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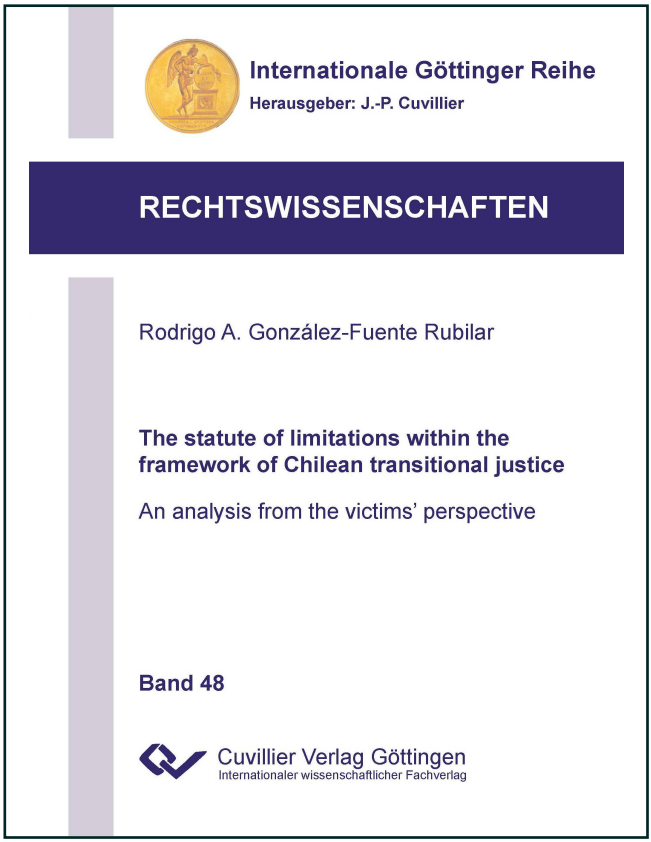
The statute of limitations within the framework of Chilean transitional justice

An analysis from the victims' perspective



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CHAPTER I: General Aspects of Transitional Justice

Introduction

During the course of human existence, serious violations of human rights have occurred for various reasons, political, ethnical, economical, and religious. Although there has been considerable development in the recognition and protection of human rights after the Second World War (WWII), these serious violations have continued. Clear examples are dictatorships in Europe and South America, and the civil war in former Yugoslavia. The serious violations of human rights represent, in total, a reality immersed in human civilization.

Nevertheless, the efforts made during the years after WWII in order to arouse awareness and to protect human rights have facilitated the development of a legal structure directed at dealing with the consequences of serious violations of human rights. In this way, the legal system accomplishes its mission of recognizing a real situation and trying to give it a legal solution. This has been called transitional justice (henceforth TJ), i.e. a system based on legal principles and policies directed towards providing an answer as to how to deal with the serious violations of human rights, during a transitional process.

The present chapter seeks to describe the most relevant aspects of TJ, and to establish a legal framework which will be subsequently used for the analysis of the Chilean case. The term “relevant aspects” is stressed, as this chapter is not intended to be a complete study of TJ. The aspects discussed in the first chapter constitute a background for the rest of the study and, mainly for its prime objective: the statute of limitationsin Chilean TJ. Throughout the chapter, the importance of victims’ rights within the TJ framework will be highlighted, and the ways in which they either constitute a limit for the adoption of political measures or a reconsideration of the traditional institutions of ordinary justice.

This chapter is divided into three parts. The first part aims at describing different theoretical aspects of TJ, emphasizing the relatively new use of the TJ concept despite the fact that it is a rather old phenomenon. The goals of TJ are determined by the definition provided by the UN Security Council. Due to the combination of political and legal aspects within TJ, it is necessary to achieve a balance between the two. A test of proportionality contributes to this mission. The characteristics and classifications made by authors in the context of TJ help to assign a more universal understanding to this discipline.

The second contains a short overview of some measures of TJ, measures that will be briefly discussed, including criminal prosecution, amnesty, lustration, truth and reconciliation commissions, and reparations. All transitional measures are directed towards different objectives and, therefore, their combination is advisable. For its part, the adoption of a certain measure will depend on the particular circumstances of each transitional process, taking into account the rights of victims as a limit.

The third part aims at describing the rights of victims. Their consideration is essential because, as already mentioned, they represent a constraint when it comes to the adoption of transitional measures. Their recognition is due to the importance that the victim has acquired, thanks to the development of the human rights doctrine. The 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* points out three rights of a victim: truth, justice and reparation.

Regarding the right to truth, the concept, objectives and essential character in the framework of the rights of the victim will be considered. With respect to the right to justice, it implies a State obligation to establish accountability, which becomes especially enforceable once democratic institutions are strengthened. The right to reparation implies many different measures that will be applied depending on each particularcase. Within the frame of TJ, two characteristics are worth mentioning: the first is that every right implies a different level of enforceability, whereas the second is that, despite their individual nature, rights are all related to one another.

A. General Aspects of Transitional Justice

Although the notion of TJ seems to be new, the topics it encompasses are very old in nature, as TJ, being a manifestation of democracy is as old as democracy itself.[1] The increasing development of the human rights doctrine posed the question of how one was to deal with the consequences of massive massacres once they had been committed.[2] Even though the international community started paying attention to matters pertaining to human's right

[1] John ELSTER, *Closing the books. Transitional Justice in historical perspective*, CUP, Cambridge, 2004, at 3.
[2] Cath COLLINS, *Post-Transitional Justice, Human Rights Trials in Chile and El Salvador*, The Pennsylvania State University Press, Pennsylvania, 2010, at 7: TJ "(…) is used to refer to and analyze how societies undergoing political change address the issue of human rights violations".

violations with the criminal prosecutions carried out by the allied forces after WWII,[3] TJ only became relevant due to the criminal prosecutions in Greece (1975) and Argentina (1983),[4] and was finally coined as a concept in the nineties.[5] This issue is multidisciplinary in nature, including both legal and non-legal aspects.[6] Because of recent developments in the field, a precise legal framework has been difficult to establish.[7] Some authors, however, have taken on this challenge.[8]

1. The concept of Transitional Justice

According to the definition of the Report of the General Secretary of the UN Security Council, TJ consists of "(…) the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[9] Significant ideas can be extracted from this definition. Firstly, it reaffirms the fact that TJ is not only limited to legal issues, but also includes the utilization of any other instrument that promotes the overcoming of past events. This overcoming is legitimate when it is the result of measures adopted by society through democratic principles. Society's participation must be effective. When it comes to overcoming the violations committed, not only the opinions of victims and offenders, but that of all members of society should be taken into account.

