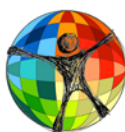


# Alternative Sanctions for International Crimes: Considering the Colombian Model



International Human Rights Internships Program - Working Paper Series



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## **Abstract**

This essay considers whether sanctions alternative to imprisonment could be a viable way to address the commission of international crimes at a national level following a non-international armed conflict. States have an obligation under international law to prosecute such crimes, but are also often at the negotiating table towards the end of a conflict. Using the Colombian peace agreement's section on justice for victims as a model (in both its positive and negatives), I explore the possibility of alternative sanctions in zero-sum situations where the justice vs peace debate will always end in a stalemate. Although these sanctions are likely to be used primarily for pragmatic reasons, there may nevertheless be convincing principles behind rejecting the use of imprisonment as a response to international crimes. Considering the goals of punishment for crime, is it possible that alternative sanctions may meet these goals better than imprisonment, in a context of political turmoil and stalemate? Considering the state's obligations to fulfill victims' rights, are alternative sanctions appropriate?

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## Introduction

In his article “Bridging the Gap between Criminological Theory and Penal Theory within the International Criminal Justice System”, Athanasios Chouliaras considers that international criminal justice (ICJ) has passed through its “formative” and its “mature” phases, and is now in its “reflective phase” - he states that we must engage in a “reevaluation the institutions of international criminal law in the light of the distinctive traits of international criminality”.<sup>1</sup> In the spirit of reevaluation, this essay considers whether sanctions alternative to imprisonment could be a viable way to address the commission of international crimes at a national level. States have an obligation under international law to prosecute such crimes, but are also often at the negotiating table towards the end of a conflict. Using the Colombian peace agreement’s section on justice for victims as a model (in both its positive and negatives), I explore the possibility of alternative sanctions in zero-sum situations where the justice vs peace debate will always end in a stalemate. Although they are likely to be used in stalemate situations for pragmatic reasons, there may nevertheless be strong principles behind rejecting the use of imprisonment as a response to international crimes.

After an initial introductory section to give context and background information, part two of this essay explores the question of the goals of punishment in both international and national contexts, and aims to justify a diversion from a primarily retributive purpose for punishment in contexts of political turmoil and stalemate in peace negotiations. Part three then analyzes the potential of the Colombian model of alternative sanctions on the basis of two criteria: first, its ability to meet non-retributive goals, and secondly, their ability to fulfill the victims’ rights to justice, reparations, and truth.<sup>2</sup>

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<sup>1</sup> Athanasios Chouliaras, “Bridging the Gap between Criminological Theory and Penal Theory within the International Criminal Justice System” (2014) 22 *European Journal of Crime, Criminal Law and Criminal Justice* 249 at 252 [*Chouliaras*].

<sup>2</sup> This essay was inspired by my summer internship with *Avocats sans frontieres* Canada, for which I conducted extensive research into states’ requirements (or lack thereof) set out by international law with regards to punishing perpetrators of international crimes.

# 1. Context and Scope

## 1.1 Theoretical Context

The specific question that this essay seeks to answer is underpinned by two different theoretical frameworks: first, this questioning concerns a specific practice in the world of transitional justice. Transitional justice refers a set of judicial and or extra-judicial mechanisms put in place in a time of transition from conflict to peace, in order to right the wrongs that have occurred and ultimately, to prevent their reoccurrence. Secondly, I draw the underlying logic of my arguments from penological theory, the study of the punishment of crime.

The field of transitional justice examines how regimes in power address the crimes that were committed in a time of conflict.<sup>3</sup> The ultimate justification for transitional justice measures is the contention that to not do so would subvert the legitimacy of the regime in power and undermine the transition into a phase of rule of law.<sup>4</sup> After any period of conflict, the state (whether a new regime or not) must decide on appropriate measures for punishing those who committed crimes during the conflict. Various transitional mechanisms have been put into practice in countless countries around the world, all of which have benefits and drawbacks. Granting amnesties or pardons was once seen as a legitimate, pragmatic way of clearing up a political impasse to allow for a quicker transition to peace, as was done in the 1990s in South Africa.<sup>5</sup> Today, the tide is turning against the granting of amnesties on the view that this practice does not bring justice for the victims of the conflict, especially regarding the granting of amnesties for those higher up in state or rebel structures.<sup>6</sup> Transitional justice measures can take many other forms, such as Truth and Reconciliation Commissions, institutional reforms, or various programs aimed at providing reparations and apologies to the victims.

Since the development of the *ad hoc* criminal tribunals and the International Criminal Court (ICC), the focus has been placed more and more on judicial mechanisms of transitional justice,

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<sup>3</sup> Ruti Teitel, *Transitional Justice* (Oxford: Oxford UP, 2000) at 6.

<sup>4</sup> *Ibid* at 12.

<sup>5</sup> International Council on Human Rights Policy, “Negotiating Justice? Human Rights and Peace Agreements” (2006) Versoix, Switzerland, at 88 [*Negotiating Justice?*].

<sup>6</sup> *Ibid* at 81.

in particular, holding criminal trials for those who breached humanitarian and international law. Indeed, many international covenants include or have been interpreted to include a requirement for states to prosecute and punish the perpetrators of certain types of crimes.<sup>7</sup>

The driving tension that has arisen from situations of transitional justice is often referred to as the “peace vs. justice” debate. Many have observed that the imposition of mechanisms aimed to bring about “justice” often do so at the risk of hindering negative peace (immediate cessation of hostilities) or positive peace (long term stability). A common example cited is that of the ICC’s intervention into Uganda, which disincentivized members of the Lord’s Resistance Army from demilitarizing - its leaders refused to give up fighting if they would be subject to criminal prosecution.<sup>8</sup> Others argue that measures of justice are necessary for building long-term, genuine peace - that impunity for perpetrators of serious crimes damages the rule of law and the dignity of victims, which could reignite tensions that were never dealt with.<sup>9</sup> As this essay will examine questions of punishment for perpetrators of international crimes, it is ultimately couched in the language of transitional justice and the peace vs justice debate.

The second theoretical framework that supports my argumentation comes from the world of penological theory, which studies punishment and prisons. The question of punishment is at the heart of this essay - what should it accomplish in post-conflict transitional justice contexts? What types of punishment have been used so far, and are alternatives to our current methods desirable? How does the punishment relate to the crime? Should the punishment be based on the crime (backward-facing) or based on goals for the future?

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<sup>7</sup> States must “prevent, investigate and punish any violation of the rights recognized by the American Convention on Human Rights”, Valásquez-Rodríguez Case, 1998 Inter-Am Ct H.R. (Ser C) No. 4, at para 166 (29 July 1988). The European Convention of Human Rights requires punishment “in cases of grave state crimes”: Fernando Felipe Basch, “The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and its Dangers” (2007) 23:1 American University Intl Law Review 195 at 102. The Convention on the Prevention and Punishment of Genocide requires “effective” punishment (art 5). The Convention Against Torture requires “appropriate penalties” (art 4.2). The International Convention for the Protection of All Persons from Enforced Disappearances requires states to hold perpetrators criminally responsible (arts 4 and 6).

