

Justice of Images, Justice through Images:  
A Few Notes to Consider the Relationship between Criminal Law and the  
Representation of Mass Atrocity

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The idea of exploring the relationship between criminal law and the representation of events of mass atrocity began during 2012 in connection with the proceedings in the Congress of the Republic entitled, “Legal Framework for Peace”, a constitutional reform that introduced mechanisms of “transitional justice” in the Colombian Constitution to achieve peace with armed groups outside the law. Thus, the 1st legislative Act of 2012 added a transitory article (Number 66) to the constitutional text, which established, amongst other things, that “the instruments of transitional justice will be exceptional and will have the ultimate purpose of facilitating the end of the armed internal conflict and achieving a stable and lasting peace”, while guaranteeing, “to the utmost possible level, the rights of victims to the truth, justice, and reparation”.

The interesting thing about the reform is that these general principals are based on directives that, at their core, have to do with the organization of the judiciary apparatus for the prosecution, investigation, and sanction of crimes of mass atrocity (genocide, crimes against humanity, and war crimes). In order to develop the themes that I will touch on in this essay, of the diverse aspects that affect the legislative act I want to emphasize, on the one hand, the idea that a statutory law can

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establish “instruments of transitional justice of a judicial nature *or extra-judicial nature* that may permit the *guarantee of the state duties of investigation and sanction* (the emphasis is mine) and, on the other hand, the principle that “both the criteria of prioritization and selection [in the exercise of penal action] are *inherently* the instruments of transitional justice” (The emphasis is mine). Subsequently, the reform develops this final directive and signals that “without harm to the general duty of the State to investigate and sanction the most serious violations of human rights and international humanitarian law”, a statutory law can be issued that, in order to make the objectives of transitional justice effective, and among other measures, determine “criteria for selection that may permit *the centralization of efforts in the criminal investigation of the most responsible individuals* of all crimes that acquire the connotation of crimes against humanity, genocide, or war crimes committed in a systematic manner” and “[authorize] *the conditional waiver of criminal judicial persecution of all the cases that are not selected*” (the emphasis is mine).<sup>2</sup>

## I.

The “Legal Framework for Peace” was issued after almost seven years after the enactment of the so-called Law of Justice and Peace,<sup>3</sup> issued after the demobilization

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<sup>2</sup> Por una parte, la determinación legislativa de los criterios de selección “tendrá en cuenta la gravedad y representatividad de los casos”. De otro lado, los tratos penales especiales que establezca la ley sólo procederán si se cumplen condiciones tales como “la dejación de las armas, el reconocimiento de responsabilidad, la contribución al esclarecimiento de la verdad y a la reparación integral de las víctimas, la liberación de los secuestrados, y la desvinculación de los menores de edad reclutados ilícitamente que se encuentren en poder de los grupos armados al margen de la ley”.

<sup>3</sup> De modo muy general, la Ley de justicia y paz (Ley 975 de 2005) permite que los miembros desmovilizados de grupos armados al margen de la ley (guerrillas y grupos paramilitares) sean condenados a una pena alternativa máxima de ocho años de prisión a cambio de su contribución “a la consecución de la paz nacional, la colaboración con la justicia, la reparación a las víctimas y su adecuada resocialización” (artículo 3). Aunque esta

of United Self-Defense Forces of Colombia (Autodefensas Unidas de Colombia, AUC), and whose application yields results that are far from ideal in terms of prosecution and punishment of the number of paramilitaries responsible for committing crimes of mass atrocity. While almost all the chief paramilitary leaders have been extradited to the United States for conduct related to narcotics trafficking, the courts of justice and peace have only produced approximately eleven condemning sentences of a few middle managers in the AUC. The political, logistical, and technical difficulties involved in prosecuting this class of crimes and perpetrators brought about by the implementation of the Law of justice and peace drove, without any doubt, that the constitutional reform of 2012 noting the idea that, in contexts of transitional justice, it's possible (1) to select and prioritize certain cases, (2) to center prosecution efforts and punishment on the individuals most responsible for crimes of mass atrocity, and (3) to renounce, in a conditional way, the penal prosecution of all non-selected cases. Thus, while the Law of justice and peace seems to deviate from a premise that might conform to the one in which they should investigate and punish *all* perpetrators of crimes of mass atrocity, the "Legal framework for peace" is based on a set of ideas that seems to point to the more strategic and efficient exercise of state powers of prosecution and penal punishment that would determine that, under certain circumstances, *not all* the responsible individuals for this class of crimes would be prosecuted and punished.