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[3]Ruti G. TEITEL, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* 2003, 69-94, at 70. The author points out that modern TJ has its origin in the First World War, but its internationalization started after WW II.

[4] Louis BICKFORD, *The Encyclopaedia of Genocide and Crimes Against Humanity* (Transitional Justice), vol. 3, Macmillan Reference, New York, 2004, at 1046.

[5] Christine BELL, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', 3 *IJTJ* 2009, 5-27, at 7.

[6] BELL (note 5) at 6 points out: "(…) transitional justice as a field and an attempt by non-law disciplines to colonize the field (or alternatively 'decolonize' it from the traditional hold of the law)"; Mario LÓPEZ, 'El ejemplo español: lecciones y advertencias sobre una experiencia', in: Bleecker/Ciurlizza/Bolaños (eds.) *El legado de la verdad: Impacto de la justicia transicional en la construcción de la democracia en América Latina*, Conference Paper 3/2007 Serie – Enfrentando el pasado (Dealing with the past), Departamento Federal de Asuntos Exteriores DFAE Schweizerische Eidgenossenschaft – Centro Internacional para la Justicia transicional, Bogotá, 2008, 168-175, at169.

[7] Claus KREß/Leena GROVER, 'International criminal law restraints in peace talks to end armed conflicts of a non-international character', in: Bergsmo/Kalmanovitz (eds.) *Law in Peace Negotiations, Forum for International Criminal and Humanitarian Law (FICHL),* Series No 5, Oslo, 2009, 29-53, at 32.

[8] Cf. Kai AMBOS, 'The Legal Framework of the Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in: Ambos/Large/Wierda (eds.) *Building a Future on Peace and Justice, Studies on Transitional Justice, Peace and Development*, Springer, Berlin-Heidelberg, 2009, 19-103; in Spanish Kai AMBOS, 'El marco jurídico de la justicia de transición', in: Ambos/Malarino/Elsner (eds.) *Justicia de Transición*, Konrad-Adeanuer-Stiftung, Georg-August-Göttingen, Montevideo, 2009, 23-129; Christine BELL, 'The "New Law" of Transitional Justice', in: Ambos/Large/Wierda (eds.) *Building a Future on Peace and Justice, Studies on Transitional Justice, Peace and Development*, Springer, Berlin-Heidelberg, 2009, 105-126.

[9]UN-Security Council, Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', Distr. General, S/2004/616, 23.08.2004; also in BICKFORD (note 4) at 1045.

Secondly, the expression "(…) to terms with a legacy of large-scale abuses" suggests the idea that it is only possible to speak about TJ when the conflict or the *de facto* regime has already come to an end. *Ambos* indicates, however, that transitional justice "(…) is not limited to situations of post-conflict and/or regime change (…) but also encompasses situations of processes within ongoing conflict and/or formal democracy".[10] In my opinion, the inclusion of processes within ongoing conflict, (as is the case of Colombia[11]) does not seem to be included in the definition. Thus, TJ is justice *during a transition*[12] and not *during a conflict*; the legal exigencies of justice contained within TJ refer to the duty of overcoming human rights violations committed before the transition.[13] Moreover, the expression *post-conflict justice* has been used as a synonym of TJ,[14] although this term only concerns cases of new regimes after a war.[15] In sum, the end of the conflict is an essential requirement in order to speak of TJ. This does not mean that transitional mechanisms cannot be used in an ongoing conflict, since TJ measures such as criminal prosecutions or reparations are not exclusive of TJ.[16]

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[10] AMBOS (note 8) at 21-22; Apparently, in the same vein Pablo GALAIN PALERMO, *La reparación del daño a la víctima del delito*, tirant lo blanch, Valencia, 2010, at 101.

[11] Colombia has created, by law 975/2005 and its complementary regulations, a parallel criminal proceeding that tries to end the internal conflict. See Rodrigo UPRIMNY/María Paula SAFFON, 'Usos y Abusos de la Justicia Transicional en Colombia', in: Rangel Suárez (eds.) *Justicia y Paz ¿Cuál es el precio que debemos pagar?*, Intermedio Editores, Bogotá, 2009, 159-236, at 223-224, for these Authors, it is not possible to speak about transitional justice in Colombia. According to Alejandro APONTE, 'Colombia, un caso sui generis de la justicia de transición', in: Almqvist/Espósito (coord.) *Justicia transicional en Iberoamérica, Cuadernos y Debates*, vol. 199, Centro de Estudios Políticos y Constitucionales, Madrid, 2009, 87-114, at 88, the Constitutional Court of Colombia has considered in its case law the law 975/2005 as a component of TJ.

[12] María AVELLO, 'La justicia transicional vista desde Europa', *FRIDE* 2007, 1-9, at 1, TJ is carried out in "societies in transition". Available at www.fride.org/descarga/COM_Transitional_Justice_ESP_dic07.pdf (Stand: 30.09.2013).

[13] Rodrigo UPRIMNY/María Paula SAFFON, 'Justicia Transicional y Justicia Restaurativa: Tensiones y Complementariedades', in: Rettberg (coord.) *Entre el Perdón y el Paredón. Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, 211-232, at 215.