<sup>8</sup> Kasaija Phillip Apuuli, “Peace over Justice: ARLPI vs ICC in Northern Uganda” (2011) 11:1 Studies in Ethnicity and Nationalism at 117.

<sup>9</sup> *Negotiating Justice?* *supra* note 4 at 77.

Theorizing punishment is by no means a new area of study. There have been many justifications given for imposing punishment on perpetrators of crime over the centuries - retribution, deterrence, incapacitation, fostering a sense of security, etc.<sup>10</sup> The imposition of prison sentences is rising throughout the world, and leading in some areas to overcrowding and breaches of prisoners' human rights.<sup>11</sup> Recently, more and more progressive and critical penological study has been done for the purpose of examining the wisdom, or lack thereof, of our current reliance on imprisonment as a response to crime. Indeed, the same reflection is taking place by scholars interested in the field of ICJ - this current away from typical retributive punishments is growing, but is by no means mainstream either on the national or international level.<sup>12</sup>

## 1.2 Methodology

This essay will examine the justifications for certain punishments within the context of transitional justice, combining these two theoretical frameworks - specifically, can alternative sanctions be better than imprisonment in a case where justice and peace defeat each other? The recent peace agreement ("Final Agreement") between the Colombian State and the FARC-EP will serve as a model for this assessment.<sup>13</sup> The final section of the Final Agreement, the "Agreement on Victims", contains the negotiators' plans for transitional justice mechanisms, one of which is a Special Jurisdiction for Peace (SJP). The SJP foresees the possibility of sanctions alternative to prison for the perpetrators of crimes during the Colombian conflict, including international crimes and for those of high status in the state or rebel apparatuses. This agreement is by no means perfect and is not being used in this sense as a "model agreement", but merely as an example of an agreement that, in some aspects, may or may not be appropriate.

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<sup>10</sup> Stanley Cohen, "An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment" (1981) 27 McGill Law Journal 73.

<sup>11</sup> UN Office on Drugs and Crime, "Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment" (2007) at 3.

<sup>12</sup> Silvia d'Ascoli, *Sentencing in International Criminal Law: the UN ad hoc Tribunals and Future Perspectives for the ICC* (Portland: Hart Publishing, 2011) at 37 [d'Ascoli].

<sup>13</sup> Signed by both sides on 26 September 2016, the Agreement was put to a popular referendum, and on October 2, 2016, the Agreement was narrowly rejected by the Colombian population. Since the time of writing, a second agreement has been reached at and ratified by Colombian Senate.



I am examining this peace agreement as it is indeed unique - it is the first modern example of a state contemplating the use of alternative sanctions for the perpetrators of international crimes in the context of peace negotiations, in a time when international law explicitly requires the prosecution and punishment of these individuals.

### 1.3 Colombia

Internal conflict has been ongoing in Colombia since 1964, and has been characterized by continuing violence between state forces and various paramilitary groups, crime syndicates, and guerilla rebel groups.<sup>14</sup> The motivations of each group are varied and complex, and are intertwined with the country's history of anti-communism and drug-trafficking. Approximately 94,000 peoples' deaths can be attributed directly to the 5 decade-long conflict, most of whom are civilians.<sup>15</sup> One of the most powerful antagonists to the Colombian state is the FARC-EP (Revolutionary Armed Forces of Colombia—People's Army), a guerilla movement that formed in the 1960s as a force for Marxist-Leninism.<sup>16</sup> FARC-EP has been accused of using illegal tactics throughout the decades, including kidnapping for ransom, extortion, extrajudicial killings, and other methods that violate human rights.<sup>17</sup> The Colombian Armed Forces have waged a military opposition to the FARC and other groups, during which state forces allegedly committed widespread war crimes.<sup>18</sup>

The peace agreement signed between the Colombian state and the FARC-EP in July of 2016 was built on four years of negotiations between the FARC and the Colombian government - therefore, the criminal process and sanctions that offenders were to be exposed to are more a product of pragmatism and compromise. This peace agreement is not a post-conflict imposition of justice by a victorious party over a losing party - instead, it is an agreement to cease hostilities

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<sup>14</sup> Jemima García-Godos and Lid, Knut, "Transitional Justice and Victims' Rights before the End of a Conflict: the Unusual Case of Colombia" (2010) 42 *Journal of Latin American Studies* 487 at 490 [García-Godos].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at 492.

<sup>17</sup> Catalina Díaz, "Colombia's Bid for Justice and Peace" in Kai Ambos, Judith Large & Marieke Wierda, eds, *Building A Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Berlin: Springer, 2009) 469 at 472 [Díaz].

<sup>18</sup> *Ibid* at 473.

on conditions that both sides will agree to, one of which is the possibility of avoiding prison sentences for those who recognize and confess their responsibility.

## 1.4 Terminology

In order to delimit the scope of this essay, it is important to define the terms I will be using:

**Alternative sanctions:** This term connotes a system of sanctioning that diverges from the regular criminal system, either in type or length of sanction. In the Colombian context, greatly reduced sentences are considered “alternative”, as are various types of “community-service” based projects that only entail moderate deprivations of liberty, such as participation in the implementation of infrastructure construction and repairs, or projects such as eliminating landmines, replacing illicit crops, etc.<sup>19</sup> In this essay, I assume that these sanctions are given at the end of a procedurally fair and legal *criminal* trial.

**Stalemate:** In the context of this essay, “stalemate” refers to situations in which mechanisms of peace and justice appear to frustrate each other's goals. Specifically, it is a situation where a peace agreement without transitional justice mechanisms would be unacceptable, but this peace agreement will not be signed by some or all parties if it contains the possibility of sanctions unacceptable to the parties.<sup>20</sup> I am not using this term to refer to situations of post-conflict in which the situation has stabilized and the victor has relative freedom to choose the mechanisms of transitional justice that are warranted.

**Victim:** This essay uses the definition set out in the United Nation “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”

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<sup>19</sup> Final Peace Agreement for the Termination of Conflict and the Construction of a Durable Peace, signed June 23, 2016, online at <http://farc-cpeace.org/peace-process/agreements/agreements.html>. [Final Agreement]. I recognize that this version is an English translation and therefore may not reflect perfectly the provisions of the original agreement. As well, the organization of this agreement is inconsistent, making precise pinpoint citations difficult. When necessary, I refer to the closest possible section header, and include paragraph numbers when these are available.

<sup>20</sup> See Juan Carlos Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2013) at 80 [Ochoa]. Ochoa notes the examples of South Africa, El Salvador, Guatemala, Haiti, and Mozambique.

(“Basic Principles”), which reads: “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment to their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. [...] A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”<sup>21</sup> This definition is holistic, rather than legalistic or based on the technicalities of establishing the occurrence of a crime. This definition is used, as this essay focuses on the use of alternative sanctions for violations of international human rights and humanitarian law.

International crimes: This essay is concerned with the crimes that the system of ICJ was set up to address - genocide, crimes against humanity, and war crimes, also known as “core international crimes”.<sup>22</sup> It is particularly interesting to consider alternative sanctions in response to these crimes, as states have a duty under international law to prosecute and punish the perpetrators of these crimes.<sup>23</sup> These are also the types of crimes that have sparked the most debate with regards to the Colombian situation and the use of alternative sanctions, as many may have the initial reaction that a prison sentence is the very least these perpetrators should be subject to. Also, being the gravest, these crimes are the most important to be dealt with in a principled way that responds to the demands of justice, and as such, receive my attention in this essay.

