What future for transitional justice? Colombia and the Balkans as case studies

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I. Introduction

In the last decades, scholars have confronted the theme of transitional justice from different and varied points of view. The linguistic expression itself was adopted for the first time in a technical sense in the late 1980s, during the democratization process in Latin America, and later used to describe the practices applied in Eastern Europe, the Balkans and sub-Saharan Africa.

It is understood as the branch of justice concerned with so-called transitional societies, those of countries going through a peace process or emerging from authoritarian regimes, and its objective is broader than that of criminal justice, since it includes elements such as responsibility, equity in the protection and vindication of rights, and the prevention and punishments of infractions.[1]

One of the most recent – and debatably still ongoing, despite the peace accords – transitional situations is that of Colombia. The choice to analyse in detail its various steps derives from the fact that this specific peace process has showed, along with the Balkans' one, many of the limits that justice in transition faces. Moreover, it highlighted that the response from the populations involved has not been consistent with the one theorised in decades of studies about the theme, which supposed peace after a conflict would always be favoured, even at the expense of accountability for the perpetrators of human rights' violations.

The Colombian transition came after years of similar experiences, which all had in common the declared scope of granting a society the opportunity to go beyond the past and create a democratic State.[2]

This noble objective has, nevertheless, frequently been exploited for more pragmatic and political reasons: it is sufficient to say that the first historical transitions, such as the Latin Americans', that took place in the 1980s, were mostly guided by the former military regimens, so that they were mainly focused on granting themselves immunity through the instrument of "blanket amnesties".[3]

More recently, considering a new conception of human rights, it was necessary to put a limit to the "clemency of the liberal State",[4] identified in the need for punishment of crimes against humanity, such as systematic torture, mass rape, disappearances, ethnic cleansing, massive killings, genocide.

Because of this necessity felt in the international community, the 1990s saw a resurgence of international criminal law, through the creation by the UN Security Council of the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the so-called ad hoc courts and the institution of the International Criminal Court (ICC). Since post-conflict societies will often lack the resources required to bring to justice those accused of serious international crimes, the last two decades saw a proliferation of "hybrid" courts, mostly established under national law, with jurisdiction over both national and international offenses and staffed in part by international judges.[5]

Last decades' analyses over transitional justice have resulted in a broad consensus on the fact that accountability for the perpetrators of the crimes is necessary in order to build a democratic society.[6] In some occasions – such as post-Franco's Spain – absolute amnesties were conceded, in other cases amnesties were only conditional, either accompanied by the establishment of a Truth Commission or not; in other situations, crime's perpetrators were only partially exempted from punishment or exempted ex post through pardons.[7]

The current concern is connected to the ways in which to operate to obtain the highest level of accountability possible. Considering transitional contexts, which entail "societies emerging from an extended period of conflict and/or repression, engaging in the process of democratization",[8] using just the standards of retributive justice to evaluate the response to wrongdoings is not necessarily the only viable answer. Because of that, in the recent debate over transitional justice, many scholars for the need to identify "restorative lenses"[9] with which to observe international crimes and serious human rights violations too, even considering that common restorative justice strategies used to face "normal" crimes must be revised and transformed in order to be applicable to a post-conflictual society.[10]

After briefly revising the acknowledged "best practices" of transitional justice that emerged after years of studies of the phenomenon, the essay's objective is to focus on the transitional measures implemented in the Colombian case, in order to evaluate their effectiveness. Additionally, it pursues the scope of suggesting, after assessing the limits that legal instruments inevitably face when trying to enforce justice in post-conflictual scenarios, which are the focus points that should be taken into account in future transitional situations.

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[1] *Ambos*, in: Ambos/Malarino/Elsner (eds.), Justicia de Transición, 2008, p. 23.

[2] *Fornasari*, Giustizia di transizione e diritto penale, 2013, pp. 9–11.

[3] *Elster*, Chiudere I conti. La giustizia nelle transizioni politiche, 2004, pp. 94–99.

[4] *Teitel*, Transitional Justice, 2000, p. 60.

[5] *Guilfoyle*, International Criminal Law, 2016, p. 80.

[6] *Volpe Rotondi/Eisikovits*, in: Corradetti/Eisikovits/Volpe Rotondi (eds.), Theorizing Transitional Justice, 2015, p. 18.

[7] *Ambos* (fn. 1), p. 95.

[8] *Murphy*, in: Corradetti/Eisikovits/Volpe Rotondi (fn. 6), p. 59.

[9] *Zehr*, Changing Lenses: a new focus on crime and justice, 1990.

[10] *Clamp*, in: Clamp (ed.), Restorative Justice in Transitional Settings, 2016, pp. 5–6.

1. Transitional measures and their applicability in concrete situations

The typical "transitional" measures are described by the UN-given definition: "transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof".[11]

Latin America's first transitions were focused on the pursuit of political change rather than on the objective of holding accountable those responsible for past violence, doing so especially through the creation of truth commissions and amnesty concession.[12]

The latter has been, historically speaking, the most commonly used transitional justice instrument: the main reason States found to justify their renounce to applying criminal punishment has been the need for social stability. Trying to enforce criminal law over subjects that, in transitional situations, often still detain political or military power, could result in an immediate dissolution of the new democratic State or in a new conflict.

More recently, auto-granted amnesties have been excluded as a legitimate transitional instrument, starting from the various pronouncements of the Inter-American Court of Human Rights' that declared inadmissible amnesty, prescription and exclusion of punishment dispositions in case they limit the investigation and prosecution of grave human rights violations.[13]

Among the main transitional justice measures are truth and reparation Commissions: this investigation instrument can be enforced both as a result of new democratic institutions' inability to implement judicial transitional measures and from the work of victims and human rights' organisations whose aim is to obtain a common truth about the violence of the past.