[14] E.g.Chicago Principles on post conflict justice, a joint project of International Human Rights Law Institute, Chicago Council on Global Affairs, Istituto Superiore Internazionale di Scienze Criminali, Association Internationale de Droit Pénal, 2007. See also Eric WIEBELHAUS-BRAHM, 'Summary of Regional and Thematic Studies', in: Bassiouni (ed.) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, v. 1, Intersentia, Antwerp-Oxford-Portland, 2010, 109-132, at 110-112, *et passim.*

[15] Hernando VALENCIA VILLA, 'Introducción a la justicia transicional', Conferencia magistral impartida en la Cátedra Latinoamericana "Julio Cortázar" de la Universidad de Guadalajara, México, 26.10.2007, 1-16, at 1. Available at http://escolapau.uab.cat/img/programas/derecho/justicia/seminariojt/tex03.pdf (Stand: 30.09.2013). The author, quoting Michael Walzer, also points out the term *jus post bellum* as synonym of TJ. However, *juspost bellum* is a concept related to the just war tradition which until now has not achieved precision. Cf. Carsten STAHN, 'The future of jus post bellum', in: Carsten/Kleffner (eds.) *Jus Post Bellum, Towards a Law of Transition from Conflict to Peace*, T.M.C. Asser Press, The Hague, 2008, 231-237, at 233. Cf. also Eric De BRABANDERE, 'The Responsibility for the Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept', 43:119 *Vanderbilt Journal of Transitional Law* 2010, 119-149, at121, who says that *jus post bellum* and post conflict justice are different, pointing out that *jus post bellum* theories "(…) are not necessarily constructive in the current debate on post-conflict legal frameworks."

[16] See Felipe GÓMEZ ISA, 'Retos de la justicia en contextos no transicionales: el caso de Colombia', in: Reed/Rivera (eds.) *Transiciones en Contienda, Dilemas de la justicia transicional en Colombia y en la*

Concerning the last paragraph, *Teitel* affirms, in a broader sense, that nowadays we are facing a normalization of TJ, which "(…) appears to be a reflection of ordinary times".[17] This denotes the application of the structure of TJ in a current, more politically oriented context, as the fight against terrorism.[18] Notwithstanding the fact that transitional measures can be used in cases where there has been no transition, this does not mean that the entire framework of TJ can be applied to those situations. An expansion of the framework of TJ does not seem to be adequate, because TJ does not adapt itself easily to assuring safety in the future,[19] but rather to putting an end to human rights' violations,[20] and preventing their repetition.

Thirdly, the definition points out that the objective of ending the legacy of past abuses must be aimed at ensuring accountability, serving justice and achieving reconciliation. These three objectives are parts of the constant dilemma that TJ must face: justice versus peace.[21] TJ must face the problem of finding a balance between the requirements of justice and those of peace. In this way, the balance between justice and peace can be understood as the global goal that TJ must achieve. The right balance between justice and peace is reduced to the question of whether it is possible to refrain from criminal prosecution without violating the victim's rights, and consequently, without producing impunity. In this sense, the demands of justice and peace must not be understood as opposite values. On the contrary, the absence of one implies necessarily the absence of the other.[22] Thus, avoiding accountability does not contribute to reconciliation.[23] Impunity cannot create permanent peace, on the contrary,

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experiencia comparada, Centro Internacional para la Justicia Transicional, Bogotá, 2010, 188-210, at 190. Stating that transitional justice measures have been increasingly used in countries that are still experiencing conflict, Roger DUTHIE, 'Transitional Justice, Development, and Economic Violence', in: Sharp (ed.) *Justice and Economic Violence in Transition*, Springer, New York, 2014, 165-201, at 168.

[17] TEITEL (note 3) at 90, 94.

[18] TEITEL (note 2) at 90-92.

[19] TEITEL (note 2) at 92. He also recognises the difficulty to this adaptation.

[20] Mark FREEMAN/Drazan DJUKIC, 'Jus post bellum and transitional justice', in: Carsten/Kleffner (eds.) *Jus Post Bellum, Towards a Law of Transition from Conflict to Peace*, T.M.C. Asser Press, The Hague, 2008, Chapter 11, 213-227, at 214.

[21] UMRPIMNY/SAFFON (note 11) at 185; UMRPIMNY/SAFFON (note 13) at 224. Cf. also UN-Security Council Resolution 827, Distr. General S/Res/827, 25.05.1993, para 9 they state that the creation of ICTY "contribute to the restoration of peace". Also available at ICTY-Appeals Chamber, *Prosecutor v Vojislav Seselj*, Decision, 11.12.2003, (IT-03-67-PT); cf. also Helmut GROPENGIEßER/Jörg MEIßNER, 'Amnesties and the Rome Statute of the International Criminal Court', 5 *ICLR* 2005, 267-300, at 268; Lars KIRCHHOFF, 'Linking Mediation and Transitional Justice: The Use of Interest-Based Mediation in Processes of Transition', in: Ambos/Large/Wierda (eds.) *Building a Future on Peace and Justice, Studies on Transitional Justice, Peace and Development*, Springer, Berlin-Heidelberg, 2009, 237-260, at 237-238: "transitional justice consists of a wide range of processes which serve to promote such generic goals as peace, human rights, the rule of law, and reconciliation."

[22] Chandra Lekha SRIRAM, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transitions*, Frank Cass, Oxin, 2004, at 1.

[23] See *infra* at 13.

prosecution can be a pre-requisite for authentic reconciliation.[24] Although amnesty can be used in order to prevent possible sabotage to a new democratic regime, especially when those responsible for the sabotage still have influences in the new regime, its effects must not be overestimated[25] as a way of substituting prosecution.

In order to achieve its goals, TJ utilizes different instruments, which may be used according to the particularities of each transitional situation.[26] The two principal instruments are criminal prosecution and the Truth and Reconciliation Commissions (henceforth TRC). Such mechanisms must be used consideringthe victim's situation so as to avoid secondary victimization.[27] Secondary victimization is here understood as the harm to a victim of a crime derived from inappropriate reactions, e.g. submitting the victim before police personnel or before the courts to lengthy interrogations or the disclosure of personal information to the mass media.[28] The danger of secondary victimization during transition should be neither greater nor smaller than that of an ordinary criminal process.[29] In matters of testimonies given before a TRC,[30] the State must take, if necessary, all measuresto prevent possible attacks against victims by ensuring the independence of testimonies. If such measures are not taken, the work of the TRC would lack legitimacy.

