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## 5. Reflections on the Need for Some Degree of Harmonization between the International Normative Framework of *Ius Cogens* Crimes and Transitional Justice Special Attention to Criminal Proceedings and Truth Commissions

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### 1. Introduction

Unlike the well-established legal regime regulating *ius cogens* crimes under international law<sup>217</sup> elaborated upon in the so-called “Nürnberg principles”,<sup>218</sup> there is no normative framework that regulates the application of the mechanisms of transitional justice under general or conventional international law. Definitions of transitional justice can only be

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<sup>217</sup> See below, section V.

<sup>218</sup> The principles contained in the 8 August 1945 London Charter of the International Military Tribunal (known as the “The Nürnberg Tribunal”) were approved by the United Nations General Assembly in its Resolution 95 (I) of 11 December 1945 on the *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*. Two years afterwards, once the Nürnberg Tribunal handed down its judgment (known as the “Nuremberg Judgment”), the United Nations General Assembly in its Resolution 177 (II) of 21 November 1947 on the *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, directed the International Law Commission (“ILC”) to “(a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (a) above”. The ILC adopted its final formulation of the Nürnberg Principles at its second meeting held between 5 June and 29 July 1950, and submitted them to the UN General Assembly. The Nürnberg Principles are reproduced in full at Yearbook of the International Law Commission, 1950, vol. II. According to the 1950 ILC Report, the following seven principles had been identified by the Commission: Principle I: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” Principle II: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” Principle III: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.” Principle IV: “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.” Principle V: “Any person charged with a crime under international law has the right to a fair trial on the facts and law.” Principle VI: “The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). (b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. (c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” Principle VII: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.” Vid. INTERNATIONAL LAW COMMISSION, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), UN DOC. A/CN.4/34. Pp. 374-377. See also, UNITED NATIONS GENERAL ASSEMBLY, Resolution 488 (V), *Formulation of Nürnberg Principles*, 12 December 1950.

found in instruments of soft law, such as the 23 August 2004 Secretary General's Report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,<sup>219</sup> and in the work of transitional justice theorists and practitioners, including the *Belfast Guidelines on Amnesty and Accountability*.<sup>220</sup>

These soft law sources underscore the lack of consensus on the specific content of transitional justice. (Olasolo *et al.* 2016a) According to the 2004 UN Secretary General's report, the justice component of any transitional process seeking to leave behind situations of large scale human rights abuses comprises

[...] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>221</sup>

As the UN Special Rapporteur for transitional justice has highlighted, beyond this general definition there is little consensus about the nature, purpose, scope and content of each of its elements. (De Greiff 2012, p. 32) Benavides provides one explanation for this lack of consensus, noting that the concept transitional justice applies equally to (i) transitions from authoritarian governments to democracy; and (ii) transitions from armed conflict to peace - thereby being part of both transition to democracy studies and peace studies. (Benavides 2013, p. 9)

A number of authors with a liberal approach to transitional justice, such as Arthur (2009), Dicklitch and Malik (2010), Little (1999), Lundi and McGovern (2008), Rubli (2012), and Waldorf (2102), equate the notion of large-scale human rights abuses with serious violations of civil and political rights (including, where appropriate, grave breaches of international humanitarian law). As a result, they put the emphasis on (i) the abandonment of those forms of socio-political organization that impede the satisfaction of civil and political rights due to their structural features; (ii) the promotion of the rule of the law; (iii) the establishment of formal mechanisms of democratic representation; and (iv) the "right balance" between retributive and restorative justice.

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<sup>219</sup> United Nations Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN. Doc. S/2004/616, 23 August 2014, paragraph 8.

<sup>220</sup> Mallinder, L. & Hadden, T., *Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster 2013

<sup>221</sup> United Nations Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN. Doc. S/2004/616, 23 August 2014, paragraph 8.

Arbour (2007), De Greiff (2102), Fuller (2012), Osterveld (2009), Roth (2004) and Miller (2008) disagree with this position because, in their view, in situations involving large-scale abuses of civil and political rights there are simultaneously other forms of rights violations, including those caused by socio-economic, gender and ethno-cultural violence. In turn, McAuliffe (2015), Nagy (2014), Thomason (Thomason 2014) and Young (Young 2011, 52) consider that the existence of large-scale human rights abuses is the symptom through which structural violence or injustice is manifested. This inevitably has an impact on the understanding of the causes of situations of large-scale human rights abuses, the determination of the goals of transitional justice, and the choice of the specific measures to be implemented to reach such goals.

From this perspective, Reátegui (Reátegui 2011, 36) affirms that the challenges and responsibilities that societies emerging from authoritarianism or armed conflict face are not only those relating to achieving an effective transition in terms of political institutions; they are also, and primarily, those relating to the provision of justice for victims of human rights violations, the determination and collective acknowledgment of past events, and ultimately, the establishment of political, social, economic and cultural conditions for sustainable peace. Accordingly, as Galaín (Galain 2016) and Benavides (Benavides 2013) highlight, transitional justice is comprised of a number of political, social, economic and cultural components that go far beyond the scope of law.

In light of the absence of a legal framework for transitional justice under international law, any program of transitional justice must be compatible with the existing international law concerning *ius cogens* crimes.<sup>222</sup> Hence, the existing international normative framework requires that transitional justice measures that further truth finding and the fight against impunity with respect to *ius cogens* crimes must be compatible with (i) the enforcement of international criminal responsibility for such crimes, (ii) the States' duties to investigate, prosecute and punish the alleged perpetrators; and (iii) the victims' rights to truth and

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<sup>222</sup> Colombia is, in this respect, an emblematic case in Latin America, as evidenced by the so-called "Legal Framework for Peace", approved by Legislative Act 01 of 2012, which introduced in the Colombian Constitution two transitory provisions (articles 66 (bis) and 67 (bis)). These two provisions contain a whole transitional justice strategy, including (i) the creation of a truth commission; (ii) and the granting of powers to the Colombian Congress to: (a) order the Colombian General Attorney not to prosecute those responsible for genocide, crimes against humanity and war crimes, who fall into the category of those "most responsible"; (b) adopt selection and prioritization criteria for the investigation and prosecution of those most responsible for the said crimes; (c) establish alternative penalties, including the suspension of the execution of any imprisonment sentence imposed on those most responsible for genocide, crimes against humanity and war crimes (this option was finally declared unconstitutional by the Colombian Constitutional Court), or serving such sentences under special detention regimes (such as, home detention); and (d) establish an administrative, non-judicial, reparations regime. The ICC Office of the Prosecutor and the Inter-American Court of Human Rights have reiterated their concern with the 2012 Legal Framework for Peace, because several features of it, including the treatment of those most responsible for genocide, crimes against humanity and war crimes, do not comply with the existing international regulation of *ius cogens* crimes. See, ICC OFFICE OF THE PROSECUTOR, *Situation in Colombia, Interim Report*, 12 November 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>; and Inter-American Commission Of Human Rights, *Country Reports: Colombia, Truth, Justice and Reparation*, 2014, Chapter III on "Constitutional and Legal Framework, in particular pp. 185-194, available at: <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

justice.<sup>223</sup> This means that criminal proceedings for *ius cogens* crimes must, in any case, be a necessary component of any transitional process (Olasolo *et al.* 2016a).