Since the 1970s, roughly 46 Commissions were created in the world – the most known one being the South African –, every one registering different degrees of effectiveness.[14]

Truth commissions have put attention on repairing the harm inflicted on the victims and are the main instrument promoted by those who advocate for a more restorative approach to transitional justice: they give offenders the opportunity of repairing (individually or collectively) the direct or indirect harm inflicted on the victims, in exchange for which they should be given the opportunity of being reintegrated in the community.[15] Moreover, collective memory, the one that truth commissions aim to create, can help victims understand and contextualise traumatic events, even playing at times an important role in preserving memory that would be otherwise lost.[16]

While theoretically effective, truth commissions were actually criticised for various reasons: for lacking a broad perspective over the socio-economic reasons behind the former conflict, not applying a "gendered" perspective,[17] failing to address the extent of the damage and recognition of all the victims.[18] Sometimes they were perceived as instruments that failed to bring perpetrators to justice and allowed them to maintain their positions of power.[19]

As for the potential of truth telling as a cathartic and relieving experience, studies have shown that the impact varies from person to person. While some victims will be glad to have the opportunity to give testimony, feeling that their suffering is finally being acknowledged, some of them can be re-traumatised by the experience, especially if their ability to express themselves is limited or their testimonies are met with negative responses from community members.[20]

It can be said that creating an official truth "presumes a degree of democratic consensus"[21] which does not always exist in post-conflictive situations. Studies show mixed results regarding the effectiveness of said instrument, connect-

[11] Guidance Note of the Secretary General: United Nations approach to Transitional Justice, 10.3.2010.

[12] Skaar/García-Godos/Collins (eds.), Transitional Justice in Latin America, 2016, pp. 1–4.

[13] Inter-American Court of Human Rights, Caso Barrios Altos contra Perú. Judgement of 14.3.2001, "41. Esta Corte considera que son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de violaciones graves de derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos". On the same theme: Caso La Cantuta contra Perú. Judgement of 29.11.2006; Caso Gomes Lund y otros (Guerrilha do Araguaia) contra Brasil, Judgement of 24.11.2010; Caso Gelman contra Uruguay. Judgement 24.2.2011.

[14] *Benavide Vanegas*, Justicia en épocas de transición. Conceptos, modelos, debates, experiencias, 2011, pp. 48–52.

[15] *Bueno/Parmentier/Weitekamp*, in: Clamp (fn. 10), p. 43.

[16] *Bird/Ottanelli*, The Performance of Memory as Transitional Justice, 2015, p. 27.

[17] For more on the theme of gender connected to transitional processes see: *Eboe-Osuji*, in: Ambos (ed.), Selección y priorización como estrategia de persecución en los casos de crímenes internacionales, Un estudio comparado, 2011, pp. 113–130; *Potter/Abernethy*, in: Simić/Volčič (eds.), Transitional Justice and Civil Society in the Balkans, 2013 pp. 163–180; *Albertson Fineman/Zinsstag*, Feminist Perspectives on Transitional Justice, From International and Criminal to Alternative Forms of Justice, 2013.

[18] *Hayner*, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions, 2001, p. 86.

[19] *Fijalkowski/Grosescu*, Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies, 2015, p. 275.

[20] *Guthrey*, Victim Healing and Truth Commissions. Transforming Pain through Voice in the Solomon Islands and Timor-Leste, 2015, p. 6.

[21] *Teitel* (fn. 4), p. 83.

ing positive social impact[22] only to the Commissions that work combined with other legal responses, such as sanctions for the perpetrators, reparations for the victims and institutional change. Given that, it is possible to conclude that 'restorative measures', such as truth telling, can be employed in the context of transitional justice, but without the pretence of completely substituting itself to retributive justice,[23] considering the serious human rights violations that have to be taken into account.

In order to ensure accountability for massive cases of human rights violations, trials – both at the national and international level – are still to be considered the most effective method.

Nevertheless, specific problems have emerged from the use of national trials: in transitional contexts, even when special jurisdictions are instituted to investigate into such cases, it is common that the allegations of international crimes expand, so that the national judicial system is not able to face the sheer volume of requests.[24]

In order to create an instrument that could pursue the objectives of granting worldwide peace and general respect of human rights, in front of the failure of national courts to bring to trial the alleged authors of international crimes, the UN Security Council created the International Criminal Court through the Rome's Statute, the first one designed for a potentially worldwide jurisdiction.

The Court, however, operates on the principle that a national judicial response is preferable to its own involvement. If a country's judiciary is genuinely investigating or prosecuting a case, the ICC is prohibited from proceeding. On the other hand, if domestic authorities are either unwilling or unable to prosecute, or if national proceedings are not deemed "genuine", the ICC prosecutor is given the power to open an investigation.[25] This widely studied principle is referred to as complementarity, and its objective is to grant balance between national sovereignty in enforcing criminal law and the international community's interest to prevent impunity for international crimes.[26] The ICC is thus asked to play a subsidiary role in enforcing criminal trials, complementing rather than supplanting national courts' proceedings.

Regarding this, especially relevant is the theme of prosecutorial discretion. After a case is initiated in front of the Court, comes the preliminary phase: the Court's Prosecutor has the power to select the situations to be evaluated on the basis of art. 17's admissibility test, and to decide which investigations are going to be carried through, with the limit of the "interests of justice" (art. 53.1.c).[27]

If the case is considered admissible, the Court's Prosecutor is still given discretion to select individuals for prosecution and crimes to be prosecuted.[28] To choose individuals, the criterion is that of "those bearing the greatest responsibility" for the crimes committed, while only a small amount of crimes can be selected, creating thus "thematic prosecutions" based on specific groups of crimes,[29] which are rendered necessary by the high number of violations that occur in a conflictive situation.

The Prosecutor's Office was often criticised because it revised situations for various years without any concrete results.[30] Regarding this, it is important to remember two things: on one hand, in carrying out its mandate, the ICC is dependent on support and cooperation from the states, since the Prosecutor's Office is primarily funded through contributions provided by state parties to the Rome Statute, a budget is notoriously low,[31] which, by itself, constitutes a serious limitation of the Court's potentialities. On the other, the Prosecutor´s Office has often shown to favour posing limits to its own intervention in order to facilitate internal peace processes that could have been tainted by an international interference.

It is debatable whether it is possible to pinpoint a common intervention method in transitional situations. The Colombian case is of particular interest in this sense, both because of the variety of transitional strategies that have been applied in this decade-long peace process and because it helps exemplifying how often political motivations – an always present element of transitions – risk undermining the purposes of the judicial transitional process as it is understood by the international community.