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ley ha sido aplicada fundamentalmente a miembros de las AUC, algunos pocos miembros de las FARC que han decidido dejar este grupo guerrillero se han acogido a sus beneficios.

The above reveals an oscillation between two conceptions of penal punishment the process of transitional justice. As much as the Law of justice and peace seems to be based on a *maximalist* vision of penal punishment, the “Legal framework for peace” would be based on a *moderated* notion of this. This essay takes the oscillation as an opportunity to reflect, in a general way, about the role that, in the last twenty years, criminal law has come to occupy in the processes of transitional justice. In this measure, my interest does not consist of evaluating the adequacy of the Law of justice and peace or of the “Legal framework for peace” with obligations that international law imposes on the states in the fight against impunity.<sup>4</sup> More than offering a thesis or definitive and absolute theories, this text pursues, for one part, to formulate a set of basic questions that will serve to guide an agenda of investigation that will develop in the next two years and, on the other hand, to indicate some possible routes of response (still very incipient) to those questions.

The questions raised in this essay come from some perplexities that are based on the observation of the type of limitations of the practical and conceptual order that confront the functioning of criminal law in contexts of mass atrocity. In order to understand the scope of these observations, it is necessary to break from the

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<sup>4</sup> Desde la perspectiva puramente jurídica, el modelo colombiano de persecución y castigo de perpetradores de atrocidades masivas derivado de la Ley de justicia y paz y el “Marco jurídico para la paz” plantea preguntas y dilemas fascinantes. En relación con la Ley de justicia y paz, cuyo régimen está en pleno funcionamiento desde hace casi ocho años, cabría preguntarse si el reducido número de condenas a paramilitares y guerrilleros desmovilizados podría entrañar una situación de impunidad que active la competencia subsidiaria de la Corte Penal Internacional (varios expertos coinciden en que tal impunidad no existe) o, en el futuro, podría ser fuente de condenas contra Colombia por parte de la Corte Interamericana de Derechos Humanos. En punto al recién expedido “Marco jurídico para la paz”, cabría preguntarse, por ejemplo, si la idea de seleccionar y priorizar casos, de centrar la persecución y castigo en los principales responsables y de renunciar al ejercicio de la acción penal en los casos no seleccionados es compatible con los denominados “estándares internacionales” en materia de “verdad, justicia y reparación” derivados, en lo fundamental, de la jurisprudencia de la Corte Interamericana de Derechos Humanos.

consolidation of the discourse of the fight against impunity and the rights of victims in international and domestic law of various countries. It is not my interest to trace the genealogy of this discourse but to establish the type of premises that establish and pose the contemporaneous challenges that surround the role of criminal justice in processes of transitional justice where it is necessary to confront phenomena of mass atrocity. The discourse of the fight against impunity and the rights of victims has consolidated in the last three decades in the sense of establishing a set of “standards” of international law that obligate the states to adopt necessary measures so that the individuals responsible for the violations of human rights and international law will be prosecuted and punished with the instruments of criminal law.<sup>5</sup> Beyond the legal details that develop this principal idea, it can be affirmed that, in contemporary times, the idea that there exists an international consensus that mandates the eradication of impunity for crimes of mass atrocity is outlined in the *trilogy of the truth, justice and reparation*. Furthermore, and even more provocatively, the notion of transitional justice seems to have been absorbed by the discourse of eradication of impunity and victims’ rights.