Hafner (Hafner *et al.*, 111), O'Connor (O'Connor 1999), and Scharf (Scharf 1999) consider that this is the right approach, because, in their view, judicial proceedings are irreplaceable for the following reasons: (i) truth commissions do not uphold civil and criminal liabilities arising from large scale human rights abuses, and thus fail to comply with International Human Rights Law ("IHRL"), International Humanitarian Law ("IHL"), and International Criminal Law ("ICL"); (ii) leaving unpunished those most responsible for *ius cogens* crimes weakens confidence in the rule of law, and fosters disdain for the political system as a whole; and (iii) new democratic systems require credibility and legitimacy through fair and transparent processes for establishing what happened and who are responsible (this can only be achieved through judicial proceedings characterised by the application of strict rules on admission of evidence, a beyond reasonable doubt standard, the rights of the defence and the presumption of innocence) (Bassioni 1996; Jackson 1945, 184).<sup>224</sup>

Nevertheless, the current international regulation of *ius cogens* crimes does not address many of the concerns raised by transitional justice theorists and practitioners. For example, regarding the debate on criminal proceedings and extrajudicial truth commission, Akhavan (Akhavan 1996, 271), Hayner (Hayner 2011), Minow (Minow 2014), and Wiebelhauss-Brahm (Wiebelhauss-Brahm 2010) consider truth commissions to be more effective in expressing social condemnation of large-scale human rights abuses. In their view, truth commissions offer the following advantages over criminal proceedings: (i) publicly identifying individual and organizational perpetrators; (ii) strengthening the role of victims by listening to their stories, publicly acknowledging their suffering and searching for ways to restore their dignity; (iii) promoting individual and collective reparations (both monetary and symbolic), educational programs, memorials and projects that strengthen democratic institutions; (iv) providing a broader view of those social, political and economic patterns that contributed to a high level of social degradation; and (v) fostering a collective memory and a cultural commitment to condemn past human rights abuses (in particular, murder, extermination, torture, sexual violence and other international crimes) (Roht-Arriaza 1995).

These advantages lead Vacas (2013) to favour a higher degree of political manoeuvrability in the design of transitional justice mechanisms in light of the specific needs of each

<sup>223</sup> This chapter does not deal with States' duties and victims' rights to integral reparations for *ius cogens* crimes.

<sup>224</sup> See also UN SPECIAL RAPPOREUR ON THE SITUATION OF HUMAN RIGHTS IN CHILE, Report *Prepared by the Special Rapporteur on the Situation of Human Rights in Chile*, U.N. GAOR, 38th Sess., Annex, Agenda Item 12, p. 341, U.N. Doc. A/38/385 (1983); and UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report on the Consequences of Impunity*, U.N. Doc. E/CN.4/1990/13.

situation of large-scale human rights abuses. This would mean, for instance, that those negotiating transitional processes should be provided with more leverage to decide whether to resort to criminal proceedings, truth commissions, or a combination of both or neither. The same position is taken by Murphy (2014), who observes that the special features of the theory of punishment in transitional situations justify greater flexibility in deciding what are the most appropriate mechanisms to enforce international criminal liability for *ius cogens* crimes.

In this context, transitional justice theorists and practitioners have largely chosen not to take into account the requirements arising out of the existing international normative framework of *ius cogens* crimes, hoping to force a change in its content through a policy of *fait accompli*. This practice has taken place with particular intensity in recent years in the design of transition mechanisms in Colombia, as evidenced by the ICC Prosecutor's reaction to the 2012 Legal Framework for Peace and its treatment of those most responsible for genocide, crimes against humanity and war crimes - including the power granted to the Colombian National Congress to legislate on: (i) alternative imprisonment sentences without any mandatory minimum length; (ii) serving such alternative sentences under special regimes, such as home detention; and (iii) suspending the execution of the alternative sentences (this last measure was subsequently declared unconstitutional by the Colombian Constitutional Court).<sup>225</sup> The recommendations made to Colombia in 2014 by the Inter-American Commission of Human Rights to amend the Legal Framework for Peace and its statutory laws, so as to make them compatible with international human rights standards, constitute a further example of this situation.<sup>226</sup>

Several aspects of the Integrated System of Truth, Justice, Reparation and Non-Repetition ("SIVJRNR"), provisionally agreed to on 15 December 2015 between the Government of Colombia and the FARC-EP, raise similar concerns. For example, the SIVJRNR provides for (i) the exemption of criminal responsibility through a blanket amnesty for those who have held the Presidency of Colombia; (ii) a maximum sentence of twenty years imprisonment for those most responsible for genocide, crimes against humanity and war crimes (i.e. *ius cogens* crimes) who refuse to acknowledge their criminal liability and decide not to cooperate with judicial authorities; and (iii) a maximum sentence of five to eight years of

<sup>225</sup> ICC Office of the Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. The concerns expressed by the ICC Prosecutor in this report, are reiterated in subsequent preliminary examination reports in relation to the situation in Colombia. See, ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, November 25, 2013, available at <https://www.icc-cpi.int/Pages/item.aspx?name=report-on-preliminary-examination-activities-2013>; ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, December 2, 2014, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pre-exam2014>; and ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, November 12, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-pe-activities-2015>. See also Olasolo 2014a.

<sup>226</sup> Inter-American Commission Of Human Rights, *Country Reports: Colombia, Truth, Justice and Reparation*, 2014, Chapter III on "Constitutional and Legal Framework, in particular pp. 185-194, available at: <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

community work or restriction of liberty (which consists of a prohibition to leave a given municipality or department during such time period) for those most responsible for *ius cogens* crimes who acknowledge their criminal liability and cooperate with the judicial authorities.<sup>227</sup>

Unilateral *de facto* initiatives such as those undertaken in Colombia are not the best way to further the dialogue between supporters of the current international normative framework of *ius cogens* crimes and transitional justice theorists and practitioners. With a particular focus on the debate on criminal trials and truth commissions, this chapter explores the need to strengthen such dialogue to seek a certain degree of harmonization between the regulation of *ius cogens* crimes under international law, and the needs arising out of the application of transitional justice to specific situations of large scale human rights abuses.

To do so, this chapter is divided into five sections, in addition to this introduction. In sections 2 and 3, the reach and limitations of criminal proceedings and truth commissions are studied. Section 4 addresses the question on whether it is possible to overcome such limitations by resorting jointly to criminal proceedings and truth commissions. Section 5 looks into the current normative framework under international law. Finally, section 6 highlights the need to harmonize the international regulation of *ius cogens* crimes with some of the demands arising out of transitional processes, which aim at overcoming situations of large-scale human rights abuses.

## **2. Reach and Limitations of Criminal Proceedings: The Symbolic Nature of the Application of International Criminal Law and Its Focus on “Those Most Responsible”**

Some supporters of truth commissions consider regional and international judicial bodies established by IHRL and ICL, in particular the International Criminal Court, as “symbolic” and “ineffective” (Minow 2014, 208). Nevertheless, the ICC does not appear to be significantly less effective than other international criminal tribunals with jurisdiction over a single crisis situation (ex-Yugoslavia, Rwanda, Sierra Leone or Cambodia),<sup>228</sup> or other

<sup>227</sup> Colombian Government and Farc-Ep, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: “Sistema Integral de Verdad, Justicia, Reparación y No Repetición”, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos*, December 15, 2015, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>, pp. 26 and 40.

<sup>228</sup> In its November 2015 report, the International Criminal Tribunal for the former Yugoslavia (ICTY) reported that between 1994 and 2015 it conducted criminal proceedings against 161 accused persons. By November 2015, only 3 appeals (concerning 10 persons) and 4 trials were pending. See ICTY, *Assessment and Report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council Resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015*, issued on November 16, 2015, p. 2, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_874.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_874.pdf). The International Criminal Tribunal for Rwanda (ICTR) explained in its final report, issued on November 17, 2015, that, between 1995 and 2015, it had

public international law jurisdictional bodies,<sup>229</sup> at least as measured by the number of individuals indicted and prosecuted.

