹⁶ This first definition of restorative justice is based on the concepts given by Clamp, Parmetier, Bueno, Marshal.

¹⁷ The South African Truth and Reconciliation Commission.

¹⁸ Gacaca Courts.

¹⁹ Lomé Agreement, Article XXVI create the Truth and Reconciliation Commission, to address impunity and break the cycle of violence.

²⁰ BUENO, Isabella: "Mass victimisation and restorative justice in Colombia: Pathways towards peace and reconciliation?" KU Leuven. 2013.

²¹ CLAMP, Kerry. "Restorative justice as a contested response to conflict and the challenge of the transitional context: an introduction"p8. *Restorative justice in Transitional Settings*. Routledge 2016.

²² Uprinmy & Saffon "*Transitional Justice, Restorative Justice and Reconciliation. Some insides from the Colombian Case*" Dejusticia 2009.

the only and the best way to solve the problems that can arise in the context of mass criminality. For these authors, “restorative justice was designed to face small-scale criminality in peaceful societies. Furthermore, restorative justice alone does not seem sufficient to supersede, by itself, the social traumas left by the massive and systematic violation of human rights”²³. Based on the limitation that restorative justice has, many scholars have doubts about the role that this model of justice can play to achieve the guarantee of truth, justice, reconciliation and non-repetition of serious human rights violations and massive victimisation within a transitional justice context.

1.2. Research question

Starting on the current dilemma between the use of traditional retributive prosecution to prioritise the achievement of justice and the incorporation of restorative justice measures as an alternative paradigm of justice in order to accomplish peace and social restoration, the case of Colombia can offer an interesting contribution to show how this discussion regarding the dichotomy between justice and peace can advance by implementing restorative justice principles in transitional justice without falling into extremes that can sacrifice one or another. Therefore, the present research seeks to discuss critically, how suitable is the application of restorative justice on situations of mass violence and gross human rights violations within the context of the Colombian transitional justice system?

The primary purpose of the research is: in one hand, critically evaluate the suitability of the application of the restorative justice model within the transitional justice system, and in the other hand, to critically discuss the implementation of the restorative justice model within the current transitional process design by the Colombian government to comply with compromises acquired in the peace agreement between the government and the FARC-EP.

²³ Uprinmy & Saffon “*Transitional Justice, Restorative Justice and Reconciliation. Some insides from the Colombian Case*” p18 Dejusticia 2009.

1.3. Methodology

To solve the research question, the present study will be conducted through a qualitative analysis of several sources. To respond the central research question, this paper will seek to answer to several sub-questions. First what restorative justice is, what the theoretical framework of restorative justice is, what the purposes, pillars and implications are on addressing severe crimes. These questions will be answered using secondary sources such as literature related to criminal justice and restorative justice. The first chapter will analyse diverse meanings given by some restorative justices authors and advocates to the concept, the discussion regarding its origins, aims and principles and finally the discussion related with its restriction to address criminal matters.

Subsequently, the second chapter will refer to the theoretical framework of transitional justice and the implication of introducing restorative justice mechanisms to deal with the context of mass victimisation. Therefore, to reply to this question the chapter will first, analyse the evolution of the concept of transitional justice, from a legalistic perspective mainly oriented to the prosecution of gross human rights violation towards a more interdisciplinary conception focusing on the social dimension of situations of armed conflict. This chapter will develop using primary sources such as the UN report of the Secretary-General in transitional justice and the rule of law and secondary sources based on transitional justice literature. Furthermore, the chapter will have a particular focus on the most relevant institutions of transitional justice, the traditional retributive oriented criminal trials and the restorative truth commissions. Finally, the chapter will address the discussion regarding the impacts of applying a restorative justice model in the transitional justice system especially concerning to the issues of accountability and the notion of reconciliation after an armed conflict. To solve the mentioned questions, the research will use literature sources related to restorative justice and transitional justice literature.

In the second part of the research will critically discuss the implementation of the restorative justice model within the current transitional process designed by the Colombian government and the FARC-EP. Therefore, in order to address the topic in a

comprehensive way, the third chapter will first analyse the context of the armed conflict in Colombia by using secondary sources such as civil societies reports on human rights violations in the country, literature related with the history of the armed conflict and reports of the Commission of the Inter-American Court of Human Rights. Secondly, will analyse the current legal framework implemented by the Colombian government to introduce a transitional justice system in an on-going armed conflict. Moreover, the rules of the Constitutional Court related with the implementation of restorative justice principles in transitional justice institutions directed to, on one hand, ensure the active participation of the victims and the protection of their rights towards the guarantee of their restoration and, on the other hand, seeking for the re-incorporation of ex-combatants into society. Finally, in the last part of the last chapter, the research will address the application of the restorative justice paradigm within the transitional legal framework by having a particular attention to the structure of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition. The research will critically evaluate how restorative is the justice model in the Colombian transitional justice system and what are the further challenges that this comprehensive system has to face in a context of on-going political violence.

2.

TOWARDS A DEFINITION OF RESTORATIVE JUSTICE

2.1 Introduction

As mentioned in the introduction, the present research seeks to establish the suitability of restorative justice in the context of mass victimization. Therefore, it is necessary to understand the scope of the concept and its capacity to deal with serious crimes. Consequently, the present chapter will analyse the origins, principles, values and restrictions of restorative justice, to have a more thorough understanding of the concept. However, the purpose of this research is not to establish a new definition of restorative justice, rather to analyse and explore the different meanings and extent given by some authors to the restorative justice theory as an alternative paradigm of justice reform. Therefore, by having a better understanding of the content and the elements involved, it is possible to make a contribution towards the recognition for the need to have a broader concept for its applicability within the criminal process and furthermore, for contexts of mass criminality. For these reasons, this chapter will analyse the different meanings of restorative justice given by some of the most prominent restorative justice advocates, identifying their common elements and contribute to the contemporary debate regarding its application for severe crimes and mass atrocities. As a result, the chapter will conclude that, restorative justice as a paradigm of justice that addresses the needs of the victims and compromises the active participation of the offender in restoration of the harm caused, can show its real power in addressing the most severe of cases of violence towards the achievement of restorative outcomes.

Restorative justice is becoming a popular term used in contexts of criminology and criminal politics as a forward-looking approach of justice that, apart from the traditional retributive justice that mainly focused on the states power to punish and condemn the wrongdoer, is oriented to encourage the offender and the victim to participate collectively to restore the harm caused by the offence. Nevertheless, even

though restorative justice is generally perceived as the paradigm of justice that gives back to the victim its lost role within the criminal system, the debate still remains in regards to the extent of the concept and the scope of its application remain in discussion. Therefore, as some authors have stated, restorative justice is an unfinished concept²⁴. Yet, as it will be further expanded upon in the chapter, restorative justice advocates have generally agreed in concluding that under this paradigm of justice, the victim, the offender and, in some cases the community, can collectively acknowledge the truth of the offence and decide what measures to take in order to reduce the harm caused by the offence. Based on this general understanding of restorative justice, some criminal systems of western societies, are currently applying this model into their criminal justice reform²⁵.

This general understanding of restorative justice as an alternative method that involves both parties and encourages them to restore the harm caused by the offence created the path for some countries like South Africa²⁶, Rwanda²⁷ and Sierra Leone²⁸, to introduce restorative oriented truth commissions within their transitional systems with a significant impact in the social restoration process. Nevertheless, the lack of uniformity in the definition of restorative justice has created the discussion regarding its suitability in context of mass criminality. Therefore, this lack of consensus has affected the legitimacy of its implementation in transitional justice processes. Based on this discussion, some authors including Uprimny and Saffón have concluded that, given the lack of clarity in its conception, restorative justice must be an alternative approach to justice restricted to solve minor criminal matters and community-based conflicts²⁹. However as Walgrave stated, restorative justice is an unfinished concept that seems to be more complicated than a friendly-settlement process mainly focused on giving back the victim a visible role to

²⁴WALGRAVE, Lode “Restorative justice. An alternative for responding to crime”. International handbook of penology and criminal justice. Boca Raton, London & New York 2008.

²⁵ In this regard restorative justice advocates have named the cases of Canada, Australia, New Zealand, England among others.

²⁶ South African Truth and Reconciliation Commission

²⁷ Gacaca Courts

²⁸ Lomé Agreement, Article XXVI create the Truth and Reconciliation Commission, to address impunity and break the cycle of violence.

²⁹ Uprimny & Saffón “*Transitional Justice, Restorative Justice and Reconciliation. Some insides from the Colombian Case*” p17 Dejusticia 2009

restore the harm caused by the offence³⁰. For this reason, despite the academic debate regarding the possibility of extending the scope of its application not only for minor offences but severe crimes and especially in the context of transitional justice, there is a real risk of applying a model of justice that does not have a consensus regarding its definition³¹.

For authors like Marshal, restorative justice is every process created to guarantee the involvement of the stakeholders, namely the offender, victim and the community in order to allow them to understand the causes and consequences of the crime and, collectively, create the measures to restore the harm caused by the offence (*purist*). However, for other authors such as Zehr, restorative justice is related to the outcomes that are directly conducted for the purposes of restoring the harm (*maximalist*). Therefore, based on the different approaches given by some restorative justice advocates, this chapter will be divided in four subsections: The first part will assess the origins of the concept, subsequently the second part will address the aims and principles of the concept, the third part will aim to contribute for the conceptualization of restorative justice and finally, the chapter will propose for a broader definition willing to address serious crimes and based on its principles and aims.

2.2. The discussion regarding the origins of restorative justice:

According to Parmentier, Clamp and Doak, restorative justice became a popular term used by criminal justice authors and scholars as a response to the crisis of the traditional retributive oriented criminal system³². According to McGonigle, this retributive paradigm of justice is considered as part of the non-consequentialist theory of justice that is solely interested in the fact of the wrongdoing and the mental state of the perpetrator to provide the adequate punishment. Therefore, retributive justice “emphasised the imposition of

³⁰ WALGRAVE, Lode “Restorative justice. An alternative for responding to crime”. International handbook of penology and criminal justice. Boca Raton, London & New York 2008.

³¹ CLAMP Kerry & DOAK Jonathan 2012 “More than words: Restorative justice concepts in transitional justice settings” p International Criminal Law Review.

³² Ibid.

punishment for the offender because it is deserved due to the commission of a crime”³³. For this reason, it is considered as backwards-looking because it gives the central attention to the offence and does not suggest the intervention of the victim in the criminal proceeding. As a result, retributive justice has been highly criticised by criminal justice authors and victims movements. For instance: it is considered founded in sanction rather than the restoration of the damage caused to the victim, does not consider essential values of modern society such as reconciliation, empathy, mercy and forgiveness and, for seeing punishment as a response to any wrongdoing and not as a response to the harm caused to the victim. In consequence, restorative justice came into the field as an alternative paradigm of justice to face criminality from a different perspective.

Restorative justice remains an unclear concept. The debate about the extent of the concept has its inception even in the determination of the origins of this concept. To have a better understanding of different theories related with the genesis of restorative justice, the present research will use the method used by Clamp³⁴ who considered that the theories regarding the origins of restorative justice can be divided into three groups: The return theory defended by scholars such as Braithwaite³⁵ and Cunneen³⁶, considers that restorative justice is the return to the primitive approach made by some ancient societies to deal with conflict. The second group of authors like Dignan³⁷ and Van Ness³⁸ have stated that restorative justice emerged as a response to the massive pressure created by the victim movement during the 1970’s seeking for the involvement of the victims within the criminal system and their needs to guarantee reparations. The final group of restorative justice advocates led by Zher³⁹ argues that restorative justice theory came to light as a “bottom-up” alternative for conflict resolution. Thereafter, the present research will develop a deeper study of the theories mentioned before.

³³ MMCGONIGLE, Brianne "Procedural Justice? Victim Participation in International Criminal Proceedings" p37, School of Human Rights Research Series Vol 42. Utrecht, 2011.

³⁴ CLAMP Kerry & DOAK Jonathan "More than words: Restorative justice concepts in transitional justice settings" International Criminal Law Review, 2012.

³⁵ BRAITHWAITE, John: 'Restorative justice: Assessing optimistic and pessimistic accounts', in M. Tonry (ed.) Crime and justice: A review of research 25: 1–127. Chicago, IL: University of Chicago Press. 1999.

³⁶ CUNEEN, Chris: "Reparations and restorative justice: Responding to gross violations of human rights" Restorative justice and civil society. Cambridge University Press. 2001

³⁷ DIGNAN James "Understanding victims and restorative justice" McGraw-Hill Education. 2006.

³⁸ VAN NESS, Daniel W & JOHNSTON Gerry "Handbook of restorative justice". Willam Publishing. 2007

³⁹ ZEHR, Haward & GOHAR, Ali "The little book of restorative justice" Good Books. 2002.