2. Goals of Transitional Justice

The objectives pursued by TJ[31] can be grouped according to the aforementioned definition. In this sense, TJ is aimed at ensuring accountability, serving justice, and achieving reconciliation. Furthermore, if ensuring accountability and serving justice are synthesised within one category (justice), the goals of TJ can be reduced into the formula justice and reconciliation. In this schema, peace should be understood as a long-term objective whose previous condition is reconciliation.

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[24] AMBOS (note 8) at 24-25 with note 32.
[25] AMBOS (note 8) at 26.
[26] Wendy LAMBOURNE, 'Transitional Justice and Peace Building after Mass Violence', 3 *IJTJ* 2009, 28-48, at 47.
[27] For further details on secondary victimization cf. Stefanie BOCK, *Das Opfer vor dem InternationalenStrafgerichtshof*, v. 7, Duncker & Humblot, Berlin, 2010, at 70-73; Elizabeth STANLEY, *Torture, Truth and Justice. The case of Timor-Leste*, Routledge, Oxon, 2009, at 65.
[28] Hans Joachim SCHNEIDER, *Kriminologie für das 21. Jahrhundert*, Lit Verlag, Münster, 2001, at 103.
[29] Regina BLÜMMEL, *Der Opferaspekt bei der strafrechtlichen Vergangenheitsbewältigung*, Duncker & Humblot, Berlin, 2002, at 43.
[30] Rama MANI, 'Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict', in: De Feyter *et al.* (eds) *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, Antwerpen-Oxford, 2005, 53-82, at 66-67.
[31] BELL (note 5) at 9, TJ has "(…) a complex set of goals beyond those of 'accountability' and 'democratization'".

2.1. Ensuring accountability

The foundation of this goal lies in preventing impunity.[32] Ensuring accountability must be understood as an effort to promote accountability and not as an obligation to punish every perpetrator for every crime committed. The idea of achieving accountability in this last sense should be discarded, as the goal of prosecuting at whatever cost (as is also the case with the other extreme possibility, namely that of forgetting all crimes) does not contribute to the satisfaction of TJ's goals.[33] In this sense, since the adoption of the Rome Statute, international law requires accountability with respect to the most accountable perpetrator for the most serious crimes.[34]

In order to establish accountability, it is possible to resort to different mechanisms, both judicial and extrajudicial. The specific measure adopted to eliminate, or at least to reduce the harmful effects on the victims, must be considered with regards to the causes of the human rights violations.

[32] See in relation to the ICC, Harmen Van der WILT, 'States' obligation to investigate and prosecute perpetrators of international crimes. The perspective of the European Court of Human Rights', in: Stahn/El Zeidy (eds.) *The International Criminal Court and Complementarity. From Theory to Practice*, vol II, CUP, Cambridge, 2011, 685-706, at 699, for whom the goal of putting an end to impunity constitutes the "raison d'être" of the ICC.

[33] Juan MÉNDEZ, 'National Reconciliation, Transitional Justice, and the International Criminal Court', Institute for International Law and Justice, New York University School of Law, 2009, 25-44, at 28-29. Available at http://www.iilj.org/courses/documents/MendezArticle.pdf (Stand: 30.09.2013).

[34] In this sense OTP, *Paper on some policy issues before the Office of the Prosecutor*, 2003, at 7. About the discussion whether there was an obligation to prosecute core crimes before the adoption of Rome Statute see Ambos (note 8) at 29-31. Cf. GROPENGIEßER/MEIßNER (note 21) at 272-273, this duty follows from the generally accepted legal principles ("soft law") and the customary international law. Cf. also Makau MUTUA, 'A Critique of Rights in Transitional Justice: The African Experience', in: Oré/Gómez (eds) *Rethinking Transitions, Equality and Social Justice in Societies Emerging from Conflict*, Intersentia, Cambridge *et al*., 2011, 31-45, at 31. Cf. international instruments as follows: Art. 4 UN Convention of the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 (III), 09.12.1948 (entry in force 12.01.1951); Art. 1 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,General Assembly resolution 39/46 of 10.12.1984 (entry into force 26.06.1987); Art. 4 UN International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), General Assembly Resolution 3068 (XXVIII), 30.11.1973 (entry into force 18.07.1976); Art. 1 in relation to Art. 17 Rome Statute, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, 17.07.1998; Art. 1 in relation to Art. 13 European Convention on Human Rights, Council of Europe, European Treaties, ETS No 5, 04.11.1950 (entry into force 03.09.1953); Art. 1(1) American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22.11.1969 (entry into force 18.07.1978); Art. 1 in relation to Art. 7, African Charter on Human and Peoples' Rights, Doc. CAB/LEG/67/3, 27.06.1981 (entry into force 21.10.1986); Art. 2 (1) and (3) International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), 16.12.1966 (entry into force 23.03.1976).

2.2. Serving justice

Justice can be understood as retributive justice or as restorative justice. While retributive justice aims only at the prosecution and punishment of the wrongdoer,[35] restorative justice is directed at satisfying the needs not only of victims and offenders, but also of the community.[36] The incorporation of the restorative justice paradigm into TJ suggests an important role for the victims,[37] and the protection of their rights, which is a limit for all possible measures adopted." Therefore, serving justice implies the use of all mechanisms, based on a mixture of retributive and restorative justice, aimed at respecting the rights of the victims and avoiding impunity. Among the instruments used, criminal prosecution has a fundamental role. Nevertheless, when transition is beginning, this demand for justice must not be interpreted in an absolute manner, especially since it has to be balanced with the objective of obtaining *peace*.[38] Thus, for *Freeman/Duke*, the cry of justice must not only be understood as a principle, but also as pragmatism directed towards the re-establishment of the rule of law.[39] The re-establishment of the rule of law is a process which will consolidate during transition. Therefore, once the rule of law is strengthened and when the risks of a loss of peace disappear, the demand for justice should become absolute.