Furthermore, international criminal law is not only enforced by international criminal tribunals, but is also enforced by national jurisdictions - in particular, by those national jurisdictions of (i) States in which *ius cogens* crimes are committed; (ii) States of which the alleged perpetrator is a national; and (iii) States acting under the principle of universal jurisdiction. (Bassiouni 1999) As a result, most trials for genocide, crimes against humanity and war crimes carried out since 1995<sup>230</sup> have taken place before national jurisdictions, as shown by the cases of Argentina,<sup>231</sup> Bosnia and Herzegovina,<sup>232</sup> Colombia<sup>233</sup> and

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completed trial proceedings against 93 accused persons, and appeal proceedings against 55. The ICTR expected to complete its last pending appeal by December 2015. See, ICTR, *Report on the Completion of the Mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015*, issued on November 17, 2015, p. 4, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_884.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_884.pdf). The Special Court of Sierra Leone (SCSL) stated in its final report that between 2003 and 2013 it had completed trial and appeal proceedings in relation to four cases concerning ten most responsible persons. See, SCSL, *Eleventh and Final Report of the President of the Special Court for Sierra Leone*, December 31, 2013, pp. 11-17, available at <http://www.rscsl.org/Documents/AnRpt11.pdf>. Finally, the Extraordinary Chambers of the Courts of Cambodia (ECCC) have finalised between 2004 and 2015 the case against the director of the S-21 prison, Kaing Guek Eav, alias *Duch*. Today, three other cases against most responsible persons of the Republic of Kampuchea (1975-1977) are still pending. See, SCCC, *The Court Report of the Extraordinary Chambers in the Courts of Cambodia*, Num. 94, February 2016, available at: <http://www.eccc.gov.kh/sites/default/files/publications/Court%20Report%20on%20February%202016.pdf>. At the end of War World II, the International Military Tribunal (Nürnberg Tribunal), established by the United States, France, the United Kingdom and the Soviet Union pursuant to the Treaty of London of August 8, 1945, tried, between November 20, 1945 and October 1, 1946, twenty-four political, military, economic and ideological leaders of the national socialist regime that ruled in Germany between 1933 and 1945. Several organizations were also prosecuted by the Nürnberg Tribunal. See, <http://avalon.law.yale.edu/imt/judgen.asp>. In turn, the International Military Tribunal for the Far East (Tokyo Tribunal), set up on January 19, 1946 by an administrative decree of the Supreme Commander of the Allied Forces in the Pacific (General Douglas McArthur), tried between May 3, 1946 and November 12, 1948, the Japanese Prime Minister, Hideki Tojo, and twenty-four members of the Japanese government and senior officials of the Japanese armed forces. In order to facilitate the transition from war to peace in Japan, General Mc Arthur exempted Emperor Hirohito, Head of the Japanese Imperial State, from any of the proceedings. He was not even called to testify. See Majima 2013. See also International Military Tribunal for the Far East, *Judgment of 4 November 1948*. <http://werle.rewi.hu-berlin.de/tokio.pdf>.

<sup>229</sup> The International Court of Justice (ICJ) has indicated that between May 22, 1947 and March 28, 2016, 161 cases have been registered in the General List of Cases. See, <http://www.ici-cij.org/docket/index.php?p1=3>. The ICJ has also received 26 requests for advisory opinions. See: <http://www.ici-cij.org/docket/index.php?p1=3&p2=4>.

<sup>230</sup> Prior to 1995, there are approximately 900 cases tried in Germany (mostly by German tribunals) concerning crimes committed during the National Socialist regime, including those conducted by British, French, US and Russian military commissions pursuant to Law No. 10 of the Allied Control Council. Nevertheless, it is surprising the tenacity with which the tribunals of the Federal Republic of Germany, unlike those of the Democratic Republic of Germany, opposed systematically to enter convictions for crimes against humanity, even in the most blatant cases of extermination, due to a very rigid and formalistic interpretation of the principle of legality. See in this respect, the excellent work by Lawrence Douglas (2013). See also Olasolo (2013). The situation was very different in Japan, where, after the judgment of the International Military Tribunal for the Far East, no further trials were conducted by Japanese tribunals - although in foreign countries occupied by Japan during World War II some criminal proceedings against occupation authorities took place. This happened, for instance, in the Yamashita case, in which a US Military Commission tried the commander-in-chief of the Japanese occupation forces in the Philippines, Gen. Tomoyuki Yamashita. Finally, in Italy, very few criminal proceedings against civilian and military authorities of Mussolini's fascist regime (1922-1943) took place. In addition, extradition requests from African and European countries were systematically denied by Italian authorities. As Nino (1996) has highlighted, ultimately, the Minister of Justice approved an amnesty law, turning any attempts to conduct criminal prosecutions into a parody. Only a small number of extremely cruel cases of torture were excluded from the amnesty law. As a result, most civil servants, who had been exonerated by the amnesty law, were reinstated to their positions, and the confiscation of the economic gains obtained during the fascist regime came abruptly to an end.

<sup>231</sup> Since the judgment of the Supreme Court of Argentina in the Simon case, issued on July 14, 2005 (in which the 1986 laws on *Obediencia Debida* and *Punto Final* were declared unconstitutional), a total of 2,354 persons (including 70 civilians) have been indicted for crimes against humanity in Argentina. 669 of them have already been convicted in 156 cases. 370 additional cases are pending. The former Head of the III Corps, Luciano Benjamin Menendez, was one of those convicted and subjected to twelve sentences, ten of which are for life imprisonment. As for the civilians, out of 70 defendants, only four have been convicted so far: two entrepreneurs, Emilio Felipe and Juan Manuel Mendez, and two former state officials, Victor Brusa (in the central province of Santa Fe) and Manlio Martinez (in the northern province of Tucuman). There are currently 13 on-going trials, including: (i) the trial concerning the crimes committed in the clandestine detention centers of the Higher Mechanic School of the Navy (ESMA) in Buenos Aires (59 defendants are tried in this case for having allegedly committed 789 acts of kidnapping, torture and killing in the ESMA, including 8 pilots accused of "death flights"

Rwanda,<sup>234</sup> and a number of heads of State or Government have been subject to investigation and/or prosecution.<sup>235</sup>

Nevertheless, even in the most active national jurisdictions, the number of those investigated and prosecuted for *ius cogens* crimes barely reaches 1 percent of all responsible persons.<sup>236</sup> This reinforces the view that the application of ICL, whether at the national or international level, has an undeniable symbolic nature, which is strengthened by its traditional focus on “the most responsible persons.”<sup>237</sup>

Zolo (2009), Margalit (2010) and Jeangène Vilmer (2011) are concerned with the symbolic reach of ICL application and its focus on those most responsible, given its potential for political manipulation. Zolo is especially leery of the limitations of the investigations and

in which detainees were thrown to the river Plate); (ii) the trial regarding the clandestine detention center of La Perla – Córdoba, involving 52 defendants and 417 victims; and (iii) the trial concerning the so-called “Plan Condor”, under which the South American dictatorships coordinated the systematic exchange of information on political opponents and the transfer of politically-motivated prisoners. See El País 2016.

<sup>232</sup> By the end of 2015, over 500 people have been formally charged in Bosnia and Herzegovina for war crimes committed during the conflict that ravaged the country between 1992 and 1995. 140 of them have already been convicted. See Balkan Transitional Justice 2015.

