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The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts

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Abstract—Recently, the idea that criminal sanctions should be seen as an essential mechanism within transitional justice for dealing with collective violence has gained increasing traction. The article focuses on the purposes of criminal law and punishment, and what they can achieve in relation to victims and society in transitional contexts. As to victims, it proposes a reorientation of the victim-oriented theories of punishment towards consequentalism and the adoption of a wider concept of justice. As to society, it argues that in transitional contexts the main purpose is positive general prevention. Under both perspectives, the conclusion is that victims' interests should be weighed up against other social aims and that a flexible approach to the prosecution and/or punishment of offenders should be permitted, in the search for the best optimum means possible to guarantee the ultimate aim of the maintenance of social order.

Keywords: purposes of criminal law, transitional justice, victim-oriented theories of punishment, retributivism, consequentialism, restorative justice.

1. *Introduction*

In recent years, the idea that criminal sanctions should be seen as an essential mechanism within transitional justice[1] for dealing with collective violence has

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[1] We understand transitional justice as the set of legal and political measures that a society may apply in order to overcome a situation of (generally inter-group) conflict where collective violence has been experienced. Whereas the concept originally developed as referring to the transitional processes after a dictatorship (such as in Latin-American countries in the 1980s, or in Post-Communist Eastern countries) or to post-conflict contexts (see Ruti Teitel, *Transitional Justice* (OUP 2000)), its recent evolution has broadened its scope, by expanding it to situations of ongoing armed conflicts like the Colombian experience (see Rodrigo Uprimny Yepes et al, *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia* (DeJusticia 2006) 14) and even to experiences of collective violence within democratic regimes (Amaia Alvarez Berastegi, 'Transitional Justice in

gained increasing traction. The theory has been given impetus by various phenomena, noteworthy among which are the prominence now given to victims in criminal policy[2] and the pressure from international law. In this context, both the development of international criminal law with the maxim of the 'fight against impunity' and the case law of human rights courts have made a contribution.[3] The latter, especially the Inter-American Court of Human Rights (IACtHR), has consolidated victims' rights to truth, justice, reparation and non-repetition, as well as a maximalist interpretation of the right to justice as a right to the punishment of criminals.[4]

Settled Democracies: Northern Ireland and the Basque Country in Comparative Perspective' (2017) 10 Critical Studies on Terrorism 542), all situations where a proper 'transition' lacks: see Joanna R Quinn, 'Whither the "Transition" of Transitional Justice?' (2014–15) 8 Interdisciplinary Journal of Human Rights Law 63. Therefore, we maintain a broad concept of transitional justice with regard to both its scope and its goals. In contrast to other definitions that focus exclusively on transitional justice being instrumental to repair victims of serious human rights violations (see Naomi Roth-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roth-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth Versus Justice* (CUP 2006) 1; or the definition offered by the International Centre for Transitional Justice: 'Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response' <www.ictj.org/about/transitional-justice> accessed 1 February 2019), we share the view that it furthers a wider set of purposes, namely, overcoming a conflictive past (or present), reconciling the society, and consolidating peace, democracy and the rule of law. In a similar vein, see Marc Engelhart, 'Objetivos de la Justicia de transición' in Pablo Galáin Palermo (ed), *¿Justicia de Transición?* (Tirant lo Blanch 2016) 35ff; Ezequiel Malarino, 'Transición, derecho penal y amnistía. Reflexiones sobre la utilización del derecho penal en procesos de transición' (2013) 9 Revista de Derecho penal y Criminología 205; Bronwyn A Leebaw, 'The Irreconciliable Goals of Transitional Justice' (2008) 30 Hum Rts Q 95, 98ff; Kimberly Theidon, 'Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia' (2007) 1 International Journal of Transitional Justice 66. For a deeper analysis of the evolution and the various experiences of transitional justice (as well as on the differences among their respective challenges, priorities and outcomes), see, among others, Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harv Hum Rts J 69; Roth-Arriaza (ibid) 1ff.

[2] Cornelius Prittwitz, 'The Resurrection of the Victim in Penal Theory' (1999) 3 Buffalo Criminal Law Review 109; Pedro Cerruti, 'Procesos emocionales y respuestas punitivas: acerca del activismo penal de las víctimas del delito' (2009) 20 Revista Electrónica de Psicología Política 15; Ana Isabel Cerezo Domínguez, *El protagonismo de las víctimas en la elaboración de las leyes penales* (Tirant lo Blanch 2010) 37ff; Luca Lupária and Raphaële Parizot, 'Which Good Practices in the Field of Victim Protection?' in Luca Luparia (ed), *Victims and Criminal Justice. European Standards and National Good Practices* (Wolters Kluwer 2015) 333.

[3] Karen Engle, Zinaida Miller and Dennis Davis, *Anti-impunity and the Human Rights Agenda* (CUP 2016); M Cherif Bassiouni, 'Victims' Rights' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-conflict Justice*, vol I (Intersentia 2010) 599ff; Kai Ambos et al (eds), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, vol I (Konrad-Adenauer Stiftung (KAS) 2010) and vol II (KAS 2011); Javier Chinchón Álvarez, *Derecho internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana* (Parthenos 2007) 235ff, 434ff.

[4] Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies' (2012) 12 International Criminal Law Review 665. Some scholars have criticised this interpretation as being weakly and questionably grounded in human rights treaties and lacking deeper questioning into the rationale and purposes of criminal law. See Jesús María Silva Sánchez, 'Una crítica a las doctrinas penales de la "lucha contra la impunidad" y del "derecho de la víctima al castigo del autor"' (2009) 11 Revista de Estudios de la Justicia 35; Daniel R Pastor, 'La ideología penal de ciertos pronunciamientos de los órganos del sistema interamericano de derechos humanos: ¿garantías para el imputado, para la víctima o para el aparato represivo del Estado?' in Ambos et al, *Sistema interamericano* vol II (n 3) 481. The European Court of Human Rights (ECtHR) has traditionally held a more cautious view, although recently it seems to come closer to the position of its American counterpart. See Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 118ff; Kai Ambos and Laura Böhm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos ¿Tribunal tímido y tribunal audaz?' in Ambos et al, *Sistema interamericano* vol II (n 3) 55ff; Francesco Viganó, 'Sobre las obligaciones de tutela penal de los derechos fundamentales en la jurisprudencia del TEDH' in Santiago Mir Puig and Mirentxu Corcoy Bidasolo (eds), *Garantías constitucionales y Derecho penal*

The concept of punishment as being the only possible form of reparation for serious human rights violations, as a means of satisfying victims, or even as the victims' right, is a significant challenge to the traditional understanding of criminal law. First, it implies ceasing to conceive of criminal law as a tool for social control, designed originally to protect legal interests for peaceful social coexistence; rather, seeing it as a mechanism designed for the reparation of victims' rights.[5] This involves abandoning the idea of criminal law as *ius puniendi*, as a right of the state, and instead seeing it as a state obligation, *officium puniendi*.[6]

Such a notion, in turn, means eliminating the set of non-exculpatory defences and mitigating circumstances based on merely political considerations, which take into account the efficacy of criminal law itself or the prevalence of other public interests, irrespective of the perpetrator's culpability.[7] These defences and mitigating factors appear frequently in national laws[8] and allow a rational use of criminal law, based on the premise that the latter is an instrument for the protection of legal interests and may be set aside when other measures grant a more satisfactory fulfilment of this aim.[9]

Besides that, and more importantly, the new conception of punishment as a state obligation diminishes the rights and guarantees of the accused—created as a containing wall against the repressive apparatus of the state—to merely individual interests over which, furthermore, according to this ideology, the victims' interests must always prevail.[10]

europeo (Marcial Pons 2012) 320ff; Carmen Tomás-Valiente Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH' (2016) 3 InDret 6ff.

[5] Silva Sánchez (n 4) 54; Alicia Gil Gil and Elena Maculan, 'Responsabilidad de proteger, derecho penal internacional y prevención y resolución de conflictos' in Miguel Requena (ed.) *La seguridad: un concepto amplio y dinámico* (IUGM 2013) 35.

[6] By talking about the role of criminal law and of the goals of punishment, we do not underestimate the differences between the two concepts, even though some scholars in continental literature question this differentiation as a consequence of the rise of the expressive, non-consequentialist theories of 'general positive prevention': Günther Jakobs, *Strafrecht, Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre* (2nd edn, De Gruyter 1998) 1/1ff, 2/22ff; Winfried Hassemer, *Hauptprobleme der Generalprävention* (Metzner 1979) 40ff. An analysis of this topic goes beyond the scope of this article; for a wider view on this discussion, see Rafael Alcácer Guirao, *Los fines del Derecho penal* (Universidad Externado de Colombia 2001) 19ff. What we want to point out here is simply that to assign a new nature and new purposes to punishment will also change the nature and goals of criminal law, and, conversely, pursuing new purposes through criminal law entails assigning new aims to punishment.

[7] On non-exculpatory defences from the Anglo-Saxon doctrine, see Paul H Robinson and Michael Cahill, *Criminal Law* (2nd edn, Wolters Kluwer 2012) 405–35; Paul H Robinson et al, 'Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment' (2012) 65 Vand L Rev 737. In the continental legal tradition, these circumstances fall within a separated element that forms part of the analytical structure of the criminal offence, named 'punishability': see eg Alicia Gil Gil et al, *Derecho penal. Parte general* (2nd edn, Dykinson 2015) 117ff.

[8] eg testimonial and bargained immunity, or sentence mitigation for cooperation with the criminal justice system.