Today there seems to exist a the following double equivalence: transitional justice = obligation to eradicate impunity = rights of victims to the truth, justice, and

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<sup>5</sup> Esta idea está expresada del modo más contundente en el preámbulo al Estatuto de Roma de la Corte Penal Internacional, que señala que “los crímenes más graves de trascendencia para la comunidad internacional en su conjunto no deben quedar sin castigo y que, a tal fin, hay que adoptar medidas en el plano nacional e intensificar la cooperación internacional para asegurar que sean efectivamente sometidos a la acción de la justicia”, que es necesario “poner fin a la impunidad de los autores de esos crímenes y a contribuir así a la prevención de nuevos crímenes” y, finalmente, “que es deber de todo Estado ejercer su jurisdicción penal contra los responsables de crímenes internacionales”. En América Latina, el discurso de la lucha contra la impunidad y los derechos de las víctimas ha estado principalmente asociado a la doctrina de la Corte Interamericana de Derechos Humanos desde el fallo *Velásquez Rodríguez v. Honduras*.

reparation. The above, in certain domestic contexts such as in Colombia, it has been converted into an even more problematic series of equivalencies: criminal prosecution and punishment of the individuals responsible for crimes of mass atrocity = maximalist vision of criminal law (all perpetrators should be prosecuted and punished). The universe of transitional justice would seem, then, to have begun confusing itself with criminal punishment. In this universe, justice of the trilogy is conceived of in terms of criminal justice; in turn, the truth is obtained primarily from the criminal processes against the perpetrators of mass atrocities; and, finally, criminal justice is an essential form of reparation. Although, of course, and particularly in relation to truth and reparation, other forms of realizing these rights have been conceived of, they have come to occupy – at least in Colombia – a secondary place to the primacy of criminal justice.

This dynamic clearly appears in the scenario opened by the Law of justice and peace in the year 2005 and its later period of application. This process, that occupied the attention of the public opinion and determined the greatest efforts to strengthen the Colombian criminal jurisdiction (training of prosecutors and judges to prosecute massive and systematic crimes such as those committed by the AUC, constant processes of supervision, diagnosis, and evaluation by the international community, among other issues), only has driven more or less eleven commanders of some blocks of this armed group to be condemned. In order to evaluate this rate it should be kept in mind that, since the process of demobilization and abandonment of weapons by the AUC began in 2002, approximately 35,000 of its members

demobilized and more or less one thousand of those have been expected to receive benefits contained in the Law of justice and peace. It is not surprising then that the failure that this law implies in terms of criminal prosecution and punishment of paramilitaries responsible for crimes of mass atrocity, and facing the perspective of an eventual peace agreement with the FARC, the “Legal framework for peace” constitutes an intent to respond to the dilemmas that pose the equivalencies derived from the contemporaneous way of understanding the notion of transitional justice. Thus, the possibility of searching for justice through extra-judicial routes would exist and, when one goes to court, it would not be necessary to criminally prosecute and punish all the responsible individuals for mass atrocity. The “Legal framework for peace” would then permit the passage of the maximalist vision of criminal justice, contained in the set of equivalencies of transitional justice just as it is been understood to this day in Colombia, to an intermediate vision of criminal justice, in which this would cease to monopolize the notion of transitional justice.

Note, in this case, that, including in this second vision of the role of criminal justice in the processes of transitional justice, the necessity of relying on criminal law is not removed and, even more, it is possible to affirm that criminal law will continue to occupy a preponderant role. Certainly, criminal prosecution would concentrate on organized emblematic cases around the determination of the criminal responsibility of the “most responsible individuals” of the crimes committed by the armed group to which they pertain. As I signaled earlier, I will not occupy myself with establishing whether this partial withdrawal of criminal law could create situations

of impunity that begin to compromise the international responsibility of the Colombian state. Rather, I take the dispositions of the “Legal framework for peace” as a challenge to think about *the role that criminal law can play in the representation of mass atrocity, as a phenomenon that operates as a center of articulation of the notion of transitional justice*. However, this reflection indicates, previously, the type of observations of practical and conceptual order in relation to the role that criminal justice actually occupies in the processes of transitional justice that raise some perplexities that drive the thought that the role criminal law plays in the representation of mass atrocity.