The authors associated with the return theory such as Braithwaite, argue that restorative justice was the predominant form of pre-modern justice used by ancient civilisations to settle disputes between community members and even used to deal with severe crimes with a significant social impact like homicides⁴⁰. Therefore, before the twelve-century, ancient civilisations used restorative justice as their primary alternative to resolve conflicts among their citizens⁴¹. In fact, in the 12th century, some communities in Northern Ireland created community encounters known as *Brechon Law* to decide, collectively, how to deal with the harm caused by the offence and the necessary measures to restore the peace and harmony of the community. Another case of dispute settlement that supports this return theory is the South African concept of *Ubuntu* described by Clamp as “the African way of life, (...) [a] spiritual communalism employed RJ rather than retributive principles”⁴². This community settlement form is currently functioning in the juvenile criminal system with exceptional results preventing recidivism among youngsters⁴³. Nevertheless, for Daly⁴⁴ this argument is used by some restorative justice advocates to legitimize the use of restorative measures in the contemporary criminal system by arguing that this paradigm of justice is the ancient form to deal with criminal matters.

In contrast, authors such as Dignan⁴⁵ and Van Ness⁴⁶ stated that the restorative justice theory rises from the crisis of the retributive contemporary criminal system applied in the western world. This crisis took place during the 1970’s with the emergence of the victim rights movement that makes visible the existence of the imbalance within the criminal proceeding. This imbalance is between the rights given to the offender during the process and the lack of scenarios where the victim, as the direct affected by the

⁴⁰ BRAITHWAITE, John: ‘Restorative justice: Assessing optimistic and pessimistic accounts’, in M. Tonry (ed.) *Crime and justice: A review of research* 25: 1–127. Chicago, IL: University of Chicago Press. 1999.

⁴¹ CUNEEN, Chris “Handbook of restorative justice”. Edited by VAN NESS, Daniel W & JOHNSTON Gerry 2007.

⁴² CLAMP Kerry “Restorative Justice in Transition”p11, Routledge. 2013.

⁴³ SKELTON, Ann “Restorative justice as a framework for juvenile justice reform: A South African Perspective” p 502. *The British Journal of Criminology*. Oxford University Vol. 42. 2002

⁴⁴ DALY, Kathleen “Restorative justice: The real story”. *Punishment and Society*. 2002.

⁴⁵ DIGNAN James “Understanding victims and restorative justice” McGraw-Hill Education. 2006.

⁴⁶ VAN NESS, Daniel W & JOHNSTON Gerry. “The meaning of restorative justice”. *Handbook of restorative justice*. Willan Publishing. 2007

offence, were able to have their own agency⁴⁷. In this context, victim organisations claimed for the recognition of their rights to know the truth, to guarantee their own agency and assurance in their reparation to restore the harm suffered as a consequence of the crime. According to McGonigle, the victim movement was seeking for 1) the recognition of the right of the victim to be treated with respect within the criminal procedure, 2) to be notified about the evolution of the investigation and the prosecution 3) to receive economic and psychological support when is needed 4) to receive protection from the accused 5) to attend and participate during the procedure and 6) to received reparation⁴⁸. As a result, many western states decided to conduct legal reforms within their criminal justice system to dignify the role of the victim by incorporating restorative measures. For instance, the figure of mediation and other friendly-settlement alternatives were implemented to address minor or juveniles systems to provide an active role of the victim and guarantee their reparation.

Finally, the “Bottom-up” theory stated that restorative justice emerged from social practices from communities in Canada, United States, New Zealand among others, to deal with offences including serious crimes⁴⁹. Later, According to Picca in 1960 “two phenomena in relation to crime and justice have caught the attention of the public: the rapid increase of grave criminality on the one hand, as well as the failure of criminal law and criminal justice to deal with it on the other hand”⁵⁰. As result, restorative justice came from communities’ practices and introduce to the legal framework as an alternative measure to settle disputes. As an example of these social practices, Zehr, one of the most outspoken authors of this theory, describes that in Ontario, Canada, Mennonite communities implemented victim-offender encounter scenarios for young offenders. With this encounter, the wrongdoer was able to meet the victim and the close related circles to achieve on one side, a comprehensive reparation for the victim and, on the other, the reintegration of the young offender to society, giving the offender the space to

⁴⁷ BUENO, Isabella “Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?” KU Leuven. p77. 2013.

⁴⁸ MCGONIGLE, Brianne "Procedural Justice? Victim Participation in International Criminal Proceedings" 2011.

⁴⁹ ZEHR Howard & GOHAR Ali "The little book of restorative justice" p10. Good Books.

⁵⁰ BUENO, PARMETIER & WEITEKAMP (2016). “Exploring restorative justice in situations of political violence. The case of Colombia”p38. Restorative Justice in Transtional Settings.

acknowledge the impact of the offence committed⁵¹. After that, this practice expanded in Elkhart, Indiana, U.S. with the creation of the Victim-Offender Reconciliation Programs (VORP) as an alternative scheme where the offender and the victim were able to meet for the first time with the purpose of giving the wrongdoer the possibility to acknowledge the harm caused to the victim. Based on these previous examples, Zehr recalls that some officers in The United States, frustrated with the ineffectiveness of the sanctions provided in the ordinary criminal system, proposed the application of encounter programs where the offender of a particular case was able to meet the victim and seek for spaces for victim/offender reconciliation. In consequence, the offender and victim can agree on the best measures to redress the harm and recompense the victim for the damage caused. Since then, restorative justice has become a popular mechanism on the basis that it can increase victim satisfaction in the criminal justice process⁵². Based on the "Bottom-up" perspective, Zehr argues that restorative justice started as an effort by a handful of people dreaming of doing justice differently. It originated in practice and experimentation rather than in abstractions. The theory, the concept, came later⁵³.

2.3. Principles, values and goals of restorative justice:

Having set out the different origins of restorative justice is now helpful to examine the different ways in which it is conceived in relation to its principles, values and goals. According to Zehr, restorative justice is based on the understanding of crime, as a violation of interpersonal relationships. Therefore, the victims and the community should be involved as primary stakeholders since they are those affected by the offence⁵⁴. This violation generates, on the one hand, an obligation for the offender to amend the harm caused and, on the other hand, a liability for the community to help the victim and offender to be restored and thus, maintain the general well-being of all its members. Therefore, based on this understanding of crime, for Zehr it is possible to perceive that we, as members of society, are interrelated and therefore, restorative justice seeks to put

⁵¹ ZEHR, Howard & GOHAR Ali "The little book of restorative justice" p10. Good Books.

⁵² Ibid p9

⁵³ Ibid. p62

⁵⁴ ZEHR Howard & GOHAR Ali "The little book of restorative justice". Good Books. p16

back the balance inside the community by restoring the harm caused⁵⁵. This communitarian interpretation of crime is also shared by other restorative justice advocates, who see the needs to recall for a broader conception of crime. Not only as an action that constitutes an offence and deserved to be punished but also as an action that needs to be addressed based on its social dimension especially in contexts of mass victimisation⁵⁶. As a result, restorative justice appears to address crime in a broader way involving all the actors affected by the wrongdoing and giving attention to restoring the harm caused by putting things back to the right place. Following this approach, Bueno considered that restorative justice is based on the conviction that all humans beings have the capacity to feel empathy for others human beings and in particular, with those who have suffered⁵⁷. Based on this conception, “Restorative justice is more likely to contribute constructively to social life and relations”⁵⁸.

In consequence of this, restorative justice does not seek to replace the criminal justice system. While the criminal system address questions like what laws have been violated, who committed the offence and what is the proportional punishment for the infraction. Restorative justice is more concerned about who was affected by the crime to guarantee their involvement, what are their needs and obligations and what are the appropriate measure that need to be implemented in order to put things right again⁵⁹. Therefore, while the goal of the criminal justice system is to prosecute and punish the perpetrator of a criminal offence, restorative justice seeks to achieve a broader truth about the wrongdoing by encouraging the involvement of all stakeholders in discussion and deciding in the appropriate outcomes to deal with the causes and consequences of the offence⁶⁰. Furthermore, restorative justice responds to crime, giving an active accountability and attempt to provide the reparation for the victim and promote

⁵⁵ Ibid. p17

⁵⁶ PARMENTIER, BUENO & WEITEKAMP “Exploring restorative justice in situations of political violence. The case of Colombia” Restorative Justice in Transitional settings.p38 2016

⁵⁷ This position is shared by: ZEHR Howard & GOHAR Ali “The little book of restorative justice”. Good Books, p55 and, BUENO, Isabella “Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?” KU Leuven. p77. 2013.

⁵⁸ WALGRAVE, Lode “Restorative justice. An alternative for responding to crime”. International handbook of penology and criminal justice. Boca Raton, London & New York 2008.

⁵⁹ ZEHR Howard & GOHAR Ali “The little book of restorative justice”. Good Books.p20.

⁶⁰ CLAMP, Kerry “Restorative Justice in transition”

reconciliation⁶¹. Nevertheless, it is relevant to make clear that the promotion of reconciliation does not mean that restorative justice is about achieving reconciliation. As Zehr, Parmentier, Bueno, and Weitekamp have stated, even though restorative measures are conducted to seek for reconciliation on a personal or national level in contexts of political violence, it is also important to evidence that corresponds to the individual the will and interest to achieve reconciliation⁶².

For the achievement of the goals mentioned before, the role of the stakeholders involved in restorative justice must be drastically diverse from traditional retributive justice. Accordingly, a restorative justice scenario has to be created in contexts where all the parts involved in the conflict can understand the other individual as an equal and can collectively understand the roles and obligation of each stakeholder. Regarding the role of the victim, restorative justice gives back the central attention as the one who has been suffering the consequences of the offence. Restorative justice addresses the victims' needs by creating the scenario to acknowledge the causes and consequences of the offence in order to ensure the right to truth of the victim. The restorative justice paradigm must promote the active participation of the infringed party to ensure the central purposes of restoring the harm caused. This restorative paradigm creates the path to a broader form of material or symbolic reparation depending on the will and expectations of the victim⁶³. The role of the community in the restorative justice paradigm as mentioned previously has two dimensions. On one hand, maintain general welfare of all its members responsible to create the measure to promote the reincorporation of the offender. On the other hand, depending on the severity of the crime it might involve the participation of the community as a secondary victim. As a result, the community has the right to participate in an active way in the adequate measures to restore caused to the community and guarantee a non-repetition⁶⁴.

Finally, the offender within the restorative justice paradigm is expected to assume the responsibility of his/her act and to acknowledge the impact of its offence. Furthermore,

⁶¹ LAMBOURNE, Wendy (2016) " Restorative justice and reconciliation: The missing link in transitional justice" Restorative justice in transitional settings. Edt. CLAMP, Kerry, p61. Routledge

⁶² ZEHR Howard & GOHAR Ali "The little book of restorative justice". Good Books. The same conclusion has been made by Parmentier, Bueno & Weitekamp "Exploring restorative justice in situations of political violence. The case of Colombia" Restorative Justice in transitional settings.Routledge. 2016

⁶³ ZEHR, Howard, 20

⁶⁴ ZEHR, Howard, 16

by recognizing the author of the offence, the wrongdoer will be able to be compromise in restoring the harm caused to the victim and the community, which according to the restorative literature is considered as a secondary affected. Therefore, under this perspective, accountability cannot be lead to punishment. In contrast with the traditional criminal system, restorative justice should address an active accountability. This alternative involves the accurate measures to made the offender understand and facing up what he/she has done, encouraging and also to acknowledge the impact of its behaviour⁶⁵. Taking that into consideration, restorative justice implies that the offender is encouraging the implications of its behaviour and alternatives to motivate its personal transformation and its reincorporation to society. As Bueno has stated, “whereas accountability under the scope of restorative justice is active, constructive, future-oriented and aims at restoring the harm [accountability in the traditional criminal system] is passive, retributive, backward-oriented dedicated to punish the individual rather than give special focus to the criminal act and does not seek to restore the harm because has a special focus on deterrence rather than the harm caused to the victim”⁶⁶. Furthermore, an active accountability will let underlying causes of the offending that pushed the wrongdoer to victimize will be understood by the others stakeholders⁶⁷. In this regard, Braithwate developed this form of active accountability under the denomination of "reintegrative shaming". According to the author, shaming may play a key role in the regulation of social behaviour by preventing or decreasing reoffending⁶⁸. The author suggests that people are further deterred by the threat of public disgrace than by threat of official punishment. Restorative justice therefore, judges the act rather than the offender as a respectful mechanism to create a censure of the wrongdoing. This paradigm of justice is a forward-looking accountability that seeks to create the space for the improvement of the reintegration of the offender inside the community. Nevertheless, this vision is not shared

⁶⁵ Parmentier, Bueno & Weitekamp "Exploring restorative justice in situations of political violence. The case of Colombia" Restorative Justice in transitional settings. Routledge. 2016

⁶⁶ BUENO, Isabella “Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?” KU Leuven. p57. 2013

⁶⁷ Ibid. p55.

⁶⁸ BRAITHWATE, John “Crime, shame and reintegration" Cambridge University Press.1989.

by some authors who have argued that addressing the underlying causes might focus too much on offenders to the expenses of victims⁶⁹.