[9] José Núñez Fernández, 'Algunas reflexiones sobre la punibilidad en el tratamiento jurídico penal del terrorismo' in Alicia Gil Gil and Elena Maculan (eds), *La influencia de las víctimas en el tratamiento jurídico de la violencia colectiva* (Dykinson 2017) 243ff.

[10] Silva Sánchez (n 4) 169; Malarino (n 4); Pastor (n 4); Jean Pierre Matus Acuña, 'Víctima, idealismo y neopunitivismo en el Derecho Penal internacional' (2013) 81 Revista Nuevo Foro Penal 139.

It is not the purpose of this article to look at all of these consequences in depth.[11] We wish to call attention, above all, to the fact that this change of orientation with regard to the use and meaning of criminal law is often invoked, without a prior analysis of its real capacity, to fulfil the aims assigned to it by these doctrines. That is to say, even before verifying whether the drawbacks of this doctrine are compensated by the benefits it may bring, we must analyse whether criminal law is indeed able to fulfil the purposes attributed to it when punishment is conceived of as a state's obligation and a victim's right.

Furthermore, this question must be analysed within the framework of the broadest aims of transitional justice. We start from the premise that the mechanisms for recovery from a situation of collective violence involving serious human rights violations must cover diverse interests and aims, the compatibility of which may be challenging.[12] Paying attention to victims and their rights is a condition *sine qua non* for the resolution of the conflict. However, a partial view of the problem, which covers only a possible claim for retributive justice by the victims, can lose sight of the other interests in play; it may give rise to the ultimate frustration of the objectives of transitional justice, namely, those of reconciliation, reconstruction of the social fabric, recovery from a conflictive past and consolidation of the new social order. Moreover, seeing criminal punishment as sacred—under the maxim of the fight against impunity—may hide the fact that victims' needs are varied, that criminal law rarely fulfils them, and that punitive solutions are prescribed in general without a prior analysis of the purposes of punishment and what it can actually achieve.

The present article is a contribution towards filling this gap: analysing the purposes of criminal law and punishment, and what they can achieve in relation to victims (section 2) and society (section 3) in transitional contexts. What we hope to achieve is to demonstrate (section 4) that there is no victims' right to punishment and that criminal law is not a sufficient—nor, on occasions, the most appropriate—measure for providing an adequate response to the complex web of the aims of transitional processes. Our hypothesis is that the rise of the idea that the full punishment of criminals has to be an essential component of transitional justice overburdens criminal law with aims that it is unable to fulfil and/or that are more satisfactorily achieved through the application of other mechanisms. In contrast, criminal law and punishment should always be considered as just *one* of the many tools that states have at their disposal, even in transitional contexts, in the search for the best possible solution to fulfil the ultimate aim of maintaining social order, that is, the set of protected legal interests in a society.

[11] For a detailed study, see Alicia Gil Gil and Elena Maculan (eds), *El papel de las víctimas en el tratamiento jurídico de la violencia colectiva* (Dykinson 2017).

[12] Leebaw (n 1) 95.

2. *The Aims and Capacities of Criminal Law and Punishment in Relation to Victims*

A. *Victim-oriented Theories of Punishment*

The first aspect we shall address in our study is that of the supposedly beneficial effects that criminal punishment of the offender may have on the victim. We shall analyse the various theories elaborated in criminal law and in philosophy that may in some way serve as a theoretical support to the idea of punishment as a means to satisfy the victim or even as a victim's right.

(i) The crime as a moral requirement or a demand for justice: classical retributionist theories

The victim-oriented theories of punishment share with Kant's conception of criminal sanction the notion of punishment as an imperative, or obligation (of society, of the state), as well as the frequent appeal to justice as a foundation, the demand for talionic punishment[13]—regardless of political and criminal considerations, and of the possible absence of preventive needs—and the requirement of the full execution of the sentence imposed. For this reason, certain authors have labelled the doctrines that promote the state's duty to punish and the victims' right to the punishment as retributionist.[14]

However, it should be noted that there are significant differences between the two doctrines.[15] The classical theory of retribution focuses on the offender and on the fact that he or she deserves to be punished;[16] therefore, its perspective is centred on the past. The victim-oriented theory of criminal punishment focuses instead on the present, on the victims and their satisfaction.[17]

Furthermore, retributionist theories, in both their classical and more modern versions, have been widely rebutted by scholars.[18] Among many other criticisms, it is argued that these theories, seeking a metaphysical foundation for punishment, forget that the foundation of the latter lies within a complex legal system. Critics point out that the conception of punishment as an evil and a purpose in itself is not rational and that one evil cannot be obliterated or compensated by another.[19]

[13] Immanuel Kant, *Die Metaphysik der Sitten* (Modes und Baumann 1838); Cerezo Domínguez (n 2) 81.

[14] Julio González Zapata, 'La justicia transicional o la relegitimación del derecho penal' (2007) 31 Estudios Políticos 23, 27; Carlos S Nino, *Radical Evil on Trial* (Yale UP 1996) 111–12.

[15] Prittwitz (n 2) 118.

[16] Bernardo Feijoo Sánchez, *La legitimidad de la pena estatal* (Iustel 2014) 24ff.

[17] Silva Sánchez (n 4) 56.

[18] Ulrich Klug, *Skeptische Rechtsphilosophie und humanes Strafrecht*, vol 2 (Springer 1981) 149ff; Bernd Schünemann, 'Aporien der Straftheorie in Philosophie und Literatur—Gedanken zu Immanuel Kant und Heinrich von Kleist' in Cornelius Prittwitz et al (eds), *Festschrift für Klaus Lüderssen* (Nomos 2002) 327.

[19] Feijoo Sánchez (n 16) 29ff; Klug (n 18); Schünemann (n 18).

(ii) Punishment as a right of the victim generated as a consequence of the crime: the appeal to historical evolution

Some authors have tried to justify the victim's right to the punishment of the offender by appealing to the evolution from vengeance to punishment.[20] It is argued that refraining from private justice and assigning to the state the monopoly on punishment means that the state has a duty to exercise it. Such an argument involves affirming a kind of natural right, not only to self-protection, but also to punishment, the existence of which is more than doubtful.[21] Additionally, more than a millennium after its consolidation, state punishment can no longer be perceived as an imaginary act of conferring by the victim; rather, it is the outcome of the will of the democratic legislator.

The main problem with these theories lies, nevertheless, in the fact that the appeal to tradition or historical evolution cannot be a substitute foundation for the imposition of punishment. In other words, evidence of historical evolution from the institution of vengeance to punishment does not explain why and for what one is punished, whether then or now. This argument would require us to investigate the purposes of the archaic institution of vengeance, in order to determine whether this could assist us in uncovering the purposes of punishment in modern times.

(iii) Punishment as a means of producing beneficial effects on the victim

Some authors have argued that the purpose of punishment is to give satisfaction to the victim, in the sense that it makes the victim feel 'better'.[22] The beneficial effects of punishment are usually said to include the recognition that the victim has suffered an unjust act and that what has occurred is neither a mere accident, the product of bad luck, nor the consequence of one's own errors.[23] The punishment of the offender also offers the symbolic assurance that it will not recur, thereby protecting the victims' sense of safety[24] or self-confidence[25] and preventing them from feeling guilty.[26] Lastly, it expresses the sympathies and solidarity of society,[27] and it furthers the consequent 're-socialisation' or reintegration of the victim.[28]

[20] Adil A Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (2005) 9 Buffalo Criminal Law Review 273.

[21] Thomas Weigend, '„Die Strafe für das Opfer"?—Zur Renaissance des Genugtuungsgedankens im Straf- und Strafverfahrensrech?—Zur Renaissance des Genugtuungsgedankens im Straf- und Strafverfahrensrech' in *Zeitschrift für rechtswissenschaftliche Forschung*, vol 1 (Nomos 2010) 39, 45.

[22] On the defenders of this idea within the common law tradition, see Whitley Kaufman, *Honor and Revenge: A Theory of Punishment* (Springer 2013) 50ff.

[23] Klaus Günther, 'Die symbolisch-expressive Bedeutung der Strafe' in Cornelius Prittwitz et al (eds.) *Festschrift für Klaus Lüderssen* (Nomos 2002) 205, 218; Jan P Reemtsma, *Das Recht des Opfers auf die Bestrafung des Täters –als Problem* (CH Beck 1999) 26.

[24] Wilfried Holz, *Justizgewähranspruch des Verbrechensopfers* (Duncker & Humblot 2007) 134ff.

[25] Günther (n 23) 208ff.

[26] Tatjana Hörnle, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht' (2016) 19 Juristenzeitung 950, 955.

[27] Hörnle (n 26).

[28] Reemtsma (n 23) 27.

Scholars, however, have cast doubt on the capacity of punishment to fulfil all of these purposes.[29] In reality, the effects of the criminal offence—and of the criminal trial—are different for each victim,[30] depending on a wide variety of circumstances. Moreover, many of the desirable effects attributed to punishment by the supporters of these theories are achievable by other means that do not imply the imposition of an evil.[31] In addition, when one wishes to show sympathy towards, and solidarity with, an individual, their acts should be better directed towards the person they wish to comfort and not towards someone else. Punishment, as the imposition of an evil, goes beyond solidarity and cannot be explained by it.[32]

Moreover, this argument faces further difficulties: if the sole purpose of punishment is to offer the victim satisfaction, then its harshness should be determined exclusively on the ground of the victim's needs, which are different for each victim.[33] Were this criterion applied, sentencing would infringe the principles of legal certainty and equality before the law.[34]

Those who see the satisfaction of certain interests of the victim, together with other social aims, as one of the possible aims (or desirable effects) of punishment ally themselves to consequentialist theories in the traditional sense, or to mixed or unitary theories of punishment.[35] These scholars have no option but to admit that the various purposes may conflict with each other and, in case they are weighted, may have to give way.[36] Therefore, these authors cannot affirm that the victim has a right to punishment as such.