## II.

The use of criminal law in processes of transitional justice (in its maximalist or intermediate version) is subject to practical and conceptual limitations whose magnitude brings us to question why criminal justice continues to occupy such an emphasized place in these processes. These limitations do not belong to the Colombian case nor do they appear exclusively when the responsible individuals for mass atrocities are prosecuted and punished in the domestic arena. On the contrary, these appear in all cases of transitional justice which may submit to criminal justice genocides, crimes against humanity or war crimes and in this way, would be part of that which would be called the “Judicial Paradigm of Nuremberg”. In effect, since the trial against the principal Nazi war criminals in 1946, passing through the ad-hoc international criminal tribunals for ex-Yugoslavia and Rwanda, until the actual processes that come before the International Criminal Court, on one hand, and the innumerable domestic criminal trials against Nazis, dictators, criminal collaborators,

and other responsible individuals for mass atrocity, and on the other hand, it is possible to identify a series of *practical limitations* that make one rethink the role that criminal law has acquired in the contemporary trilogy of truth, justice, and reparation.

Although it is possible to enumerate others, it would be possible to organize these limitations around four large axes.<sup>6</sup> First would appear the scarce or null power of transitional criminal trials to dissuade or prevent new mass atrocities. For example, the trial that was conducted by the Nuremberg International Military Tribunal and its posterior trials, as much international powers as domestic powers against Nazi criminals, did not prevent the massive violations of human rights committed during the Balkan Wars, including the putting in place of concentration camps in Bosnia and Herzegovina. Even more telling is the fact that the creation of the International Criminal Tribunal for ex-Yugoslavia by the United Nations Security Council in May of 1993 did not dissuade the genocide in Rwanda in 1994 nor the massacre of Srebrenica in July of 1995. But, even more interesting, is that in reaction to these facts, we have responded with *more* criminal law: the United Nations Security Council created the International Criminal Tribunal for Rwanda in November 1994 and the International Criminal Tribunal for ex-Yugoslavia continued prosecuting

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<sup>6</sup> Por supuesto, esta es una abstracción que implica todos los defectos propios de una generalización. En elaboraciones posteriores mucho más afinadas de estas limitaciones sería necesario establecer los matices y diferenciaciones que provendrían, por ejemplo, del tipo de atrocidad masiva de que se está tratando, de la organización o régimen que la produce, del nivel de mando o autonomía que tenía el procesado, de si se trata de un juicio internacional o doméstico, entre otras cuestiones. Sin embargo, presentar las limitaciones con el nivel de generalidad que aquí se asume podría propiciar la discusión en relación con la tipología de juicios penales transicionales y la organización de las distintas limitaciones a que éstos se confrontan. Adicionalmente, cada una de estas limitaciones ha sido discutida ampliamente en literatura especializada en derecho penal general, derecho penal internacional y justicia transicional. Aquí simplemente señalo las líneas generales de los debates que pueden encontrarse en esa literatura.

and punishing, with great enthusiasm, all genocide, crimes against humanity or war crimes that might be seized and brought to the Hague.