<sup>233</sup> In Colombia more than 600 members of the army and the security forces have been convicted since 2008, and several thousands are under investigation, for the systematic extrajudicial killings of, at least, 3,000 civilians, committed by several Colombian army brigades throughout the country between 2000 and 2008. See, Maseri 2016; El País 2015. Furthermore, between 2006 and 2016, Colombian tribunals: (i) have convicted around 60 senators and congressmen, as well as 15 governors, for ties to paramilitary groups; (ii) have convicted, or indicted, 43 out of the 46 highest living paramilitary leaders; (iii) are trying, through the special jurisdiction for Justice and Peace, nearly 3,000 demobilized paramilitaries; and (iv) have issued numerous judgments against members of the country's two main guerrillas (FARC and ELN), including those who are part of their respective Secretariats. See, ICC Office Of The Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. See also, Olasolo (2014).

<sup>234</sup> Before resorting to community justice (*gacaca*), Rwanda conducted around 1,300 genocide trials in national tribunals between 1995 and 2001. See Tirrell 2014, 243.

<sup>235</sup> Between 1990 and 2009, a number of Heads of State and Heads of Government were prosecuted for *ius cogens* crimes. These cases, with a particular focus on the trial for *ius cogens* crimes of Augusto Pinochet (Chile), Alberto Fujimori (Peru), Slobodan Milosevic (former Yugoslavia), Charles Taylor (Liberia) and Saddam Hussein (Iraq), are studied in Lutz and Reiger 2009. From 2009 on, the ICC has conducted criminal proceedings against the following Heads of States or Government: Omar Al-Bashir (Sudan), Muammar El Gaddafi (Libya), Said Al Islam Gaddafi (Libya), Uhuru Kenyatta (Kenya) and Laurent Gbagbo (Ivory Coast).

<sup>236</sup> For example, the 140 convicted persons, and the almost 400 additional persons that have been charged, by the Bosnia and Herzegovina War Crimes Chamber, are only a small fraction of those responsible for the forced displacement of half of the population of the country (two out of four million inhabitants) between 1992 and 1995. Similarly, in Colombia, where there are about seven million displaced persons and tens of thousands of cases of sexual violence, only a few dozens of judgments concerning these crimes have been handed down so far. See, ICC Office of the Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. These conclusions are reaffirmed in subsequent ICC Prosecutor reports on the preliminary examination of the situation in Colombia. See, ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2013*, November 25, 2013, available at <https://www.icc-cpi.int/Pages/item.aspx?name=report-on-preliminary-examination-activities-2013>; ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2014*, December 2, 2014, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pre-exam2014>; and ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2015*, November 12, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-pe-activities-2015>. Concerning Rwanda, Tirrell (2014, 243) reminds us that the cases prosecuted in national criminal courts are less than 1 percent of the 130,000 detainees who had been sent back to the community justice of the *gacaca* to avoid a collapse in the justice system. With regard to the *ius cogens* crimes committed during World War II, Douglas (2013) reminds us that those cases tried in Germany did not even affect 1 percent of the 500,000 persons who were part of the National Socialist Party in the 1940's. Hence, it is in Argentina, where, in light of the relatively high number of prosecutions, and low number of victims, the highest percentage of the total alleged responsible persons has been brought to trial.

<sup>237</sup> See ICC Office Of The Prosecutor, “Policy Paper on Preliminary Examinations”, November 1, 2013, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11-2013>; ICC Office Of The Prosecutor, “Draft Policy Paper on Case Selection and Prioritisation”, February 29, 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Draft-Policy-Paper-on-Case-Selection-and-Prioritisation>; and United Nations Security Council Resolution 1534, concerning the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), United Nations Security Council, Resolution S/RES/1534, March 26, 2004, paras 5-6,

prosecutions conducted by the Nuremberg and Tokyo Tribunals to War World II German and Japanese leadership. He believes that something similar may be happening with the new wave of international criminal tribunals established in the context of a single political and military superpower in the 1990s.<sup>238</sup> In turn, Jeangène Vilmer refers to numerous documents (including several statements by former ICTY and ICTR Prosecutor, Carla del Ponte) to show a notable degree of dependence of international criminal tribunals on the cooperation of the most influential States in the international society (Jeangène Vilmer 2011, 99-109).

Furthermore, Guembe and Olea (2006), as well as former ICC Prosecutor Luis Moreno-Ocampo (2005), stress, in light of the Colombian and Ugandan situations, the difficulties in successfully concluding peace deals between parties to an armed conflict that have not been military defeated. In their view, such peace deals become almost impossible if the leaders of the negotiating parties view their choice as between continuing the war or being subject to prosecution and punishment for *ius cogens* crimes committed by their subordinates.

But, if international criminal proceedings against the most responsible persons are problematic because of their potential for political manipulation, or the need for their contribution to overcome situations of large-scale human rights abuses, what should then be the scope of application of international criminal law, given its aim to provide protection against the gravest attacks to the most fundamental values of the international society?

### **3. Reach and Limitations of Truth Commissions**

Minow (2014, 208-211) and Nagy (2014, 223) argue that truth commissions are better equipped than criminal proceedings because they put victims at the centre of the process, provide for a broader understanding of the social, political, economic and cultural factors that brought about large scale human rights abuses, and allow a glimpse into the past without threatening the leadership of the parties to the conflict. Nevertheless, Lawther (2014b), Rotondi and Eisikovits (2014) remind us that truth commissions usually avoid looking thoroughly into the past, and do not necessarily make the parties' leadership feel safe.

Jolly (2001), Rehn and Sirleaf (2002) also remind us that many truth commissions do not address the patterns of structural injustice, particularly with regard to (i) gender

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<sup>238</sup> In support of this statement, Zolo points what he describes as the ICTY's excessive focus on crimes committed by Serbs and Bosnian Serbs, and the forgetfulness of the international society with regard to the tens (or even hundreds) of thousands of persons killed by the Rwandan Patriotic Front upon seizing control of Rwanda in July 1994.

violence;<sup>239</sup> and (ii) the socio-economic effects of the violence, which are “legalized” through transitional processes that leave them hidden in the background (transitional processes rarely reverse systematic and large-scale acquisitions of property obtained through violence and coercion).<sup>240</sup> For Mamdani (1996) and Nagy (2014), the South African Truth and Reconciliation Commission is a paradigmatic example of self-restraint in its analysis of violence as it tried, at all times, to focus on individual, isolated, acts of violence that took place against the backdrop of apartheid, rather than the systemic violence of apartheid itself.<sup>241</sup>

Moreover, even when these issues are addressed, there are very few truth commissions that describe the critical role of foreign States in the large-scale commission of human rights abuses. (Nagy 2014, 223)<sup>242</sup> One notable exception was the East Timorese Commission that examined the 1974-1999 Indonesian occupation supported by Australia, USA, Japan and the United Kingdom. Indeed, out of more than forty extrajudicial truth commissions that have been operative in the last twenty years,<sup>243</sup> Hayner (2011, 75-6) and Nagy (2014, 224-6) point out that only a handful of them, including Chad, Chile, East Timor, El Salvador and Guatemala, have thoroughly analysed the fundamental role of foreign states (particularly, those most influential in the international society) on the structural injustice that is at the root of *ius cogens* crimes (Hayner 2011, 75-6).