## **1. International Criminal Justice and the Purposes of Punishment**

ICJ is a relatively new field of international law that reflects the value that the international community places on criminal justice for perpetrators of war crimes, genocide, and crimes against humanity. ICJ takes place both on the international level, through institutions such as the International Criminal Court (ICC) and the ad hoc tribunals for Rwanda and ex-Yugoslavia,

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<sup>21</sup> UN Doc A/RES/60/147/Add.1 at para 8. [UN *Basic Principles*]

<sup>22</sup> Robert Cryer and Friman, Hakan, *An Introduction to Criminal Law and Procedure* (Cambridge: Cambridge UP, 2010) at 4.

<sup>23</sup> *Ibid* at 69.

as well as on the national level, given that States have the primary duty to prosecute these crimes.<sup>24</sup> This section explores the idea that international crimes are fundamentally different from national crimes, but also that prosecuting these crimes on a national level is fundamentally different from international prosecution. On this basis, restricting the choice of punishment to imprisonment appears unreflected and inappropriate.

## 2.1 The Uniqueness of International Crimes

The creation of all of the international ICJ institutions has, in general, been justified by recalling the horror of the crimes that were committed - en masse, and with shocking cruelty and disregard for the value of human life, as in Germany's Third Reich or Cambodia under the Khmer Rouge.<sup>25</sup> The Nuremberg IMT's Preamble refers to "abominable deeds"; the ICC's preamble to "unimaginable atrocities that deeply shock the conscience of humanity." Indeed, if there were not something fundamentally different about these crimes, why would we not simply leave national criminal systems to deal with them (or not deal with them), as we do in most situations? The fact that we do not points to the idea that there is something unique about these crimes that call for a different reaction than do "normal" crimes. This proposition is supported by international criminologists:<sup>26</sup> "We are not just dealing with ordinary domestic crimes, which are principally linked to individual life stories, but with 'unimaginable atrocities' that leave deep scars on the body of the universal history of the world."<sup>27</sup> Both the rhetoric of these institutions and analysts of international criminology point towards the idea that these crimes are in some way different in kind, rather than simply in severity, from normal crimes. There is a general agreement that these crimes find their uniqueness in the political and widespread context of their commission.<sup>28</sup> Athanasios Chouliaras refers to this as "system criminology", a product of the interaction between the individual criminal responsibility of those designing or

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<sup>24</sup> "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", Preamble of the Rome Statute of the International Criminal Court, 1 July 2002.

<sup>25</sup> Damien Scalia, "La peine privative de liberté en droit pénal européen et international: une sanction à tout faire?" in Diane Bernard & Yves Cartuyvels, eds, *Fondements et objectifs des incriminations et des peines en droit européen et international* (Limal: Anthémis, 2013) 457 at 459.

<sup>26</sup> Chouliaras, *supra* note 1 at 252.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 254.

implementing a state or organized policy and the state as a criminal actor itself.<sup>29</sup> Many authors speak about “systemic international criminality”, a “specific type of action that exceeds the paradigm of interpersonal violence and infringes on the interests of the international community as a whole, justifying the mobilization of its penal institutions.”<sup>30</sup>

Based on this generally accepted idea of the uniqueness of international crimes, it is therefore surprising that the international response has taken the form of tribunals and courts that bear such striking resemblance to national systems of criminal justice, which are designed to deal with individual criminality. Specifically, for the purposes of this essay, it is curious that the system of sanctions in international tribunal appears to be based upon the model of a national criminal justice system. All international criminal tribunals, without exception, give imprisonment as the minimum sanction.<sup>31</sup> National tribunals, at least on paper, also impose a minimum of a prison sentence.<sup>32</sup>

This is logical, if one thinks of international crimes as simply more serious versions of national crimes - if this is true, then it is obvious that imprisonment is the least any convicted person should receive. However, the current status of sentencing of international crimes butts up against the limits of the logic of basing the length of the punishment on the severity of the crime. Punishments must be proportional to the crime, but under national law, one murder may attract life imprisonment. What, then, of a genocide? One accused can only serve one life sentence. This “problem of proportionality” is a common critique of ICJ institutions.<sup>33</sup> Instead, based on the idea that international crimes are fundamentally different from international crimes, it would make sense for this to be taken into account when determining the availability of different sanctions. Instead, the drafters of the ICC’s Rome Statute dismissed alternative sanctions as “entirely inappropriate”.<sup>34</sup>

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<sup>29</sup> Chouliaras, *supra* note 1 at 257.

<sup>30</sup> *Ibid* at 258.

<sup>31</sup> Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge UP, 2009) at 51-53 [Drumbl].

<sup>32</sup> *Ibid* at 69.

<sup>33</sup> D’Ascoli, *supra* note 12 at 27.

<sup>34</sup> International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court with Commentaries*, 22 July 1994 at 60. Online at <http://www.refworld.org/docid/47fd40d.html>.

## 2.2 Dislocation between the Goals of ICJ and the Sanctions Given

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<sup>35</sup> Damien Scalia, "La peine privative de liberté en droit pénal européen et international: une sanction à tout faire?" in Diane Bernard & Yves Cartuyvels, eds, *Fondements et objectifs des incriminations et des peines en droit européen et international* (Limal: Anthemis, 2013) 457 at 459.

<sup>36</sup> Chouliaras, *supra* note 1 at 252.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* at 254.

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### **2.3 Dislocation between the Goals of ICJ and the Sanctions Given**

In this same vein, there appears to be a general lack of attention paid by ICJ institutions to setting out specific goals for each punishment given, and to setting out plainly how imprisonment is supposed to meet these goals. Silvia d’Ascoli submits that there is an absence of justification for sentencing in ICJ: “the system of international criminal justice has not yet

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<sup>41</sup> Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge UP, 2009) at 51-53 [Drumbl].

<sup>42</sup> *Ibid* at 69.

<sup>43</sup> D’Ascoli, *supra* note 12 at 27.

<sup>44</sup> International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court with Commentaries*, 22 July 1994 at 60. Online at <http://www.refworld.org/docid/47fdfb40d.html>.

agreed about the purposes that should characterize and determine its actions [...] scholars and practitioners agree on the fact that the current praxis of international sentencing reveals a certain degree of obfuscation and confusion in the penal justification for punishment.”<sup>45</sup> None of the institutions of ICJ institutions state in their provisions their purposes for punishment.<sup>46</sup> Although goals are sometimes mentioned in judgements and rulings on sentencing, much rarer is the *connection* explored between the proposed goal and the proposed sentence - Thibault Slingeneyer writes, “on évoque le pardon et la réconciliation pour justifier l’institution du droit international pénal mais on ne fait pas le lien entre ces notions et la peine prononcée.”<sup>47</sup> For example: in the ICC’s first conviction, it specified the two-fold role of the sentence given to Germaine Katanga for war crimes and crimes against humanity: his prison sentence was to be “the expression of society’s condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose.”<sup>48</sup> His prison sentence was 12 years<sup>49</sup> - arguably not a fierce condemnation or an effective deterrent.