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[35] About retributive justice see Joseph SANDERS/V Lee HAMILTON, 'Justice and Legal Institutions', in: Sanders/Hamilton (eds.) *Handbook of Justice Research in Law*, Kluwer Academic/Plenum Publishers, New York, 2001, 3-27, at 6-7.

[36] One of the first authors who evoked restorative foundation of justice was Randy BARNETT, 'Restitution: A New Paradigm of Criminal Justice', 87 (4) *Ethics* 1977, 279-301, at 287-291, who states that the problem with the punishment paradigm is the idea of crime as an act against the State, and not as an offense of one individual against the rights of another. Cf. also Tony MARSHALL, 'The Evolution of Restorative Justice in Britain', 4 (4) *European Journal on Criminal Policy and Research* 1996, 21-43, at 37, defines restorative justice as "(…) a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implication for the future." For more details about restorative justice, see Antonio BUTI, 'Restorative Justice', in: Bassiouni (ed.) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, v. 1, Intersentia, Antwerp-Oxford-Portland, 2010, 699-707, at 700 *et seq.*; Laura STOVEL, *Long Road Home, Building Reconciliation and Trust in Post-War Sierra Leone*, Intersentia, Antwerp-Oxford-Portland, 2010, at 42-45.

[37] STOVEL (note 36) at 42: "(...) restorative justice is a human-centred approach to reconciliation."

[38] Franklin ODURO, 'What do we understand by 'Reconciliation'?Emerging Definitions of Reconciliation in the Context of Transitional Justice',*Evaluating experiences in transitional justice and reconciliation: Challenges and opportunities for advancing the field*, the International Development Research Centre website, 2007, 1-34, at 3. Available at http://reports.idrc.ca/uploads/user-S/11776890581A_Review_of_the_Lit._on_Reconciliation(final_draft).doc (Stand: 30.09.2013).

[39] FREEMAN/DJUKIC (note 20) at 215. See Mark AMSTUTZ, *International Ethics concepts, theories, and cases in global politics*, 2nd ed., Rowman and Littlefield Publishers, Lanham, 2005, at 69, in relation to the restorative justice that must not be understand as "(…) an attempt to bypass the rule of law". For a definition of rule of law see UN-Security Council, Report of the Secretary-General (note 9) at 4: "It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

2.3. Achieving reconciliation

According to *Brounéus*, reconciliation can be defined as a "societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour into constructive relationships toward sustainable peace." [40] Mutual acknowledgment[41] is essential within the concept of reconciliation for there is a need to differentiate it from mere forgiveness.[42] This last concept is just a "one-way process".[43] Reconciliation is a societal process[44] in the sense that not only direct victims, their next of kin and wrongdoers must be part of it, but society as well, since the consequences of violence also affect the social structure. In the words of *Little*, reconciliation is "the restoration of social harmony".[45]

Reconciliation is essential in order to achieve sustainable peace.[46] It is possible to affirm that reconciliation constitutes the ultimate goal of TJ.[47] While *Gil Gil*,following the case of the Spanish transition, states that in the relationship between criminal prosecution and reconciliation the former is not necessary for achieving the latter,[48] *Orozco* considers criminal justice as a necessary element for reconciliation, but that the relationship between the two is often complicated. [49] Such a statement could imply that criminal justice prevents the achievement of peace. He indicates that justice has a memorial character, whereas reconciliation a forgetful one. Therefore, whereas reconciliation contributes to bringing victims and offenders closer together, justice maintains the distance between them.[50] *Orozco*

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[40] Karen BROUNÉUS, **'**Reconciliation and Development**'**, in: Ambos/Large/Wierda (eds.) *Building a Future on Peace and Justice, Studies on Transitional Justice, Peace and Development*, Springer, Berlin-Heidelberg, 2009, 203-216, at 205.
[41] John Paul LEDERACH, *Building Peace: Sustainable Reconciliation in Divided Societies*, United States Institute of Peace Press, Washington D.C., 1997, at 26-27.
[42] Forgiveness represents a more religious-linked concept, which has been related to reconciliation for the literature; see ODURO for some examples (note 38) at 5-8.
[43] BROUNÉUS (note 40) at 205.
[44] ODURO (note 38) at 19.
[45] David LITTLE, 'A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies', 13 (1) *Ethics & International Affairs* 1999, 65-80, at 65.
[46] LEDERACH (note 41) at 25, at 151: "(…) reconciliation is a central component of dealing with contemporary conflict and reconstructing divided societies." Cf. also Simone SCHULLER, *Versöhnung durch strafrechtliche Aufarbeitung?, Die Verfolgung von Kriegsverbrechen in Bosnien und Herzegowina*, Peter Lang GmbH, Frankfurt am Main, 2010, at 17.
[47] ODURO (note 38) at 3; MÉNDEZ (note 33) at 28.
[48] Alicia GIL GIL, *La justicia de Transición en España. De la Amnistía a la memoria histórica*, Atelier, Barcelona, 2009, at 137.
[49] Iván OROZCO ABAD, *Justicia transicional en tiempos del deber de memoria*, Temis, Bogota, 2009, at 21-22. Cf. also José Luis GUZMÁN DALBORA, 'Chile', in: Ambos/Malarino/Elsner (eds.) *Justicia de Transición*, Konrad-Adeanuer-Stiftung, Georg-August-Göttingen, Montevideo, 2009, 201-234, at 204. Reconciliation is a moral concept which "(…) exceeds (…) the possibilities of the criminal justice" (free translation).
[50] OROZCO ABAD (note 40) at 21.

adds that reconciliation can be better achieved through the victim's right to reparation.[51] Although this last statement is acceptable, the argument for opposing justice and reconciliation must be rejected. On the one hand, reconciliation must not be understood as forgetting but as remembering,[52] and, on the other, justice, as within the framework of TJ, is also restorative, i.e.it contributes to bringing the parties closer.[53] Moreover, if reconciliation has a forgetful character, and if it can be achieved better through the right to reparation, a contradiction arises, for many of the reparation measures aim at conserving memory. In my opinion, criminal prosecution is a necessary transitional instrument in order to achieve reconciliation, as it is particularly directed towards the goal of 'ensuring accountability', and that accountability contributes towards reconciliation.[54]