In light of the cases of Spain, Northern Ireland and Mozambique, Lawther (2014b), Rotondi and Eisikovits (2014) reject the proposition that truth commissions allow for a glimpse into past human rights abuses without posing a threat to the leadership of the parties to the conflict. They acknowledge the lack of studies on the correlation between the amount and nature of the information disclosed by truth commissions and the degree of threat experienced by major players in those negotiations in which transitions are designed. Nevertheless, they assert that truth commissions highlight, as “a powerful intuition”, the belief that the level of threat experienced by the leadership of the parties involved is proportional to the level of systematicity and depth in the truth commissions’ analysis of the following questions: (i) the structural injustice that generated the social degradation in which *ius cogens* crimes were committed; (ii) the socio-economic effects of the violence, and the risk of their “legalization” through transitional mechanisms; and (iii)

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<sup>239</sup> As Nagy (2014, 224-225) points out, the Sierra Leone Truth and Reconciliation Commission has been an exception because it has dealt with gender violence in an usual systematic manner. See also Sierra Leone Truth And Reconciliation Commission, *Witness to Truth: Final Report of the TRC*, available at: <http://www.sierraleonetr.org/index.php/view-the-final-report>.

<sup>240</sup> A similar view is held by Olasolo (2016b).

<sup>241</sup> They reach this conclusion even acknowledging the positive aspects of the sectorial hearings held by the TRC on the role of business, medical, legal, religious and prison staff communities. The value of these sectorial hearings has been highlighted by Dyzenhaus (1998), Boraine (2000), and Rolston (2002).

<sup>242</sup> See also, Comissao De Acolhimento, Verdade E Reconciliacao De Timor-Leste, *Chega! The Report of the Commission for the Reception, Truth and Reconciliation for Timor-Leste (CAVR)*, 2005, available at: <http://www.cavr-timorleste.org/en/ChegaReport.htm>.

<sup>243</sup> A historical account of the tens of truth commissions established since 1990, can be found in Ibañez Najar (2014).

the fundamental role in the violence of the most influential States of the international society.

Concerning the situation in Northern Ireland, Hamber (1998), Lundy (2010), and Lawther (2014b) point to the extensive and controversial debate held within the transitional institutions (the Northern Ireland Affairs Committee<sup>244</sup> and the Consultative Group on the Past<sup>245</sup>) and civil society on whether or not to establish a general mechanism for truth-seeking to overcome the political violence experienced in Northern Ireland since the late 1960s.<sup>246</sup> If, as Ignatieff (1998) suggests, the ultimate goal of recovering the truth is to divide responsibilities and expose the false myth of the absence of guilt for large-scale human rights abuses on any of the adverse parties, and taking into account that influential actors in Northern Ireland hold completely different views of the causes and responsibilities for the violence, it is not surprising that the process of truth recovery looks more like a sectarian battle for memory than an instrument for furthering reconciliation with the past (Lawther 2014a).

Transitional processes in Northern Ireland (Eames and Bradley 2008) and Spain (Aguilar 2001) also illustrate strong resistance to acknowledging the "dark truths" of state institutions and the paramilitary groups supported by them. This has caused many victims not to proceed with their requests for truth and recovery of the bodies of their disappeared relatives. A paradigmatic example of this situation is the suspension, after an attempted military coup on February 23, 1981, of the 1979 programme of exhumations of unidentified bodies buried in mass graves in Spain between 1936 and 1975. (Jerez-Farran and Amago) A similar programme has not been set into motion since then, even though, according to the June 2, 2014 Report on Spain of the Working Group on Enforced or Involuntary Disappearances (para. 6):

In Spain there were committed serious and massive violations of human rights during the Civil War (1936-1939) and the dictatorship (1939-1975). To date there is no official figure for the number of missing persons since Spain does not have a centralized database on the subject. According to the criminal investigation conducted by the Penal Investigative Tribunal No. 5 of the *Audiencia Nacional*, the number of victims of forced disappearances from July 17, 1936 to December 1951 amount to 114,226. Since this criminal investigation was, for all practical effects,

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<sup>244</sup> Northern Ireland Affairs Committee, *Ways of Dealing with Northern Ireland's Past: Interim Report – Victims and Survivors*, The Stationary Office, London, 2005.

<sup>245</sup> Consultative Group On The Past, *Report of the Consultative Group on the Past*, Belfast, 2009.

<sup>246</sup> See also Healing Through Remembering, *Making Peace with the Past: Options for Truth Recovery Regarding the Conflict in and about Northern Ireland*, Belfast, 2006.

paralyzed or broken up, the number could not be determined reliably by a judicial inquiry.

The gravity of this situation is manifest when compared with the 39,000 disappearances recorded by the Center for Historical Memory (2013) with regard to the fifty-year long Colombian armed conflict, the 10,000 to 30,000 disappearances in Argentina between 1976 and 1983 (National Commission on the Disappearance of Persons 1984), and the 3,400 disappearances in Chile between 1973 and 1989 during the dictatorship of Augusto Pinochet (Chilean National Commission on Truth and Reconciliation 1991). In some Spanish regions, such as La Rioja, the number of alleged missing persons per hundred thousand inhabitants (643) is approximately eight times higher than the average in Colombia (81.5).<sup>247</sup>

In light of this situation, Leebaw affirms that the tension between the goal of ending denial and exposing the extent of State complicity on the one hand, and the importance of protecting political compromises on the other, is inherent to transitional justice. (Leebaw 2008) In the same vein, Lawther (2014b, 37) recounts the political, sociological and practical reasons that justify opposition to the truth recovery process, underlining in particular "the competing notions of victimhood; the impact of a continued legacy of mistrust; the importance of honouring past sacrifices; and from a practical peace-making perspective, the need to maintain political and social stability." As a result, Roht-Arriaza (2006) argues that truth commissions are much better equipped to look into what happened than to generate common understanding, reconciliation and social change.

#### **4. Is It Possible To Overcome The Limitations Of Criminal Proceedings And Truth Commissions By Resorting To Them Jointly?**

The question arises as to whether the combination of national and/or international criminal proceedings, together with truth commissions, can cover some of the concerns referred to in the previous two sections. The cases of Peru, Sierra Leone and East Timor, as well as the 15 December 2015 provisional agreement between the Colombian Government and the FARC-EP on a comprehensive system of truth, justice, reparation and guarantees of non-repetition (i.e. the SIVJRRN),<sup>248</sup> provide some evidence for an

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<sup>247</sup> According to the Government of La Rioja, on July 1, 2015 there was a population in La Rioja of 312,624 persons. See: <http://www.larioja.org/larioja-client/cm/estadistica/images?idMmedia=731286>. According to the criminal complaint filed with the *Audiencia Nacional* on October 16, 2008, the number of alleged disappeared persons in La Rioja is 2,007 (Working Group on Enforced or Involuntary Disappearances 2014). As result, the *ratio* of alleged disappeared persons per each hundred thousand inhabitants in La Rioja amounts to 643.

<sup>248</sup> Colombian Government and FARC-EP, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición", incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos,*

affirmative answer to this question. Likewise, Tejan-Coley (2003), Schabas (2006, 38-40), Horowitz (2006, 54-5), Burgess (2006, 200-201), Cueva (2006, 85-89), Lutz (2006, 325-327) and Minow (2014, 210-211) emphasize the need to coordinate the overall goals, actions and procedures for the exchange of information between criminal proceedings and truth commissions.

Criminal proceedings and truth commissions can follow one another, as in the Peruvian case in which a truth commission collected documents that were subsequently used in national criminal proceedings. (Cueva 2006, 85-89) Both mechanisms may also act simultaneously. For instance, in Sierra Leone, criminal proceedings against the most responsible persons were conducted at the same time that a truth commission undertook its work. (Horowitz 2006, 54-5) In turn, in East Timor, a clear demarcation was set up between the enforcement of criminal liability through criminal proceedings, and the overall goals of the truth commission to promote the restoration of the dignity of victims, and foster reconciliation through a broader articulation of the social, political, economic and cultural causes of the large scale human rights abuses (Burgess 2006, 200-1).