Silvia d’Ascoli has gathered the goals of sentencing from the judgements of ICJ institutions, and confirms that they conform with the “traditional” purposes of sentencing.<sup>50</sup> The most oft-cited and obvious purpose of ICJ punishment is *retribution*: the idea that the convicted person attracts the penalty because of the inherent wrongness of his act.<sup>51</sup> *Deterrence* is also very commonly cited as a purpose of punishment. This is linked particularly to these institutions’ rhetoric concerning peace: they aim to have an impact on the decision-making of potential

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<sup>45</sup> *Supra* note 33 at 33.

<sup>46</sup> *Ibid.*

<sup>47</sup> Thibault Slingeneyer, “Les justifications de la peine de prison: timidité du droit pénal européen et du droit international pénal face à la rationalité pénale moderne” in Diane Bernard & Yves Cartuyvels, eds, *Fondements et objectifs des incriminations et des peines en droit européen et international* (Limal: Anthemis, 2013) 477 at 489 [*Slingeneyer*].

<sup>48</sup> *The Prosecutor v Germain Katanga*, ICC-01/04-01/07, Decision on Sentence pursuant to article 76 of the Rome Statute (23 May 2014) at para 38.

<sup>49</sup> *Ibid* para 170.

<sup>50</sup> *Supra* note 12 at 34.

<sup>51</sup> W.J. Van der Wolf, *Prosecution and Punishment of International Crimes by National Courts* (The Hague, International Courts Association: 2011) at 53 [*Wolf*].



future criminals.<sup>52</sup> Another aim put forward by these institutions is *reconciliation* - the rhetoric of ICJ is based on the idea that peace cannot come about or last meaningfully without healing the divisiveness caused by the conflict.<sup>53</sup> The goal of *rehabilitation* has been noted in some final judgements; however, it is generally a “subsidiary rationale.”<sup>54</sup> This goal is vaguely gestured to by the fact that international tribunals are required to take into account the personal situations of the accused in the determination of their sentencing; however, rehabilitation as a goal in general has not been explored in depth in any judgement.<sup>55</sup> The goals of *truth-finding* and *pedagogy* are similarly less explored than retribution in international criminal jurisprudence.<sup>56</sup>

## 2.4 What goals and what sanctions at a national level?

The prosecution and punishment of international crimes on a national level takes on many complicated dimensions when it comes to deciding on goals and the appropriate punishment to help meet those goals. ICJ institutions are (ostensibly) apolitical and decontextualized,<sup>57</sup> making it possible to process every accused from any country in a like manner, and to decide on the goals of punishment as a function of the goals of the institution itself, as opposed to the goals of a much wider variety of actors and in the context of the conflict itself - for example, the ICC specifically states that it does not consider peace when deciding to initiate investigations.<sup>58</sup> The prosecution of international crimes at a national level, however, is located directly in the centre of the context of the crimes, and is carried out by an actor (the state) which simultaneously has the obligation to bring about an end to the conflict. This may call for a

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<sup>52</sup> *d’Ascoli*, *supra* note 12 at 35.

<sup>53</sup> *Ibid* at 36.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* at 38.

<sup>57</sup> Danilo Zolo, “Peace Through Criminal Law?” (2004) 2 *Journal of International Criminal Justice* 727 at 729 [Zolo].

<sup>58</sup> “The broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.” Office of the Prosecutor of the ICC, Policy Paper on the Interests of Justice (September 2007), at 8. Online at <https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>.

contextualized hierarchization of the goals of punishment - the methods of ICJ institutions should not automatically be copied at the national level.<sup>59</sup>

It is natural that the goals of punishment on a national level may be different than those of international institutions. At this national level, criminal process and punishment are dictated by that country's criminal justice system, their individual goals as a country or society, the specific context of the conflict, and the political situation<sup>60</sup> - and all of these elements differ from country to country, and conflict to conflict. Therefore, it is impossible in an essay about stalemates in general to create an enumerated list of what specific goals punishment should target in a post-context situation. However, it is possible to gesture in that direction - considering the general attributes of a situation of stalemate, as defined above, what should be the goals of punishment? What should not?

Although retribution is often seen as the ultimate justification of ICJ, retribution as a main goal for punishment in national, post-conflict or mid-conflict processes of justice is problematic. In practice, this seems to stem from pragmatic considerations - for example, it is difficult to effect a demobilization of a paramilitary group that fears a severe punishment. However, enacting retribution arguably also works against other goals of punishment that may be more important in situations of conflict or post-conflict. Danilo Zolo writes, in regards to retribution and the re-establishment of peace,

The retributive character of punishment rules out the goal of re-education, is at odds with the concept of alternative measures to imprisonment, rejects the very notion of a flexible application of penalties and does not allow for any form of re-socialization of convicts. ... Prison becomes a place of sheer misery - sometimes, of actual physical and mental torture - and violation of a citizen's most elementary rights. It is quite clear, in my view that the retributive conception of criminal punishment can hardly be reconciled with any project of social peacemaking.<sup>61</sup>

Retributive punishments arguably work against the creation of conditions needed to re-establish peace and heal societies - they may mask desires of vengeance, reinforce hostility, and

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<sup>59</sup> Drumbl (*supra* note 31) calls this copying "legal mimicry". This is not to say that ICJ institutions should not to re-evaluate their goals of punishment - indeed, many scholars recommend a turn away from retributivism and towards restorative justice for these institutions as well: see *d'Ascoli*, *supra* note 12 at 37.

<sup>60</sup> *Ochoa*, *supra* note 20 at 80.

<sup>61</sup> *Zolo*, *supra* note 47 at 733.

eliminate the possibilities of mediation and rebuilding social fabric.<sup>62</sup> If retribution is relegated to a lesser importance in the sentencing process at the national level, this allows more possibility for other, more appropriate goals to become primary, such as reconciliation, rehabilitation of the offender, pedagogy, and truth-finding. These are generally referred to generally as “restorative” goals, as they focus on restoring peace as opposed to punishing. Naturally, not every post-conflict transitional justice process will target the same goals - but abandoning retribution as the ultimate goal allows for more “contextualization”, i.e. it allows for the actors involved in negotiations to “meet the complexity of historical and social dynamics.”<sup>63</sup>

Both the uniqueness of international crimes as such and the need to contextualize responses to international crime pull one towards considering alternative sanctions as a response to international crime on a national level, as they would allow states to create sanctions that respond to the communal nature of the crime and the specific goals that the political climate calls for. The following section examines the Colombian model of alternative sanctions more in detail in order to determine whether it could meet these more restorative goals of justice, and fulfill victims’ rights to truth, justice, and reparations.

### **3. Examining the Potential of Alternative Sanctions**

This essay posits overall that, in situations of ongoing conflict, it may be desirable for peace negotiations to plan for criminal trials that give alternative sanctions, for pragmatic but also for principled reasons. Refusing to impose prison sentences in the context of peace negotiation is often considered in its practical aspects - the obvious benefit to avoiding prison sentences is to allow for immediate cease-fire, or demobilization, or other short-term types of peace. This section considers further benefits by evaluating this model of alternative sanctions first against the yardstick of its potential to fulfill the goals of punishment of a country trying to end a conflict, and secondly, against the requirement that states fulfill the victims’ rights to truth, justice, and reparation. There are many possible aspects to focus on when evaluating a system of alternative sanctions: its conformity with international law, its procedural fairness, etc. These

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<sup>62</sup> *Ibid* at 734.