Those who, on the contrary, deem the victims' satisfaction as the sole purpose of the punishment can claim a right to punishment, but they cannot explain why exactly this purpose (giving satisfaction or happiness to the victim) must prevail over any other.[37]

In conclusion, we cannot claim the existence of a right to punishment[38] solely on the basis of its possible beneficial effects for victims.[39]

[29] Weigend (n 21) 48ff.

[30] Darío Páez Rovira et al, 'Afrontamiento y violencia colectiva' in Darío Páez Rovira et al (eds), *Superando la violencia colectiva, construyendo cultura de paz* (Fundamentos 2011) 279, 293. On the inability of punishment to 'heal' the victim in many cases, see also, with subsequent bibliography, Hörnle (n 26) 955.

[31] Prittwitz (n 2) 120–1; Michael Wenzel and Tyler Okimoto, 'How Acts of Forgiveness Restore a Sense of Justice: Addressing Status/Power and Value Concerns Raised by Transgressions' (2010) 40 European Journal of Social Psychology 401; M Ángeles Maitane Arnoso et al, 'Violencia colectiva y creencias básicas sobre el mundo, los otros y el yo: impacto y reconstrucción' in Páez Rovira et al (n 30) 247.

[32] Silva Sánchez (n 4) 56.

[33] Hörnle (n 26) 956 does not agree with this, arguing that the punishment envisaged in any criminal code for each offence is already sufficient to comply with the function of expressing solidarity. From this we can deduce that, in her view, criminal punishment is not aimed to satisfying the needs of each single victim.

[34] Alicia Gil Gil, 'Sobre la satisfacción de la víctima como fin de la pena' (2016) 4 InDret 1ff.

[35] Holz (n 24) 200; Hörnle (n 26) 956.

[36] Kaufman (n 22) 50ff.

[37] Kaufman (n 22) 51.

[38] This right is refuted by Holz (n 24) 129, who exclusively defends a right of access to the criminal proceeding, finding support mainly on the basis of the case law of the ECtHR. Weigend (n 21) 46 recalls that the German Supreme Court has clearly stated that there is no right of the victim to the criminal prosecution of the offender.

[39] Weigend (n 21) 57.

(iv) Punishment as constituting the elimination or cessation of a harm to the victim as differentiated from the harm to a legal interest

Contrary to (or even together with) the previous positions, we find some others, along similar lines yet with distinctive nuances, which argue that a criminal offence always causes a harm to the victim, further and distinct from the specific harm caused to the protected legal interest. The only way this harm may be ended or eliminated would be by imposing a criminal punishment on the offender. It is thus argued that criminal punishment fulfils the function of putting an end to a disorientation in social life suffered by the victims, where this may arise from a lack or loss of confidence in the law if no punishment were imposed.[40] Others maintain that its purpose is to liberate the victim from the offender's domination,[41] restoring or reaffirming his or her social worth,[42] or to put an end to an ongoing harm to his or her honour, which continues as long as the offender is not prosecuted and sanctioned.[43] There has also been an attempt to relate the theory of the victim-oriented punishment to positive general prevention, by stating that criminal sanction pursues the reaffirmation not of the legal values infringed by the offence—as is claimed by the positive general prevention[44]—but of the victims themselves.[45] In other words, criminal punishment is deemed to seek the 're-socialisation of the victim'.[46]

The divergence from the position described in the previous section would be founded on the belief that it is precisely the absence of the punishment that causes the continuing perpetration of the harm, from which arises the state's duty to punish[47] in order to put an end to this harm. This argument reminds us of the Kantian theory,[48] which holds that a society that fails to punish is accomplice in the crime.[49] Furthermore, it follows the doctrine of human rights courts, in arguing that the state commits a new and independent violation of human rights when it fails to punish a primary violation thereof.

These arguments usually present the same defects that have already been denounced in interpretations discussed in the previous section, namely, that the need to equalise the victim and the offender in the evil suffered lacks a rational explanation; also, that there is no demonstration that the expression of concern for the victims and their suffering requires the imposition of an evil

[40] Reemtsma (n 23) 26.
[41] George P Fletcher, 'The Place of Victims in the Theory of Retribution' (1999) 3 Buffalo Criminal Law Review 51.
[42] Jeffrie Murph and Jean Hampton, *Forgiveness and Mercy* (CUP 1988) 132; for further references, see Heather J Gert et al, 'Hampton on the Expressive Power of Punishment' (2004) 35 Journal of Social Philosophy 79.
[43] Kaufman (n 22) 117ff.
[44] See also below, section 3A(ii).
[45] Fletcher (n 41) 58.
[46] Reemtsma (n 23) 27. On all these theories in more depth, see Gil Gil (n 34).
[47] Reemtsma (n 23) 27.
[48] Kant (n 13) 127ff.
[49] Fletcher (n 41) 60ff.

on the offender. Very much to the contrary: one asks oneself how the causing of an evil, ie imprisonment, to another can relieve the suffering of the victim, and whether reparatory measures centred on the victims themselves would not be more effective for this purpose.[50] How can the exclusion of the offender return the victim to society?[51]

It is also unclear up to what point and in which crimes the victims suffer a trauma, and of what kind[52] or for what reason the recovery from this trauma necessarily requires the imposition of an evil on the offender. In reality, the victim's expectations in relation to the declarations of solidarity of the rest of society, an important factor for overcoming trauma and for avoiding its desocialising effect, would also vary depending on the method adopted by the victim to deal with the crime. The victim who reacts to the trauma with a confrontational strategy expects that society's solidarity will consist of sharing this strategy in relation to the crime. However, social psychology has demonstrated that not all victims confront crime using such strategies, nor that they are likely to be the optimum strategies for overcoming or avoiding psychological disorder and suffering.[53]

The supposed domination by the perpetrator or the humiliation or subjection of the victim are no more than a subjective response experienced by some (not even the majority) of the victims. This response should not be turned into a reality by virtue of a legislative choice, nor could it constitute the foundation of criminal prosecution. The same is true of the argument that attempts to endow punishment with the restoration of the victim's honour, worth or dignity.[54] Fortunately, this is not in accordance with the current conception of honour and dignity. If it were indeed to be accepted, it would send an utterly incorrect message. Where, historically, within the ambit of private vengeance, the absence of a physical response to the crime through punishment was sanctioned socially with a loss of honour, this was because in a non-institutionalised system of control few alternative ways existed of obliging compliance with the so-called secondary rule, which addressed all of the members of the community.[55] Nowadays, however, these theories, affirming that the victim's restoration of

[50] Silva Sánchez (n 4) 53. Zedner also warns against the possible conflict between the claim for compensation, under a reparative approach, and penalties belonging to the classic criminal law paradigm, such as custody: see Lucia Zedner, 'Reparation and Retribution: Are They Reconciliable' (1994) 57 MLR 228, 247.

[51] In similar terms, see Jan P Reemtsma, *Im Keller* (6th edn, Rowohlt 2012) 216; against, Prittwitz (n 2) 129.

[52] Prittwitz (n 2) 124–5.

[53] As indicated by Prittwitz (n 2) 128, it is preferable simply to talk of the beneficial effects that punishment may have on the victim and not of 'compensation', 'aid for survival', 'cessation of a harm', etc.

[54] For a critical comment on this argument, see Gil Gil (n 34).

[55] According to Santiago Mir Puig, *Derecho penal. Parte General* (10th edn, Tirant lo blanch 2015) 67ff, the secondary rule is the rule that envisages a sanction of the violation of a primary rule, whereas the primary rule is that which expresses a mandate or prohibition on a certain action. For instance, if we recall the old Barbaricino Code, being the primary rule 'do not kill', the secondary rule was 'to punish those who kill with the death penalty'. Therefore, infringement of the primary rule brings with it, according to this example, the death penalty, whereas infringement of the secondary rule brings with it the punishment of dishonour. This is clearly confirmed by art 1 of the Barbaricino Code, which imposed on every citizen the duty of vengeance. Accordingly, anyone who renounced vengeance was not considered a man of honour. See Lorenzo Passerini

honour, value or dignity depends on the imposition of a punishment, instead of correcting moral judgments or erroneous attributions of meanings, would reinforce a false claim: that a correlation exists between power, on the one hand, and the value or honour of a human being, on the other.[56]

B. *Alternative Proposal*

(i) Reorientation of victim-oriented theories on punishment towards a consequentialist approach

In our opinion, the—at least abstract—potential of punishment to produce beneficial effects for the victims cannot be refuted. The effects consist principally of demonstrating the injustice suffered by them and offering a certain degree of non-repetition guarantees, thereby assuaging their need for justice, restoring their confidence in the law and in society, and encouraging their non-desocialisation. We must acknowledge it as evident that, as human beings, our sense of justice leads us to require that bad acts be punished. However, we must not forget that these feelings respond to the calculated reciprocity mechanism,[57] present not only in the human being, but also in other species with social behaviours.[58] This mechanism, which acts as a preventive tool, ultimately serves to promote the conservation of the group and of the individual as a social being.[59] In other words, even when the punishment does serve to satisfy the needs for reciprocity that are so firmly inherent in our system of social interrelations, this purpose is ultimately instrumental. For this reason, the victims' satisfaction may never be extrapolated and placed as either a purpose in itself or superior to the classic preventive aims, nor can it eclipse or replace the main rationale of criminal law, that is, to protect legal interests and the social order.[60]

Glazel, 'La semántica nomotrofica della vendetta' in Giuseppe Lorini and Michelina Masia (eds), *Antropologia della vendetta* (ESI 2015) 169, 175.