2. Colombia, a transition in progress

Colombia, uncharacteristically, started its transitional process before the actual end of the national armed conflict. The country has been divided for more than half a century: the conflict dates back to 1964, when the first communist guerrilla groups, the FARC-EP, ELN and EPL where established. In the 1970s, the three groups were joined by a second wave of guerrillas and, in response to the insurgent violence, landowners and businesspersons sponsored the creation of right-wing self-defence groups. In the 1990s, these groups structured themselves as modern paramilitary forces called United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia AUC), which managed to engage and displace the guerrillas, and started accessing formal politics, since the State considered them allies in the anti-guerrilla effort.[32] The different groups have been behind grave crimes, obtaining a

[22] *Hayner* (fn. 18), p. 26.
[23] *Benavide Vanegas* (fn. 14), p. 10.
[24] *Bergsmo/Saffon*, in: Ambos (fn. 17), p. 25.
[25] *Hayner* (fn. 18), p. 113.
[26] *Ambos* (fn. 1), p. 6.
[27] *Ambos/Stegmiller*, in: Ambos (ed.), Fundamentos y Problemas del Derecho Penal y Procesal Penal Internacional y Europeo, 2013, pp. 136–137.
[28] *Kloss*, The Exercise of Prosecutorial Discretion at the International Criminal Court. Towards a more Principled Approach, 2016, p. 15.
[29] *Bergsmo/Saffon* (fn. 24), pp. 104–105.
[30] *Ambos/Stegmiller* (fn. 27), p. 167.
[31] *Cassese*, in: Cassese (ed.), The Oxford companion to international criminal justice, 2009, p. 97.
[32] *Sánchez León/García-Godos/Vallejo*, in: Skaar/García-Godos/Collins (fn. 12), p. 252.

lucrative income from illegal activities, such as drug trafficking, expropriation and kidnappings.[33]

The complex transitional process in this country saw its starting point only on the 25th of July 2005, through Law 975, the Justice and Peace Law.

The law pursued the objective of disarming, demobilising and reintegrating irregular armed groups, offering a considerable mitigation of the ordinary punishment, even if granted, only to members of the irregular groups who accepted to contribute to "truth, justice and reparation" (art. 1), applying to international core crimes, such as genocide, crimes against humanity and war crimes, except for drug trafficking (art. 10–11).

The law allowed criminals who accepted to confess their crimes related to illegal armed groups' membership to receive a benefit, consisting of having the standard penalty imposed replaced by an alternative one of between five and eight years in prison. Its concession depended on the fulfilment of conditions related to the clarification of the facts and the realisation of measures in favour of victims.

The norms established that the transition would undergo two phases: a first administrative, controlled by the government, in which members of the armed groups would need to disarm and abandon the groups, in exchange receiving economic assistance and additional measures to help their reintegration into society. The second phase being judiciary, controlled by the Justice and Peace Unit (Unidad Nacional de Fiscalia para Justicia y Paz),[34] which coordinated several Justice and Peace Tribunals, appointed to prosecute members of illegal armed groups that demobilised between 2004 and 2006. Its investigations and confessions shed light on the configuration of paramilitary structures and the relationships between these groups, government actors and business figures.

Furthermore, the Commission for Reparation and Reconciliation (CNRR) was created, and it established that its investigation would start from 1964, the year of the creation of the FARC. However, this decision received criticism, since in this way, the Commission would not be able to account for the violence that had taken place in the 1950s, with the acceptance of the liberal and conservative parties, which by many were to be considered the real cause behind the following conflict.[35]

The judicial phase envisaged by the Law, should have granted rights to the victims, such as that of participation in the hearings and, in the case of the legality of the charges being confirmed, the right to reparations.

In practice, the 975/2005 Law did not seem to give the expected results: reports from human rights' defendants showed that impunity levels for the former paramilitaries were high, and the necessary protection was not granted to victims, often threatened by remaining paramilitaries in order not to give their testimonies. Moreover, the main "justice and peace" judicial structures were localised in the biggest cities of the country: Bogotá, Medellín and Barranquilla. This meant that victims of the armed groups – which consisted mainly of farmers and inhabitants of marginalised communities – more often than not, faced geographical and economic barriers that limited their possibilities of travelling to the cities and actively participating in the hearings.[36]

Meanwhile, it arose the necessity to select the cases to which Law 975/2005 would be applicable. Of the more than 31000 non-state combatants who laid down arms by 2006, the policy only applied to those who voluntarily decided to participate, were ready to confess their role in the investigated crimes and had no pre-existing, upstanding criminal charges against them. At the time, this included approximately 3500 people, while the rest would be reincorporated into society through an amnesty model recognized through Law 782/2002 for political offenders. This measure was firmly opposed both by courts and by victims' organisations: in the end, the Supreme Court argued, in a 2007 judgement,[37] that membership in a paramilitary group could not qualify as "political offence",[38] since the groups act for selfish reasons and count on the support of important institutional actors. This meant that the amnesty concession would not be applicable to simple memberships in paramilitaries groups, being vetoed by the Court.[39] In 2009, a reform of the Code of Criminal Procedure was approved,[40] extending the prosecutorial discretion to suspend, interrupt or abstain from proceedings to judgements regarding demobilised members of the armed groups being investigated for simple membership in the group, clarifying that it could not be invoked in cases considered to be atrocious crimes under international law.

The law did not satisfy human rights and victims' organisations that had campaigned against impunity for human rights violations, since they did not accept the instrument of prosecutorial discretion being applied to these cases.

This vision was then confirmed both by the Constitutional and Supreme Court's[41] jurisprudence, which contributed in the following years to the development of the public discus-

[33] *Bueno/Parmentier/Weitekamp*, in: Clamp (fn. 10), p. 46.

[34] *Ambos*, The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court, 2010, pp. 12–15.

[35] *Benavide Vanegas* (fn. 14), p. 54.

[36] *Gómez Sánchez*, in: Querejazu Escobari (ed.), Estudios de Derecho, Vol. LXIX, Nº 153, June 2012, p. 102.