2.4. Conceptualizing restorative justice:

Based on the previous study restorative justice can be understood in broad terms as an alternative paradigm of justice that address the harm caused by the offence by involving the stakeholders to identifying the causes and consequences of the offending and acts towards seeking for the restoration of the harm. Nevertheless, there is an on-going debate regarding its concept, on one side, the purist for some authors denominated as *the purist*, the definition of restorative justice needs to highlight the relevance of the procedural element⁷⁰. As a result, restorative justice, under this perspective, is every process that conducts the involvement of the offender, the victim and the community as stakeholders in order to let them meet and create the adequate alternatives to restore the harm caused⁷¹. This process-focused approach believes that every alternative creating the spaces to empower the stakeholders and let them decide the appropriate way to restore the harm is restorative. In that sense, any outcome resulted from the encounter is restorative as long as all the stakeholders participate actively in the resolution of the offence. As an expression of this approach, Marshall defined restorative justices as "a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future"⁷².

Based on this concept, other authors such as McGonigle conceptualize restorative justice as "a process after guilt has been established whereby the offender, victim and potentially, the wider community begin to attempt to repair the harm suffered by the victim"⁷³. As is visible from the definitions given by Marshal and McGonigle, the authors

⁶⁹ WALGRAVE, Lode "Restorative justice. An alternative for responding to crime". International handbook of penology and criminal justice. Boca Raton, London & New York 2008.

⁷⁰ CLAMP Kerry & DOAK Jonathan "More than words: Restorative justice concepts in transitional justice settings" International Criminal Law Review, 2012

⁷¹ Ibid.

⁷² MARSHAL T: "The evolution of restorative justice in Britain". European Journal on Criminal Policy and Research p37. 1996.

⁷³ MCGONIGLE, Brianne "Procedural Justice? Victim Participation in International Criminal Proceedings" 2011.

do not make any references to the potential results that might come from the process. In that sense, as Morris declares, even the imprisonment of the offender can be restorative if the stakeholders have collectively decided on this solution⁷⁴. In consequence, the purist approach of restorative justice is more focused on the encounter process rather than the effectiveness of the measures to guarantee restoration of the harm. Therefore, the authors identified with this approach are more critical with the scope of action of restorative justice within the criminal system and, therefore, considered necessary to restrict its application only for juveniles' criminal matters and minor offences⁷⁵. As a result, restorative justice is reduced to the voluntary encounter process of the stakeholders who deliberately decide the best measures to repair the harm. However, according to Clamp and Doak⁷⁶, the process-centric definition of restorative justice made by Marshal and other purist authors, is considered too legalistic and gives more relevance to the process without considering the outcomes that may result from the encounter. Furthermore, this purist approach does not give any attention to the aims or objectives of the restorative process and finally, does not solve the question regarding the nature and the extent of the participation of the stakeholders within the process⁷⁷.

Given this process-oriented definition of restorative justice, it is common to see in the academic literature that some authors have related the scope of its application in contexts of mediation or friendly settlement process. Nevertheless, for authors like Zehr the use of the term of mediation as an equivalent for restorative process, only leads to the misunderstanding of the purposes, principles and values of restorative justice. For this author "In a mediated conflict or dispute, parties are assumed to be on a level moral playing field, often with responsibilities that may need to be shared on all sides. While this sense of "balance" may be true in some criminal cases, in many cases it is not. A victim in a rape or even a burglary does not want to be known as a "disputant"⁷⁸. Therefore, the use of the term mediation to relate restorative justice is equivocal and reduces the purposes of the application of restorative justice in contexts of serious crimes.

⁷⁴ MORRIS, Allison "Critiquing the critics. A Brief Response to Critics of Restorative Justice. 1999

⁷⁵ *ibid.*

⁷⁶ CLAMP Kerry & DOAK Jonathan "More than words: Restorative justice concepts in transitional justice settings" *International Criminal Law Review*, 2012

⁷⁷ *Ibid.*

⁷⁸ ZEHR Howard & GOHAR Ali "The little book of restorative justice". Good Books. p13

In contrast to the purist approach of restorative justice, *the maximalist approach* of restorative justice does not give attention to the deliberative process but gives more awareness on the measures aimed to restore the harm caused by the offence. According to this approach Bazemore and Walgrave state that, restorative justice is “every action that is primarily oriented towards doing justice by restoring the harm that has been caused by a crime. Such a view would potentially encapsulate restitutionary and compensatory remedies, which have been available through the conventional civil and criminal justice system for many years”⁷⁹. Therefore, for the maximalist approach of restorative justice, the process is not the principal element of the concept and, as a result, for the wellbeing of the victim, it is possible to avoid the encounter to solve collectively the particular incident that has taken place. In this regard, giving the special relevance to the consequences rather than the process involved, the authors of the maximalist perspective have stated that, even though the stakeholders involve collectively settled the solution to solve the conflict, the process cannot be named as restorative if the measure goes against the principles and values of restorative justice and violate human rights.

2.5. Towards a unifying definition of restorative justice:

The study developed in the present chapter made evident the complexity of defining restorative justice. Indeed, this paradigm of justice encompasses a variety of practices at different stages of the criminal system. However, given the growing literature that has contributed to gain a better understanding of its principles, goals, origins and conceptual scope, it is possible to have a better approach to the limitations and extent that restorative justice might have in the context of serious crimes. In consequence, based on the study made in the present chapter, it is feasible to argue that restorative justice is a complex term created with the purpose to transform the traditional conception of crime as an offence committed against the state and justice as the legitimate way to punish the wrongdoer. It is also possible to state that restorative justice is far from being a legalistic concept, in contrast, is an alternative paradigm of justice that understand the complexity

⁷⁹ BAZEMORE Gordon & WALGRAVE Lode "Restorative Juvenile Justice: Repairing the harm of youth crime" p48. 1999

of the crime based on its social dimension by involving all the actors affected by the offence with the purpose of restoring the harm caused. Therefore, after analysing the literature related to the conceptualization of restorative justice and the scope of its application, it is possible to affirm that this paradigm of justice is not created to replace the traditional criminal system but to have a different understanding of the crime and seeks to address the offence in a more comprehensive way by introducing the participation of the community and the victim.

Based on the aforementioned preliminary statements and following the affirmation made by Bueno, three elements seem to be necessary to defining restorative justice: “(a) the intention to repair the harm inflicted, this may be in form of material such as monetary compensation or symbolic forms of reparation such as an apology or social work (b) a non-vengeful active accountability aiming at repair of the harm and eventual reintegration of offenders, and (c) the intention to establish a respectful, participatory and flexible process of justice”⁸⁰ by giving a balance in the way how the stakeholders interact with each other⁸¹. Therefore, to reach a definition of restorative justice that encompasses these elements it is necessary to bridge the process (purist approach) and outcomes (maximalist approach) theories explained before, towards a broader definition of restorative justice. In that sense, restorative justice could be a program that uses restorative process or aims to achieve restorative outcomes⁸². Accepting a broader concept of restorative justice responds to the fact that, governments are introducing restorative measures not only in their criminal system to deal with serious crimes but also in applying to deal with situations of mass victimizations and has contribute with the social reconciliation process after periods of political violence. As Zehr has argued “Some think RJ should only be applied to minor offenses, but its real power and value may actually become most evident in severest of cases, as these are often where the needs of the victim and obligations of the offender are greatest”⁸³

In consequence, the discussion about the concept of restorative justice can no longer be reduced to whereas the scope of its application has to be reduced to minor

⁸⁰ PARMENTIER, BUENO & WEITEKAMP “Exploring restorative justice in situations of political violence. The case of Colombia” Restorative Justice in Transitional settings.p33 2016

⁸¹ Ibid. 38

⁸² Ibid.

⁸³ ZEHR Howard & GOHAR Ali "The little book of restorative justice". Good Books,p9.

crimes and context of mediation and friendly-settlement process, or should be extended to address serious crimes. As Zehr and other contemporary restorative justice advocates have argued, restorative justice is not primarily intended for minor offences or first-time offenders⁸⁴. In consequence, following a maximalist approach and based on the principles, values and elements of restorative justice, is possible to claim for a broader definition that extends its application to address crimes that has a social impact with the purpose of creating outcomes with a transformative dimension among the stakeholders. As McCold and Wachtel have stated, restorative outcomes have a transformative dimension: transforming victims into survivors, conflict into cooperation, shame into proud, and individuals into a community"⁸⁵. In consequence, by having a broader definition of restorative justice, it is possible to start to address the critics propose by some authors⁸⁶, related with its application in context of mass victimisation, for example: what can be understood as community, to which extent is possible to guarantee the participation of the community and what happen if the intentions and purposes of victims radically disagree with the community as the "secondary victim", which one has to predominate in order to achieve the principal purpose of restorative justice, are some of the critics that restorative justice literature needs to solve. Furthermore, with this broader conception it is also possible to analyse the contribution that restorative justice gives for the achievements of the pillars of transitional justice, towards the restoration of the social harm and the peace building process. Consequently, the next chapter will analyse the suitability of restorative justice to address context of mass victimization and will propose for the implementation of restorative justice as one of the main foundations of transitional justice to deal with the social impact of the armed conflict and towards the construction of social reconciliation.

⁸⁴ Ibid.

⁸⁵ MCCOLD, Paul & WACHTEL, Ted "Restorative justice theory validation" Restorative justice: Theoretical foundations. Willan Publishing. 2002

⁸⁶ In this regard: CLAMP Kerry & DOAK Jonathan "More than words: Restorative justice concepts in transitional justice settings" International Criminal Law Review, 2012

The implementation of restorative justice in transitional settings

3.1. Introduction

Based on a better understanding of the concept of Restorative Justice, the present chapter will address the application of this paradigm of justice in contexts of mass victimization. Therefore, the first part of this chapter will develop the evolution of the concept of Transitional Justice using the approach given by Teitel⁸⁷ related to the genealogy of restorative justice. Furthermore, the chapter will analyse various measures and institutions of transitional justice with special focus on the permanent dichotomy between the guarantee of the right to justice and the right to achieve peace. As a result, the research will put emphasis on the two principal transitional justice institutions: Truth Commission as classical institution of restorative justice, and retributive oriented criminal trials. The purpose of this analysis is demonstrating that based on the statement made by the Secretary-General of the UN " Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives"⁸⁸. It is possible to argue that the classical dichotomy of peace versus justice can be solved by applying restorative justice as one of the main principles of transitional justice.

Therefore, the chapter will address the application of restorative justice in transitional justice and the permanent debate on the academic level regarding its suitability in contexts of mass victimization. The first part of the research will explore the evolution of the concept of transitional justice initially understood as legal responses to confront extra ordinary violence but based on the complexity related with the social dimension in every armed conflict. The concept of transitional justice and its institutions must enlarge allowing participation of more social sciences able to deal with the complexity of the social dimension of the armed conflict and promote interdisciplinary measures to achieve social reconstruction. In consequence, given the similarity of goals

⁸⁷ TEITEL, Ruti: "Transitional Justice Genealogy (Symposium: Human Rights in Transition)". Harvard Human Rights Journal, vol. 16, 2003.

⁸⁸ United Nations. Report of the Secretary-General " The rule of law and transitional justice in conflict and post-conflict societies" p1. S/2004/616

and principles of restorative justice and transitional justice, such as reconciliation and restoration of the harm caused by the conflict, transitional justice should use the restorative justice paradigm as one of its fundamental principles. However, this statement recognizes the relevance of the retributive justice paradigm in criminal trials within transitional justice and therefore, will argue that in the criminal prosecution is possible to combine restorative and retributive paradigm in criminal process.

3.2. Clarifying the conceptual framework of transitional justice

In contexts of prolonged armed conflict where the commission of international crimes and the absence of rule of law have created a large number of victims and instability, states are no longer capable to use ordinary institutions to address gross human rights violations and mass victimization. Parmentier, Bueno and Weitekamp argue that the differences between ordinary criminality and gross human rights violations make infeasible for states to address the latest with ordinary institutions. According to the authors, ordinary criminality differ from international crimes “in at least three aspects: first, the extremely violent character of the crime that frequently goes back to deeply rooted conflicts in society concerned and generates a “culture of violence”; second the massive number of victims; and third the political nature of the crimes, to the extent that they are committed for political reasons”⁸⁹. Therefore, transitional justice comes to the arena as the group of institutions and bodies created with the purpose of addressing extraordinary violence, reconstructing the order and pursue the peace. Nevertheless, given the complexity of facing gross human rights violations, states and the international community have historical questioning: how is it possible to rebuild the institutions and re-construct the democratic system? What are the appropriate measures to restore the harm caused by the crimes committed? The evolution of transitional justice is also an expression of how states and the international community have faced mass victimization and have created institutions conducted to restore the rule of law.

⁸⁹ BUENO, PARMENTIER & WEITEKAMP (2016) “Exploring restorative justice in situations of political violence. The case of Colombia”. *Restorative Justice in Transitional Settings*, p40. Edt. CLAMP Kerry. Routledge.

Ruti Teitel, one of the most relevant experts in the field of transitional justice, in her article *Transitional Justice Genealogy* gave a legalistic scope of the concept that defined transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessors regimes”⁹⁰. According to Teitel, genealogy of transitional justice can be described in three main phases: The first emerged during the post second world war period with the implementation of the Allied-run Nuremberg Tribunals. In this phase, transitional justice was a response to the need of seeking for accountability of the authors of the gross human right atrocities committed by the Nazi regime during the war. In consequence, national prosecutions were replaced by international retributive trials and as a result, the scope of transitional justice was related with international cooperation, war crimes trials and sanctions⁹¹. Finally, for Teitel “while the asserted aim of the transitional justice norm in this first phase was accountability, a striking innovation at the time was the turn to international criminal law and the extension of its applicability beyond the state to the individual”.