[56] Gert et al (n 42) 84.

[57] Raffaele Caterina, 'La reciprocià: alle origini della vendetta e dello scambio' in Giuseppe Lorini and Michelina Masia (eds), *Antropologia della vendetta* (ESI 2015) 205, 213.

[58] ibid 212; Filippo Aureli et al, 'Kin-oriented Redirection among Japanese Macaques: An Expression of a Revenge System?' (1992) 44 Animal Behaviour 283.

[59] See Émile Durkheim, *De la division du travail social* (Les Presses universitaires de France 2008). Nowadays, we find various studies (from anthropology, psychology and the philosophy of law) that support the idea of a preventive ground of both punishment (even when the latter is understood as retribution) and vengeance itself. These studies have found that both punishment and vengeance are based on the calculated reciprocity mechanism. See eg Napoleon Chagnon, 'Life Histories, Blood Revenge, and Warfare in a Tribal Population' (1988) 4843 Science 985; Dale T Miller, 'Disrespect and the Experience of Injustice' (2001) 52 Annual Review of Psychology 527, 541; Mario Gollwitzer and Markus Denzler, 'What Makes Revenge Sweet: Seeing the Offender Suffer or Delivering a Message?' (2009) 45 Journal of Experimental Social Psychology 840, 843; Olimpia G Loddo, 'Reciprocità aspettative e aspettative di reciprocità nella vendetta' in Giuseppe Lorini and Michelina Masia (eds), *Antropologia della vendetta* (ESI 2015) 217; Daniel Rodríguez Horcajo, *Comportamiento humano, y pena estatal: disuasión, cooperación y equidad* (Marcial Pons 2016) 308ff; Glazel(n 55) 171; Gil Gil (n 34) 31.

[60] In a similar sense, Rodríguez Horcajo (n 59) 308ff highlights how the feeling of justice is the result of the standardisation of an evolutionary positive reaction. In his opinion, what remains of retribution in the rationale of punishment would be just a willingness towards a behaviour (the punishment) which in turn pursues a favourable goal.

In conclusion, we may state that a strategy that attempts to satisfy all of the interests in play in order to build a sustainable peace must not neglect to respond to past crimes. Having said this, the state, through its monopoly on violence, may in our opinion moderate the understandable and legitimate instincts and desires for reciprocity of the victims and of the society as a whole and submit these to certain rational limits. The state should attempt to give satisfaction to those desires through other mechanisms and weigh them against other social aims, and even against other victims'—equally legitimate—interests in the search for the optimum means possible to guarantee the ultimate aim of the maintenance of social order.[61]

(ii) Requiring a wider concept of justice for victims

When talking of victims' right to justice, it is essential to require a broader concept of justice, one not limited to the imposition of a punishment, but one that opens its doors to the enormous possibilities offered by restorative justice.[62] Specifically, restorative justice is characterised by seeking the reparation of the harm caused to the victim by the crime, rather than merely the punishment of the offender, and it attempts to overcome certain deficiencies in the traditional system of retributive justice.[63]

The various restorative justice mechanisms, eg mediation, are designed such that the victim has a voice in the conflict resolution process and is thus able to express his or her needs and obtain reparation. This is an attempt to favour 'de-victimisation', also assuaging feelings of a lack of understanding or of guilt. Furthermore, restorative justice mechanisms contribute—and do so more effectively than conventional criminal justice—to the acknowledgement of responsibility by the offender, to his or her re-socialisation and to the restoration of interpersonal relations.[64] Lastly, as some authors have remarked, restorative justice not only has an impact at the interpersonal

[61] Jesús María Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Atelier 2018) 195ff also points out the need for criminal law to be subordinated to other interests that are alien to its scope. In his view, this explains why it is legitimate to reduce the penalty when the offender performs certain *post delicto* conducts, such as confession: ibid 122ff.

[62] John Braithwaite, *Restorative Justice & Responsive Regulation* (OUP 2002) 16ff; Josep Tamarit Sumalla, 'Comisiones de la verdad y justicia penal en contextos de transición' (2010) 1 InDret 21; Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge, 2016); Wenzel and Okimoto (n 31) 413ff. However, the scope and definition of restorative justice are still heavily contested. See eg Andreas von Hirsch, Julian V Roberts and Anthony E Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing 2003).

[63] Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice* (Willan 2007) 5ff; Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley 2007) 32; Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated* (Good Books 2014) 4ff; Marina Sanz Díez de Ulzurrun, 'Justicia restaurativa y mediación penal' in Gil Gil and Maculan (n 9) 121; Gema Varona Martínez, 'El papel de las víctimas respecto de los mecanismos utilizados en la justicia transicional' in Gil Gil and Maculan (n 9) 145 (especially at 163ff). Yet, the incorporation of a restorative approach into the classic retributive paradigm also poses some practical and conceptual challenges, as suggested by Zedner (n 50) 238ff.

[64] Howard Zher, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990); Johnstone and Van Ness (n 63); Liebman (n 63) 32.

level, but may also have broader transformative effects on institutions and community as a whole.[65]

Social psychology has also questioned the affirmation that only criminal punishment, based on the idea of just deserts, re-establishes justice. A broader concept of justice is needed; it has been argued that, from the victims' own point of view, their need for justice is better satisfied by an apology from the offender, an acknowledgement of the injustice committed and the acceptance of responsibility than by the unilateral imposition of a punishment by the state. Various studies have demonstrated that restorative measures such as saying 'Sorry' have a reparatory effect as to the sense of justice.[66] Besides that, with these tools, the legal values harmed by the crime are reaffirmed. The situation of asking for forgiveness expresses, first, that the offender shares those values and, secondly, an acknowledgement of and restoration of the dignity of the victims. In conclusion, these studies state that punishment may be seen as insufficient or as unnecessary for restoring justice for victims.[67]

It is worth clarifying that we do not deem restorative justice to constitute an alternative to the traditional criminal justice system.[68] Rather, it could be a mechanism complementary to the latter, one that allows the incorporation of new elements that humanise the system and favour the fulfilment of its aims. At the same time, when restorative justice is applied, there may be evidence of a reduced need for punishment if some of the purposes of the punishment are deemed to be at least partially fulfilled. In such circumstances, there is an argument to be made in favour of the reduction of the criminal punishment, or its replacement by an alternative sanction, a conditional suspended sentence or probation.[69]

These ideas run counter to the requirement of the punishment's being in any event proportional to the gravity of the crime and the degree of culpability, which prevents it from being mitigated by any other consideration.[70]

[65] M Kay Harris, 'An Expansive, Transformative View of Restorative Justice' (2004) 7 Contemporary Justice Review 117, arguing that restorative justice 'necessarily must address community well-being along with that of the specific parties to crime and conflict' (120); Zehr (n 64) s 4; Dennis Sullivan and Larry Tifft, *Restorative Justice: Healing the Foundations of our Everyday Lives* (Willow Tree Press 2001), pointing out that restorative justice is 'concerned with processes of healing but also with transforming the social institutions' (ix–x); Dennis Sullivan and Larry Tifft, 'The Transformative and Economic Dimensions of Restorative Justice' (1998) 22 Humanity & Society 38.

[66] Wenzel and Okimoto (n 31) 402–3, 414.

[67] Wenzel and Okimoto (n 31).

[68] Although some penal abolitionists have made precisely this claim. See eg Herman Bianchi, *Justice as Sanctuary: Toward a System of Crime Control* (Indiana UP 1994) 10ff; Louk Hulsman and Jacqueline Bernat de Celis, *Peines perdues. Le système pénal en question* (Le Centurion 1982) 45. This is currently a minority view, though, which we do not share. In contrast, we agree with Zehr's idea that 'real world justice' may be seen as a 'continuum' from criminal justice to restorative justice, and that these forms of justice should be complementary: Zehr (n 64) s 4.

[69] Paul H Robinson, 'The Virtues of Restorative Processes, the Vices of "Restorative Justice"' (2003) 1 Utah L Rev 387. In contrast, Silva Sánchez (n 61) 219ff maintains that restorative processes must always be applied after the completion of the criminal trial and in a separate manner, in order to guarantee the sincerity of the offender. Silva Sánchez nevertheless recognises the utility of those processes, especially in those situations in which the penalty has not been imposed even though the perpetrator was found guilty, due to the prevalence of other public interests.

[70] Although the latter view is held in some of the judgments by the IACtHR (see eg IACtHR, *Case of the Rochela Massacre v Colombia* Series C no 163, 11 May 2007, para 196), we deem it to be incorrect.

It is also appropriate to point out the differences between transitional justice and restorative justice, and how the latter must be understood within the framework of the former. While transitional justice is the product of a public design, restorative justice starts from the premise that all involvement in the various measures is voluntary. For this reason, we cannot talk about an imposed restorative justice. Rather, it is a case of the transitional justice processes allowing, on the one hand, the application of restorative justice mechanisms and, on the other, adopting a restorative perspective in their design, by adapting some of those mechanisms to the specific transitional framework.[71] For instance, certain transitional tools, such as truth commissions, may be classified as forms of transitional justice with a restorative perspective, since they formally acknowledge that a wrong has been committed, especially if they encompass the issuing and receiving of apologies.[72] The same definition may be applied to official apologies by state actors, official ceremonies of recognition of victims or compensation schemes provided by the state for past wrongdoing.