[37] Supreme Court of Justice – Criminal Chamber, Judgment of 11.7.2007, Rad. 26945.

[38] For more over the Colombian Constitutional Court's approach to the concept of "political crime", especially in the light of Judgment C-577/2014, see Ambos (ed.), Justicia de Transición y Constitución II, 2015.

[39] *Ambos* (fn. 34), pp. 6–7.

[40] Law 1312/2009, 9.7.2009, Diario Oficial No.47.405.

[41] Through, respectively, the Constitutional Court Judgments n. C-370/2006, n. C-936/2010 and the Supreme Court 31.3.2009, Rad. 31391 Judgment, which established that the 975/2005 Law had to be interpreted in the context of the attention to the victims and of a transitional and restorative justice process.

sion about victims' rights.[42] In 2010, the Constitutional Court ruled in favour of the victims' organisations in a divided decision, pushing towards full investigation and prosecution of all offences and combatants, but it triggered a crisis in the demobilisation process, as the initial agreement had not entailed the prosecution of all former combatants.

Meanwhile, the collective demobilisation process from 2004 to 2006 had produced a total number of 31.671 demobilised paramilitaries, with an additional 17.696 of individually demobilised subjects.[43] The amount of proceedings needed were causing the judicial system to be overburdened, so in 2012, the Colombian Congress enacted Law 1592, which required prosecutorial efforts to be directed towards the "most responsible" for serious crimes and provided mechanisms of selection and prioritisation of cases on this basis. Even this measure failed to deliver the expected results, since many crimes examined did not comply with the fixed relevance criterion.[44]

Also enacted in 2012, was the Legal Framework for Peace, a constitutional reform providing transitional justice measures, setting basic rules and standards for future negotiations with armed groups.[45]

In 2011 Law 1448, known as Victims' Law, was enacted: it created three units, one for land restitution, one for compensation and reparation for victims, and one that changed the previously quasi-independent Historical Memory Group into a state agency called the Historical Memory Center.

Furthermore, many provisions were focused on reparatory measures directed towards the victims (theoretically already recognised as a right from the enactment of the Justice and Peace Law), in the form of restitutions of land that they owned but had been forced to leave, rights to compensation and damages, social services and support systems, legal protection in court proceedings, and protective security forces.

By March 2012, 386.069 victims had been registered through the justice and peace process:[46] within the new legal framework, reparations were to be provided by the single victimiser, while, if the victim was unable to identify the specific victimiser, reparations had to be provided from the Reparations Fund.

The system that emerged from this law has nevertheless shown its own problems: structural disorganisation that resulted in difficulties in implementing its own measures, scarce participation from the victims themselves and limited coordination between central and local administrations all contributed to limit the positive effects of the new norms.[47]

a) Official closure of the peace process and evaluation of the Colombian case by the ICC

Year 2012 was particularly relevant for the Colombian peace process, since negotiations with the FARC-EP began in Oslo in October and then moved to Havana. On 26 September 2016, after nearly four years of negotiations, the parties signed the Final Agreement for Ending Conflict and Building a Stable and Long-Lasting Peace (Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera), but a referendum held on October 2, to ratify it, was unsuccessful. Afterward, the Colombian government and the FARC signed a revised peace deal on November 24 and sent it to Congress, which, ratifying it on November 29–30, marked the official end of the conflict.

The main points of the agreement focus on the realisation of a rural reform, fight against drug trafficking, political participation and victims' rights. In this respect it creates the "Comprehensive System for Truth, Justice, Reparations and Non-Recurrence" (Sistema Integral de Verdad, Justicia, Reparación y No Repetición), whose objective is to fight against impunity, using a combination of judicial mechanisms that allow for the investigation and sanctioning of serious violations of human rights and serious infringements of international humanitarian law, with supplementary extra-judicial mechanisms aimed at clarifying the truth.

The System is composed of the Truth, Coexistence and Non-Recurrence Commission; the Special Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict; the Special Jurisdiction for Peace; Comprehensive reparation measures for peace-building purposes; and Guarantees of Non-Recurrence.

The creation of the Special Jurisdiction for Peace had been envisioned since the realisation of the Agreement Regarding the Victims of the Conflict, concluded between the Government of Colombia and the FARC-EP in December 2015. This established that, once in force, the Special Peace Jurisdiction would have jurisdiction to investigate and prosecute those most responsible for the most serious conflict-related crimes, including cases against members of the FARC-EP, members of the armed forces and those who, directly or indirectly, participated in the internal armed conflict.[48]

In respect to the cases, it is established that crimes against humanity, genocide, serious war crimes, hostage taking and other serious deprivation of liberty, such as the kidnapping of civilians, torture, extra-judicial executions, forced disappearance, violent sexual intercourse and other forms of sexual

[42] *Gómez Sánchez*, Entre la esperanza y la frustración: luchas sociales por un marco jurídico para la reparación en Colombia, Estudios de Derecho, 70 (155), 2013, p. 150.

[43] *Quinche Ramírez/Peña Huertas*, in: ACDI (ed.), Vol. 7, 2014, p. 135, dx.doi.org/10.12804/acdi7.2014.04 (23.8.2018).

[44] *Andreas Forer/López Díaz*, in: Ambos (fn. 17), pp. 229–253.

[45] *Sánchez León/García-Godos/Vallejo* (fn. 32), pp. 256–259.

[46] Comité Interinstitucional de Justicia y Paz (CIJP), Informe anual matriz, 2012, Bogotá: Ministerio de Justicia y del Derecho.

[47] *Berrío*, in: Malagón Pinzón (ed.), Revista de Derecho Público N. 31, Julio–Diciembre 2013, Universidad de los Andes – Facultad de Derecho, p. 29.

[48] ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2016, p. 56, in https://www.icc-cpi.int/colombia (23.8.2018).

violence, forced displacement, and the recruitment of minors will not be the object of amnesty or pardon.