According to *Stovel*, reconciliation can be divided into three levels: individual, group-level and national.[55] Individual reconciliation can be sub-divided into three categories. The first one is *intrapersonal reconciliation*, i.e."(…) the process by which individuals who suffered from or conducted violence need to reconcile with themselves".[56] A second category is constituted by *interpersonal reconciliation*, by means of which the understanding between victims and offenders is pursued.[57] Finally, there is *individual-community reconciliation*, which aims at reintegrating victims into their social groups. For the author, this last type is the least recognized form of reconciliation in the literature.[58]

The group-level reconciliation constitutes the second level of reconciliation and it can also be the object of sub-classification. Thus, *intragroup reconciliation* takes place when "(…) a group comes to terms with its own history and culture which may have been based on enmity,

[51] OROZCO ABAD (note 49) at 23. Cf. also COLLINS (note 2) at 11: "The pursuit of reconciliation has motivated the provision of reparations to survivors or to relatives of victims."
[52] In this sense Charles VILLA-VICENCIO, *Walk with us and listen. Political reconciliation in Africa*, University of Cape Town Press, Cape Town, 2009, at 154.
[53] BUTI (note36) at 699-700; ODURO (note 38) at 21.
[54] BROUNÉUS (note 40) at 205: "Reconciliation does not mean avoiding accountability for the sake of the truth, neither does it entail collective amnesia to avoid the risks of truth telling." See also Jennifer BALINT, *Genocide, State Crime and the Law. In the Name of the State*, Routledge, Oxon, 2012, at 183: (…) "reconciliation cannot replace accountability".
[55] STOVEL (note 36) at 12-16. See ODURO for a similar classification (note 38) at 29 who distinguishes between three kinds of levels: individual/interpersonal, community/society and national/political.
[56] STOVEL (note 36) at 12. According to Erin DALY/Jeremy SARKIN, *Reconciliation in Divided Societies. Finding Common Ground*, University of Pennsylvania Press, Philadelphia, 2007, at 44-45 the importance of individuals as components of society implies that individual reconciliation is relevant for the reconstruction of nation.
[57] STOVEL (note 36) at 13. According to ODURO (note 38) at 1: "Reconciliation at the inter-personal level involves mending relations between previously friendly individuals".
[58] STOVEL (note 36) at 14.

war thinking or a fixation on 'victimization' or inherent 'superiority'". [59] *Intergroup reconciliation* is directed at the creation of an "interdependent future" between rival groups.[60]

Last but not least, national reconciliation can be perceived in two ways. On the one hand, it refers to the creation of a *social consensus*, which may involve both a "shared history, values and future", and an agreement "to forget the past with little public acknowledgment of, or accountability for, grievous crimes".[61] On the other hand, national reconciliation can be understood as *political reconciliation*, i.e. when the current leaders consider the possibility of "sharing a common political process with their opponents" or when "after a crisis of governance, citizens restore trust in their government and its institutions".[62]

3. Justice-Peace Balance

In order to achieve the right balance between justice and peace it is possible to resort to a test of proportionality. Before explaining the test, it is necessary to take into account that both justice and peace can be understood in both a narrow and a broader sense. The latter sense should be preferred in the framework of TJ.

3.1. Narrow and broad notions of justice and peace

The goals of TJ are framed within the justice-peace balance**.** Both justice and peace can be understood in a narrow and a broad sense. On the one hand, peace in the narrow sense suggests the absence of war or dictatorship,[63] i.e. peace as a requirement and not as a goal of TJ. On the other hand, peace in the broader sense implies not only the absence of conflict,[64] but also the achievement of reconciliation, precisely one of the goals of TJ. Therefore, reconciliation constitutes an intrinsic requirement of permanent peace.[65] A similar approach is set forth by *Galtung*, who distinguishes between negative and positive peace. Whereas the former is related to the absence of physical aggression, the latter is aimed at social harmony through active social participation.[66] Consequently, the notion of peace in the framework of

[59] STOVEL (note 36) at 15.
[60] STOVEL (note 36) at 15.
[61] STOVEL (note 36) at 15.
[62] STOVEL (note 36) at 15.
[63] M. Cherif BASSIOUNI, 'Searching for peace and achieving justice: the need for accountability', 59 (4) *Law and Contemporary Problems* Autumn 1996, 9-28, at 12: "(…) the word peace is freely used in the context of ending conflicts or ensuring transition to non-tyrannical regimes but without being defined or, more particularly, without any identification of what the peace goal is or how long the purported peace is designed to last".
[64] MÉNDEZ (note 33) at 20: "(...) peace cannot be the mere absence of fighting".
[65] See *supra* at 12.
[66] Johan GALTUNG, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization*, PRIO, Oslo, 1996, at 63. Cf. also Jon ELSTER, 'Justice, truth, peace', in: Bergsmo/Kalmanovitz (eds.) *Law in Peace Negotiations, Forum for International Criminal and Humanitarian Law (FICHL)*, Series No 5, Oslo, 2009, 21-

TJ must be understood in its broader sense, or, according to *Galtung's*, terminology, as positive. Moreover, a narrow sense of peace can imply that the conflict is facing some kind of interruption or a truce,[67] and, hence, has not yet ended.