Second, in this class of criminal processes the most responsible individuals for mass atrocity—those that devised and put into action the regimes or systems that produced those violations—tend to escape prosecution and criminal punishment. Instead, subordinate commanders appear in the courts (with diverse levels of commanding power and autonomy) that, in the majority of cases, will follow orders and complete segmented and partial functions in the execution of atrocities. This phenomenon can be accompanied, also, by the difficulties of capturing and bringing the important perpetrators before a court (as has occurred in the case of ex-Yugoslavia) or, on the contrary, by the excess of captured perpetrators that cannot be judged and punished because the penal system (national or international) simply lacks the technical capacity and logistics to process high numbers of responsible individuals (as has occurred in the case of Rwanda). As will be seen, the criminal judgment of this class of perpetrators produces a particular tension in the criminal court. In these cases, a tension between the determination and the *individual* criminal responsibility tends to appear, strictly considered, and the historic or political purposes that, in many cases, are ascribed to these processes. Said in another way, the process of determination of individual criminal responsibility of a person that had little or nothing to do with the creation and putting into place of the regime or system that massively violated human rights is used to “reconstruct” or “narrate” the history of this regime and how these mass atrocities were committed.

If the person who were to occupy the stage were an individual whose responsibility in the design and operation of the regime of human rights violations was of major significance, maybe it would be more appropriate to utilize the process of determination of criminal responsibility to clarify historical aspects of great transcendence in which, perhaps, its actions had a larger impact. Besides these difficulties, more recently it has been noted that the dynamics of armed conflicts in which mass human rights violations are produced may obscure the distinction between victims and perpetrators, which would complicate the determination of responsibility that fits with latter atrocities.

The third limitation of transitional criminal courts has to do with the tension to which guarantees of due criminal process are usually submitted in this class of processes. The most important of the discussions about this point have sometimes had to do with application of the principle of criminal legality in these courts: in many cases, the perpetrators have been found responsible for criminal conduct that the law has not typified until the moment of its commission. Clearly, this issue has not been settled with the trial of major Nazi war criminals in the International Military Tribunal of Nuremberg, where they first discussed the criminal responsibility of individuals for conduct (in this case dealing fundamentally with aggressive war and crimes against humanity) that did not exist as crimes when they were committed. Later, this same debate would emerge, for example, in the trials before the Criminal Tribunal for ex Yugoslavia where several of the defendants alleged conduct were not contemplated in the active criminal norms of former

Yugoslavia at the moment of their occurrence. Today, in the processes of justice and peace in Colombia it has been discussed if actions committed by paramilitaries before the year 2000 could be typified as crimes against international humanitarian law that were introduced into the Colombian legal system by the Criminal Code issued that year. However, the peculiar method (of saying the least) in which the guarantees in transitional criminal trials are understood not only refers to the principle of criminal legality. In actuality, there is an intense controversy about the most appropriate mode of attributing individual criminal responsibility to the perpetrators of mass and systematic crimes. Thus, for example, the ad-hoc international criminal tribunals for ex-Yugoslavia and Rwanda utilize the so-called *joint criminal enterprise*, that tends (at least in two of its forms) to facilitate exemplary sentences for perpetrators whose contribution to the acts of mass atrocity is relatively small. Given the criticism that this type of imputation has received by the detriment it poses to the basic guarantees of criminal law, the International Criminal Court and other national criminal tribunals have begun to appeal to methods of attributing individual responsibility based in the ideas of Claus Roxin about command authority in organized power structures.<sup>7</sup>

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Fourthly and finally, the transitional criminal trials face limitations—or, better, tensions—of a historic and political order derived from the particular context in which they are developed. It could even be said that these tensions originate the remaining limitations on the use of criminal law in contexts of transition. In effect, if it were not because the transitional trials are called to mediate in particular historical and political circumstances perhaps the problems related to the scarcity of preventative power of these processes would not emerge, the type of perpetrator that tends to be judged and punished and the tensions to which are submitted basic guarantees of due criminal process. From a historical point of view, the contemporary discourse about transitional justice, contained in the trilogy of truth, justice, and reparation, might signal that criminal trials are determinants for the reconstruction of the “historical truth” and the “collective memory”, to the point that the international community has developed prescriptions that indicate to the states which are the most appropriate measures to come close to the that we has been called the “judicial truth” in transitional criminal trials. Furthermore, since its origins in Nuremberg, these criminal processes have been submitted to political questionings that do not tend to confront ordinary criminal trials. A classic form of questioning appears when the “victors” in a conflict submit to their conquered enemies to *their* criminal justice. The problems that this form of criminal justice creates have been usually posed under the argument “justice of victors”, as occurred with the trial of the International Military Tribunal of Nuremberg and the following trials brought about by the protection of Law No. 10 of the Control Council in distinct zones of Germany occupied by allied forces. However, if the transition is not