Concerning the perpetrators of crimes, the agreement determines two different types of judicial procedures: one for those who decisively participated in the most serious and representative crimes and recognise their responsibility, who will receive a sanction containing an effective restriction of their liberty for 5 to 8 years, in addition to the obligation to carry out public works and reparation efforts in the affected communities. Another for those who fail to recognise their responsibility and are found guilty, who will receive prison sentences of 15 to 20 years.[49]

The agreement was soon followed by an amnesty law, the 1820/2016, and by the Presidential order 277 of February 2017, through which amnesty, pardon and alternative sanctions are enforced on those responsible only for the participation in the guerrillas' political and connected activities (art. 8). The 2016 law grants to those subjects the opportunity for conditional release, maintaining their obligation to satisfy victims' rights. The matter becomes more complicated by the successive 2017 Presidential order, which gives access to the conditional release not only to former FARC members for which the amnesty would be applicable de iure (art. 35, Law 1820), but even to others outside of this provision, given that they have been submitted to a criminal custodial sanction for at least five years. Even if the normative kept excluding the possibility of granting amnesty for serious crimes under international law (art. 23.3), which would constitute a violation to article 28 of the Court's Statute, this spurred critiques as it complicated and slowed the already overburdened Special Peace Jurisdiction.

Having considered only part of the broad normative apparatus established by Colombia in order to bring the country through its transition, it is clear that many of the provisions are still lacking or are partly inefficient, considering the enormous amount of cases to be taken into account.

The situation has not been ignored at the international level: Colombia deposited its instrument of accession to the Rome Statute on 5 August 2002, together with a declaration pursuant to article 124, excluding war crimes from the jurisdiction of the ICC for a seven-year period. The ICC was therefore allowed to exercise its jurisdiction over war crimes committed in the territory or by the nationals of Colombia since 1 November 2009 and over other crimes listed in the Rome Statute committed since 1 November 2002.[50]

Colombia's preliminary examination by the Court started in June 2004 and is still ongoing. The key areas of continuing focus, where the Prosecutor found further efforts to address insufficient judicial activity were required, were various. "Proceedings relating to killings and enforced disappearances, commonly known as 'false positives' cases; proceedings relating to forced displacement; proceedings relating to sexual crimes; and, national proceedings relating to the promotion and expansion of paramilitary groups […] and legislative developments that could impact the conduct of national proceedings, including the Legal Framework for Peace and others, as well as jurisdictional aspects relating to the emergence of 'new illegal armed groups'".[51]

As previously addressed, the OTP operates under the principle of complementarity, which means that at first it has to verify the subsistence of the "gravity" standard needed in order to act. The standard had to be evaluated on the basis of "quantitative criteria", in light of the scale, nature and manner of the violence and crimes committed.[52] The Office determined that the information available provided a reasonable basis to believe that crimes against humanity under article 7 and 8 of the Rome Statute had been committed in Colombia by different actors, since 1 November 2002. Up to 2016, the Office received from the Colombian authorities approximately 80 judgments rendered by Colombian courts against members of the armed forces, FARC-EP and ELN armed groups, and members of paramilitary armed groups, identified at least five potential cases relating to false positives killings allegedly committed by members of the Colombian armed forces between 2002 and 2010. It registered that until February 2016, Colombian courts had rendered 817 convicting sentences against 961 members of the armed forces for false positives cases and that the reported killings by members of the armed forces amounted to a total number of 4.190 victims.[53]

Even if the Colombian situation overcomes the threshold of gravity of art. 17.1.d, that does not automatically mean that the Procurator's Office can pass into examination phase, since the complementarity test entails the analysis of the State's judicial response. In the Colombian case, the State is demonstrating to having taken action, adopting a negotiated transitional justice system based on "measures that do not amount to full exemptions of criminal responsibility",[54] which could be determined as a case of inadmissibility in front of the Court due to State action (art. 17.1.a–c and 20.3). An exception to this inadmissibility would exist in the case in which, despite the State activity, it showed either unwillingness or inability (art. 17.2–3) to proceed judicially in respect to the uncovered crimes. The former presumes the existence of a functioning judicial system, which was politically manipulated in order to generate impunity for powerful and influential perpetrators, while the latter accounts for cases in which the judicial system does physically not exist or has substantially collapsed or is unavailable.[55]

In the actual situation, the existence both of the Justice and Peace Procedure and of the Special Jurisdiction for Peace

[49] Final Agreement to end the Armed Conflict and build a stable and lasting Peace, 24.11.2016, in http://www.altocomisionadoparalapaz.gov.co/herramientas/Paginas/Todo-lo-que-necesita-saber-sobre-el-proceso-de-paz.aspx (23.8.2018).

[50] https://www.icc-cpi.int/colombia (23.8.2018).

[51] ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2016, p. 53.

[52] *Ambos*, (fn. 34), p. 51.

[53] ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2016, pp. 54–55.

[54] *Ambos* (fn. 34), p. 89.

[55] *Ambos* (fn. 34), pp. 55–65.

demonstrates that the Colombian State is undertaking efforts to deal with the crimes of the illegal armed groups, however, the norms have already shown their weaknesses and resulted in an objectively limited number of actual convictions. Nevertheless, it cannot be said that the Colombian judicial system has ever substantially collapsed.

Having considered the complexity of the case, it is important to understand the reasons of the Court's approach towards the Colombian situation, which has been very cautious from the start. Remaining engaged in the country for more than a decade without progressing toward an examination phase, even before 2011 and in the face of evidence suggesting that Colombian justice mechanisms did not meet admissibility standards, attracted numerous criticisms towards its supposed passivity.