For its part, peace as a goal of TJ must not be confused with peacebuilding. This term became known when *Boutros Boutros-Ghali*, former UN Secretary-General, announced his Agenda for Peace.[68] Peacebuilding is "a comprehensive concept that encompasses, generates, and sustains the full array of processes, approaches, and stages needed to transform conflict toward more sustainable, peaceful relationships."[69] Thus, peacebuilding is a much broader concept than peace, which directs attention to the conflict,[70] before the violence has ended. Peacebuilding is about designing a strategy to stop violence and consolidate peace. This aspect is also confirmed by the definition given in the Agenda for Peace for post-conflict peacebuilding.[71] Post-conflict peacebuilding limits its action to the end phase of a conflict, and does not create peace but rather consolidates a peaceful situation, so to prevent the return of violence. Moreover, peacebuilding encompasses not only legal or social aspects, but also economic and cultural ones.[72] According to *Lambourne*, TJ can contribute to sustainable peacebuilding only if it is conceived as transformative.[73] This transformative character of TJ is also pointed out by *Lederach*, who indicates that "(…) the goal of peacebuilding is to create and sustain transformation".[74] Therefore, if the instruments of TJ are used during a conflict, justice must be transformative. Transformative justice must include all mechanisms directed at balancing restorative and retributive justice, promoting knowledge and acknowledgment of the violations, economic distribution and political transformations.[75] The combination of

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28, at 21, according to the author, peace also includes a "social or civic peace", e.g., "(i) a low level of ordinary (criminal) violence, (ii) some form of psychological healing, and (iii) a cooperative attitude of public officials to the post-transitional regime."

[67] REVISTA FUTUROS, 'Reconciliación: sin ella la paz es sólo una tregua', 18(V) *Revista Futuros* 2007, 1-6, at 3. Available at http://www.revistafuturos.info/raw_text/raw_futuro18/reconciliacion_paz.pdf (Stand: 30.09.2013).

[68] Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 'An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping', A/47/277 - S/24111, 17.06.1992, para 5 (henceforth "An Agenda for Peace"). Available at http://www.un.org/Docs/SG/agpeace.html (Stand: 30.09.2013).

[69] LEDERACH (note 41) at 20.

[70] LEDERACH (note 41) at 152.

[71] Agenda for Peace (note 68) para 21: "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."

[72] Cf. An Agenda for Peace (note 28) para 56. See also for a short summary of liberal peacebuilding Chandra Lekha SRIRAM, 'Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?', in: Sharp (ed.) *Justice and Economic Violence in Transition*, Springer, New York, 2014, 27-49, at 30.

[73] LAMBOURNE (note 26) at 34. Transformative justice "(…) must set up structures, institutions and relationships to promote sustainability."

[74] LEDERACH (note 41) at 71.

[75] Cf. LAMBOURNE (note 26) at 36, 37-47 *inter alia*.

measures aims at fostering a culture of peace instead of a culture of violence,[76] i.e.to put an end to the conflict and transform it into conciliatory coexistence.

Justice, as with the case of peace, must be understood in a broader sense.[77] Hence, justice has been defined as:

> "(…) an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant."[78]

What can be highlighted in this definition is that other resolution mechanisms apart from criminal prosecution are admissible, i.e. it conceives both notions of justice (retributive and restorative).[79] Bearing this in mind, a broad notion of justice allows the State to comply with its international obligations,[80] e.g. when the State grants amnesty pending criminal prosecution, but at the same time takes a series of measures contained within the notion of restorative justice.[81] Moreover, if retributive and restorative justice measures are used in combination with each other, then the goals of TJ, such as assuring accountability and serving justice, can be achieved. If we also consider that peace implies reconciliation, then the three main goals of TJ are covered by the broad concept of justice and peace.

However, the broad concept of peace and justice may become problematic. Thus, a very broad notion of justice could affect the rights of victims, especially the right to accountability through criminal prosecution and the application of a proportional penalty. A very broad notion of peace, on the other hand, allows for the adoption of political measures,[82] which

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[76] LAMBOURNE (note 26) at 34.
[77] AMBOS (note 8) at 22.
[78] UN-Security Council, Report of the Secretary-General (note 9) at 4.
[79] See Gregory GORDON, 'Complementarity and alternative forms of justice. A new test for ICC admissibility', in: Stahn/El Zeidy (eds.) *The International Criminal Court and Complementarity. From Theory to Practice*, vol II, CUP, Cambridge, 2011, 745-806, at 802.
[80] Louise MALLINDER, 'Exploring the Practice of States in Introducing Amnesties', in: Ambos/Large/Wierda (eds.) *Building a Future on Peace and Justice, Studies on Transitional Justice, Peace and Development*, Springer, Berlin-Heidelberg, 2009, 127-171, at 153.
[81] See Lúcia Elena ARANTES FERREIRA BASTOS, 'As leis de anistia face ao direito internacional e à justiça transicional', in: Prado Soares/Shimada Kishi (coord.) *Memória e Verdade, A Justiça do Transição no Estado Democrático Brasileiro*, Editora Forum, Belo Horizonte, 2009, 169-196, at 189.
[82] Kieran McEVOY/Lorna McGREGOR, 'Transitional Justice from Below: an Agenda for Research, Policy and Praxis', in: McEvoy/McGregor (eds.) *Transitional Justice from Below, Grassroots Activism and the Struggle for*

could affect, to some extent, the rule of law,[83] e.g. the establishment of an exceptional proceeding that infringes the rules of fair process.[84] Although the adoption of this kind of measures in the context of TJ is necessary,[85] they should not exceed the rule of law standards, since they are immersed in a democratic conception of the State.[86] The political measures that seek peace related to State criminal policy, e.g. avoiding criminal prosecution through amnesty, cannot affect due process standards. Despite the inevitable influence of the political context, TJ should be identified with the human rights concept,[87] and it must not accept deviations from the rule of law for humanitarian-type reasons. [88]

Given the important political component of TJ,[89] it is important to provide a solution to these political issues that have priority over judicial exigencies.[90] In order to find a solution to this dilemma, the aforementioned balance between justice and peace, (i.e. between justice and the political reality of the country)[91] or between justice and stability, must be taken into account.[92] Thus, the justice-peace balance can be achieved and justified by the possibility of judicializing the policy measures adopted during the transition.[93] This prevents the legal

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Change, Hart Publishing, Oxford-Portland-Oregon, 2008, 1-13, at 6: "transitional justice is by its nature a heavily politicised process."

[83] TEITEL (note 3) at 90.