The second phase of transitional justice emerged with the democratic transition process started in South America and lately followed in East Europe, Africa and Central America. According to the author, the transition was characterized by a broader and more diverse understanding of the rule-of-law⁹². Therefore, the notion of justice was expanded allowing the incorporation of the various human sciences such as history, anthropology, sociology and political sciences. With this broader conception of justice, some countries in East Europe faced the tension between amnesty and prosecutions. Therefore, “Phase II moved beyond retributive justice as historically understood. The transitional dilemmas at stake in Phase II were framed in terms more comprehensive than simply confronting or holding accountable the predecessor regime, and included questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation that had previously been treated as largely external to the transitional justice project”⁹³. Thus, this phase allowed the incorporation of the restorative justice paradigm with the

⁹⁰ TEITEL, Ruti (2003) “Transitional Justice Genealogy (Symposium: Human Rights in Transition)”p70. Harvard Human Rights Journal. Vol, 16.

⁹¹ *Ibid*, 70.

⁹² *Ibid*, 72

⁹³ *Ibid*, p77.

purpose of conducting an alternative to deal with past abuses. For Teitel, the transitional justice aims shifted from the establishment of the rule of law through accountability to the goal of achieving peace by using non-judicial mechanism. Therefore, truth and reconciliation commissions were implemented as an alternative measure to deal with past abuses by creating the spaces where the victims were able to dialogue with its perpetrators, achieve social reconciliation, acknowledge the broader truth about the conflict among others. Finally, the last phase of transitional justice is characterized by the transformation from a legal phenomenon associated with extraordinary situations of armed conflict to an ordinary concept applied in ordinary context as a paradigm of the rule of law. The author supports this statement with the creation of the International Criminal Law as a permanent institution to respond to gross violations of International Humanitarian Law. In accordance, the author states that “the ICC symbolizes the entrenchment of the Nuremberg Model: the creation of a permanent international tribunal appointed to prosecute war crimes, genocide, and crimes against humanity as a routine matter under international law”⁹⁴.

Even though Teitel describes the last phase as the normalization of transitional justice based on the implementation of the permanent tribunal to prosecute gross human rights violation. According to transitional justice literature, the discussion regarding the dichotomy between the rights of victims to have the truth and be able to reconcile through institutions with a restorative justice approach and the obligation of the state to achieve justice through criminal retributive prosecution remains in discussion⁹⁵. However, the Secretary-General of the UN, understanding the social dimension of the conflict, looked for a broader definition of transitional justice that solved the dichotomy created between justice and peace and considered this two aims as mutually reinforcing imperatives⁹⁶. As a result, transitional justice is “the range of process and mechanism associated with a society’s attempt to come to term with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. This may include both judicial and non-judicial mechanisms with differing levels of

⁹⁴ Ibid, p90.

⁹⁵ LAMBOURNE, Wendy (2016) “ Restorative justice and reconciliation: The missing link in transitional justice” Restorative justice in transitional settings. Edt. CLAMP, Kerry, p61. Routledge.

⁹⁶ United Nations. Report of the Secretary-General “ The rule of law and transitional justice in conflict and post-conflict societies” p1. S/2004/616.

international involvement -or none at all- and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”⁹⁷. A broader definition of transitional justice legitimizes the implementation of restorative institutions, practices and mechanism dealing with human rights violations towards the achievement of reconciliation.

Furthermore, this broader concept of transitional justice expanded the scope of its application not only for post-conflict situations but also for contexts of on-going armed confrontation or political violence. In fact, in her Doctoral dissertation, Bueno named as an example, the case of Colombia, where even though the country can be considered formally as a democratic society, is currently dealing an on-going conflict and has not hesitated on implementing transitional justice: measures such as prosecutorial trials for the responsible of mass abuses, reparative measures for the victims, a DDR process, among others. Therefore “the case of Colombia illustrates that TJ should not simply be viewed as synonymous of a political transformation from oppressive regimes to democratic ones or with negotiated ends of armed conflict. Therefore TJ should also embrace those cases in which mechanism, designed to deal with mass abuses, are created during an on-going conflict”⁹⁸. Based on the evolution of the conceptual framework of transitional justice, it is possible to evidence the relationship between restorative justice paradigm within contexts of transition. Given the complexity of the conflicts, transitional justice cannot be reduced any longer to the principal aim of prosecuting the perpetrators of the crimes. Therefore, restorative justice appears in transitional justice as a tool to promote transformation in a society and heal the caused pain.

3.3.Principles, aims and institutions of transitional justice

As it was mentioned before, the concept of transitional justice goes beyond the obligation of states to seek for accountability for the authors of the gross human right atrocities committed during the armed conflict. Therefore, a broader conceptual understanding of

⁹⁷ United Nations. Report of the Secretary-General “The rule of law and transitional justice in conflict and post-conflict societies” p6 S/2004/616.

⁹⁸ BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p10. Doctoral Dissertation, Leuven: Faculty of Law. KU Leuven.

transitional justice embraces diverse forms of institutions that allow the social restoration of the harm caused by the conflict. Moreover, transitional justice must include judicial and non-judicial mechanism and institutions that aim directly at confronting and dealing with past violations of human rights and humanitarian law⁹⁹. These institutions must be oriented to promote social restoration that is directly related with strategies oriented to the re-establishment of the rule of law as the vital element for the democratization process. According to the UN, the key pillars of transitional justice are truth-telling, reparations and institutional reforms¹⁰⁰. In consequence, the goals of transitional justice consisting of dealing with the legacy of mass victimization in an effective way and creating a stable society capable to avoid atrocity, are better pursued through four key issues: truth, ensuring accountability for the acts committed during the armed conflict, priding reparations to victims and promoting reconciliation among the society¹⁰¹.

The challenges of the states immerse in conflict environments is represented by the achievement of a balance between the variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democratic institutions based on the rule of law. Through transitional justice instruments, states should create judicial and non-judicial institutions to guarantee the return of the rule of law integrated with plans to reincorporate victims, displaced civilians and former fighters to social life. As a result, a comprehensive strategy should also pay special attention to abuses committed against groups most affected by the conflict and establish particular measures for their protection and redress in judicial and reconciliation process¹⁰². These strategies have been implemented with the creation of diverse institutions and mechanism with a restorative approach such as truth and reconciliation commissions, memory centres, policies for victim's reparations and programs for the reincorporation of ex-combatants. Nevertheless, criminal trials remain as the principal

⁹⁹ RUTH-ARRIAZA, Naomi: "The new landscape of transitional justice". *Transitional justice in the twenty-first century. Beyond truth versus justice* (Ed): Naomi Ruth-Arriza & Javier Mariezcurena. Available at: http://assets.cambridge.org/97805218/60109/excerpt/9780521860109_excerpt.htm.

¹⁰⁰ United Nations. Report of the Secretary-General "The rule of law and transitional justice in conflict and post-conflict societies" S/2004/616.p6

¹⁰¹ LAMBOURNE, Wendy (2016) "Restorative justice and reconciliation: The missing link in transitional justice" *Restorative justice in transitional settings*. Edt. CLAMP, Kerry, p61. Routledge.

¹⁰² United Nations. Report of the Secretary-General (2004) "The rule of law and transitional justice in conflict and post-conflict societies"p9. S/2004/616

institution of transitional justice for the establishment of the rule of law. This relevance is based on the international obligation of states to investigate and prosecute the perpetrators for mass atrocities and prevent impunity. In consequence, national, international and hybrid tribunals have been created to investigate and prosecute the gross violation of international humanitarian law committed in the context of mass victimization.

Lambourne explains the dichotomy between justice through criminal prosecution and peace through other disciplines that can contribute in a broader and multidisciplinary way to the reconstruction of the society, by arguing that “the efforts of international lawyers and human rights advocates, fairly and justly prosecute those responsible for perpetrating crimes against humanity, and to ensure a future respect for the rule of law and human right principles, are juxtaposed against the efforts of international peace negotiators and conflict resolution practitioner who prioritize the establishment of peace and security and a climate of reconciliation between former enemies”¹⁰³. To have a better understanding about this dichotomy, this chapter will address the two principle transitional justice institution named, criminal tribunals with a retributive approach of justice and the non-judicial institution of truth commission highly characterized by the use of the restorative justice approach of justice.

3.3.1.Criminal trials:

Criminal trials are known as the main instrument of transitional justice to address human rights violations and promote the justice and the establishment of the rule of law by prosecuting the perpetrators of the gross human rights violation committed during the armed conflict. Starting from the Nuremberg Tribunals, criminal prosecution has played an important role in transitional context. Through local, international or hybrid criminal tribunals, the prosecution can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them a chance to see their former

¹⁰³ LAMBOURNE, Wendy (2006) “Transitional justice and peace-building after mass violence”, Seminar presentation, Centre for Research and Strategic Studies . KU Leuven. Leuven.

offenders respond for their crimes¹⁰⁴. As a response to the some of the biggest conflicts occurred around the globe, United Nations, has created international criminal tribunals established by the Security Council as subsidiary organ of the United Nations for the former Yugoslavia (ICTY) and Rwanda (ICTR), mixed tribunals for Sierra Leone, Cambodia; mixed tribunals in form of special chamber in the Democratic Republic of Congo, Bosnia and Herzegovina and Panels with Exclusive Jurisdiction over East Timor among others institutions, seeking to ensure justice and achieve deterrence.

Based on the states obligation to investigate and prosecute the violations of International Humanitarian Law¹⁰⁵ and the difficulties faced to promote reconciliation and reparation of victims in countries were has included amnesties laws in favour of the former regime, states cannot include under their transitional justices policies that promote amnesties or other measures that ensure impunity for perpetrators of genocides, war crimes, crime against humanity or gross violations of human rights. In fact, on the regional level the jurisprudence of the Inter-American Court of Human Rights has reinforced the state's obligation to investigate, conduct criminal trials and punish for crimes that constituted serious violations of human rights committed during the confrontation¹⁰⁶. In consequence, the traditional adversarial criminal trials based on retributive approach is broadly known as the appropriate institution to peruse the re-establishment of the rule of law through the prosecution of the perpetrators of gross human rights violations. Furthermore, criminal trials not only responds to the state's obligation to investigate and prosecute the authors of the gross human rights violations committed in the conflict, but also responds to the needs of the victims to hold accountable the author of the crime, specially in western societies, where retributive justice is the traditional paradigm of justice used to address crimes. For some authors, in cases of serious crimes prosecution and punishment plays a relevant role among the victims and the broader community. Therefore, when the gravity of a crime increases so

¹⁰⁴ Ibid, p13

¹⁰⁵ First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146.

¹⁰⁶ In this regard, the Inter-American Court of Human Rights has developed the mentioned rule in the following cases: *Barrios Altos V. Perú* 2002; *La Cantuta V. Perú* 2006; *Case Cantoral-Humaní & García Santa Cruz Case V. Perú*, 2008, among others.

too does an individual's and the community desire for punitive punishment¹⁰⁷. For instance, in cases of political violence and mass victimization like Colombia, a large percentage of the population was against alternative and non-judicial measures to address the crimes committed during the armed conflict by the ex-combatants. As a result, some sectors of the society would only prefer to incorporate in the peace agreement, the implementation of retributive criminal trials directly oriented to promote the imprisonment for the perpetrators of the crimes.

Even the UN has recognised the weaknesses of prosecution in transitional justice settings considering that national and/or international tribunals have been expensive and have contributed little to sustainable national capacities for justice administration¹⁰⁸. The main purpose of the criminal prosecution is to achieve the judicial truth and condemn the perpetrators of crimes against International Humanitarian Law, with little focus on the promotion of the restoration of the harm caused by the conflict. Criminal trials do not have the appearance of being the best scenario to guarantee an adequate measure for the reparation and the comprehensive assistance of the victims during the judicial process. Especially in the field of gender-based violence in the context of armed conflict, some international tribunals had failed in assisting the victims according to their cultural background¹⁰⁹. For example, in the case of the International Criminal Tribunal for the Former Yugoslavia, human rights defenders have argued that during the criminal procedure, victims played a passive role because their narratives had to be reduced in order to demonstrate only the relevant fact for the purpose of the trial. In consequence, survivors lost their opportunity to speak about their own experiences under the victim perspective rather than the judicial one¹¹⁰. In consequence, witnesses in general, showed a tendency to feel the trial experience as dehumanizing and traumatizing. The anxiety produced by facing the perpetrator inside the courtroom, the way how prosecutors and defenders approach the witnesses, and the complexity of the legal language, are some of

¹⁰⁷ MCGONIGLE, Brianne (2011) "Procedural Justice? Victims participation in International Criminal Proceedings" p57. School of Human Rights Research Series. Vol 42.

¹⁰⁸ United Nations. Report of the Secretary-General (2004) "The rule of law and transitional justice in conflict and post-conflict societies" S/2004/616.

¹⁰⁹ Julie Mertus (2004) "Shouting from the Bottom of the Well The Impact of International Trials for Wartime Rape on Women's Agency" International Feminist Journal of Politics, 6:1, 110-128, DOI: 10.1080/1461674032000165950.