Many highlighted that the initial implementation of transitional measures based on the system created by the Justice and Peace Law, had been very disappointing, with few paramilitary figures sentenced, and many of them reportedly continuing to operate in organised crime networks.[56]

This does not mean, however, that the OTP's approach was necessarily wrong, since it managed not to impose itself on the internal matters of the country, behavior that probably favoured the development of the peace process and that has helped to keep the focus on domestic approaches to peacebuilding and enforcement of justice during transition.[57]

b) An ongoing critical situation

That is not to say that the current Colombian situation is devoid of problems or challenges for the future. On the contrary, violence has not stopped in the country during the last year, even if the peace process is formally closed. As reported by recent news, at least 170 community representatives were assassinated in Colombia's countryside in 2017, primarily over territorial control and access to lucrative resources like gold and coca. Authors of the attacks are both narcotraffickants cartels and dissident paramilitaries associated with the Gaitanista Self-Defense Forces of Colombia (AGC) – whose activities are often interconnected –,[58] whose actual objective is to claim lands previously deemed off-limits because of the FARC's occupation.[59]

Moreover, Colombia is currently second to Brazil as the most economically unequal country in Latin America. Without structural reforms that will help create more economic equality and provide sustainable solutions for its millions of impoverished citizens, traditional transitional justice instruments will have little effect on survivor well-being and preventing future violence.[60]

Meanwhile, legitimate concerns[61] persist about the themes of the excessive leniency of the transitional justice criminal penalties, accountability for command responsibilities and the necessarily long time that will be needed in order to implement the SPJ system, which could lead some of the ex-guerrillas to return to the jungle, joining other groups of armed 'dissidents'.

Colombia´s transitional system implementation includes, alongside with the trials and amnesties mechanism, some restorative initiatives. The first measure definable as restorative, was adopted in 2005 with the creation of the National Commission for Reparation and Reconciliation, later substituted by the National Center for Historical Memory. The most recent accomplishment has certainly been the official inauguration, in April 2017, of a Truth Commission that will investigate the victimisation of civilians during the 52-year war, considering the deeds of a multitude of actors, including the State. Alongside, a governmental program of reintegration and reintegration into society for former members of armed groups has been implemented.[62]

Regardless of the results that the Truth Commission work will show in the future, it is important to consider how, in a conflict so harmful to the population as the Colombian one – it is estimated that it produced more than 7 million victims –,[63] a restorative approach can certainly be used, but only complementary to transitional justice measures that entail punishments sufficient to ensure accountability for the atrocities of the past. While the restorative approach entails the idea of criminal sanctions as something undesirable,[64] this

[56] UN Human Rights Council (ed.), Annual report of the United Nations High Commissioner for Human Rights, Addendum: Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, 23.1.2015, A/HRC/28/3/Add.3, available at: http://www.refworld.org/docid/551948dc4.html (23.8.2018).

[57] *Kersen*, The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process, posted on 13.10.2013, at https://justiceinconflict.org/2016/10/13/the-great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/ (23.8.2018).

[58] Regarding the connexions between paramilitaries and narcotraffic in Colombia see *Reed*, in: Reed/Rivera (eds.), Transiciones en contienda: disyuntivas de la justicia transicional en Colombia desde la experiencia comparada, 2010, pp. 87–113.

[59] https://www.theguardian.com/environment/2017/oct/28/nasa-colombia-cauca-valley-battle-mother-land (23.8.2018); https://colombiareports.com/colombias-community-leader-assassinations-45-2017 (23.8.2018); https://colombiareports.com/colombia-peace-community-still-living-terror/ (23.8.2018).

[60] *Rowen*, Searching for Truth in the Transitional Justice Movement, 2017, p. 122.

[61] WOLA (Advocacy for Human Rights in the Americas), Rescuing Colombia's Post-Conflict Transitional Justice System, 30.11.2017, in http://colombiapeace.org/2017/11/30/rescuing-colombias-post-conflict-transitional-justice-system/ (23.8.2018).

[62] http://www.reintegracion.gov.co/ (23.8.2018).

[63] https://www.ictj.org/our-work/regions-and-countries/colombia (23.8.2018).

[64] *Uprimny Yepes/Saffon Sanín*, in: Uprimny Yepes, Rodrigo/Saffon Sanín/Marino/Saldarriaga (eds.), ¿Justicia

specific post-conflictive transition shows not only a dramatically high number of victims and victimisers, but also that the conflict has been rooted into the Colombian society for decades. This means that it is necessary to clarify its dynamics and grant recognition to the victims, which must necessarily happen by means of criminal trials: despite its limits, truth-telling through courts remains an important vehicle for piercing together key details about the atrocities, identifying victims and victimisers, and preventing the denial of the occurrence of past crimes.[65] This instrument could be the only one able to create a fixed memory of the past, which could help the Colombian society to recreate itself on a different – and hopefully peaceful –basis.

3. Transitional justice and its limits: the Balkans' example

In order to draw conclusions regarding the actual state and possible future developments of transitional justice practices, it is still necessary to analyse the conceptual problems that concern the entire movement, especially considering its past results.

Transitional justice has often been criticised for being "too normative and abstract, and lacking context and historical background".[66] Furthermore, it has been described as an "academic trend",[67] the result of a mainly western conception of justice, which pinpoints, as the desired result of a transition, the creation of a western liberal democracy, with all the preconceptions about human needs and desirable life accomplishments that it entails.

Another critique of the concept, accounts for the common lack of analysis of the economic element's relevance in determining the causes of the conflict. Economic matters are considered mainly just in connection with compensations and restitutions to the victims, but overlooking the fact that in many post-conflictual societies, the economic liberalisation results in an unfair resources' redistribution[68], closing the eyes to situations that could cause reasons for a reprisal of the conflict in the affected society. Colombia's case can actually be cited as an example of how efforts to promote transitional justice can partly become a distraction from a country's neoliberal policies that will continue to promote inequality in the country.[69]

Even one of the most declaredly victim-focused instrument of transitional justice, that of Truth Commissions, has not given, historically speaking, particularly appreciable results: often leaving civil society and victims' groups unsatisfied and without any material restitution. Even regarding the South African Commission, usually presented as a positive example of a restorative transitional approach, various studies have shown that it had a limited impact in reducing racism in the country or improving the mental and physical well-being of victims.[70]

Despite this, it has been argued that the instrument is still widely popular because of its "malleability",[71] which permits individuals and organisations with contradictory goals to see its utility and encourage its implementation, but ultimately providing outcomes that prove to be useful mainly for the elites controlling a country.

A relevant example of a situation that transitional justice was not able to solve, is that of the Balkans, in which the States involved used their own mechanisms in order to achieve goals quite different from those envisaged by international criminal justice theorists and activists.