[84] ELSTER (note 1) at 118: "transitional justice, in fact, is characterized not only by its dramatic and traumatic substance but also by numerous deviations from due process." In contrast Gerhard WERLE, 'Legalität und Oportunität im teilharmonisierten europäischen Strafverfahren und der Grundsatz ne bis in idem', in: *Festschrift für Ulrich Eisenberg zum 70. Geburtstag*, C.H.Beck, München, 2009, 791-806, at 803, to the author, there is no exception to the right to a fair process ("vom Recht auf ein faires Verfahren […] keine Ausnahme.")

[85] WERLE (note 84) at 798, the decision to adopt a transitional justice model is dependent on "a large number of political, legal and cultural factors" (free translation).

[86] According to TEITEL (note 3) at 90, the current TJ manifests "(…) some degree of compromise in rule-of-law standars."

[87] Leonard FILIPPINI/Lisa MAGARRELL, 'Instituciones de la Justicia de Transición y Contexto Político', in: Rettberg (coord.) *Entre el Perdón y el Paredón. Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, 143-168, at 144, 149; cf. also Mahnoush ARSANJANI, 'The International Criminal Court and National Amnesty Laws', 93 *American Society of International Law Proceeding* 1999, 65-68, at 65: the conflict between national amnesty and the ICC's jurisdiction "(…) involves fundamental questions of policy with far-reaching implications for the international human rights program and the maintenance of minimum public order."

[88] For a different opinion see TEITEL (note 2) at 92: "The apparent normalization of transitional justice is also evident in (…) the rise of highly irregular procedures (…) justified in humanitarian terms."

[89] OROZCO ABAD (note 49) at 61-64.

[90] In this sense BASSIOUNI (note 63) at 27: "(…) the peace negotiators acting in good faith in the pursuit of peace must be immune from the pressures of having to barter away justice for political settlements". To Faustin Z. NTOUBANDI, *Amnesty for Crimes against Humanity under International Law*, Martinus Nijhoff Publishers, Leiden-Boston, 2007, at 13, justice is not always the best alternative to overcoming the past.

[91] Pierre HAZAN, *Juger la guerre, juger l'histoire: du bon usage des commissions vérité et de la justice internationale*, PUF, Paris, 2007, at 47.

[92] Roozbeh B. BAKER, 'Towards A New Transitional Justice Model: Assessing the Serbian Case', 11 *San Diego International Law Journal* 2009, 171-225, at 174.

[93] AMBOS (note 8) at 28; cf. Iván OROZCO, 'Reflexiones Impertinentes: sobre la Memoria y el Olvido, sobre el Castigo y la Clemencia', in: Rettberg (coord.) *Entre el Perdón y el Paredón. Preguntas y Dilemas de la Justicia Transicional, Universidad de los Andes*, Bogotá, 2005, 171-209, at 187. According to the author, the policy

aspects from being overlooked in favour of the political choices. Under this premise, the States can adopt *bona fide* measures directed at achieving peace and consolidating democracy.[94]

With the passage of time, there is an increasing awareness in international practice that peace and justice are not contradictory, but rather complementary concepts.[95] Bearing that in mind, a transitional process without the requirements of justice renders the creation and maintenance of permanent peace impossible.[96] The complementary character of both concepts, nevertheless, is reflected more in the means of achieving these purposes than in the balance between peace and justice. Whereas justice uses legal instruments, especially criminal prosecution, peace advances other measures of political character (alternative justice mechanisms).[97] In sum, legal instruments and political decisions must complement each other and coexist, but they should always do so under the prism of the judicialization of alternative justice instruments.[98]

3.2. The test of proportionality and the rights of victims

In order to obtain the balance between justice and peace, a test of proportionality can be used. This test is clearly explained by *Ambos* and consists of assessing whether a specific political measure or a legal institution, which opposes prosecution, satisfies the three levels proposed

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during the transition is nowadays strongly judicialized, but he asks himself, however, on page 188, whether we are not actually facing a politicization of justice. According to AVELLO (note 12) at 8, the political aspect seems to be more important, when she writes that TJ has to be understood as part of a "political process".

[94] Max Du PLESSIS/Jolyon FORD, 'Transitional Justice: A Future Truth Commission for Zimbabwe?', 58 (1) *ICLQ* 2009, 73-117, at 116.

[95] Carsten STAHN, 'La Geometría de la Justicia Transicional: Opciones de Diseño Institucional', in: Rettberg (coord.) *Entre el Perdón y el Paredón. Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, 81-142, at 82; In the same vein, Du PLESSIS/FORD (note 94) at 76. In contrast UPRIMNY/SAFFON (note 11) at 208, Impunity is an obstacle to achieving justice and the protection of the rights of victims, an obstacle in achieving peace. Therefore, TJ implies necessarily a partial sacrifice of either peace or justice. Also cf. Rodrigo UPRIMNY, 'Las enseñanzas del análisis comparado: procesos transicionales, fomas de justicia transicional y el caso colombiano', in: Uprimny *et al* (coord.) *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*, DeJuSticia, Bogotá, 2006, 17-44, at 32; partially against Robert CRYER, 'Prosecuting the Leaders: Promises, Politics and Practicalities', 1 *Göttingen Journal of International Law* 2009, 47-75, at 72 with note 114: "(...) the interests of justice are not necessarily the same as the interests of peace."

[96] Florence HARTMANN, 'International politics and international criminal justice', in: Bergsmo/Kalmanovitz (eds.) *Law in Peace Negotiations, Forum for International Criminal and Humanitarian Law (FICHL)*, Series No 5, Oslo, 2009, 183-190, at 189; BASSIOUNI (note 63) at 12: "(…) justice is frequently necessary to attain peace."

[97] Cf. BAKER (note 92) at 190-191, to those for whom the success or failure of the transition process depends on the existence of a political pact. The judicial measures are not significantly relevant.

[98] See with regard to the relation between alternative justice mechanisms and the admissibility before the ICC GORDON (note 79) at 785 *et seq.* The author points out on page 786 four criteria for determining the degree of judicialization of a TJ measure: "(1) The constituent nature of the body; (2) the substantive and procedural law of the body; (3) the body's sanctioning power; and (4) its linkage with the country's standard court system."