¹¹⁰ Ibid.

the main issues that seem to interfere with the process of the survivors to restore their lives after a traumatizing event.

3.3.2. Truth Commissions

As a response to the critics related with the restriction of criminal tribunals to address the social impact of armed conflict and the restoration of the victim, truth commissions appear in transitional justice context as a temporary, non-judicial fact-finding body that investigates a pattern of abuses of human rights or humanitarian law committed over a number of years¹¹¹. According to Priscilla B Hayner, truth commissions are focused on the past and try to describe violations of human rights that have taken place over certain period of time. Generally exist for a predefined period of time, which ends up with the submission of the resulting report and is vested with authority¹¹². These bodies are characterised for taking a victim-oriented approach of justice by promoting the encounter between the offender, the victims and in some cases the community directly affected by the offence, with the purpose of understanding the broader truth about the conflict, acknowledge the causes and consequences of the wrongdoing and at the end of their mandate, the truth commission concludes its work with a final report of found facts and recommendations oriented to promote social restoration.

According to Clamp, the first truth commission was implemented in Uganda in 1974 but without greater international repercussion. It was incorporated as part of the transitional justice processes in Latin America given the great pressure created by the victims' movements in the region that claimed for the right to find out what happened to those who had been victims of forced disappearance by the military regime. In the case of Chile, for instance, the truth commission recommended legal and institutional measures, including the harmonization of national laws with international human rights standards, and advocated for the creation of public law foundations¹¹³. However, it was not until the Truth and Reconciliation Commission in South Africa that the truth commission with

¹¹¹ SCABAS, William (2004) "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone" 150 University of California Vol 11

¹¹² HAYNER Priscilla B (2002) "Unspeakable Truths: Facing the Challenge of Truth Commissions" p84. Routledge.

¹¹³ Ibid, p89

restorative approach was acknowledged as a form of justice through the act of truth-telling¹¹⁴. Therefore, Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala, East Timor and Sierra Leone are some of the countries that have introduced truth commission in their transitional justice processes.

Truth commission is the principal non-judicial institution within transitional justice that uses a restorative approach. In contrast with criminal trials, the main goals of truth commissions are: i) to discover, clarify and formally acknowledge past abuses; ii) to respond to the victims specific needs, iii) to contribute to justice and iv) to outline institutional responsibility and recommend reforms; and v) to promote reconciliation and reduce conflict over the past by using strategies that promote an open dialogue between perpetrator and victim¹¹⁵. According to Bueno, truth commissions main objective is to design a framework of the violation of human rights based on the testimonies of participants acknowledging the suffering of victims and later on, inquires on the causes and consequences of the crimes and present reparation measures as well as reforms to avoid repetition of such atrocities¹¹⁶. Therefore, based on the experiences of South Africa and Sierra Leone, truth commissions are considered for some authors as more suitable than criminal trials to reconstruct the full truth about the past. Supporters of the restorative justice approach have stated that a well-designed truth commission has less formal and procedural constraints and are ideally more inclusive not only for victims but also for perpetrators¹¹⁷ which are often too concentrated in the head of the armed group leaving the bottom without intervening in the process. Including the UN special report on transitional justice, the contribution of the truth commission has been recognized as a "complementary tool in the quest for justice and reconciliation, taking as they do a victim-oriented approach and helping to establish a historical record and recommend

¹¹⁴ CLAMP, Kerry (2016) "Restorative justice as a contested respond to conflict and the challenge of the transitional context: an introduction" p24. Restorative Justice in Transitional Settings. Edit. Kerry Clamp. Routledge.

¹¹⁵ HAYNER Priscilla B (2002) "Unspeakable Truths: Facing the Challenge of Truth Commissions" p84. Routledge.

¹¹⁶ BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p10. Doctoral Dissertation, Leuven: Faculty of Law. KU Leuven.

¹¹⁷ GIRELI, Giada (2017) "Healing a wounded nation: The reconciliatory paradigm of truth commissions" p202. Understanding Transitional Justice. A struggle for peace, reconciliation and rebuilding. Giada Girelli. Palgrave macmillan

remedial action”¹¹⁸. Because of these reasons some defenders of the restorative justice paradigm advocate for the implementation of a truth commission within transitional justice. Llewellyn¹¹⁹ and Dimitrijevic¹²⁰ had suggested that truth and reconciliation commission served as a tool to investigate the facts towards an understanding of the conflict in a comprehensive way, giving an example of how transitional institutions should function to achieve social reconciliation.

Nevertheless, even though it is important to recognize the achievements of truth commission within transitional justice, it is also relevant to state that according to some authors, truth commissions have been historically used to weaken the prospect for a proper justice in trials and in some cases also intentionally used to avoid holding perpetrators accountable for the crimes¹²¹. Furthermore, due to the short-term essence of the truth commission, the mandates are often reduced to address only a few crimes without no possibility to assist victims of other graves crimes. For example, in the cases of Argentina and Chile, the mandate of the truth commission was reduced to make emphasis on torture, forced disappearance and extrajudicial executions leaving outside victims of other crimes committed during the military junta¹²². Finally, other critics related to the implementation of truth commission are founded on the means in which these institutions are designed, for some authors, truth commission does not create the path for a real encounter among the stakeholders and, therefore, give little opportunity for the perpetrator to really acknowledge the suffering caused to the victims and the adequate measures to redress the harm¹²³. As a result, even though truth commission can contribute with the truth-seeking aim and respond to a broader conception of justice, this institution should be complementary and interconnected with other institutions within the transitional justice system and cannot replace or overlap criminal trials. As it is going to

¹¹⁸ United Nations. Report of the Secretary-General (2004) “The rule of law and transitional justice in conflict and post-conflict societies” p2. S/2004/616.

¹¹⁹ LLEWELLYN, Jennifer (2007) "Truth commission and restorative justice" p355 Handbook of restorative justice. Edi: Johnstone & Van Ness. Collumpton, UK: Willian Publishing.

¹²⁰ DIMITRIJEVIC, Nenad (2006) “Justice beyond blame: Moral justification of the idea of a truth commission”. Central European University. Budapest

¹²¹ HAYNER Priscilla B (2002) “Unspeakable Truths: Facing the Challenge of Truth Commissions” p87. Routledge.

¹²² Example the cases of the truth commission in Chile and Argentina.

¹²³ CLAMP, Kerry (2016) “Restorative justice as a contested responds to conflict and the challenge of the transitional context: an introduction” p27. Restorative Justice in Transitional Settings. Edit. Kerry Clamp. Routledge

be explained in the present chapter, based on the principles and aims that transitional justice has, it is necessary to implement all the transitional justice institutions grounded on the principles of restorative justice in order to achieve a comprehensive system that can reach accountability and truth, and that also contributes with the restoration of the harm caused to every party including the perpetrator.

3.4. Application of restorative justice in transitional justice

Some authors such as Uprimny & Saffón¹²⁴ have argued that restorative justice has been applied recently to contexts of mass atrocities transplanting restorative practices from ordinary criminal matters. Nevertheless, based on Teitels' description on the genealogy of transitional justice and followed by the definition used by the UN report of the secretary general and the rule of law, transitional justice is a complex system that involves interrelated judicial and non-judicial institutions and aims for the contribution of justice, truth and reparation towards the achievement of reconciliation and peace. This broader definition of transitional justice legitimized the implementation of restorative institutions, practices and mechanism dealing with human rights violations towards the achievement of reconciliation. In fact, by using a maximalist definition of restorative justice that describes it as "every action that is primarily oriented towards doing justice by repairing the harm that has been caused by the crime"¹²⁵, it is possible to argue that restorative justice and transitional justice are two interrelated concepts that share similar values and aims. Therefore, by using restorative justice principles in transitional justice is possible to understand the social dimension of the conflict and create measures that can promote social restoration. As McCold and Wachtel have stated, restorative outcomes have a transformative dimension: transforming victims into survivors, conflict into cooperation, shame into pride and individuals into a community"¹²⁶. In consequence, based on the principles and aims that transitional justice has, it is necessary to conduct all

¹²⁴ Uprimny & Saffon "Transitional Justice, Restorative Justice and Reconciliation. Some insides from the Colombian Case" Dejusticia. Bogotá. 2009.

¹²⁵ BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p54. Doctoral Dissertation, Leuven: Faculty of Law. KU Leuven. This definition is also used by Walgrave, Parmentier, Zehr among others.

¹²⁶ MCCOLD, Paul & WACHTEL, Ted "Restorative justice theory validation" Restorative justice: Theoretical foundations. Willam Publishing. 2002

the transitional justice mechanism based on the principles of restorative justice to achieve a comprehensive system that can reach accountability, truth and can contribute with the restoration of the harm caused to all the stakeholder including the perpetrator.

Regarding the aim of justice as one of the most relevant pillars in transitional justice settings, it is important to understand that criminal prosecution is not only an international obligation but also necessary for the construction of the rule of law and gives legitimacy to the transitional justice process. In fact, Hayner has stated that after an armed conflict, the social claim for the investigation and prosecutions of the perpetrators to get the fair sanction for their crimes is a permanent constant¹²⁷. These demands are part of the catharsis process not only for the society but also for the victims and their families who want to know the truth behind the atrocities. Nevertheless, in context of mass victimization, understanding the right to justice as the right to prosecute is too narrow¹²⁸. Therefore, the use of the traditional retributive criminal trials does not respond to the complexity of the conflict and has also been highly criticised for requiring a large amount of resources, taking long periods of time to prosecute only a few perpetrators, only achieves the judicial truth of the conflict and it is focused on proving the guilt of the accused part without addressing the harm caused to the victims. Therefore, it is possible to apply restorative justice measures within the retributive oriented criminal trial in order to create a more victim-oriented prosecution that can also contribute to the restoration process not only for the victims but also the society as a secondary victim.

To support the previous statement, the Extraordinary Chamber in the Court of Cambodia (ECCC) can be a relevant example of how possible it is to apply restorative justice principles within the retributive justice criminal trial to prosecute crimes committed in the armed conflict and also contribute to the promotion of national reconciliation by creating a more victim-oriented criminal process. In this case, the government of Cambodia, in cooperation with the UN decided to design a criminal trial to prosecute the gross human rights violations committed during the conflict of Khemer

¹²⁷ HAYNER Priscilla B (2002) “Unspeakable Truths: Facing the Challenge of Truth Commissions”. Routledge.

¹²⁸ LAMBOURNE, Wendy (2016) “ Restorative justice and reconciliation: The missing link in transitional justice” Restorative justice in transitional settings. Edt. CLAMP, Kerry, p61. Routledge.

Rouge regime between April 17th, 1975 and January 6th, 1979¹²⁹, but also using important elements of the truth and reconciliation commission. According to McGonigle, this case can be used as an example of how to combine successful traditional retributive procedures with restorative or victim-oriented processes¹³⁰. According to McGonigle, the Court granted victims before the ECCC more participatory rights than those found in any other international criminal proceeding, including the ICC. In other words, their role in the proceedings is not limited to their specific interest such as a claim for damages. The Internal Rules state that they may participate by supporting the entire prosecution. Moreover, “the civil parties have argued that their right to participation encompasses the right to represent not only their individual interests in the case but also the wider community’s interests”¹³¹. The implementation of restorative principles in criminal trials will allow the transition from a passive accountability focused on punishment to an active accountability towards the involvement of the perpetrator in the restoration process. In Howard Zehr words: “real accountability involves facing up to what one has done: It means encouraging the offender to understand the impact of their behaviour”. Following this logic, restorative accountability implies that the offender is encouraged to comprehend in depth the implications of their behaviour and take actions to put things right to the maximum possible extent¹³².

As Lambourne argues, the efforts of international peace practitioners to establish peace and a climate of reconciliation are juxtaposed against the interest of human rights advocates to prosecute the perpetrators of human rights violation and establish a respectful culture of the rule of law¹³³. Nevertheless, even though the existence of the

¹²⁹ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, Available at: https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf

¹³⁰ MCGONIGLE, Brianne (2009) "Two for the price of one: Attempts by the Extraordinary Chamber in the Courts of Cambodia to combine retributive and restorative justice principles" p130. *Leiden Journal in International Law*

¹³¹ *Ibid*, p 144.

¹³² BUENO, PARMENTIER & WEITEKAMP (2016) “Exploring restorative justice in situations of political violence. The case of Colombia”. *Restorative Justice in Transitional Settings*, p39. Edt. CLAMP Kerry. Routledge.

¹³³ Took from BUENO, Isabella "BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p12. KU Leuven. 2013 LAMBOURNE Wendy (2006) "Transitional justice and peacebuilding after mass violence" Seminar presentation, Centre for Peace Research and Strategic Studies, Leuven: KU Leuven.

juxtaposition is clear, this conflict can be solved by implementing restorative principles in transitional justice. Therefore, it is necessary to create a comprehensive transitional justice system based on restorative justice principles with institutions, measures and policies that seek to promote the creation of judicial and non-judicial mechanisms that can be interrelated, but all of them should be oriented to some extent to achieve social reconciliation. In that sense, prosecution is vital not only because of the international obligation of states but also because of the promotion of the rule of law and the legitimacy of the transitional process.