<sup>63</sup> *Ibid*.

two “yardsticks” (goals of punishment and victims’ rights) were chosen as they reflect both pragmatism and principle.<sup>64</sup> Achieving the goals of reconciliation, rehabilitation, pedagogy and truth-finding, as well as fulfilling in a meaningful way the rights of victims, are more likely to lead to long-term, positive peace, on top of immediate-term negative peace. As well, fulfilling the rights of victims is a principle upon which the victims themselves, civil society, and the international community place great weight<sup>65</sup> - and any alternative response to international crime is going to be scrutinized for its adherence to the principle that victims’ rights must not be ignored.

### 3.1 The Colombian Model

As noted in Part 1, the Colombian peace agreement’s section entitled “Agreement on Victims” will serve as an illustration of such a transitional mechanism. The 400-page Final Agreement addresses comprehensive rural reform, reforms of the democratic political system, the problem of illicit drugs, and finally, transitional justice. This final section creates four judicial and extra-judicial transitional justice mechanisms: a truth commission, a special unit to search for missing persons, a comprehensive system of reparations, and finally, the Special Jurisdiction for Peace (“SJP”).

The SJP is the criminal justice aspect of the Final Agreement, and its task is to “administer justice and investigate, clarify, prosecute and punish serious human rights violations and serious breaches of International Humanitarian Law.”<sup>66</sup> The SJP, which applies to any rebel groups that have signed the agreement as well as state forces,<sup>67</sup> foresees a mechanism that differentiates the process and sanctions based on both the crimes that have been committed and the degree to which the accused accept their responsibility and give a full confession.

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<sup>64</sup> Conformity with international law and procedural fairness are not to be ignored when evaluating a system of alternative sanctions for international crimes - but could not be addressed in this essay for lack of space.

<sup>65</sup> Theo van Boven, “Victim-Oriented Perspectives: Rights and Realities” in Thorsten Bonacker & Christoph Safferling, eds, *Victims of International Crimes: An Interdisciplinary Discourse* (The Hague: TMC Asser Press, 2013) 17 at 20.

<sup>66</sup> *Final Agreement* *supra* note 19 part 5.1.

<sup>67</sup> Avocats sans frontières Canada, “Note 4: The Justice Dimension of the Peace Agreement”, Practical Notes by Lawyers without Borders Canada (2016), online at [http://www.asfcanada.ca/uploads/publications/uploaded\\_processus-de-paix-ang-note-4-pdf-105.pdf](http://www.asfcanada.ca/uploads/publications/uploaded_processus-de-paix-ang-note-4-pdf-105.pdf).

First, the agreement foresees granting “the broadest possible amnesty”<sup>68</sup> to those who have committed political crimes, such as sedition or rebellion, as recommended by the Geneva Convention,<sup>69</sup> provided they comply with a list of requirements. Those who have, however, committed violations of human rights or international humanitarian law will be given the opportunity to recognize their responsibility and give a full account of their crimes before a “Chamber of Acknowledgement.”<sup>70</sup> Those who do so will be sent for their trial to a “Chamber for the Acknowledgement of Truth and Responsibility”, where they will be eligible for alternative sanctions of a duration of 5 to 8 years.<sup>71</sup> These sanctions will involve community projects and under no circumstances will include deprivations of liberty equivalent to prison.<sup>72</sup> Those who do not give such recognition or confession will be sent to the “Chamber for Peace”. If the accused provides a “delayed” recognition and confession at this Chamber *before* their sentencing, but that is nevertheless “full, complete and exhaustive”, they are eligible for a sanction of “deprivation of liberty [...] like prison and/or any measure of securing” of a duration of 5 to 8 years.<sup>73</sup> If there is no recognition of responsibility and confession, the accused is to be given a sanction of “deprivation of liberty [...] like prison and/or any measure of securing”, the duration of which will range from 15 to 20 years.<sup>74</sup>

This graduated system evoked much discussion and controversy, as it applies to all who are not eligible for amnesties. The Final Agreement underlines that “Crimes against humanity do not receive amnesty nor do other crimes described in the Rome Statute.”<sup>75</sup> Thus, this mechanism foresees that those who have committed international crimes (in this case, war crimes or crimes against humanity), provided that they give a full confession before the Chamber of Acknowledgement, will not see a substantial deprivation of liberty equivalent to a prison sentence. Given the severity and duration of the Colombian conflict, as well as the

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<sup>68</sup> *Final Agreement supra* note 19 at part 5.3 para 23.

<sup>69</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, Can TS 1991 No 2, art 6(5).

<sup>70</sup> *Final Agreement supra* note 19 at part 5.3 para 60.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at part 5.3 para 25.

obligation under international law of States to prevent, prosecute, and *punish* international crimes, this system has been subject to much criticism and debate as to whether such provisions constitute adequate punishment.

### **3.2 Alternative Sanctions and the Goals of Punishment**

The specific goals of the SJP are enumerated: “The goals of the justice component ... are to satisfy the rights of victims to justice, offer truth to the Colombian society, protect the rights of victims, contribute to the achievement of a stable and long-lasting peace and adopt decisions that grant full legal security to those who participated directly or indirectly in the internal armed conflict [...].”<sup>76</sup> While somewhat vague, these goals do seem to line up with the previous section’s argumentation that in conflict situations, the goals of punishment should be more restorative and victim-focused, as opposed to focused on retribution. It is made explicit that the implementation of justice mechanisms has the purpose of restoring peace to the country.<sup>77</sup> An analysis of the SJP shows that various restorative goals of punishment can be achieved in a meaningful way by this model in a way that is appropriate for a conflict-transition situation.

#### **3.2.1 Rehabilitation of the Offender and Reconciliation with the Community**

The judicial process that would be applied to participants according to this agreement provides possibilities for reconciliation with Colombian society and specific communities. In the context of this essay, I consider “reconciliation” to refer to repairing a minimum basis of trust between, on the one hand, the actors in the conflict (whether rebel or state agents) and on the other, the communities and individuals who were subject to the international crimes.

The International Institute for Democracy and Electoral Assistance (IDEA), in its Handbook on reconciliation, defines it not as an ultimate goal, but as a continually ongoing process that strives towards that goal: it means “finding a way to live alongside former enemies - not necessarily to love them, or forgive them ... but to coexist with them, to develop the degree of cooperation necessary to share our society with them... it redesigns the relationship

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<sup>76</sup> *Final Agreement supra* note 19 at part 5.3 para 2.