a consequence of a scheme of conquerers/conquered but rather a result of negotiation, the criminal trials also tend to be submitted to political pressures emerging from the necessity to compromise aspects of the prosecution and criminal punishment with those who are leaving power (as in the case of certain dictators) or ceasing illegal armed actions (guerrillas or other paramilitary groups) with the purpose of consolidating the new state of things (weighing criminal justice against peace).

Through the consolidation of these limitations, it can be concluded that criminal law is not the most appropriate instrument to get the truth, justice, and reparation to which the discourse of transitional justice refers and they should be guaranteed through other less problematic mechanisms. In fact, certain relatively successful transitions –such as that in South Africa—would suggest that these values can be achieved independently of criminal trials. However, this case seems to be rather exceptional. Why, weighing the limitations, does criminal law continue appearing with force every time a political community manifests political will to confront mass atrocity committed in the past? Why does the trilogy of truth, justice, and reparation continue occupying a space so preponderant? What truth, what justice, and what reparation can be hoped for from a legal system that seems to have so much difficulty in confronting a phenomenon such as mass atrocity? This essay does not sustain the hypothesis that the limitations of the transitional criminal trials might lead to prescribe the truth, justice, and reparation and that they should be ensured through other mechanisms of law. On the contrary, it proposes, on the one hand,

that criminal law will continue appearing (in its maximalist or moderated version) in processes of transitional justice. I suggest that this incessant and compulsive appeal to the criminal trials obey a *fascination with representation of mass atrocity* that offers criminal law.

### III.

Until this point, I have referred, on the one hand, to “criminal law” or to “criminal trials” and, on the other hand, to “mass atrocities” or to “mass and systematic violations of human rights”. More exactly, I have indicated that, in contexts of transition, the criminal trials constitute a primitive way – or, *the primitive way*—of confronting a past of mass atrocities through the judgment and punishment of the responsible individuals. Thus, I have noted the meeting of a very particular historical and social phenomenon and the language of criminal law. I suggest then that the space in which this meeting is produced is a space of *representation*, where *criminal law represents mass atrocity*. This affirmation would seem somewhat novel, in the way in which the law, as a discursive form, is called, in general, to represent portions of the “reality” through the specialized language of its institutions and categories. However, the representation of mass atrocity is not an ordinary case of judicial representation of reality. On the contrary, from the representative perspective, atrocity as much as criminal law has particularities that it is necessary to make explicit before studying how one would think about the representation of the one by the other.

Mass atrocity is a form of reality that is distinct from phenomena that criminal law is usually called to represent. Even more, it is a phenomenon that, in general, challenges the usual modes in which we conceive and conceptualize representation through any discursive form. An extremely extensive literature would be impossible to include or summarize in this brief essay that has shown, from a multiplicity of disciplinary perspectives, how mass atrocity is a historical and social reality that, in various ways, challenges its representation. Thus, it has been signaled as an “incomprehensible”, “extreme”, “exceptional”, “unimaginable”, “impossible”, “offensive” phenomenon, as a “limited event” or as a “traumatic event”, amongst other qualifications, whose representation is then “impossible”, “difficult”, “partial”, “refractory” or “prohibited”. With the risk involved in reducing the richness of all this literature, I utilize here, to the effects of the argument of this work, the characterization of Dominick LaCapra of mass atrocity as a “limited event”. More than transcribe this characterization, I am interested in highlighting the fundamental elements that constitute the category of the limited event and that have problematic incidence associated with their representation. For LaCapra, the limited event (1) is “that which goes beyond the capacity of the imagination to conceive or anticipate it”, (2) is “necessarily traumatic or traumatizing”, (3) its “nature in unimaginable appearance” tends to determine that “its fictional or artistic [or judicial?] treatment seem unsatisfactory or lacking”, (4) its “excess” beyond the “imaginative ability” raises “a large challenge to the artistic [or judicial?] representation or treatment of the themes”, and (5) this challenge “does not disappear, and may possible increase, when the extreme or the exceptional