The provisional agreement on the establishment of transitional mechanisms (the SIVJNRN) in Colombia raises concern, since it includes a court process (the Special Jurisdiction for Peace) and a truth commission (the Commission for Truth, Reconciliation and Non-Repetition), without a clear division of functions between both truth-seeking mechanisms.<sup>249</sup> Furthermore, the information received or produced by the truth commission may not be transferred *proprio motu*, or even at the request of any judicial authority, for use in judicial proceedings during the life of the truth commission.<sup>250</sup> Moreover, it leaves unresolved the question of whether the information generated by the truth commission during its very limited mandate of three years can later be accessed by the Special Jurisdiction for Peace, or any other judicial authority, after the commission has finished its work.<sup>251</sup>

The combination of criminal proceedings and truth commissions can certainly facilitate the restoration of the dignity of victims, help to prevent grave breaches of IHRL, IHL and ICL, and promote complementarity between: (i) a judicial truth on individual liabilities, which is obtained through criminal proceedings that offer greater protection to the

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December 15, 2015, pp. 26 and 40, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>.

<sup>249</sup> Colombian Government and FARC-EP, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición", incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos*, December 15, 2015, pp. 26 and 40, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>, p. 11.

<sup>250</sup> Id.

<sup>251</sup> Id. It leaves also unresolved the issue of the probative value of such information. According to the provisional agreement, such information will not have any probative value during the three years mandate of the truth commission. However, it is unclear whether this lack of probative value is limited to this three years period, or it extends beyond it.

accused persons; and (ii) a significantly broader historical and contextual account on the causes of the violence by truth commissions.

Nevertheless, the combination of both truth-seeking mechanisms does not necessarily cover the main concern shown by Lawther (2014b), Rotondi and Eisikovits (2014), Hamber (1998) and Lundy (2010): the opposition to such mechanisms by influential socio-political actors (in particular, the leadership of the parties involved in the commission of *ius cogens* crimes), who may see in the recovery of the truth a considerable threat to their position.

Likewise, such combination does not necessarily overcome the objections raised by Hayner (2011, 75-6) and Nagy (2014, 224-6) concerning the insufficient analysis in the recovery of the truth of: (i) the structural injustice that generated the social degradation in which *ius cogens* crimes were committed; (ii) the socio-economic effects of the violence, and the risk of their "legalization" through transitional mechanisms; and (iii) the fundamental role in the violence of the most influential States of the international society.

Although the presentation of evidence on the contextual elements of crimes against humanity (the existence of a widespread and systematic attack against a civilian population in furtherance of a State or organisational policy) and war crimes (existence of an international or non-international armed conflict) could provide a good opportunity to overcome these deficiencies, Minow (2014, 208-11) highlights that the type of documentary or expert evidence used for these purposes in national and international criminal proceedings add very little to the information that can be obtained by truth commissions. As a result, criminal proceedings could, at best, serve as a palliative in those cases in which truth commissions are reluctant to entertain in sufficient depth the kind of historical and contextual analysis for which they are actually better equipped.

Furthermore, in relation to the role played in the violence by the most influential states of the international society, the contribution that can be reasonably expected from the application of international criminal law is limited, in light of the concerns highlighted by Zolo (2009), Margalit (2010), and Jeangène Vilmer (2011) about the considerable degree of dependence of international criminal tribunals on the actual cooperation of such States.

## **5. The Current Normative Framework under International Law**

As seen in previous sections, criminal proceedings and truth commissions have strengths and weaknesses. The latter can be minimized, but not fully overcome, when both truth-seeking mechanisms are jointly resorted to. Nevertheless, this analysis does not take into account the existing normative framework under international law.

For Elster (2004), none of the components of transitional justice, including criminal investigations and prosecutions for *ius cogens* crimes, are mandatory under international law, because transitional justice, which aims at guiding the design of the justice element in transitional processes, has a non-binding descriptive nature. Hence, transitional processes must exclusively implement the will of the negotiating parties, which cannot be subject to any limitation by international law standards. Accordingly, it will be up to the negotiating parties to decide on the establishment of criminal proceedings, truth commission, both or none of them (Elster 2004).

Nagy's (2014, 215) critique of the trend in international society to impose decontextualized, technocratic and monolithic solutions ("one size fits all") is in line with Elster's approach. Corradetti, Eisikovits and Rotondi (2014, 5) also take this view, when - on the basis of political experiences and sociological practices in transitional processes in Spain, Northern Ireland and Mozambique - they stress that there are at least three types of situations where stating the binding nature of criminal proceedings and truth commissions is problematic: (i) post-conflict societies that show a cultural ambivalence towards policies of enforcement of responsibility for past abuses (Mozambique); (ii) post-conflict societies in which there is a complex division of blame between the different parties (Northern Ireland); and (iii) post-conflict societies in which insisting on truth recovery and liability enforcement poses a serious risk of reactivating violence or conflict (Spain in the late 1970s and early 1980s).

Teitel (2000) disagrees with this view. She affirms the binding nature under international law of the notion of transitional justice and its various components. For her, forgetting the past without establishing what happened and enforcing those responsibilities arising therefrom, impedes the development of real transitions and generates greater division between victims and perpetrators.

With regard to the specific international legal regime of the core *ius cogens* crimes (genocide, crimes against humanity and war crimes), the 1950 Nuremberg principles, as elaborated upon by the International Law Commission, affirm that those who commit, or participate in the commission of, any of these crimes incur international criminal liability.<sup>252</sup> In turn, the jurisprudence of the international criminal tribunals, particularly the ICTY, has stressed the *ius cogens* nature of the said crimes.<sup>253</sup>

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<sup>252</sup> See *supra* n. 2.

<sup>253</sup> ICTY, *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic and Drogan Papic*, Case No. IT-95-16-T, Trial Chamber, Judgment, January 14, 2000, paragraph 520; and ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeals Chamber, Judgment, July 15, 1999, paragraph 296, quoting United Nations Secretary-General, *Report pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN. Doc. S/25704, May 3, 1993, paragraph 34. With regard to the crime of torture as a crime against humanity and as a war crime, see ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T, Trial Chamber, Judgment, November 16, 1998, paragraph 454; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vokovic*, Case No. IT-96-23-T &

The Preamble of the ICC Statute also recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>254</sup> In the same vein, the Human Rights Committee, in its General Observation 31 (2004), affirms that, as part of the States Parties’ obligations “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights” provided for in the ICCPR,<sup>255</sup> they must investigate, prosecute and punish all violations that amount to international crimes.<sup>256</sup> In the Committee's view, this also means prohibiting all exemptions of criminal liability as part of transitional processes.<sup>257</sup>

Moreover, although the jurisprudence of the International Court of Justice and the European Court of Human Rights has not been as vocal in this regard the Inter-American Court of Human Rights has affirmed the *ius cogens* nature of the prohibition addressed to States to undertake systematic or widespread violence against the civilian population (Olasolo *et al.* 2016b). Furthermore, in the cases *Almonacid Arellano et al.*,<sup>258</sup> *Miguel Castro Castro Prison*,<sup>259</sup> and *La Cantuta University*,<sup>260</sup> the Inter-American Court has also stated the *ius cogens* nature of the international norms which (i) provide for the individual criminal liability of those involved in crimes against humanity; and (ii) impose on those States where such crimes are committed the duty to investigate them, to prosecute the alleged responsible persons, and to punish those who are convicted. The Inter-American Court has also affirmed in these cases the *ius cogens* nature of the international norms establishing the non-applicability of any statute of limitations and prohibiting any amnesty laws for crimes against humanity.<sup>261</sup>

In application of this normative framework, the Human Rights Committee, in its August 14, 2015 Report on Spain, expressed its concerns about: (i) “the State party’s decision that the 1977 Amnesty Act, which hinders the investigation of past human rights violations, particularly crimes of torture, enforced disappearance and summary

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IT-96-23/1-T, Trial Chamber, Judgment, February 22, 2001, paragraph 466; and ICTY, *Prosecutor v. Anto Furundzija*, Case No. IT-95-/7/1-T, Trial Chamber, Judgment, December 10, 1998, paragraphs 153-157. See also SCSL, *Prosecutor v. Augustine Gbao*, Case No. SCSL-2004-15-AR72 (E), Appeals Chamber, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, May 25, 2004, paragraph 9.