<sup>77</sup> *Ibid* at part 5.3 para 17.

between us.”<sup>78</sup> It is a large part of ensuring that the violence does not reoccur.<sup>79</sup> The alternative sanctions envisioned by the Final Agreement are explicitly described to be “of a restorative and reparative nature”.<sup>80</sup> The sanctions involve community re-building projects that would work towards promises made in other areas of the Final Agreement, such as participating in reparation programs for displaced farmer peasants; programs for the protection of the environment in reserve areas; construction and reparation of infrastructure in rural areas, such as schools, roads, health centres, housing, community centres, municipal infrastructures; the improvement of electrification; demining, etc.<sup>81</sup> The accused would thus be engaged in rebuilding part of the devastation caused by the conflict, and would be, in fact, actively helping the victims by contributing to the development of their communities. The logic behind these sanctions seems similar to that of community service orders given for national crimes: the aim is for the offender to make reparations to the community. In Sierra Leone, with regards to the transitional justice mechanism of disarmament in exchange for stipends and training, it was observed that anger with this “preferential treatment” was short lived, but what remained was frustration with the impoverishment of the country, which sowed the seeds of further divisiveness.<sup>82</sup> Thus, sanctions that involve convicted persons helping to relieve the burdens of a community may foster attitudes more open to reconciliation.

Just as these rebuilding programs may allow the communities to accept the offender, it may also serve as a way to rehabilitate the offenders themselves. Active and effective rehabilitation of the offenders is often ignored in a prison system,<sup>83</sup> but a convicted criminal, as a human being, deserves the chance to learn to correct his behaviour and recognize the

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<sup>78</sup> International Institute for Democracy and Electoral Assistance, *Reconciliation After Violent Conflict: A Handbook*, David Bloomfield & Teresa Barnes, eds, 2003 at 12. Online at <http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf>.

<sup>79</sup> *Ibid* at 19.

<sup>80</sup> *Final Agreement supra* note 19 at part 5.3.1.

<sup>81</sup> *Ibid* at part 5.3.1, “Sanctions applicable to persons that comprehensively acknowledge truth in the Chamber for the Acknowledgement of Truth and Responsibilities”, parts A-C.

<sup>82</sup> Rosalind Shaw, “Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment” in Rosalind Shaw, Lars Waldorf & Pierre Hazan, eds, *Localising Transitional Justice: Interventions and Priorities After Mass Violence* (Redwood City: Stanford UP, 2010) 111 at 115 [Shaw].

<sup>83</sup> Iain Crow, *The Treatment and Rehabilitation of Offenders* (London, Sage Publishing: 2001) at 20 [Crow].

wrongfulness of his actions, and his punishment should in part aim for this goal. Because the sanctions given in the Colombian model are based on the convicted person's willingness to cooperate with the system, it reflects his or her current potential for rehabilitation, as opposed to a system of punishment that looks to the past for a person's worst moment. "Community service orders may be seen as having a mixture of objectives, including elements of punishment, reparation, and the potential for rehabilitation."<sup>84</sup> Community service confronts the offenders with the effects of their crimes, improves their attitudes towards society, and provide them with useful employment skills.<sup>85</sup> In the case of long-term internal conflict, contributing to the reparation of targeted communities may also help the perpetrator to recognize the widespread effects of the conflict and his or her participation in it. As well, those who are sanctioned with reduced prison sentences are required to commit to "his or her re-socialization through work, training or education during his or her period of deprivation."<sup>86</sup>

### 3.2.2 Fact Finding and Pedagogy

Part of the value of criminal trials is their ability to create a narrative of the crime(s), which is important for accountability, reconciliation, and providing justice to victims.<sup>87</sup> Transitional justice mechanisms in general are expected to contribute towards creating a historical narrative of the conflict, for the purposes of ensuring conflict does not return for another cycle. This particular model of alternative sanctions provides extra incentives for the accused to provide information that may contribute towards creating this narrative of truth.

The graduated system of punishment, as described above, is contingent on the accused's willingness to give an "acknowledgement of truth and responsibilities" before the Chamber of Acknowledgement. Those who give a confession that is "exhaustive, complete, and detailed" will be eligible for alternative sanctions.<sup>88</sup> The longest prison sentence (20 years) is only possible

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<sup>84</sup> *Crow*, *supra* note 73 at 29.

<sup>85</sup> Mandeep K Dhali, "Restorative Justice in Prisons" (2009) 12:4 Contemporary Justice Review 433 at 435.

<sup>86</sup> *Final Agreement* *supra* note 19 at part 5.3.1, "Sanctions applicable to those who acknowledge truth and responsibilities for the first time in the contradictory process before the Section of first instance of the Peace Tribunal, prior to the pronouncing of a sentence" para 2.

<sup>87</sup> *Wolf*, *supra* note 41 at 67.

<sup>88</sup> *Final Agreement* *supra* note 19 at part 5.3.1, "Sanctions applicable to those who acknowledge truth and responsibilities for the first time in the contradictory process before the Section of first instance of the Peace



for those who do not give any information. The “truth” generated by criminal trials is often criticized as narrow,<sup>89</sup> but in this system, there is an incentive and space to paint a broader picture. The severity of the punishment is thus contingent on the accused’s willingness to contribute to the creation of a collection of facts and a narrative that is an important foundation for peace-building, as opposed to being contingent on the severity of the crime.

As well, this collection of facts, the public nature of a criminal trial and of the execution of the convicted person’s punishments, are all likely to contribute to the goal of pedagogy - of communicating in a broad manner the disapprobation of society at large and the international community of the acts that were committed.<sup>90</sup> Although not supported by empirical research, ICJ’s didactic function is often cited as a justification for these trials.<sup>91</sup> Juan Carlos Ochoa argues that the “most attainable objectives of criminal procedures for serious human rights violations are expressivist ones”<sup>92</sup> - throughout this process, criminal responsibility is established, in a way that is public and official, and thus has the possibility of reinforcing the international norm against the commission of international crimes.<sup>93</sup> Although lengthy prison sentences may indeed communicate a stronger disapprobation of the commission of international crimes, this would require sacrifice the principle-based and pragmatic benefits of alternative sanctions for the more vague and unmeasurable goal of pedagogy.

### 3.2.3 Retribution and Accountability

While not the driving force behind this system, retribution still plays a part in the SJP. Specifically, retribution is reserved for those who do not cooperate with the fact-finding aspect of the process: “The alternative sanctions for very serious offences that will be imposed to those who acknowledge truth and responsibility before the Section of Judgments, before the Sentence, will have an essentially retributive function.”<sup>94</sup> Deprivations of liberty similar to prison are

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Tribunal, prior to the pronouncing of a sentence” para 2. Naturally this should not just taken on face value, and this analysis assumes due process and independence of the judiciary.

<sup>89</sup> Wolf, *supra* note 41 at 68.

<sup>90</sup> Wolf, *supra* note 41 at 63.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra* note 20 at 60.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Final Agreement supra* note 19 at part 5.3 para 60.

reserved for those who do not give their full cooperation and acknowledge their responsibility. As noted above, retribution should not be placed at the top of the list of priorities for a judicial post-conflict mechanism. However, in some contexts, ignoring it completely may upset the balance that must be struck in order for the transitional justice project to gain public legitimacy, given the current emphasis that current international and national criminal systems place on retributive punishment. A penal process that completely rejects any retribution, in the context of peace negotiations, may be seen as an attempt to allow impunity for those who committed international crimes during the conflict.<sup>95</sup> The Colombian model attempted to strike this balance by reducing the retributive elements for pragmatic reasons.