However, criminal trials cannot be the only measure, it needs to be connected with non-legalistic methods that can address in a more interdisciplinary way with the social harm caused by the armed conflict. In consequence, as Lambourne has stated, in order to achieve the effectiveness of the transitional justice, the 4 pillars of transitional justice need to be seen as interdependent and, therefore, for the achievement of peace and social restoration, transitional justice should be a holistic, comprehensive model¹³⁴. Furthermore, based on this statement, the present research, will give, in the following chapter, special attention to the structure of the latest transitional justice system of Colombia in order to demonstrate that the Colombian case can offer an interesting contribution to show that the discussion regarding the dichotomy between justice and peace can advance by implementing restorative justice principles in transitional justice without falling in extremes that can sacrifice one or another principle.

¹³⁴ LAMBOURNE, Wendy (2016) “ Restorative justice and reconciliation: The missing link in transitional justice” Restorative justice in transitional settings. Edt. CLAMP, Kerry, p65. Routledge.

Restorative justice in the Colombian transitional justice system.

4.1. Introduction

As has been explored, restorative justice, understood under its broader dimension can be conceptualized as an alternative paradigm of justice primarily oriented to repairing the harm that has been caused by the crime¹³⁵. Furthermore, restorative justice is characterized for seeking the reparation of the harm using material or symbolic forms, promotes a non-vengeful active accountability aiming at repairing of the harm and eventual reintegration of offenders, and finally, seeks to establish a respectful, participatory and flexible process of justice¹³⁶. Consequently, given the similarity of values and goals, with transitional justice, it is also stated in this research that restorative justice can be adapted to address contexts of mass victimization and its principles should be the principal foundations of transitional justice. Under this lens, restorative justice in transitional settings focuses on measures and mechanisms that aims at repairing the harm caused to victims, offenders and community, to guarantee social restoration and the reintegration of the offender. Based on the previous statements, for the achievements of accountability, truth and the social restoration of the harm caused, transitional justice institutions should be founded on restorative justice principles.

Nevertheless, as it was also stated in this research, transitional justice based on restorative justice, is a comprehensive system composed by interdisciplinary institutions that can contribute to solving the dichotomy between peace and justice by addressing the social dimension of the conflict. For this reason, retributive oriented institutions like criminal trials are also necessary for the guarantee of the rule of law and contribute to the legitimacy of the process and deterrence. However, based on the weaknesses of the traditional retributive justice in dealing with mass atrocities. It is also stated in the present

¹³⁵ BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p54. Doctoral Dissertation, Leuven: Faculty of Law. KU Leuven. This definition is also used by Walgrave, Parmentier, Zehr among others.

¹³⁶ PARMENTIER, BUENO & WEITEKAMP "Exploring restorative justice in situations of political violence. The case of Colombia" Restorative Justice in Transitional settings.p38 2016

research that it is possible to incorporate restorative justice principles in criminal trials to promote active accountability, contribute with a comprehensive restoration of the victim and promote measures that allow restoration of the social the harm.

The government of Colombia, under the context of armed conflict, has implemented transitional justice systems to accomplish the international demand and the social claim to investigate and prosecute the gross human rights violation committed during an armed conflict that has lasted for more than 50 years. Additionally, aware of the relevance of the social dimension of the conflict, Colombia has also implemented restorative measures aiming to contribute to the restoration of the social structure. Especially in 2016, the government signed a historical peace agreement with the FARC-EP guerrilla group. Incorporating in the agreement the application of the paradigms of restorative justice as a foundation of its transitional system. Based on this context, the present research aims to understand how the peace agreement is implementing restorative justice as one of the fundamental pillars. To address the question stated before, the present chapter will first analyze the context of the contemporary armed conflict in Colombia. Later, it will analyze the Justice and Peace Law, which is the previous transitional justice system implemented as a result of the peace agreement made between the government and the paramilitaries group, with a particular focus on the restorative measures introduce in that context. Finally, this research will study the peace agreement between the Colombian government and the FARC-EP to understand how restorative oriented the new peace agreement is and the challenges of implementing a restorative oriented transitional justice system in a context of ongoing political violence.

4.2. The context of the Colombian on-going internal armed conflict.

The contemporary armed conflict in Colombia took place in the 60's during the consolidation of the left-wing insurgencies. These armed groups were influenced by the ideas of the Cuban revolution and acted as a response to the tremendous political repression suffered by social leaders and left-wing political leaders that wanted to promote its ideas independent from the traditional political groups, the conservatives and

the liberals¹³⁷. As a result of the lack of political participation, small guerrilla organizations such as the *Fuerzas Armadas Revolucionarias de Colombia*-FARC (Revolutionary Armed Forces of Colombia) the *Ejército de Liberación Nacional*-ELN (National Liberation Army) the *Ejército Popular de Liberación*-ELP (Popular Liberation Army) and the *Movimiento 19 de Abril* -M-19 (the 19th of April Movement) among others, were created under the belief that through armed confrontation it was possible to create the necessary pressure to guarantee the involvement of historically ignored social groups. During the 80's the traffic of drugs became a profitable business that played a relevant role in displaying characteristics between armed conflict and common organized crime, generating the incapacity of the Armed Forces to guarantee the security of territory. This incapacity of the state to guarantee security consolidated the emergence of self-defence groups denominated "the paramilitaries". These armed groups emerged initially in the Caribbean coast and Antioquia under the leadership of Carlos Castaño, becoming a large organisation known as *Autodefensas Unidas de Colombia* (self-defence Forces of Colombia-AUC). According to Guembe & Olea "other sectors of society, particularly state members, landowners and essential business organizations supported the creation of paramilitary groups as part of their defence strategy against guerrilla groups which were targeting them through kidnappings and extortion schemes"¹³⁸.

As a result, the permanent confrontation between the different armed actors, the increase of the drug trafficking business and the lack of military capacity of the state to defeat the growing of the armed confrontation, made Colombia a country with a context of on-going political violence. This scenario created an overwhelming cruelty and massive scales of crimes. According to the Human Rights Watch, the different armed actors of the conflict have committed "systematic atrocities against civilians, including child recruitment, abductions, and widespread crimes of sexual violence"¹³⁹. Furthermore, the civilians living in the rural areas of the country are the most affected by the conflict. The constant combats among the armed actors have forced the entire

¹³⁷ GUEMBE, María José & OLEA, Helena (2006) "No justice no peace, discussion of a legal framework regarding the demobilization of non-state armed groups in Colombia" p122. *Transitional Justice in the twenty-first century*. Edit Naomi Roht-Arriaza & Javier Mariezcurrena. Cambridge University Press.

¹³⁸ Ibid. p123.

¹³⁹ Human Rights Watch Report on Colombia, Available at: <https://www.hrw.org/world-report/2017/country-chapters/colombia>

populations to leave their towns and villages, making Colombia the country with the second largest population of internal displacement in the world. Therefore, according to this organization, the Colombian armed conflict has left more than 8 millions of victims, including 6.8 million people internally displaced since 1985¹⁴⁰.

Given the long history of political violence, the Colombian government has dealt with several peace negotiations with different armed groups. The majority of these agreements did not include any obligation to guarantee the reparation of the victims or a search for the truth about the crimes, but only judicial and political benefits for the ex-combatants¹⁴¹. To mention an example, the peace agreement with the left-wing guerrilla M-19, created the need for the implementation of a legal framework that allowed the amnesties of ex-combatants to guarantee their reincorporation (Law 77 of 1989). The amnesty law creates a path for the political participation of ex-combatants allowing them to participate in the National Constitutional Assembly, which resulted in a new Colombian Constitution. This new Constitution included political reforms, in fact, “a mechanism was introduced to guarantee full incorporation of combatants into civilian life, with security schemes, the application of pardons and economic support for reintegration”¹⁴². Despite of this opportunity, the assassinations and political persecution of their leaders made it impossible for the ex-guerrilla organization to guarantee their social reincorporation, especially in the political arena. Later, the former president Andrés Pastrana opened a negotiation table with the FARC-EP in 1999. However, the leader of the guerrilla organization, Manuel Marulanda Vélez refused to attend the meeting leaving an empty chair that symbolized the lack of commitment of the guerrilla organization to engage in a negotiation with the government.

After the failure of the peace negotiation between the FARC-EP and the government of the former president Andrés Pastrana, the social feeling about the guerrilla organization was more than negative. As a result, in the country it was evident that the social will was to achieve peace no longer by using political negotiations, but military

¹⁴⁰ Humans Rights Watch Report in Colombia. Available at: <https://www.hrw.org/world-report/2017/country-chapters/colombia>.

¹⁴¹ BUENO, Isabella & DIAZ ROZAS, Adriana (2011) “Which approach of justice in Colombia under the ICC” p218. International Criminal Law Review.13. KU Leuven. Belgium.

¹⁴² GRABE, Vera (2004) ”Formal Peace process. Peace processes 1990-1994” p40 Accord, alternatives to war. Colombia’s peace processes. Edit: Mauricio García-Durán. Conciliation Resources in Collaboration with CINEP. London.

more disturbing was the discriminatory discourse and hatred towards the LGBTI collective and organization that works for the rights of women. One of the strongest arguments in the "NO" campaign was the questioning of the gender approach in the agreement"¹⁴⁵. Giving this context of social polarization it was necessary to implement new modifications based on the amendments proposed by the NO campaign led by the former president Álvaro Uribe Vélez.

After a difficult negotiation with the leaders of the opposition and without conciliating some aspects considered as vital, the final agreement to end the armed conflict and build a stable and lasting peace was re-signed by the president Santos and the leader of the FARC the 24th of November of 2016 and later ratified by the Congress. This final agreement is a complex document that seeks to address some of the causes of the conflict such as the rural reform, the political participation, the rights of the victims and the reintegration process of ex-combatants. The Final agreement incorporated in its fifth chapter the formation of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (CS)¹⁴⁶. This comprehensive system will contain different mechanisms such as the truth, coexistence and non-repetition commission, the special unit for the search for persons deemed as missing in the context of the armed conflict and the special jurisdiction for peace, created to administer justice and investigate, clarify, prosecute and punish serious human rights violations and infringements of international humanitarian law. This comprehensive system is a combination of judicial and non-judicial mechanisms aimed at clarifying the truth of what happened, searching for loved ones who have disappeared and providing reparations for the harm and injury caused to individuals, groups and entire territories¹⁴⁷. The agreement was incorporated to the Colombian legal framework through the Legislative Act 01 of 2017.¹⁴⁸ Its article 1 stipulates that

¹⁴⁵ Taula Catalana per la Pau i els Drets Humans a Colòmbia & The International Office on Human Rights-Action Colombia (OIDHACO) “ One year since the start of the implementation of the peace agreement in Colombia” p7. Brussels.2017.

¹⁴⁶ Final agreement to end the armed conflict and build a stable and lasting peace: Chapter v: Victims agreement. P 132. 2016

¹⁴⁷ Ibid Chapter I, p9. 2016.

¹⁴⁸ “*Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación de conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones*”. Article 1.

restorative justice specifically attends the needs and dignity of victims and is applied with an integral focus that guarantees the justice, truth and non-repetition of past violence¹⁴⁹.

Because of the nature of the conflict, some citizens have legitimized the crimes committed by the paramilitaries groups, and some others believe in the social ideologies of the guerrilla organizations. Therefore, among other reasons, the polarization of the country has reached the most critic level. Regarding this issue, Bueno has stated that “on the one hand, those who are more right-wing oriented may advocate for a flexible judicial process with the paramilitaries and a rigid one for the future process with the FARC and the ELN, and on the other hand, those more left-wing oriented may advocate for rigidity towards the AUC and for flexibility towards the FARC and the ELN¹⁵⁰.”

Since the implementation of the peace agreement, the country has reached one of the most peaceful times in its history. More than 12.000 ex-combatants are starting their reincorporation process, hundreds of children, victims of forced recruitment are now starting their process to meet their families, and the death records have drastically decreased¹⁵¹. Currently, the reelected president Santos, determinate to achieve the peace of the country through the consolidation of peace agreements, decided to open the negotiation table with the ELN. However, on the 17th of June of 2018, right-wing politician Iván Duque was elected as new president of Colombia¹⁵². Given the orientation of his political party ruled by the former president Álvaro Uribe, the future president has proposed several modifications to the peace agreement that, according to experts like Rodrigo Urpimny and María Teresa Garcés, these modifications can have a counterproductive effect in the implementation of the peace agreement and can put in risk the current negotiation with the ELN¹⁵³.

¹⁴⁹ Translation made by the author.

¹⁵⁰ BUENO, Isabella: “Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?” KU Leuven. 2013.