<sup>254</sup> ICC Statute, Preamble, paragraph 5.

<sup>255</sup> ICCPR, Article 2 (1).

<sup>256</sup> Human Rights Committee, *General Comment 31, Nature of General Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paragraph 18.

<sup>257</sup> *Id.*

<sup>258</sup> Inter-American Court Of Human Rights, *Case of Almonacid Arellano et al. vs. Chile*, Series C, Num. 154, Judgment (Preliminary Exceptions, Merits, Reparations and Costs), September 26, 2006, at paragraph 114.

<sup>259</sup> Inter-American Court Of Human Rights, *Case of Miguel Castro Prison vs. Peru*, Series C, Num. 160, Judgment (Merits, Reparations and Costs), November 25, 2006, at paragraphs 402 and 404.

<sup>260</sup> Inter-American Court Of Human Rights, *Case of La Cantuta vs. Peru*, Series C, Num. 162, Judgment (Merits, Reparations and Costs), November 29, 2006, at paragraphs 168 and 225.

<sup>261</sup> See supra notes 139, 140 and 141.

execution, should remain in force;”<sup>262</sup> (ii) “the shortcomings and deficiencies in the regulation of search, exhumation and identification procedures, in particular by the fact that the localization and identification of disappeared persons are left to the initiative of families, and by the resulting inequalities for victims due to regional differences;”<sup>263</sup> and (iii) “the difficulties in access to archives, in particular military archives.”<sup>264</sup>

As a result, the Human Rights Committee, “reiterate[d] its recommendation that the Amnesty Act should be repealed or amended to bring it fully into line with the provisions of the Covenant.”<sup>265</sup> It also recommended that Spain: (i) “actively encourage investigations into all past human rights violations;”<sup>266</sup> (ii) “ensure that, as a result of these investigations, the perpetrators are identified, prosecuted and punished in a manner commensurate with the gravity of the crimes committed;”<sup>267</sup> and (iii) “ensure that redress is provided to the victims.”<sup>268</sup> Furthermore, the Human Rights Committee urged Spain to “review its legislation on the search for, exhumation and identification of disappeared persons,”<sup>269</sup> “establish a legal framework at national level for its archives,”<sup>270</sup> and “allow the opening of archives on the basis of clear, public criteria, in accordance with the rights enshrined in the Covenant.”<sup>271</sup>

Three days after issuing its report on Spain, the Human Rights Committee issued its report on Great Britain and Northern Ireland in which it expressed concern “about the quality and pace of the process of promoting accountability in relation to ‘the Troubles’ in Northern Ireland and about the absence of a comprehensive framework for dealing with conflict-related serious human rights violations.”<sup>272</sup> As a result, the Human

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<sup>262</sup> Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, CCPR/C/ESP/CO/6, August 14, 2015, at paragraph 21.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* In this respect, the Human Rights Committee urged Spain “to implement the recommendations of the Committee on Enforced Disappearances contained in its recent concluding observations (CED/C/ESP/CO/1, paragraph 32).”

<sup>270</sup> Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, CCPR/C/ESP/CO/6, August 14, 2015, at paragraph 2.

<sup>271</sup> *Id.*

<sup>272</sup> Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, August 17, 2015, at paragraph 8. The Human Rights Committee had already expressed this concern in its previous report on Great Britain and Northern Ireland of May 30, 2008, CCPR/C/GBR/CO/6, at paragraph 9. The Human Rights Committee also “note[d] with concern (a) the multiple independence and effectiveness shortcomings alleged in relation to the Police Ombudsman’s ability to investigate historical cases of police misconduct; (b) that the Legacy Investigation Branch established within the Police Service of Northern Ireland to carry out the work of the closed Historical Enquiries Team may [have] lack[ed] sufficient independence and adequate resources; (c) delays in the functioning of the Coroner’s inquest system in legacy cases; (d) the retention in the Inquiries Act 2005 of a broad mandate for government ministers to suppress the publication of inquiry reports and the lack of safeguards against abuse of those executive powers; and (e) that the review relating to the murder of Patrick Finucane (i.e. the de Silva Review) d[id] not appear to satisfy the effective investigation standards under the Covenant.” Furthermore, the Human Rights

Rights Committee recommended that Great Britain *inter alia*: (i) [e]nsure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;<sup>273</sup> (ii) “[e]nsure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases; and ensure its access to all documentation and material relevant to its investigations;”<sup>274</sup> (iii) “[e]nsure that the Legacy Investigation Branch and the Coroner’s Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;”<sup>275</sup> and (d) “[r]econsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005.”<sup>276</sup>

The existing normative framework that obligates States to investigate, prosecute and punish acts of genocide, crimes against humanity and war crimes is of great significance because, as Osiel (2000, 121) has pointed out, such crimes are made up of a sum of atrocities. Likewise, Luban (2004, 90) considers that such crimes represent the worst threat to our well-being, and even to our very survival because “they are the limiting case of politics gone cancerous.”<sup>277</sup> Otherwise, it is difficult to explain the reasons behind the design and implementation of campaigns of violence which aim to destroy national, ethnic, racial or religious groups (genocide), to attack the civilian population in a systematic or large scale manner (crimes against humanity), or to harm those persons and objects that are protected during armed conflict due to their vulnerability (war crimes). This means that in all those situations in which these crimes are committed, it will, sooner or later, be necessary to undertake a transitional process to put an end to political regimes characterized by large scale human rights abuses or to move away from armed conflict. In light of the above-mentioned,<sup>278</sup> it is not permitted under current international law for the negotiating parties to design transitional processes that do not provide for national or

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Committee, “while welcoming the proposed establishment of an Historical Investigations Unit to deal with outstanding cases related to the conflict in Northern Ireland, [was] concerned that the quality of investigations to be conducted may be affected by the passage of time, given that the unit would become fully operational only in 2017 (arts. 2 and 6).” Vid. Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, August 17, 2015, at paragraph 8.

<sup>273</sup> Id.

<sup>274</sup> Id.

<sup>275</sup> Id.

<sup>276</sup> Id.

<sup>277</sup> According to Luban, “[p]recisely because we cannot live without politics, we exist under the permanent threat that politics will turn cancerous and the indispensable institutions of organized political life will destroy us.”