### 3.3 Victims' Rights

The concept of victims' rights has gained increasing recognition in transitional justice situations - the argument for transitional mechanisms is more and more often framed in terms of vindicating victims' rights to justice, truth, and reparations.<sup>96</sup> These rights have been enshrined in various international instruments, most importantly the UN's Basic Principles, as well as the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Updated Principles").<sup>97</sup> Both of these instruments codify the previously existing rights<sup>98</sup> of victims of international crimes, expressed as three general rights: the right to know the truth, the right to justice, and the right to reparations. It is often expressed that achieving the goals of negotiations (peace and reconciliation) will depend on the creation of mechanisms that comply with these guidelines and principles.<sup>99</sup> This section

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<sup>95</sup> See *Negotiating Justice?* *supra* note 5 at 77 for an account of the culture of impunity in Cambodia. However, depending on differences in social context, retribution may not be a culturally important concept - see the case of Mozambique in *Negotiating Justice?* *supra* note 5 at 79.

<sup>96</sup> *García-Godos*, *supra* note 14 at 514.

<sup>97</sup> United Nations Economic and Social Council, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc E/CN.4/2005/102/Add.1.

<sup>98</sup> Kelly McCracken, "Commentary on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (2005) 1:76 *Revue Internationale de Droit Pénal* 77 at para 1. Online at <https://www.cairn.info/revue-internationale-de-droit-penal-2005-1-page-77.htm>.

<sup>99</sup> Beatriz Eugenia Suárez López, "La satisfacción del derecho a la justicia en el marco del proceso de paz colombiano: una mirada a la evolución en materia de responsabilidad penal en el contexto de un proceso de paz y de los actuales estándares internacionales" (2014) 16:2 *Estudios Socio-Jurídicos* 61 at 74.

examines the potential of the alternative sanctions model for compliance with these instruments - the agreement explicitly states, “the main purpose of the sanctions will be to satisfy the victims of the rights and consolidate peace.”<sup>100</sup> To what extent does this Colombian model give indications of being able to fulfill victims’ rights to truth, justice, and reparation?

### 3.3.1 Right to Truth

S. 24 of the Basic Principles enshrine victims’ rights to “seek and obtain information on the causes leading to their victimization ... and to learn the truth in regard to these violations.” Principle 2 of the Updated Principles set out a “right to know”, and stresses the “inalienable right to truth”. This right is recognized as one that “may be carried out by whatever means individual states may choose.”<sup>101</sup> Above, I explored the goal of “truth telling” as a goal of a peace process - this refers to a more general goal, that a country should come out of a period of transition with a full record of what happened. The right to truth, however, is conceived as a justiciable individual or group human right,<sup>102</sup> which is instrumental in leading to victims’ satisfaction, peace, and reconciliation.<sup>103</sup> An automatic recourse to prison sentences would certainly not violate victims’ right to know the truth of what happened to them or to their loved ones. However, the Colombian model sets out a system in which access to alternative sanctions is dependent on the extent to which the accused tells the truth about the violations he or she committed (see section 3.1 of this essay) - the accused thus has an incentive to give information, as opposed to hiding it. As well, this model’s granting of amnesty for political crimes “doesn’t absolve from the obligation to contribute [...] to the clarification of the truth according to the [...]”<sup>104</sup> established in this document.”<sup>105</sup> Although not set out in detail, the agreement provides for victims’ participation in the justice process, in particular, that the victims “will have to be

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<sup>100</sup> *Final Agreement supra* note 19 at part 5.3 para 60.

<sup>101</sup> Sévane Garibian, “Truth Versus Impunity: Post-Transitional Justice in Argentina and the Human Rights Turn” (2015) 6:1 *African Yearbook of Rhetoric* 63 at 72.

<sup>102</sup> *Ibid.*

<sup>103</sup> Updated Principles, Principle 2 includes, “Full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations.”

<sup>104</sup> A word appears to be missing at this point from the English translation of the Peace Agreement available on the FARC’s website.

<sup>105</sup> *Final Agreement supra* note 19 at part 5.3 (“Special Jurisdiction for Peace”) para 27.

listened to in cases of prioritization and selection of cases.”<sup>106</sup> The results of the trials and final sentences will be sent to the Truth Commission, which is mandated to make its information fully available.<sup>107</sup> Although the process of the SJP appears to place great weight on the importance of clarifying the truth, it must be carried out in a way that full information derived from the trial is ultimately accessible to all victims, not just the sentences given.

Rosalind Shaw’s research in Sierra Leone shows that punitive sanctions may, in other ways, hinder access to the truth by frustrating the work of any simultaneous TRC - people were scared to give information to the TRC because of a fear that this information would be fed to the Special Court for Sierra Leone.<sup>108</sup> The final Report included, “The Commission’s ability to create a forum of exchange between perpetrators and victims was retarded by the presence of the Special Court.”<sup>109</sup> This alternative sanctions model would arguably nourish the TRC’s work, instead of undermining it, as participants have much less to fear by giving the whole truth.

### 3.3.2 Right to Justice

Fulfilling the victims’ right to justice is the most controversial aspect of the Colombian model. The issue in this situation is: to what degree must a perpetrator be punished in order to fulfill victims’ right to justice? Is there an important link at all between these two? Principle 19 of the Updated Principles sets out, in the section entitled “The Right to Justice”, that “States shall [...] [ensure] that those responsible for serious crimes under international law are prosecuted, tried, and duly punished.” Human Rights Watch forcefully argued that “the practice and statutes of international tribunals show that this principle requires imprisonment - deprivation of liberty - for crimes against humanity and war crimes.”<sup>110</sup> Amnesty International held that the alternative sanctions “will not reflect the gravity of the crimes” and thus falls short

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<sup>106</sup> *Ibid* at para 25.

<sup>107</sup> *Ibid* at para 55 and part 5.1.1.1.4 (“Functions”).

<sup>108</sup> *Shaw, supra* note 72 at 122.

<sup>109</sup> *Ibid* at 121.

<sup>110</sup> Human Rights Watch, “Human Rights Watch Analysis of Colombia-Farc Agreement” 21 December 2015, online at <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>. Arguably, however, the practice of international tribunals does not necessarily define the manner in which states are obligated to fulfill victims’ rights to justice. As explained in Part 2, many international covenants require punishment, but do not specify what type.

of its human rights obligations.<sup>111</sup> However, principle 28 of the Updated Principles provides that while disclosing information about violations cannot exempt an accused from criminal responsibility, that “disclosure may ... provide grounds for a reduction of sentence in order to encourage revelation of the truth.” As well, the Inter-American Court of Human Rights has specified only that a punishment is a necessity in order to fulfill the right to justice,<sup>112</sup> and that “measures aimed at preventing criminal prosecution or voiding the effects of a conviction” are unacceptable.<sup>113</sup> Alternative sanctions do not necessarily run afoul of these requirements.