¹⁵¹ <http://www.newsweek.com/colombia-peace-process-year-later-violence-and-drugs-surge-despite-advances-722232>

¹⁵² Registraduría Nacional del Estado Civil: <https://presidente2018.registraduria.gov.co/resultados/2html/resultados.html>

¹⁵³ La Paz Querida Organization: <http://lapazquerida.com/2018/06/mandato-ciudadano-exige-respeto-por-la-paz-a-candidatos-presidenciales/>

4.3. The Justice and Peace Law

The Colombian government has made a continuing effort to put an end to the large history of armed conflict. As it was mentioned before, in the 80's and 90's amnesties laws were implemented with judicial benefits following the pardon tradition models implemented by South American and Eastern European countries. These traditions of forgiveness and forgetting raised the levels of impunity and affected the right to know the truth about the conflict¹⁵⁴. However, with the consolidation of the International Criminal Court in 2002, the Court has developed a special interest in the situation of mass victimization in Colombia. Therefore, since 2004 the ICC opened a preliminary investigation to have a close look to the situation of human right violations within the on-going armed conflict¹⁵⁵. Consequently, based on the rules of the Geneva contention¹⁵⁶. Colombia has the obligation to prosecute all the gross human rights violation or the ICC can active its jurisdiction based on the principle of complementarity. Additionally, the ruling of the Inter-American Court of Human Rights has recalled the states obligation to investigate, conduct criminal trials and punish for crimes that constituted serious violations of human rights committed during the confrontation¹⁵⁷.

Nevertheless, in context of political violence like in Colombia, the government has been dealing with the dilemma between justice and peace. Therefore, its transitional system is a combination of on one hand, the traditional retributive criminal prosecution with victim-oriented measures within the criminal process and, on the other hand, non-judicial institutions tending to ensure the restoration of the victims and the social reintegration of ex-combatants.

Given the accord made by the government and the paramilitaries groups in 2003, the transitional justice legal framework in Colombia started with the Law 782 of

¹⁵⁴ BUENO, Isabella & DIAZ ROZAS, Adriana (2011) "Which approach of justice in Colombia under the ICC" p216. International Criminal Law Review.13. KU Leuven. Belgium.

¹⁵⁵ International Criminal Court: Alleged war crimes committed since 1 November 2009 and alleged crimes against humanity committed since 1 November 2002 in Colombia. Available at: <https://www.icc-cpi.int/colombia>.

¹⁵⁶ First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146. (ratified by Colombia on Aug. 11,1961)

¹⁵⁷ In this regard, the Inter-American Court of Human Rights has developed the mentioned rule in the following cases: Barrios Altos V. Perú 2002; La Cantuta V. Perú 2006; Case Cantoral-Humaní & García Santa Cruz Case V. Perú, 2008, among others.

2002, extended by the Law 1106 of 2006 and lately by the Law 1424 of 2010 which guarantees amnesties to demobilize members of the illegal armed groups who did not have criminal charges and who have declared not to have committed grave crimes. To deal with the large number of ex-combatants that did not have serious criminal charges, in 2003 the government created the Program for Reincorporation to the Civil life (PRVC) which aimed to reform and prepare the demobilized to social reintegration, through psychological care, academic training and access to the national health system in addition to a monthly economic contribution¹⁵⁸.

Nevertheless, the government was highly criticized by human right organizations that claimed for justice and recall for the international obligation to prosecute gross human rights violations¹⁵⁹. As a result, the Law 975 of 2005, better known as the Justice and Peace Law (JPL) was created implementing criminal trial to prosecute the perpetrators of grave crimes so they would be able to confess their crimes in exchange of reducing of sanctions. The law states that demobilized paramilitaries ‘who confess ... and hand in their properties for the reparation of victims, in spite of the type and number of crimes perpetrated will receive an alternative sentence of five to eight years in prison’¹⁶⁰. As a result, Lyons described the JPL as a ‘confessional justice model that offers willing candidates significant reduced sentences (five to eight years of imprisonment) in exchange for satisfaction of several conditions, including cessation of criminal activity, full confession to past crimes, and submission of all personal assets for victim reparation’¹⁶¹.

The Justice and Peace Law was later declared constitutional by the Constitutional Court in its ruling C-370 of 2006. In its decision, the Court “accepted the constitutionality of the measures of alternative sentencing established ... so long as it is effectively employed as an initiative toward satisfying the rights to truth, reparation, and

¹⁵⁸ Agencia para la Reintegración y Normalización:

<http://www.reintegracion.gov.co/en/agency/Pages/historical.aspx>

Uppinmy & Saffon “*Transitional Justice, Restorative Justice and Reconciliation. Some insides from the Colombian Case*” Dejusticia 2009.

¹⁶⁰ BERISTAIN, Carlos and others (2011)“Contribution of Truth, Justice and Reparation Policies to Latin American Democracies” p.131. First edition: Inter-American Institute for Human Rights.

¹⁶¹ LYONS, Amanda (2010) "For a just transition in Colombia" p. Contested Transitions: Dilemmas of transitional justice in Colombia and comparative experience. Edit: Michael Reed and Amanda Lyon. International Centre for transitional justices. Bogotá.

guarantees of non-repetition”¹⁶². Nevertheless, even though, the Court left the sentencing benefits for demobilized paramilitaries largely intact, significant amendments were made in regards to the safeguard of victims’ rights. Significantly, a “full confession by demobilized individuals both of their crimes and of the proprieties that would be used for reparation purposes”¹⁶³ was included as a condition for benefiting from the law. Sanctions for hiding the truth were also imposed to support this provision and extensions to investigation periods further enabled this to be enforced. As a result, even though the JPL is founded on retributive justice principles, it has also implemented restorative justice measures to guarantee the participation of the victim within the criminal process and seek for its restoration.

From a restorative justice perspective, it is relevant to note the positive changes made by the Constitutional Court in regard to the requirements of a full confession. “As a component of truth, the confession tends to be characterized as one of the forms of reparation aimed at preventing collective memory from being forgotten”¹⁶⁴. If this is ensured, those submitting to the JPL have to make the victims visible, reconstruct the shared past, and project reconciliation based on what cannot be repeated”¹⁶⁵. What can be seen here is the connection between criminal prosecutions, truth-seeking, memory, and victims' reparations together with the reconciliation pillar. The Court also ensured that the law “should be interpreted to allow victims' participation in all stages of the proceedings, in fulfilment of their rights to justice and truth”¹⁶⁶. Such involvement in criminal proceedings can have a reparatory effect on victims showing how these two pillars are interlinked. The move away from mechanisms being “unilaterally directed from the highest posts of the executive power—without any transparency and without effective participation of the victims of the violence, towards a more participatory framework is a

¹⁶² Ibid.150.

¹⁶³ BERISTAIN. Carlos and others (2011) p.131.

¹⁶⁴ LYONS, Amanda (2010) “For a just transition in Colombia”, p44. *Contested Transitions: Dilemmas of transitional justice in Colombia and comparative experience*. Edit: Michael Reed and Amanda Lyons. International Centre for transitional justices. Bogotá.

¹⁶⁵ Ibid p.43.

¹⁶⁶ Human Rights Watch (Organization) and Human Rights Watch/Americas (2008) “Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia” p.27.

progressive trend that runs through further developments in Colombia's reparations strategy”¹⁶⁷.

Besides the criminal proceedings, the transitional justice system ruled by JPL has created other non-judicial institutions and measures seeking for the restoration of the victims and the social reintegration of ex-combatants. The Article 50 of the JPL created the National Reparation and Reconciliation Commission (CNRR) to guarantee the active participation of the victims in the truth-seeking process. The commission was in charge of elaborating periodical reports to evaluate the reintegration process of ex-combatants, promoting the guarantees of reparations and elaborating recommendations for the protection of victims. Furthermore, administrative reparations were introduced through the historical victims' Law (Law 1448 of 2011) which encompasses tools to guarantee monetary compensation for victims of gross human rights violation committed by illegal armed groups and state agents, and policies related with land restitution for victims of forced displacement. Additionally, in 2011 the Demobilization and reintegration process (DDR) was also implemented in Colombia with the creation of the high office for the reintegration (*Alta Consejería para la Reintegración –ACR*). This office provides interdisciplinary assistance to ex-combatants as an individual based on its gender, cultural back-ground, locations and also policies and strategies to the collective reintegration into society¹⁶⁸. These are a clear example of mechanisms that complement and establish a connection between truth seeking, memory, and victims' reparations. However, on a practical level, the existence of diverse mechanisms has also increased the level of bureaucracy creating restrictions for victims and ex-combatants to have access to information and restorative measures.

Besides the achievements made by the JPL, it is relevant to mention as well the challenges of this transitional system on a judicial level. According to the report made by the Inter-American Court of Human Right about Colombia, the JPL has made it possible to reveal a truth that would have been impossible to obtain by other means, as well as certain links with elements of the political sphere, which constitutes an important starting point. “Nonetheless, the Commission observes with concern that the results are

¹⁶⁷LYONS, Amanda (2010) 49.

¹⁶⁸ Alta Consejería para la Reintegración:
<http://www.reincorporacion.gov.co/en/agency/Pages/historical.aspx>

insufficient of this report, eight years after the Law on Justice and Peace was adopted, only 10 judgments of the first instance and 7 judgments of the second instance have been handed down, and only 14 of those who sought to avail themselves of the benefits have been convicted. In addition, none of those judgments refer to anyone who has the status of both highest-level responsibility and representative member of the group, nor do they sufficiently address criminal acts that reflect patterns of macro-criminality and macro-victimization"¹⁶⁹. As a result, the JPL is far from assuming restorative justice as a main principle in the transitional justice. Giving the current context of political violence, the ineffectiveness of the criminal trials, the absence of truth and a reconciliation commission, or similar institutions that can contribute with the social healing process, and the absence of interconnection among the non-judicial institutions, are some of the challenges that restrict the aims of social reconciliation and a future peace in Colombia.

4.4. The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace

Continuing with the governmental effort to put an end to more than 50 years of armed confrontation, in 2012, the president Juan Manuel Santos started the peace negotiation with the FARC-EP. During the negotiation process, the country was extremely polarized between those who were against negotiation with the insurgencies and seeking solely in defeating the FRAC members through military intervention and criminal prosecutions led by extreme-right former president Álvaro Uribe, and those political groups that believed negotiation was the way to finalize the conflict. After transcending difficult obstacles, the final peace agreement was signed in November of 2016.

The peace agreement is a sophisticated and comprehensive document that encompasses diverse mechanism and institutions directed to solved the leading causes of the conflict: The first part of the agenda is the creation of a Comprehensive Agrarian Development Policy, followed by the Agenda dedicated to the guarantee of political participation; the third Agenda is dedicated to implementing solutions to the illicit drugs problem and, more relevant about this agreement, is the creation of a special Agenda

¹⁶⁹ Inter-American Commission on Human Rights. (2013) "Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia". <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>

dedicated to the right of the victims through the creation of the ‘Comprehensive System of Truth, Justice, Reparation and Non-Repetition’. This comprehensive system will be constituted by different judicial and non-judicial mechanisms such as the truth, coexistence and non-repetition Commission, Special Unit for the Search for Persons Deemed as Missing in the Context of the Armed Conflict. Regarding the Special Jurisdiction for Peace, this jurisdiction is created with judicial panels for justice, including a judicial panel for Amnesty and pardon and a Tribunal for peace to administer justice and investigate, clarify, prosecute and impart sanctions to the perpetrators of serious human rights violations and serious infringements of the international humanitarian law.

To incorporate the decisions made in the peace agreement within the Colombian legal framework, the Congress of Colombia created the Legislative Act 01 of 2017 which was later declared constitutional by the Constitutional Court in its ruling C- 674 of 2017. This legislative act has stated that one of the foundations of the Comprehensive System is the restorative justice paradigm, which seeks for the restoration of the harm and the reparation of the armed conflict’s victims¹⁷⁰. Additionally, according to the mentioned Act, restorative justice specially attends the needs and dignity of victims and is applied under a comprehensive focus that guarantees the justice, truth and the non-repetition of past violence¹⁷¹. Based on the previous statements made in the Peace Agreement, the political debate in Colombia remains between those who see the use of the restorative justice paradigm as a tool to reach impunity and the defenders of the government’s decision of implementing restorative justice as the primary paradigm of justice to achieve justice, peace and reconciliation. Therefore, the present research will give particular attention to the structure of the Comprehensive system, with the purpose of demonstrating that the Colombian case can offer an interesting contribution to showing that the discussion regarding the dichotomy between justice and peace can advance by implementing restorative justice principles in transitional justice.

¹⁷⁰ Legislative Act 01 of 2017, Article 1.

¹⁷¹ Legislative Act No 01 of 2017 “Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación de conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones” Art 1.

4.4.1. The Comprehensive System for Truth, Justice, Reparation and Non-recurrence- CSTJRNR

One of the highest achievements of the peace negotiation between the government and the FARC-EP was the conformation of a special agenda dedicated to the victims of the armed conflict. In June of 2014 after allowing an active participation of victim representatives and civil society organization, the parties involved in the negotiation agreed on creating the denominated “Comprehensive System of Truth Justice, Reparation and Non-Repetition”. Following Gómez Isa’s opinion, “it is remarkable that one of the points of the agenda was precisely the rights of the victims. In fact, this is one of the most positive elements of the Colombian peace process; victims were at the heart of the process from the very beginning”¹⁷². This system is structured under the implementation of judicial and non-judicial bodies in order to achieve the goals established in the agreement. For instance, the agreement includes the goals of the realization of victims’ rights, accountability, the guarantees of non-repetition, equity-based and gender-based approach, legal certainty, coexistence, legitimacy, and reconciliation¹⁷³. These mechanisms are the Truth, Coexistence and Non-Repetition Commission, the Special Unit for the Search for Persons Deemed as Missing in the Context of the Armed Conflict and the Special Jurisdiction for Peace. Following a restorative approach of justice, these bodies will be interconnected and will be based on the acknowledgement of the truth and responsibility¹⁷⁴.