Of course, not even restorative justice, or transitional justice with a restorative perspective, is sufficient to fulfil all of the aims of a transitional process, since it focuses on relationships and the interpersonal plane. And even if some of the tools implemented under this perspective also have potential community benefits, they cannot provide an answer to the (political, economic, or social) macro aspects of the conflict, which are related to peace building. For this reason, we must bear in mind that this is only one perspective to take into account within the set of tools that must make up the complex mechanism of transitional justice.[73] To achieve these further aims, transitional processes require the use of other tools, ones that go beyond the concept of justice—both criminal and restorative—by applying the so-called integral or holistic approach to transitional processes.[74]

This broader view has also been labelled 'transformative justice', a concept which would comprise a range of policies and approaches that can impact on the social, political and economic status of a large range of stakeholders, therefore going beyond the traditional goals of truth and justice as accountability.[75]

[71] For more details on these possibilities, see Clamp (n 62); Varona Martínez (n 63) 167ff.

[72] James L Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa' (2002) 46 American Journal of Political Science 547.

[73] Ivo Aertsen et al, *Restoring Justice after Large-Scale Violent Conflicts* (William 2008) 17ff.

[74] Carsten Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design' (2005) 18 LJIL 425.

[75] Paul Gready and Simon Robin, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339ff; Wendy Lambourne, 'Transformative Justice, Reconciliation and Peacebuilding' in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge 2014) 19. The latter author identifies four elements in this idea of transformative justice: criminal justice or responsibility; truth as knowledge and acknowledgement; socioeconomic justice; and political justice (23ff).

3. *The Purposes and Capacities of Criminal Law and Punishment in Relation to Society*

The aims that criminal law fulfils (or should fulfil) in relation to society undergo profound changes in the contexts of transition when faced with the legacy of experiences of mass violence. The phenomenology of the crimes themselves calls into question some of the purposes traditionally attributed to criminal law and to punishment: in particular, special deterrence, general deterrence and retribution or desert. In addition, there is a marked tendency to entrust to criminal law the achieving of new aims that are central to all transitional processes, such as the search for truth, the building of peace, and the founding of the new social and legal order arising as a result of the transition.

A. *The Rethinking of the Traditional Purposes of Criminal Law and Punishment*

The contexts of transition require at least a partial rethinking of the traditional purposes of criminal law and of punishment.[76] Aside from the fact that the debate on the identification of the aim or aims of criminal law and of punishment remain open and are probably inexhaustible,[77] we can say that both the inherent traits of these crimes and the peculiarities of the transitional period raise doubts and new challenges in relation to those aims.[78]

(i) Retribution and deterrence when faced with a particular criminal phenomenology

The massive nature of the violence perpetrated gives rise to the impossibility in practice of trying all of the persons who in some way participated in committing the crimes. This circumstance frequently combines with the institutional weakness during the transitional period, which also affects the courts. These factors normally impose a selective criminal prosecution, which should at least be based on rational criteria such as the gravity or type of crimes, the identification of those who bear the greatest responsibility[79] or the

[76] Paul Seils, *Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace* (ICTJ 2015) 9–11 <www.ictj.org/publication/squaring-colombia-circle-objectives-punishment-peace> accessed 1 February 2019.

[77] For a recent and complete description of the various theories of punishment developed by both Anglo-Saxon and continental scholars, see Rodríguez Horcajo (n 59) 29–86. See also George Fletcher, *Rethinking Criminal Law* (OUP 2000) 414–40.

[78] See the critical account by Mark Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2010) 22 Hum Rts Q 118; see also Jon Elster, 'Retribution in the Transition to Democracy' in Arend Soeteman (ed), *Pluralism and Law* (Springer 2001) 19; Nino (n 14).

[79] In addition to having been used by the *ad hoc* International Criminal Tribunal to rationalise their activity, this criterion is specified at the statutory level to determine the jurisdiction of the SCSL (art 1 of the Statute of the Special Court for Sierra Leone: '... persons who bear the greatest responsibility') and of the ECCC (art 2 of Law on the Establishment of the ECCC: '... senior leaders of Democratic Kampuchea and those who were most responsible for the crimes').

representative nature of the cases.[80] Such selectivity, while being necessary and inevitable when facing experiences of collective violence, challenges the ethical concept of retribution,[81] ie the idea of retribution understood as the offenders 'getting their just deserts' for what they have done, because it applies punishment unequally and incompletely.[82] Similarly, a selective criminal prosecution also adversely affects the deterrence function, inasmuch as it allows a proportion of the criminals to escape sentencing and punishment.[83]

Another common feature of the crimes faced by transitional processes is their commission by organised groups or organisational structures governed by a strict hierarchy and, usually, by an ideology (political, religious or rooted in other beliefs) that is very strong and exclusive. Although these circumstances do not serve to dilute individual criminal responsibility within a more diffuse collective responsibility, it is worth asking whether, once the apparatus or group concerned has been dismantled, the risk that the criminals will commit new crimes really exists.[84] These considerations raise doubts about the special deterrence that punishment may pursue in these contexts.

[80] This criterion is combined with other objective and subjective criteria to govern the policy of selection and prioritisation of cases introduced in Colombia with the constitutional reform known as 'Marco Jurídico para la Paz' (Acto Legislativo 1/2012) and developed by the General Prosecutor of the Colombian Nation in its Directive 001/2012 of 4 October. This is one of the original transitional justice mechanisms that the Colombian State has adopted into its extremely interesting peace process, where the challenging goal is to put an end to an especially complex and long-lasting armed conflict that is still ongoing. For further information, see eg Alicia Gil Gil, Elena Maculan and Susana Ferreira (eds), *Colombia como nuevo modelo para la justicia de transición* (IUGM 2017); Alejandro Aponte Cardona, 'El Acuerdo de paz y el modelo transicional colombiano: hacia un reconocimiento y dignificación de las víctimas' in Gil Gil and Maculan (n 9); Alejandro Aponte Cardona, 'Colombia' in Kai Ambos et al (eds), *Justicia de transición* (KAS 2009) 235. For a comparison between various policies of selection and prioritising international crimes cases, applied both by international and hybrid criminal tribunals and in national legal systems, see Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2nd edn, Torkel Opsahl Academic 2010).

[81] Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 151–4; Robert Cryer, 'Aims, Objectives, Justifications of International Criminal Law' in Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) 28, 44.

[82] We may also recall the practice of plea bargaining, used both by international criminal tribunals and by many domestic courts in relation to international crimes. This instrument is a response to requirements for procedural economy and flexibility of procedures, but as it brings with it the imposition of a reduced penalty to those accused persons who request it, it contradicts the idea of retribution as proportionality: Antony R Duff, 'Process, not Punishment: The Importance of Criminal Trials for Transitional and Transnational Justice' (2014) Minnesota Legal Studies Research Paper 14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387601> accessed 1 February 2019; Pablo D Eiroa, *Politicas del castigo y derecho internacional* (Ad Hoc 2009) 162; Drumbl (n 81) 163–9. Furthermore, it has been argued that for these kinds of crimes there is an intrinsic impossibility of fitting within any proportionality criterion. As indicated by Garapon, citing Hannah Arendt, these are 'crimes that one can neither punish, nor forgive': Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner* (Odile Jacob 2002). This raises doubts as to whether there are punishments that are sufficiently burdensome both in the absolute sense (measurement between the offence and the punishment in themselves) and in a relative perspective (measurement based on the comparison between various crimes and the corresponding punishments), unless one accepts the imposition of treatments that would in turn entail a violation of human dignity and fundamental rights, such as torture, the death penalty or treatments that cause great suffering to the convicted person. Such a view, nonetheless, is grounded on a pure retributivist approach, which we have already criticised (cf section 2); additionally, problems related to proportionality also appear in ordinary criminality, eg in cases of conviction for multiple offences: see Osiel (n 78) 128–9.

[83] The capacity to intimidate is prejudiced especially when selectivity is based more on political criteria and mainly concerned that nothing can interfere in the interests of the state apparatus or of the powerful countries: Gil Gil and Maculan (n 5) 49.

[84] In similar terms, Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33

It can be argued that transitional processes do not always involve the disappearance of the organisations involved in committing the abuses, but, rather, their conversion into legitimate groups and their participation in the new regime. Even in these cases, the disappearance of the context that favoured the structural violence, such as the cessation of armed conflict, the reduction in the power they held previously or the loss of support of (part of) the population, makes it really unlikely that these individuals would once again commit the same crimes.

Otherwise, where these circumstances have not disappeared and the criminals continue to perceive that they are supported by the power structures to which they belong, criminal punishment actually does little to contribute to its elimination.[85] What are really needed in these contexts are wider measures of institutional reform.[86]

Similarly, both deterrence and the rehabilitation function of punishment appear to have less relevance when dealing with crimes that are not the result of the deviant conduct of one or a few people, but are the consequence of the activity of perverted institutions[87] or of an extraordinary context generated by an inter-community conflict. The systematic nature of these crimes requires a response combining the penalties directed towards individuals with wider structural measures that eliminate, or at least reduce, the ground on which the ideology of the criminal system, or the origins of the conflict, is founded.

(ii) Positive general prevention and communication

The purpose of criminal law which has the greater chance of retaining its full validity in transitional contexts is the protection of legal interest through the positive general, or integrating, prevention[88] or, according to concepts pertaining more closely to Anglo-Saxon doctrine, through the expressive function of punishment.[89]

From this standpoint, punishment serves to express the community's reprobation of certain conducts, thus confirming the norm and the social values protected by it and restoring confidence in them.[90] This confirmation of the

OJLS 293; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *Philosophy of International Law* (OUP 2010) 569, 577; Teitel, *Transitional Justice* (n 1) 44ff. Similarly, Elster (n 78) 28ff.