This issue brings up the question of how one can evaluate whether the right to justice has been fulfilled in a particular situation. One might consider whether the victims feel a sense of this right having been vindicated, or not - for example, if alternative sanctions erodes their confidence in the legitimacy of the entire peace process. This, however, will vary individual by individual, as victims are not one homogenous group with a homogenous opinion on the matter.<sup>114</sup> One might also consider the ICC’s conclusion on the matter as determinative - whether the Prosecutor decides that particular alternative sanctions are evidence of the State being “unwilling or unable genuinely to carry out the investigation or prosecution,” as per Article 17 of the Rome Statute. However, the ICC’s Deputy Prosecutor has indicated that alternative sanctions may be acceptable and thus not trigger the court’s jurisdiction, provided they are “consistent with a genuine intention to bring the convicted person to justice.”<sup>115</sup> As well, it is not clear that the ICC’s use of the term “justice” refers to the same type of justice that might satisfy this right.

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<sup>111</sup> Amnesty International, “Colombia: Peace agreement must open the door to justice” 1 December 2015, online at <https://www.amnesty.org/en/latest/news/2016/12/colombia-peace-agreement-must-open-the-door-to-justice/>.

<sup>112</sup> *Case of the Mapiripán Massacre*, Judgment of September 15, 2005. Inter-Am Ct HR, Ser C No 134 at para 216. See also *Case of Velásquez Rodríguez*, Judgement of July 29, 1988. Inter-Am Ct HR, Ser C No 4 at para 166.

<sup>113</sup> *Case of Gutiérrez-Soler v Colombia*, Merits, Reparations and Costs, 12 September 2005. Inter-Am Ct HR, para 96.

<sup>114</sup> *García-Godos*, *supra* note 14 at 494.

<sup>115</sup> James Stewart, “Transitional Justice in Colombia and the Role of the International Criminal Court” (Speech delivered at the Universidad el Rosario, Bogota, 13 May 2015).

If the ultimate goal of the right to justice is reconciliation and peace,<sup>116</sup> but this can be achieved in certain circumstances without criminal punishment, to what extent is the “right to justice” necessarily linked to a certain type or outcome of a criminal justice procedure? In 1992, Mozambique promulgated a broad amnesty law which succeeded in ending its civil war, a peace which has lasted.<sup>117</sup> Some authors recommend stepping away from a narrow conception of “justice” as referring solely to criminal justice procedures: for example, Rosalind Shaw argues that the “justice” envisioned by those who stress criminal justice in transitional periods “must extend beyond crimes of war to encompass social and economic justice in contexts of enduring structural violence.”<sup>118</sup>

### 3.3.3 Right to Reparations

The SJP contains many provisions aiming to satisfy the right of victims to reparations. According to the Basic Principles, victims have a right to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Fulfilling the requirement of “satisfaction” (Art 22) could easily be related to the type of sanction given, as it includes: “full and public disclosure of the truth”, “public apology, including acknowledgement of the facts and acceptance of responsibility”, and “judicial and administrative sanctions against persons liable for the violations”. The Colombian model’s criminal trial process, organized by the degree to which responsibility is accepted, arguably fulfills these requirements. Neither the Basic nor Updated Principles indicate any particular form of criminal procedure to fulfill this goal. The Agreement states, “once the decisions of the tribunal have been taken, it will seek to ...establish symbolic or reparative obligations for the state and organizations.”<sup>119</sup> As well, the community-service based sanctions are intended to play a double role as both punishment and reparation: “...particular sanctions ... address the need for reparation and restoration of victims of the

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<sup>116</sup> The preamble to the Updated Principles on Impunity states: “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied”.

<sup>117</sup> *Negotiating Justice?* *Supra* note 5 at 128.

<sup>118</sup> *Shaw*, *supra* note 72 at 131.

<sup>119</sup> *Final Agreement* *supra* note 19 at part 5.3, para 54.

armed conflict,”<sup>120</sup> and are to be decided on in consultation with the victims’ community.<sup>121</sup> As long as a system of alternative sanctions is accompanied by non-judicial mechanisms that provide full reparations for the victims as set out in these guidelines, alternative sanctions are not likely to have any impact on the fulfillment of this right.

Ultimately, it is likely possible for a system of alternative sanctions not only to avoid violating victims’ rights to truth, justice, and reparations, but to actively pursue these goals. The right to justice, however, must be interpreted in a broader sense, to encapsulate more than simply convictions and imprisonment.

The analysis of this section also highlights the important difference between alternative sanctions and amnesties - when amnesties are given to those who commit international crimes, there is no punishment but also no criminal trial whatsoever, foreclosing important contributions to truth-finding, pedagogy, retribution, and reconciliation, and likely violating victims’ rights to justice and reparations. Alternative sanctions given at the end of a full, legitimate, genuine and independent criminal trial are thus radically different from amnesties, and may well contribute to the goals of reconciliation and peace, and satisfy victims’ rights.

## Conclusion

This essay argues that alternative sanctions may be an acceptable way for states to move through stalemates, in the context of peace negotiations hindered by the spectre of criminal justice. This is argued on a principled as well as pragmatic basis, considering two yardsticks by which a system of alternative punishments is likely to be judged: how it achieves the goals of punishment of a particular situation, and its complicity with the requirement to fulfill victims’ rights to truth, justice, and reparation. It seems plausible, therefore, that alternative sanctions could be an appropriate solution to moving through stalemate situations by allowing states to

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<sup>120</sup> *Ibid*, at “Sanctions applicable to persons that comprehensively acknowledge truth in the Chamber for the Acknowledgement of Truth and Responsibilities”.

<sup>121</sup> *Ibid*.

mould the sanctions to achieve their particular goals, based on the social, legal, and historical context, in a way that does not violate victims' rights.

This conclusion, however, does not change the fact that to many people, a lack of imprisonment, or a short prison sentence for those who have committed international crimes is simply wrong. This reflects what Thibault Slingeneuer refers to as “la rationalité pénale moderne”, by which “seul le mal concret et immédiat causé au déviant peut produire un bien pour le groupe”.<sup>122</sup> Del Vecchio wrote,

La justification intrinsèque de la peine se trouve dans la fonction réparatrice et réintégratrice du droit lésé - rendre le mal pour le mal, dans la même mesure, est la manière la plus facile, mais non la plus vraie, de rétablir l'équilibre détruit: le mal ne se répare vraiment que par le bien ... a une action injuste, on doit opposer non pas une réaction par le mal, mais bien une réaction par le bien, c'est-à-dire une activité s'exerçant en sens contraire de la part de l'auteur du délit, activité qui en annule ou en réduise les effets, dans la mesure où la chose est possible.<sup>123</sup>

This restorative rationality is not the status quo in ICJ, nor in international law in general. Alternative sanctions may initially be used to respond to international criminality for pragmatic reasons. However, if they are carried out genuinely and with due regard for the goals and rights set out above, they may eventually become co-constitutive of a general trend away from “la rationalité pénale moderne”, and towards recognition of the place of restorative approaches to international criminality in the field of ICJ.

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<sup>122</sup> *Slingeneuer*, *supra* note 38 at 481.

<sup>123</sup> Giorgio del Vecchio, “La justice, la vérité: essais de philosophie juridique et morale” (1955) 7:4 *Revue internationale de droit comparé* 900, as cited in *Slingeneuer*, *supra* note 38 at 489 .



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