4.4.1.1. The Truth, Coexistence and Non-Repetition Commission TCNRC (*Comisión de Esclarecimiento de la Verdad, la Convivencia y la no Repetición- CEVCR*)

The justice and Peace Law created in 2005, the National Reparation and Reconciliation Commission (CNRR) for a period of eight years. This commission reached many achievements in regard to the construction of historical memory about the conflict and

¹⁷² GÓMEZ IZA, Felipe (2017) “Response to Annette Pearson’s note on restorative justice in the Colombian peace process” p310. Restorative Justice: An International Journal. Vol5.

¹⁷³ Final Agreement to end the armed conflict and build a stable and lasting peace p136. 2016

¹⁷⁴ Ibid.p135.

the support of the creation of victim organizations without promoting public hearings. However, for the first time, with the support of the State, a truth commission will take place. This Commission will be an independent, impartial and non-judicial body in charge of the reconstruction of the historical truth about the conflict. This institution will last for a period of 3 years to contribute for the promotion of the recognition of victims as citizens with rights, create the measures that promote the acknowledgement of the human rights violations caused by the perpetrator, as an individual but also the collective responsibility by those who participate directly or indirectly in the conflict. This institution will contribute with the promotion of dialogue among the stakeholders by creating forums for the restoration of the dignity of the victims in specific territories affected by the conflict and it will seek for collective and individual acknowledgement of responsibility¹⁷⁵.

On the 8th of May of 2018 father Francisco de Roux took office as president of the TCNRC accompanied 11 Commissioners including 4 women. It is relevant to mention that one of the commissioners is a social leader from the Urabá region, one of the most affected by the conflict¹⁷⁶. According to the president, the Commission is implemented “to invite us to a collective understanding of what really happened to us and why we came to the barbarism the country was deeply involved in”¹⁷⁷. In consequence, this restorative oriented institution seeks to play a relevant role on the restoration of the social harm caused by the armed conflict. Based on its mandate, the Commission will tend to establish a respectful, participatory and flexible process of justice by encouraging the participation of all the armed actors including state agents. Moreover, the Commission will work on a regional level to promote the participation of marginalized groups like afro-Colombians, indigenous and peasants. Nevertheless, for the Commission, the achievement of its ambitious mandate is going to be a challenge given the short term of its duration.

¹⁷⁵ Ibid. p143.

¹⁷⁶ El Espectador. Colombia 2020: <https://colombia2020.elespectador.com/verdad-y-memoria/conozca-los-comisionados-de-la-verdad-que-se-posesionaron-en-presidencia>

¹⁷⁷ El Espectador. Colombia 2020: <https://colombia2020.elespectador.com/verdad-y-memoria/video-el-padre-francisco-de-roux-y-la-mision-de-reconstruir-la-verdad-del-conflicto>

4.4.1.2. The Special Jurisdiction for Peace (SJP)

The judicial component of the CS is fulfilled by the creation of the Special Jurisdiction for Peace (SJP). One of the most important but also criticized transitional justice institutions of the peace agreement. According to the agreement, this judicial body is designed to prosecute the most relevant violations and grave crimes committed during the armed conflict by any armed and not armed actor, especially those most responsible of the most severe cases. This criminal trial is created in order to respond to the social claim on a national level and the international obligation of the state to investigate and prosecute the violations of International Humanitarian Law. However, what is relevant about this special trial is that it is defined by the peace agreement as a "forward-looking justice that is respectful of the values of the present and, at the same time, concerned to put an end to conflicts that must not be perpetuated, with the aim of defending the right of future generations"¹⁷⁸. Furthermore, it is stated that the guiding paradigm of this institution is the restorative justice that preferably seeks the restoration of the damage caused and the reparations for the victims affected by the conflict. Particularly the accord implemented the SJP to reduce the social exclusion generated by marginalized groups. The SJP will last for 5 years with a possibility of extension based on the necessity to accomplish its mandate.

What is relevant about this judicial body is the implementation of a Panel for the Acknowledgment of Truth, Responsibility and Determination of Facts¹⁷⁹. This special Unit will receive the collective or individual confessions and, to guarantee the veracity of the declaration it will be able to receive among others, reports made by human rights organizations and civil society organizations focused on victims. However, the SJP will also have the competence to conduct criminal investigation and prosecution of crimes occurred during the armed conflict in case of "lack of acknowledgement of truth and responsibility"¹⁸⁰. Moreover, regarding the sanctions imposed by the jurisdiction, the peace agreement stated that "they will need to have the greatest restorative and reparative

¹⁷⁸ Peace Agreement: p152.

¹⁷⁹ Ibid 164

¹⁸⁰ Ibid.

function in relation to the harm caused, and will always correspond to the degree of acknowledgement of truth and responsibility demonstrated in front of the judicial component”¹⁸¹. Therefore, based on the element of the acknowledgement of the truth, the sanctions will last between five to eight years and may vary starting from effective restriction of freedoms but “in no case shall be understood as jail or prison, nor the adoption of equivalent forms of detention”¹⁸². The alternative sanction includes restorative measures such as community service, demining and rebuilding processes for the affected communities and other projects to assist victims of the conflict. Among the opponents of the peace agreement, the alternative sanctions including an impunity trap are contrary to the international law standards. According to international organizations like Human Rights Watch, with this alternative sanction, it will be impossible for the State to meet the binding obligations under international law to ensure accountability for crimes against humanity and war crimes¹⁸³. Nevertheless, for those who do not recognize criminal responsibility and are found guilty by the SPJ, a restriction of liberty will be imposed for no more than 20 years.

The agreement also incorporates special attention to the guarantee of reparative measures that starts with the recognition of responsibility of the government of Colombia and the FARC-EP guerrilla organization in the commission on massive human rights violation during the armed conflict¹⁸⁴. As a result, collective acts will take place on a regional and national level with the support of victim organizations and other institutions such as the National Episcopal Conference. According to the agreement, “in addition to acknowledgement of responsibility and a public apology, these acts may also include undertakings to take specific action to contribute towards ensuring full reparation to victim, coexistence and guarantees of non-recurrence”¹⁸⁵. This encounter programs may play a relevant role in seeking for a more active accountability and will seek for encouraging the offenders to understand the impact of their behaviour. Especially in context of mass victimization where there is a bigger obligation for the state to create

¹⁸¹ Ibid 174

¹⁸² Ibid 175

¹⁸³ Analysis of Colombia-FARC Agreement, Human Rights Watch (2015).

<https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>.

¹⁸⁴ Peace Agreement: p188

¹⁸⁵ Ibid.

adequate measures to guarantee the reparation and create measures to ensure better conditions for civilians in order to prevent future confrontations.

Based on the previous study it is possible to state that, in fact, restorative justice is an important paradigm in the Colombian transitional justice system. Great efforts have been made to create restorative measures that conduct to the social restoration in Colombia. The CSTJNR seeks for the implementation of a comprehensive system composed of interdisciplinary institutions that can contribute to solving the dichotomy between peace and justice. For instance, regarding the alternative sanctions in benefits for perpetrators of crimes propose in the agreement. Following the argument made by Lambourne, CSTJNR established institutions that aim to resolve the juxtaposition among the aims of social reconciliation and the interest of prosecuting the perpetrators of human rights violations¹⁸⁶. Therefore, SPJ tents to solve the dichotomy between peace and justice by implementing a retributive-oriented criminal trial but introducing restorative sanctions that seeks for an active accountability by involving the perpetrator in the projects to assist victims of the conflict. As a result, the CSTJNR seeks to have a comprehensive system that promotes the truth-seeking, accountability and the social restoration of the harm caused by the conflict. However, it is necessary to realize that restorative justice is an important but not main paradigm of the SJP. As Gómez Isa stated, in the SJP, restorative justice is “designed to complement retributive justice for egregious crimes such as war crimes and crimes against humanity (that cannot be amnestied), not as a way to grant impunity to perpetrators”¹⁸⁷.

¹⁸⁶ Took from BUENO, Isabella "BUENO, Isabella (2013) " Mass victimization and restorative justice in Colombia: Pathways towards peace and reconciliation?" p12. KU Leuven. 2013 LAMBOURNE Wendy (2006) "Transitional justice and peacebuilding after mass violence" Seminar presentation, Centre for Peace Research and Strategic Studies, Leuven: KU Leuven.

¹⁸⁷ GÓMEZ ISA, Felipe “(2017) “Response to Annette Pearson’s note on restorative justice in the Colombian peace process” p310. Restorative Justice: An International Journal. Vol5.

CONCLUSION

The purpose of the research was to contribute to the clarification on the suitability of restorative justice in transitional justice. To address the investigation on a theoretical level, the research started with assessing the traditional criminal system and conceptualize the traditional retributive paradigm of justice, recognizing its failure on addressing correctively the rapid increase of grave criminality and to dealing with the social dimension of the crime. Furthermore, despite the on-going debate regarding the definition of restorative justice, it was possible to demonstrate that this paradigm of justice can contribute to change the traditional way to approach crimes and perpetrators. Therefore, through this study was possible to acknowledge that restorative justice address crime by taking into account social values such as reconciliation, empathy, mercy and forgiveness to understand criminality towards the recognition of those affected by the crime (perpetrator, victim and community) as equal parties commonly oriented to restore the harm. This research intended to contribute to the on-going debate regarding its definition by sharing the approach given by Zehr, Parmentier, Bueno to understand restorative justice as a broad paradigm of justice that seeks to see beyond the criminal proceeding to address both the causes and the consequences of the offence in a way that can contribute with the restoration of the harm. It was also possible to conclude that by expanding the horizons of the crime, restorative justice goes beyond the criminal proceeding and pursues the reparation of the harm, promotes a non-vengeful active accountability aiming at repairing the harm and eventual reintegration of offenders, and finally, seeks to establish a respectful, participatory and flexible process of justice. Therefore, restorative justice is not a paradigm of justice restricted to deal with minor crimes but a concept that is suitable to deal with serious crimes by engaging the needs of all the parties involved in the offence.

Subsequently, to demonstrate the suitability of restorative justice to address context of mass victimization, the research analysed the evolution of transitional justice

starting from its legalistic approach mainly oriented to the prosecution of gross human rights violation towards a more comprehensive definition recognizing the relevance of the social dimension of the conflict. Using transitional justice literature and guidance of the UN in transitional justice, it was possible to conclude that transitional justice needs interdisciplinary institutions to deal in a more comprehensive way with the aims of accountability, truth seeking and social restoration. Nevertheless, achieving the aims in context of on-going political violence tends to represent juxtaposition among the aims of justice and peace. Therefore, the research highlighted the potential of restorative justice in solving this dichotomy by analysing the principal transitional justice institutions, named criminal trials and truth commission.

Regarding the criminal trials, prosecution is vital not only because of the international obligation of states but also because of the promotion of the rule of law and the legitimacy of the transitional process. However, the retributive criminal trials cannot be the only and most important transitional measures given its restrictions to address context of mass victimization. As it was recognize by the UN, national and/or international tribunals have been expensive and have contributed little to sustainable national capacities for justice administration. Therefore, restorative oriented measures such as truth commission can address in a more interdisciplinary way with the social harm caused by the armed conflict. In consequence, as Lambourne has stated, in order to achieve the effectiveness of the transitional justice, transitional justice need should be a holistic, comprehensive model guiding by restorative justice principles.

Consequently, given the similarity of values and goals between restorative justice and transitional justice, it is also stated in this research that restorative justice can be adapted to address contexts of mass victimization. Under this lens, restorative justice in transitional settings focuses on measures and mechanisms that aims at repairing the harm caused to victims, offenders and community, to guarantee social restoration and the reintegration of the offender. Based on the previous statement, in the context of the Colombian transitional justice the research attempts to explain how the peace agreement between the FARC-EP and the government Colombia is implementing restorative justice principles to its CSTJNR. As it was stated, the peace agreement designed a comprehensive transitional system implementing restorative principles in its institutions.

Understanding the historical causes of the conflict, it is remarkable to see how the peace agreement incorporates restorative measures to give special protection to vulnerable groups like indigenous, Afro-Colombians, LGBTI community and rural population, to ensure their comprehensive restoration¹⁸⁸.

However, recognising the importance of restorative justice in the context of political violence is essential to conclude that the real challenge of the Colombian transitional justice system is not the incorporation of restorative principles in the peace agreement but its effective implementation in its institutions and policies during the application of the peace agreement. As it was stated, Colombia is facing one of the most critic levels of political polarisation given the lack of education about the components of the agreement. For this reason, to guarantee the aims of accountability, truth-seeking and social restoration, the government has to create strong transitional institutions founded in restorative justice. Primarily, the SJP is a retributive oriented criminal trial that uses restorative justice as a complement paradigm of justice and can promote for an active accountability of the perpetrator of the human right violations committed during the armed conflict. Consequently, a comprehensive transitional justice based on restorative justice principles can contribute effectively to the eternal dream of all Colombians to live in a country without violence.

¹⁸⁸ Peace agreement 3.

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