[85] Eiroa (n 82) 165; Jaime Malamud-Goti, 'Transitional Government in the Breach: Why Punish State Criminals?' (1990) 12 Hum Rts Q 1, 9.

[86] Cryer (n 81) 43; Naomi Roth-Arriaza, *Impunity and Human Rights in International Law and Practice* (OUP 1995) 14.

[87] Malamud-Goti (n 85) 10.

[88] Kai Ambos, *Treatise of International Criminal Law. Vol. I. Foundations and General Part* (OUP 2013) 72.

[89] The resurgence of these theories was inaugurated by the seminal work by Joel Feinberg, 'The Expressive Function of Punishment' in Joel Feinberg, *Doing and Deserving* (Princeton UP 1970) 95. For a general account on expressive theories of law, see eg Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 U Pa L Rev 1503.

[90] Elena Maculan, 'Fines de la pena y del proceso penal en contextos de transición' in Gil Gil and Maculan (n 9) 207.

validity of the norm and the reminding of the value of the protected interests is intended to prevent future attacks against those norms and interests.[91]

This communication is delivered at two different stages. At a first stage, the mere existence of the law, by prohibiting some conducts and by threatening them with punishment, performs the function of informing about the prohibited behaviour and expressing the value of the protected legal interest. At a second stage, the same function is developed by the application of criminal law. Here, we can distinguish three successive phases: first, the central core of the message of reprobation and stigmatisation is expressed through the ritual of the criminal trial, when the defendant is seated in the dock and faces the prosecution and the judge, as well as through the judgment officially declaring his or her responsibility. Naturally, the validity and efficacy of the reproach expressed goes hand in hand with the legitimacy of the institutions (national or international) sending this message.[92]

The second phase in the construction of this message lies in sentencing. We believe that the role of punishment is more than an element added to the message of reproach already contained in the fact of the criminal process and in the conviction.[93] If this were the case, it would delegitimise the function and value of the punishment; it would lead us to propose its elimination not only in the extraordinary contexts of transition, but also in general. On the contrary, it appears to us that punishment meets an expressive function of its own that consists in reflecting the gravity of the offence and the degree of blameworthiness: the more serious the act and the greater the degree of blameworthiness of the convicted person, the greater the punishment required to express the (negative) evaluation merited by the crime.

The third phase in which this function is developed is the enforcement of the punishment. When the offender serves his or her sentence, the seriousness and importance of the message of reproach and the gravity and blameworthiness of the act are once again confirmed, giving it a concrete and thus tangible content.

An acknowledgement of the three phases in which the communicative function is fulfilled does not, however, mean that the complete elimination of one of these impinges on the fulfilling of this purpose. This circumstance may be seen in transitional contexts, where specific priorities and demands arise, such as reaching a peace agreement or maintaining it; involving the criminals in

[91] Alicia Gil Gil, 'Prevención general positiva y función ético-social del derecho penal' in José Luis Díez Ripollés (ed), *La ciencia del derecho penal ante el nuevo siglo: libro homenaje al profesor doctor don José Cerezo Mir* (Tecnos 2002) 9ff. This position represents a unitary or mixed theory of punishment that combines retribution (understood, according to a modern view, as the confirmation of the validity of the norm and of the legal protected values) and deterrence. Together with the general prevention, we admit specific deterrence as an aim of punishment. Von Hirsch's theory can also be labelled as unitary, since he recognises a deterrence element, subject to the 'censuring framework': Andrew von Hirsch, *Censure and Sanctions* (OUP 1993) 14.

[92] Luban (n 84) 582 brilliantly expresses this idea in the slogan 'fairness to rightness': the courts have to comply with the fair trial standards and other minimum requirements in their creation and composition in order to be legitimate institutions that really dispense justice.

[93] See also Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP 2011) 100.

investigating what has occurred and in reparations to benefit the victims; or avoiding a resurgence of the violence. The combination of these objectives with the demand for criminal prosecution and sanctioning for past crimes generates an intrinsic tension inherent to all transition scenarios. They must achieve a balance between short-term solutions and long-term aspirations, which can be partially managed only by considering the objectives and transitional mechanisms as dynamic[94] and are therefore subject to a necessary balancing exercise.[95]

The concurrence of these objectives may therefore suggest a flexible approach to criminal prosecution in one or all of the three phases mentioned. Thus, the priorities of the transitional process may be taken into account as constituting the factors affecting the enforcement of the punishment through extinguishing it with a pardon, suspending it, limiting it or replacing it with other kinds of measures. This was the option chosen, for example, in Northern Ireland, with the early releases provided under the Good Friday Agreement of 10 April 1998.[96]

The same considerations could also affect the second phase in which the expressive function manifests itself, ie sentencing. They may lead to opting for a punishment less than proportionate to the gravity of the offence and its blameworthiness.[97] The alternative punishments provided by the Colombian Peace and Justice Law (Law 975/2005, of 25 July 2005) fall within this second category.[98] Furthermore, criteria based on special deterrence and rehabilitation may also suggest changes in the punishment to be imposed or in its enforcement. The participation of the accused in particular truth-finding and/or

[94] Leebaw (n 1) 118.

[95] Alicia Gil Gil, 'El tratamiento jurídico de los crímenes cometidos en el conflicto armado colombiano. La problemática jurídica en el marco de la dicotomía paz-justicia' in Alicia Gil Gil et al (eds), *Colombia como nuevo modelo para la justicia de transición* (IUGM 2017) 21, 36.

[96] This mechanism, the application of which was entrusted to the Sentence Review Commission, an independent body created in 1998, was used for persons serving sentences for political and associated crimes, committed prior to the signing of the agreement itself and subject to a series of conditions. The experience of Northern Ireland does not fit into the traditional transitional settings (namely, the aftermath of a dictatorship or of an armed conflict), yet some of its features and some of the mechanisms adopted within it can be properly defined as transitional justice: Colm Campbell et al, 'The frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 MLR 317.

[97] This view is in line with the conceptual distinction made by Feinberg (n 89) between the 'reprobative symbolism of punishment' and its character as 'hard treatment' (98), and the subsequent affirmation that 'it is social disapproval and its appropriate expression that should fit the crime, and not hard treatment (pain) as such' (118).

[98] This law provided for the imposition of a punishment of the deprivation of liberty of between five and eight years, plus an additional term of conditional release (art 29 of the Law), for members of illegal armed groups that demobilise, give a free version of the crimes of which they are aware and contribute with their assets to reparations for the victims. A similar sanction (imprisonment for between five and eight years) is also provided in the Special Jurisdiction for Peace created by the agreement between the Colombian Government and the FARC-EP signed last November. This penalty will be applied to those persons who declare their responsibility for crimes committed after an investigation has been opened but before the trial against them begins. For those who give this declaration before the investigation begins, an even more beneficial punishment is provided, ie an alternative penalty that involves a restriction of liberty (although not to be served in prison) and carrying out restorative activities.

reparation mechanisms would show their potential for re-socialisation and a corresponding reduced need for punishment.

Finally, we believe that in transitional contexts, solutions that involve (at least partial) waivers of the criminal trial, in the form of amnesties or equivalent measures, rooted equally in political and criminal law considerations, should not be completely ruled out.[99] Our position therefore runs counter to the reiterated doctrine of the IACtHR, which, since the seminal *Barrios Altos* case, has been affirming the prohibition not only of self-amnesties, but also of all kinds of amnesty (even those passed by democratic parliaments and confirmed by referendum), pardons and all measures preventing criminal prosecution.[100] The more nuanced position we defend seems to be closer to the ECtHR traditional view,[101] although there are good reasons to think that in the future this body might adopt a position closer to its Inter-American counterpart.[102]

If we maintain the admissibility of these waivers of criminal prosecution, as we suggest, the communicative function to which the criminal trial is directed could be replaced, as an exception and due precisely to the exceptional nature of the transitional context, by other mechanisms transmitting the same message of stigma and reaffirmation of the legal values violated. The ritual of the criminal trial has historically been chosen as the best tool with which to comply with the above-mentioned function; however, there is no reason why other mechanisms (eg a public declaration of guilt before a truth commission, such as the South African Truth and Reconciliation Commission[103]) could not

[99] The same view is also held, with special reference to the ECtHR position, by Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 OJLS 1, 17–18 and 22–4.

[100] See IACtHR, *Barrios Altos v Perú* Series C no 75, 14 March 2001, paras 41–3; *Gelman v Uruguay* Series C no 221, 24 February 2011 (declaring that an amnesty law passed under the recovered democracy and confirmed in two different referendum amounted to a violation of the American Convention of Human Rights); *Barrios Altos and La Cantuta v Perú* 'Supervisión de cumplimiento de sentencia', 30 May 2018 (affirming the inadmissibility of pardons whenever they aim to cover gross human right violations, with specific reference to the pardon recently issued to the former President of Perú Alberto Fujimori). Yet, the IACtHR appears to be more flexible in its position when facing an ongoing armed conflict: IACtHR, *El Mozote Massacre v El Salvador* Series C no 252, 25 October 2012. For a deeper analysis, see Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 International and Comparative Law Quarterly 645.

[101] See eg *Ould Dahl v France* App no 13113/03 (ECtHR, 17 March 2009). In a more recent judgment, the ECtHR recognised that 'a growing tendency in international law is to see such amnesties as unacceptable': *Marguš v Croacia* App no 4455/10 (ECtHR, 13 November 2012) para 139, while not completely closing the door on amnesties. See Elena Maculan, 'Derecho penal, obligaciones internacionales y justicia de transición' (2018) 41 Revista penal 117, 126ff.