<sup>278</sup> For a deeper analysis, on the existing normative framework on crimes against humanity under international law, see Olasolo *et al.* (2016b).

international criminal proceedings for genocide, crimes against humanity and war crimes, as one of its core components (Olasolo 2014b). The same conclusion is reached by Espindola (2014) after critiquing the arguments put forward by Carl Schmitt in favour of amnesties, and tracing the evolution of international law since the promulgation of the Nuremberg principles (including the development of the principle of universal jurisdiction, and the entry into force of the ICC Statute) to outlaw amnesty laws. Uprimny and Saffon also embrace this view when claiming that victims' rights to truth and justice under international law constitute an inescapable mandatory minimum which is not negotiable, and thus poses a credible threat for those who might engage in genocide, crimes against humanity and war crimes (Uprimny and Saffon 2009, 209).

## **6. Conclusion: The Need To Harmonize The Existing Normative Framework Of *Ius Cogens* Crimes Under International Law With The Demands Arising Out Of Transitional Processes Which Aim At Overcoming Situations Of Large Scale Human Rights Abuses**

Resistance to the application of the international regulation of *ius cogens* crimes is nothing new. The resistance to this regulatory scheme has its roots in the transformation inherent in the prohibition against *ius cogens* crimes because, unlike national criminal law and transnational criminal law,<sup>279</sup> international criminal law targets in particular those leaders who have traditionally been above the law. Applying Arendt's (1963) categories, such leaders are those "dogmatists" (who deal with their anguish of living with uncertainty by pursuing an ideal to the end by all available means) and those "nihilistic" (who do not believe in anything but themselves, and do whatever is necessary to meet their ambitions for social advancement and political and economic power), who use the power structures that they control to make "ordinary citizens" carry out uncritically the most horrific atrocities against their peers. As the ICC Prosecutor has put it, what this ultimately means is that international criminal law is particularly concerned with those persons who are "most responsible" for *ius cogens* crimes.<sup>280</sup>

<sup>279</sup> Latest developments in core transnational crimes, such as terrorism, have been based, to a large extent, on the so-called "penal law for the enemy". See Jakobs and Meliá (2006), and Vervaele (2005). For a critical approach to these developments, see Bustos Ramírez (2004, 407); Zaffaroni *et al.* (2000, 17) Muñoz Conde (2004), and Olasolo and Peréz Cepeda (2008, Ch. II).

<sup>280</sup> ICC Office Of The Prosecutor, "Policy Paper", September 1, 2003, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-paper-2003>; ICC Office Of The Prosecutor, "Policy Paper on the Interests of Justice", September 1, 2007, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just>; ICC Office Of The Prosecutor, "Policy Paper on Preliminary Examinations", November 1, 2013, available at: [https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11\\_2013](https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013); and ICC Office Of The Prosecutor, "Draft Policy Paper on Case Selection and Prioritisation", February 29, 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Draft-Policy-Paper-on-Case-Selection-and-Prioritisation>.

Nevertheless, this does not mean that all concerns expressed by transitional justice theorists and practitioners must be dismissed. On the contrary, what is most needed is to put an end to the "dialogue of the deaf" that, for more than two decades, has characterized the relationship between those interacting in overlapping fields of application. Reactivation of communication between transitional justice theorists and practitioners on the one hand, and those who support the current normative framework concerning *ius cogens* crimes on the other, should lead to a process that harmonizes the legal content of a states' duty to investigate, prosecute and punish those responsible for *ius cogens* crimes (and the correlative victims' rights to truth and justice), with the need to design transitional processes that are suitable to overcome situations of large-scale human rights abuses.

Leaving for future works the elaboration of a comprehensive proposal on how this harmonization process should be conducted, it can be stated that it should be based on two basic principles.<sup>281</sup> First, it is necessary for transitional justice theorists and practitioners to make an effort to achieve a minimum degree of consensus on the nature, purpose, scope and content of each of the elements of transitional justice. (De Greiff 2012, 32) Second, supporters of the current international normative framework of *ius cogens* crimes need to acknowledge the symbolic nature of international criminal law, its traditional focus on those most responsible, and the limitations in applying it beyond them. This is shown by the fact that only a few hundred cases have been dealt with by international criminal tribunals since 1995. Furthermore, even in the most active national jurisdictions, the number of those subject to investigation and prosecution for genocide, crimes against humanity and war crimes reaches barely 1 percent of all personas allegedly involved in their commission.

It is also important to consider the ever-increasing relevance of community justice mechanisms (such as *gacaca* in Rwanda (Tirrell 2014, 243), community assemblies in the Quechua-speaking Andean region of Peru (Theidon, 153-7), or *jirgas* in Afghanistan (Newton 2013), to name just a few examples). Tirrell (2014, 243) underlines this trend by explaining how out of all of those involved in the 800,000 murders committed during the Rwandan genocide in 1994, the ICTR has handled 93 cases in the twenty years between 1995 and 2015, Rwandan criminal courts processed about 1,300 cases between 1995 and 2001, and the vast majority of the 130,000 persons arrested in connection with the genocide have been sent to the *gacaca* process in order to avoid the collapse of national and international judicial bodies.

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<sup>281</sup> A comprehensive proposal will be made on the basis of the work that will be conducted in the next five years in the Research Network on Ibero-American Epistemological Approach to Justice. This research network was set up in June 2015 and is coordinated by the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice ("IIH"). Further information on the research network can be found on: [www.iberoamericaninstituteofthehague.org](http://www.iberoamericaninstituteofthehague.org).

Similarly, those justice mechanisms created by civil society in light of states' inaction must be taken into consideration. A paradigmatic example in this regard is the International Tribunal for Restorative Justice in El Salvador, set up in 2009 by the Centro-American University (UCA) in light of the refusal by the Salvadorian Government to annul the 1993 Amnesty Law and start the investigation, prosecution and punishment of those responsible for *ius cogens* crimes committed during the civil war in El Salvador (1980-1993). (Frisso 2016) This refusal continued even after the 2012 decision of the Inter-American Court of Human Rights in the case of the *El Mozote Masacre*, which ordered El Salvador to annul the Amnesty Law.<sup>282</sup> It was only in July 2016 that the Salvadorian Constitutional Court declared the 1993 Amnesty Law unconstitutional.<sup>283</sup>

Some efforts have already been made in this direction, including the decision of the ICC Office of the Prosecutor to concentrate its efforts on those persons most responsible for crimes within the jurisdiction of the ICC,<sup>284</sup> the UN Security Council resolutions limiting the ICTY and ICTR personal jurisdiction to those persons with the "greatest responsibility,"<sup>285</sup> and the current work of the Sixth Committee of the UN General Assembly on the determination of guiding criteria for the application of the principle of universal jurisdiction.<sup>286</sup> Nevertheless, such efforts, though constituting a good starting point, are still very limited when compared with the process of dialogue and harmonization that should be carried out in the coming years.

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<sup>282</sup> Inter-American Court Of Human Rights, *Case of The Massacres of El Mozote and Nearby Places v. El Salvador*, Series C, Num. 252, Judgment (Merits, Reparations and Costs), October 25, 2012, at pp. 123-124, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_252\\_ing1.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf).

<sup>283</sup> Constitutional Cour of El Salvador, Case Num. 44-2013/145-2013, Judgment, July 2016.

<sup>284</sup> See *supra* n. 166.

<sup>285</sup> United Nations Security Council, Resolution S/RES/1534, March 26, 2004, paragraphs 5 and 6, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1534\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1534(2004)). In this Resolution, the UN Security Council *inter alia*: (i) "[c]alls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); and (ii) [r]equests each Tribunal to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments."

<sup>286</sup> *The Scope and Application of the Principle of Universal Jurisdiction*, United Nations General Assembly, A/RES/69/124, December 18, 2014 available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/124](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/124).

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