Concretely, officially available TJ compliance models, have been used as "an easy way to show compliance with international rules without making broader domestic normative changes",[72] as in the case of Serbia, whose population was lead to consider the transitional process as more of a business transaction than a question of justice. The country started a policy of "voluntary surrenders" to the jurisdiction of the ICTY tribunal, aimed at maintaining international financial aids through which dozens of suspects were transferred to The Hague in exchange for monetary support for them and their families, granted by the government.[73] Even considering the high number of judgements that found members of every ethnic group participating in the war guilty of crimes against humanity,[74] Serbia still defends that the tribunal has been biased against the country.

Croatia's situation was that both the recognised victims and perpetrators committed war atrocities, but that did not change the fact that transitional justice was interpreted in the country mostly as a pass to reach the EU, but not really analysed in moral terms. Considering the perception of victims of the war in Croatia, more than half of the general population (52 %) thought victims of the war were exclusively Croats. Almost a third (31 %) thought that victims from the Croatian side were far more numerous than Serbian ones, while none of the respondents from the general population said they thought there had been more victims on the Serbian side.[75]

In general, in the case of the former Yugoslavia, denial still remains an important phenomenon in society, as well as a certain tolerance for "own" war criminals and scarce sympathy for victims from other ethnic communities: this could happen partly because state institutions have sustained certain

transicional sin transición? Verdad, justicia y reparación para Colombia, 2006, p. 126.

[65] *Olsen/Payne/Reiter*, Transitional Justice in Balance: Comparing Processes, Weighting Efficacy, 2010, p. 277.

[66] *Banjeglav*, in: Simić/Volčič (fn. 17), p. 35.

[67] *García-Amado*, in: Londoño Ulloa (ed.), Justicia Derecho y Postconflicto en Colombia, 2016, p. 123.

[68] *Miller*, in: Alviar García/Jaramillo Sierra (eds.), Perspectivas jurídicas para la paz, 2016, pp. 264–265.

[69] *Rowen* (fn. 60), p. 159.

[70] *Backer*, Evaluating Transitional Justice in South Africa From a Victim's Perspective, The Journal of the International Institute, Vol. 12, Issue 2, 2005, in http://hdl.handle.net/2027/spo.4750978.0012.207 (23.8.2018).

[71] *Rowen* (fn. 60), p. 4.

[72] *Subotić*, Hijacked justice, Dealing with the past in the Balkans, 2016, p. 23.

[73] *Subotić*, (fn. 72), p. 23.

[74] http://www.icty.org/en/cases/judgement-list (23.8.2018).

[75] *Banjeglav* (fn. 66), p. 37.

political discourses focused on the same nationalistic/patriotic logic that had led to the events of the war.[76]

Post-conflict Bosnia was divided in two halves: The Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (BH), and the Dayton accords made Bosnia an international protectorate, ruled by the Office of the High Representative. The ICTY trials were obviously perceived very differently in the two entities: while the RS refused to collaborate with the Court until 2005, when they began arresting and transferring Bosnian Serb war suspects to The Hague tribunal, the Bosnian Federation collaborated until there were the first warrants of arrest against Bosnian generals for crimes against the Serbs. At that point, the population's reaction was one of anger and resentment, and led to the reaffirmation from Bosnians of their being the only victims of the conflict.[77]

It is clear that, as long as revisionism will be used as a coping mechanism[78] in respect to war crimes, no transitional measure employed will be of any use to the population and to the creation of a common historical memory.

The low credibility and perceived impact of the ICTY in former Yugoslavia's countries certainly did not help: the tribunal has been seen – especially in the Bosnian society, whose public demand for transitional justice was always high – as "'a world unto itself,' removed psychically, culturally, and politically from those who would live most intimately with its success or failure".[79] Even considering the ICTY's notable accomplishments in terms of its primary task to prosecute individuals responsible for war crimes, the disappointment over its proceedings was high, probably as the result of overstated expectations that both international actors and the local population had placed on this institution.[80]

Even the birth, in 2008, of the Coalition for RECOM, whose objective was to prompt the creation of a Regional Truth Commission for the establishment of facts about war crimes and other serious violations of human rights committed in the former Yugoslavia from January 1, 1991 until December 31, 2001, has still not produced the desired outcome.[81]

RECOM's policy strategy has not actually received the expected approval from its main target, support groups of war victims: because of its holistic approach, some victims' organisations, such as the Mothers of Srebrenica, do not participate officially as a member of the coalition.[82]

II. Conclusions

Both the Balkans and the Colombian cases are of interest, because they seem to contradict one of the basic ideas at the roots of transitional justice: the belief that populations and victims will favour peace even at the cost of impunity, thus being always ready to support well-organised transitional processes based on restorative justice, while international actors are the ones who impose their own values that favour justice over political issues.

Judging from the RECOM consultations and the referendum vote in Colombia, this assumption must be reexamined. In the first case, participants in the consultation process, particularly victims' associations, were overwhelmingly focused on the need to identify and punish perpetrators,[83] while in Colombia, similarly, the population clearly expressed its need for accountability, even if it was at the expense of the peace process.[84]

Actually, already *Jon Elster*, in his analysis of post-WWII transitional societies, had noticed the frequent "retributive emotions" recurring in the conflict-affected populations, and registered the role of State agents as mediators between popular rage and the pursuit of social peace.[85] The most recent developments of transitional situations only seem to confirm this assessment and the fact that it is not possible to apply a restorative model of transitional justice, actually able to 'heal' victims without granting accountability for the perpetrators of crimes and their fair punishment.

That is not to say that a clear and common approach to transitions is attainable: as already stated, both the use of trials and truth commission as a way to establish accountability for perpetrators of internationally recognised crimes have shown their limits. While some commissions "have short-circuited the link between truth and consequences, providing incentives for perpetrators testimony such as anonymity or the possibility of immunity from prosecution via amnesty",[86] trials have, furthermore, revealed issues about access for the victims, cost and judicial systems' capacity.