[102] See the brilliant criticism developed by Jackson (n 99). For a comparative analysis of the case law of the two human rights bodies, see Seibert-Fohr (n 4) 51ff and 105ff.

[103] This experience is commonly viewed as a turning point in evolution of transitional justice, since its key mechanism was not a self-amnesty nor a blanket one, but a properly democratic, bilateral and conditional amnesty. Here, the benefit could be granted for crimes committed for political motives, even when they amounted to serious human rights violations, in exchange for the offenders' public declaration of guilt and their contribution to the ascertaining of the truth about the wrongdoings. This approach allowed, at least in principle, the combination of different goals, namely, accountability (not in the traditional criminal sense), truth finding and reconciliation. See Antje Du Bois-Pedain, *Transitional Amnesty in South Africa* (CUP 2007); Jeremy Sarkin-Hughes, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia 2004).

transmit the message satisfactorily in these exceptional circumstances, provided that certain requisites of legitimacy and fairness are satisfied.[104]

It is essentially a case of acknowledging that the characteristics and requirements of a specific community could require a review of the traditional concepts and definitions (at least within Western legal systems) of punishment and the ascertaining of guilt, where these are not in line either with local realities or with specific circumstances of a particular historical juncture, according to the idea of 'cosmopolitan pluralism' defended by Drumbl.[105]

B. *The New Aims of Criminal Law in Transition Processes*

Transitional experiences have led to the rise of a tendency to attribute to criminal law, as well as the classical aims we have discussed, other added objectives that are strictly related to the unusual context in which the transition develops.

(i) Criminal law as a truth-finding mechanism

First, there is a widespread imperative that the criminal trial is central to ascertaining the truth about the violent experience. This truth is deemed to be not only one of the indispensable elements for overcoming a conflictive past and giving non-repetition guarantees, but also a true right of victims.[106] In this regard, the fact finding contained in a judgment, which needs to be proven beyond all reasonable doubt, requires rigorous documentation and reconstruction,[107] thereby providing a high-standard declaration of what occurred. Furthermore, the criminal trial offers a public forum in which the truth determined in this way is officially declared by bodies (the courts) whose legitimacy is at least in principle consolidated.[108]

However, we know all too well the significant differences between the material or historical truth, which seeks the widest possible reconstruction, and procedural truth, which is structurally limited.[109] The latter, on the one hand, adopts a more restricted focus, centring on the conduct of the accused and the harmful effects thereof, leaving aside the macro dimension within which this kind of crime occurs.[110] On the other hand, procedural truth has to

[104] Mark Freeman, *Truth Commissions and Procedural Fairness* (CUP 2006) 88ff. Here again, Osiel (n 78) 134–7 warns against the risks and limits of truth commissions or other official public reports as alternatives to criminal trial.

[105] Drumbl (n 81): the author maintains the universality of the blaming for certain crimes at the same time as arguing for the pluralism of mechanisms created to deal with them.

[106] Bassiouni, 'Victims' Rights' (n 3); Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart Publishing 2008) 180ff.

[107] Malamud-Goti (n 85) 11.

[108] Duff (n 82) 10.

[109] See the brilliant and still relevant study of Piero Calamandrei, who describes the differences between the judge and the historian, alerting readers of the risks involved in merging the two roles: Piero Calamandrei, 'Il giudice e lo storico' (1939) Rivista di Diritto Processuale Civile 105.

[110] M Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational 2002) 383, 400.

submit to the limits imposed by the fundamental guarantees of defence. The presumption of innocence, the *in dubio pro reo* principle, the right not to incriminate oneself, the burden of proof falling on the prosecution, the so-called cross examination, the *res judicata*, the exclusionary rules of evidence: all of these guarantees act simultaneously as a limitation on ascertaining the truth.[111] The consolidation of these rules has led to a general rethinking of the truth-finding goal of the criminal trial even in inquisitorial procedural systems, where the outcome of ascertaining the truth about the facts has traditionally been considered a priority, as opposed to the focus that the adversarial systems put on the rules applied to the confrontation between the parties and their competing truths.[112] Yet, the progressive blurring of the differences between these two pure models (in favour of the creation of various kinds of hybrid procedural systems), together with the consolidation of the fair trial standards as human rights recognised by international law, has consolidated the almost universal acceptance of procedural limits to the truth-finding role of criminal trials.[113]

Therefore, an exhaustive investigation of a collective violence experience can undoubtedly benefit from the contributions contained in court investigations, yet it cannot be limited only to these. Establishing the truth must be complemented by other mechanisms, exempt from the strict limits applied within the criminal jurisdiction, thus offering the broadest, deepest and most multifaceted reconstruction of the events that have occurred.[114]

(ii) Criminal law as a mechanism for reconciliation

Criminal prosecution is often seen as being indispensable to fulfilling the aim of social reconciliation, one of the priorities of transitional processes.

[111] Daniel Pastor, 'Acerca de la verdad como derecho y como objeto exclusivo del proceso penal' in Elena Maculan and Daniel Pastor, *El derecho a la verdad y su realización por medio del proceso penal* (Hammurabi 2013) 19; Thomas Weigend, 'Is the Criminal Process about Truth? A German Perspective' (2003) 26 Harvard Journal of Law & Pubic Policy 157. Yet, some authors also maintain the opposite view that the criminal trial is a perfect venue for the truth-finding task: see eg Michele Taruffo, 'Verità e giustizia di transizione' (2015) Criminalia 21.

[112] This different set of priorities may reflect a different concept of truth, being the inquisitorial model in line with the correspondence theory (truth exists *a priori* and the judge has the task to discover and reveal it) and the adversarial one, more congruent with the consensus theory (truth is what reasonable people agree upon, in a trial, after an antagonistic presentation of competing versions of the facts): Thomas Weigend, 'Should We Search for the Truth, and Who Should Do It' (2010) 36 NCJ Int'l L & Com Reg 389. In a similar vein, Grande points out the correspondence of the two models with the concept of *ontological truth* and *interpretive truth*, respectively: Elisabetta Grande, 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in John Jackson et al (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (Hart Publishing 2008) 145, 147. See also the seminal work by Mirjan Damaška, 'Truth in Adjudication' (1998) 49 Hastings LJ 289.

[113] For instance, the respect for the defendant's right to silence and the rejection of evidence that was acquired in clear violation of Constitutional rights (such as dignity and privacy) are nowadays almost universally accepted also in inquisitorial systems, despite the obstacle they create for the ascertaining of truth: Weigend (n 112) 400–1. Besides the fair trial standards, there is a set of social needs and values that exercise a constraining effect on truth values in trials, such as the demand for stability in decision making and cost: Damaška (n 112) 301.

[114] See the mechanisms recalled by Freeman: truth commissions, human rights commissions, commissions of inquiry, complaints procedures: Freeman (n 104) 40–69.

However, it appears to us that the criminal trial, the structure of which reproduces a conflict as a formalised ritual on a specific, temporal and procedural level,[115] does not favour the meeting between victim and offender. Rather, it brings into focus the conflict of perceptions between them. Therefore, there is some doubt as to its appropriacy as a tool for reconciliation. Nothing may be predicted in relation to the criminal trial except its capacity to promote a—purely formal—acknowledgement of the criminals and the victims as members of the political community. This mutual acknowledgement may in turn contribute to reconstructing a minimum level of social coexistence.[116]

Nonetheless, attaining a deeper reconciliation between victims and offenders will require the use of restorative justice mechanisms that favour an inclusive dialogue between the parties and the restoration of interpersonal relations.[117] In addition, from the perspective of the whole society, reconciliation will need, instead of criminal prosecutions, a set of political, economic and educational measures that may foster the elimination of the division between opposing social groups.

On the contrary, a criminal prosecution rooted in a purely retributionist and maximalist standpoint—a perspective, it appears, defended by the IACtHR—involves the risk of becoming a potent factor of exclusion of criminals. The latter, far from enjoying the desired acknowledgement as members of the community, would be the 'other', the enemy, and would be subject to permanent ostracism. Such an outcome is entirely contrary to the objectives of social reconciliation.[118]

(iii) Criminal law as a peace-building and foundational mechanism

A third idea that has been widely disseminated recently, under the maxim 'No peace without justice',[119] is that criminal law in transitional contexts plays a peace-building role. This idea assumes as axiomatic the notion that the exemplary punishment of crimes committed by one or all of the parties to a conflict contributes to the construction of peace.[120]

Similarly, some authors have stressed the foundational function fulfilled by criminal law in transitional contexts in terms of the creation of a new legal

[115] Antoine Garapon, *Bien juger. Essai sur le rituel judiciaire* (Odile Jacob 2001).
[116] Duff (n 82) 7.
[117] cf section 2B(ii).
[118] Luban (n 84) 579; Eiroa (n 82) 205ff.
[119] We find this formula in the founding instruments of the International Criminal Tribunals: Considering 9 of UN Security Council Resolution no 808/1993, of 22 February, setting up the ICTY; Considering 7 of UN Security Council Resolution no 955/1994, of 8 November, setting up the ICTR) and in all the rhetoric surrounding their legitimation (Danilo Zolo, 'Peace through Criminal Law?' (2002) 2 JICJ 727, 729.
[120] For a critical look at the arguments of the defenders of this idea, see Mark Kersten, *Justice in Conflict* (OUP 2016) 19–36. See also Lisa Schirch, 'Linking Human Rights and Conflict Transformation. A Peacebuilding Framework' in Julie Mertus and Jeffery Helsing (eds), *Human Rights and Conflict. Exploring the Links between Rights, Law and Peacebuilding* (UN Institute for Peace Press 2006) 63.

order.[121] By expressing firm condemnation of past violence, the criminal trial restores social values and rules violated by such violence, marks a clear break between the previous and the current regime, promotes confidence of citizens in the new order and restores the offenders' full participation in society.[122] In this way, criminal law fulfils a clear transformative and foundational function, particularly oriented towards the future and to the (re-)establishment of the democratic rule of law.[123]

In reality, both theories merely constitute an expression of positive general prevention theories, described above,[124] in the specific contexts of the transition. The contribution offered by criminal law to the construction of the new legal and social order and a stable and lasting peace is no more than an indirect effect of the functions of stigmatisation, communication and reaffirmation of the violated values normally fulfilled by criminal prosecution. For this reason, it seems to us unnecessary to isolate these objectives as being the aims in themselves of criminal law. Moreover, as Teitel herself acknowledges, criminal justice fulfils this foundational task even when applied in a limited way, when responsibility for past wrongdoing is not fully ascribed and/or when sentences are not fully served.[125]

Additionally, criminal prosecution is in itself manifestly insufficient to act as the basis of a new social and legal order and a peaceful coexistence. As we recalled referring to social reconciliation, here again other measures are needed, such as restorative justice mechanisms, education plans, institutional reforms, and training and reconstruction programmes.[126]

Finally, in some specific circumstances, holding criminal trials could even make the fulfilment of the aims mentioned above more difficult.[127] The consolidation of new institutions could be placed in jeopardy by prosecuting those responsible for past crimes where these persons still hold a degree of power within the new regime.[128] The priority aim of putting an end to an armed conflict could, similarly, require certain concessions, such as the imposition of a reduced punishment or of alternative sanctions,[129] to be made: moves that encourage those responsible for the crimes to take part in the disarmament and in the peace process.[130]

[121] Teitel, *Transitional Justice* (n 1) 49–51.
[122] Malamud-Goti (n 85) 11–12.
[123] Teitel, *Transitional Justice* (n 1) 30.
[124] cf section 3A(ii).
[125] Teitel, *Transitional Justice* (n 1) 49.
[126] Janine N Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' (2011) 11 JICJ 521, 521; Eiroa (n 82) 143.
[127] As stated by Pablo D Eiroa, 'El impacto de las jurisdicciones penales internacionales en la finalización de un conflicto de violencia grave y la consolidación de la paz' in Gil Gil and Maculan (n 9) 81. See also Michael Broache, 'Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case' (2016) 10 International Journal of Transitional Justice 388.
[128] Malamud-Goti (n 85) 14.
[129] Both solutions have been adopted in the Colombian peace process, both in the Peace and Justice Law and in the recently created Special Jurisdiction for Peace.
[130] Along the same lines, see the dissenting opinion of Judge García Sayán in IACtHR, *El Mozote v El Salvador* Series C no 252, 25 October 2012, paras 30–1.

The application of criteria of selection and prioritisation in criminal prosecution would similarly allow obstacles to the viability of criminal prosecution, raised by the magnitude of crimes committed, to be overcome. What is more, as has already been stated, other out-of-court measures exist that could perform this foundational and constructive role equally satisfactorily: the South African experience clearly shows how the conditional amnesty applied there has played a truly constituent function in the transitional process experienced by that country.[131]

Therefore, we do not propose refraining completely from exercising criminal prosecution, but we suggest that, in these extraordinary contexts, a flexible approach to the prosecution and/or punishment of criminals should be permitted when it is considered that trials and sanctions constitute an obstacle rather than an aid to achieving peace. A more appropriate maxim for transitional processes could therefore be 'as much [criminal] justice as peace allows'.[132]

4. *Conclusions*

In recent years, we have seen the rise of the idea that the full punishment of criminals has to be an essential component of transitional justice. Punishment has come to be understood as a mechanism for giving satisfaction to the victim, or even as a victim's right, as well as being the preferred means of obtaining peace and of constructing the new social order.

This study, on the contrary, shows that such an interpretation overburdens criminal law with aims that it is unable to fulfil or that are more satisfactorily achieved through the application of other mechanisms.

With regard to the possible beneficial effects of punishment on victims, the analysis of various theories of punishment that could serve as a foundation for this doctrine have shown that punishment, in the form of the imposition of a subsequent evil, may only be rationally explained through its preventive effect. For this reason, it is argued that the diverse theories that attempt to defend the need for the imposition of an evil on the offender, based on its possible beneficial effects or on the cessation of harm that this would have for the

[131] Andrea Lollini, *Constitutionalism and Transitional Justice in South Africa* (Berghan Books 2011) 95ff.

[132] Malarino (n 1) 211. This proposal differs from another interesting view that can be summarised by the phrase 'First peace, then justice'. According to Kersten (n 120) 31–2, this idea has the advantage of converting the peace versus justice dilema into a question of sequence that does not eliminate the justice element, but rather defers it to a time when peace and stability have been consolidated. However, as the same author notes, the sequence cannot be premeditated, because no leader would be prepared to sit down to negotiate knowing in advance that the benefits obtained in such negotiations would sooner or later be annulled. Furthermore, this idea fails to take into account the fact that on many occasions the negotiations concede to the adversary party guarantees regarding not only criminal prosecution, but also positions of political power (ibid). Finally, these solutions involve serious legal problems as to the retroactive nature of the new, unfavourable law and the resurgence of criminal liability already cancelled, which would bring into question the commitment to the rule of law of the new democratic regime.

victim, are merely an attempt to rationalise the victim's desire for reciprocity (or vengeance, using the term with no pejorative intent).[133]

In our opinion, one cannot dismiss the idea that punishment may indeed have beneficial effects for the victim, such as by demonstrating publicly the injustice suffered and by offering a certain guarantee of non-repetition. This would satisfy the victim's need for justice, restore his or her confidence in the legal system and society, and favour his or her non-desocialisation. It must nevertheless not be forgotten that these feelings of justice are grounded on the reciprocity mechanism that, in the final instance, serves to uphold the conservation of both the group and the individual as social entities. The feeling of justice is the result of the standardisation of an evolutionary positive reaction (the punishment being a preventive tool), and that concept of justice is also a limit to the *quantum* of punishment (by imposing proportionality in sanctions). Therefore, punishment must never be extrapolated and invoked as an end in itself, nor should the 'victims' right' to justice eclipse or replace the rationale of criminal law to protect legal values or interests by means of the preventive function of punishment.

The state, therefore, through its monopoly on violence, can control the victims' understandable and legitimate instincts and desires for reciprocity, and place certain rational limits on these. We must not forget that beneficial treatments in criminal law, making the application of more benevolent sanctions conditional on demobilisation, confession, an acknowledgement of responsibility and the making of reparations, will undoubtedly involve renouncing the 'just' punishment, that is, a punishment proportional to the gravity of the offence and the degree of culpability of the perpetrator. However, it will comply with other aims that are also of interest to the victims and to society as a whole, such as favouring the promptness of the punishment (which results in achieving the aim of justice) and contributing to truth finding, reparation and non-repetition.

The state may therefore try to offer satisfaction to victims' claims through other mechanisms (such as truth-finding mechanisms, official apologies, public events acknowledging the victims and their suffering, memorials, material and symbolic reparations), measuring them against other aims and needs, in the search for the best possible solution to fulfil the ultimate aim of maintaining social order, that is, the set of protected legal interests in a society.

Moreover, we have confirmed that collective violence phenomena (characterised by a massive scale and, in most cases, the systematic nature of the crimes) and transitional contexts, with their exceptional priorities and features, require the rethinking of the classical purposes of criminal law and a wider reflexion on the supposed new aims with which many authors attempt to endow it. In these scenarios, the aim of positive general and integrating prevention is

[133] Prittwitz (n 2) 129; Silva Sánchez (n 4) 56.

of central importance, since criminal prosecution—in its three phases, the trial, the sentencing and the enforcement of the sentence—serves to express the community's rejection of specific conducts, thereby confirming the legal values protected by criminal law, restoring confidence in the norms and consequently preventing future crimes. Through these effects, criminal law also contributes, indirectly, to the foundation and consolidation of the new legal order and the construction of a stable peace.

On the one hand, the insufficiency of criminal proceedings *per se* must be recognised in fulfilling such objectives, which require further complementary reform, investigation, reparations and education measures, within the framework of an idea of 'transformative justice' that is much broader than criminal justice,[134] in order for this future project to take shape in all its complexity.

On the other hand, the circumstances pertaining to the transitional process may produce the paradoxical effect of making criminal law an obstacle, and not an instrument, for the maintenance of social order and the protection of legal interests. This occurs when criminal prosecution and punishment, through using a purely retributive and maximalist approach, triggers new episodes of violence or prevents putting an end to ongoing violence, distances criminals from truth and reparation initiatives, and weakens the new institutions.

As a consequence, we wish to stress the importance of the maintenance of criminal law as a *ius puniendi* and as a tool of the state—not the only tool available, nor an absolute obligation—to achieve the ultimate aim of protecting legal interests and thus ensuring peaceful coexistence among the individuals making up a community.[135] This allows the use of criminal law only inasmuch as it is useful and necessary. When other mechanisms exist that provide this protection more satisfactorily, or when criminal law runs the risk of becoming, if applied, a danger to these legal interests, inasmuch as it ends up destabilising the legal system that is entrusted with this protection, then criminal prosecution and punishment have to take a step back, and be adjusted and restricted according to the specific circumstances of each case.

[134] Lambourne (n 75) 23ff.
[135] Ambos (n 84) 314–15.