Both instruments have entailed the risk of re-traumatizing victims: truth-hearings were considered harmful in cases in which they took place many years after the abuses, while trials often caused the victims to feel that their stories or character were doubted.[87]

There is then the question of what is the preferable approach when establishing trials, doing so through national courts that, in transitional situation, can maintain a legacy of collusion or tolerance toward authoritarian repression, but, at

[76] *Arnaud Kurze/Vukusic*, in: Simić/Volčič (fn. 17), p. 210.
[77] *Subotić* (fn. 72), p. 129.
[78] http://www.balkaninsight.com/en/article/war-crimes-denial-is-a-psychological-defence-mechanism-10-30-2017 (23.8.2018).
[79] *Castro Seixas*, in: Simić/Volčič (fn. 17), p. 72.
[80] *Irvine/McMahon*, in: Simić/Volčič (fn. 17), p. 225.
[81] http://recom.link/coalition-recom-calls-leaders-post-yugoslav-states-establish-regional-commission/ (23.8.2018).
[82] *Arnaud Kurze/Vukusic* (fn. 76), p. 211.
[83] *Irvine/McMahon* (fn. 80), p. 225.
[84] *Kersen*, The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process, posted on 13.10.2013, at https://justiceinconflict.org/2016/10/13/the-great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/ (23.8.2018).
[85] *Elster* (fn. 3), p. 301.
[86] *Collins*, Post-Transitional Justice. Human Rights Trials in Chile and El Salvador, 2010, p. 10.
[87] *Guthrey* (fn. 20), pp. 32–33.

the same time, are able to address a high number of cases, or through international or hybrid courts. Considering past interventions of this kind, international intervention has not always given the best results, especially given the high expectations that populations usually held in relation to their work.

Both the ICC and hybrid tribunals have been invaluable instruments to enforce criminal justice in situations in which State's intervention was not sufficient, but in future it will be necessary not to overcharge them with unrealistic requirements. Their role cannot be that of substituting national institutions and their proceedings, nor are they able to establish alone the rule of law in a country.[88] Obviously, they are fundamental in the broader transitional strategy, since they have the relevant role of granting accountability in the case of State's unwillingness or inability to do so, but it is clear that their ability to act will always have to be balanced with the best interest of the peace-process taking place in the examined country.

Furthermore, even considering the importance of international interventions, the relevance of national courts cannot be disregarded, since they continue to play "a central role in the increasingly wide-ranging accountability and international norm-enforcement scenario".[89]

Regarding the possibility of mixing transitional justice instances with restorative ones, while it is certainly acceptable for restorative justice principles to complement those that rule over transitions, it is important to remember, especially considering actual victims' responses to the previously analysed cases, that it is neither positive nor likely to force all victims to reconstruct social ties with perpetrators of violations of human rights, even if they belong to the same community. It would mean delegitimising and marginalising most victims' point of view[90] in favour of a theoretical statement that is not mirrored in the population´s expressed needs.

The punishment of former perpetrators is, instead, to be considered as a requirement for the creation of a democratic society: a trial can in some cases present a better opportunity of reconciling victims and victimisers, while at the same time help strengthening the rule of law and faith in the judiciary system.[91]

One distinction to keep in mind, when analysing transitions, is whether they come from "above" or from "below". In other words, if they come from international pressures or agreements among elites, as can arguably be said about former Yugoslavia and Colombia; or as a result or social organisation movements' pressures, as in the cases of Argentina and Chile, where well-organised, often lawyer-led human rights movements adopted a legally framed strategy that led to the pursuit of justice claims in national courts.[92] In the second case, given a functioning judicial system, the transitional process will obviously show better results, given its being rooted into a society that supports it and pushes for renewal.

When dealing with the former, it is important for law to show its potential as an element of political change:[93] that can be realised by incorporating the needs emerging from local movements and associations into its objectives, pursuing to meet the concrete interests of the conflict's victims[94] and promoting actual social change.

The question that could be provocatively posed at this point is: if transitional justice processes are so flawed, are they necessary? The easy counterargument is that a country that has been affected by conflict, left without transitional institutions and laws, would never be able to reach the required social stability needed to ensure a lasting peace.

An important lesson that comes from past and current transitional methods is that they lose efficiency and credibility when they remain at the level of a political exchange between local elites and the international community.

What transitional institutions should do from the judicial point of view, is to enforce a judicial transitional system able to grant the highest level of accountability, creating a truth commission formed by recognised and independent professionals, whose proceedings are to be as broadly socially participated in as possible,[95] assuring reparations and enforcing trials, even if accepting forms of alternative punishments for perpetrators who submit voluntarily to justice.[96]

Furthermore, they should promote comprehensive education and social reforms, recognition of the victims, granting them, when possible, to obtain direct reparations (as in traditional criminal justice) from the offenders.[97] Moreover, more relevance should be placed on the truth-seeking process, especially focusing on transparency when creating truth commissions and selecting the cases that will be publicly discussed, in order to give the whole population of the country a common historical memory regarding its past.[98]

At the same time, the international community should be able to revise its comprehension of transitional justice: understanding that a country's compliance with imposed norms and trials does not always mean that the transitional process has been successful,[99] should lead to a more cautious promotion of transitional measures, whose effectiveness has to be evaluated, keeping in mind how domestic political dynamics shape how they are promoted and what their concrete effects could be.

In conclusion, it is fundamental to acknowledge that a transitional process does not end with the punishment of

[88] *Martin-Ortega/Herman*, in: Reed/Rivera (fn. 58), pp. 309–310.
[89] *Collins* (fn. 86), p. 60.
[90] *Uprimny/Saffon*, in: Rettberg (ed.), Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional, 2005, p. 226.
[91] *Fijalkowski/Grosescu*, Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies, 2015, pp. 274–275.
[92] *Collins* (fn. 86), p. 76.
[93] *Teitel* (fn. 4).
[94] *Benavide Vanegas* (fn. 14), pp. 158–159.
[95] *Ambos* (fn. 1), pp. 66–74.
[96] *Skaar/García-Godos/Collins* (fn. 12), p. 41.
[97] *Clamp* (fn. 10).
[98] *Subotić* (fn. 72), pp. 191–192.
[99] *García-Amado* (fn. 67), p. 142.

murderers and torturers, but finds a positive closure only when the – often economic – reasons at the base of the conflict are finally addressed, and measures to grant a "political reparation"[100] able to shape a different future are taken.

[100] *Cepeda Castro/Girón Ortiz*, in: Rettberg (fn. 90), p. 280.