manifests in daily life as part of a distorted “normality” that subverts normativity.<sup>8</sup> This characterization has the advantage of raising the exceptionality or the excess of mass atrocity as a phenomenon of reality, on the one hand, and the fundamental challenges involved in its representation, on the other. Note, however, that LaCapra, at the mention of the vehicles of representation, only makes a reference to the “fictional” or “artistic” treatment of the limited event, leaving to the side other representative routes and, particularly, the legal route.<sup>9</sup>

Although the representation of mass atrocity in trials is not completely absent from the literature that was mentioned above, it is possible to affirm that it is not been occupied, in a particularized manner, which is the dynamic-representative manner that appears when *criminal law*, as a specialized legal system, whose institutions and categories are mobilized to *determine the individual responsibility of one or various persons in the commission of a crime or a set of crimes*, intends to represent atrocious phenomena. Thus as mass atrocity is a phenomenon of reality whose representation, as it is seen, determines very particular problems, criminal law is a representative vehicle that, given the way it represents the world, raises peculiar challenges. In this case, and taking into account the particularity of the object of representation as much as the representative vehicle, I suggest that the fascination

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<sup>8</sup> Dominick LaCapra, “Estudios del trauma: sus críticas y vicisitudes”, en *Historia en tránsito: experiencia, identidad, teoría crítica*, Buenos Aires: FCE, 2006, pp. 181-182.

<sup>9</sup> Aunque aquí podría entrar a preguntarme hasta qué punto el derecho provee o proveería un tratamiento ficcional o artístico de las realidades que le corresponde representar, creo que ello me llevaría a tocar temáticas distintas a las que constituyen el punto central de este ensayo. Ahora bien, en el presente estado de mis reflexiones sobre estos temas, y particularmente de mi idea de que el derecho penal produce un cierto tipo de imágenes que ayudan a explicar la fascinación con la justicia penal en los procesos de transición, intuyo — aunque aún no tengo claridad acerca de cuáles serían las vías apropiadas para esa exploración— que si el derecho es considerado como una forma de ficción o de arte ello podría abrir caminos interesantes y sugerentes para pensar esta cuestión.

with the law and criminal trials that appear in processes of transition, have to do, precisely, with the meeting between that object and that vehicle. Said in another way, the fascination with criminal law is raised by the way in which mass atrocity is represented when a tribunal establishes, through the categories and institutions characteristic of criminal law, the individual responsibility of various accused individuals in the perpetration of particular atrocious acts that form parte of a context of mass atrocity that is even larger. In a more precise way, I suggest that the fascination with the law and criminal trials in contexts of transition emerges from the *images* that produce the representation of mass atrocity through judicial categories and institutions by which the individual criminal responsibility is determined for one or various perpetrators of atrocious acts.

Conforming to this idea, in contexts of transition the law and criminal trials fascinate us because *they would produce a justice of images and through images*. What are they like and what is there in the images that produces criminal law? How do images of mass atrocity produce criminal law? Why are these images fascinating? To respond to these questions I am inspired by some of the reflections of Hannah Arendt about the trial followed by the State of Israel by Adolf Eichmann in 1961. I should warn that what I propose to do is simply open avenues for reflection, although embryonic, entirely left to deepening the debate.

By publishing *Eichmann in Jerusalem* in 1963, Hannah Arendt dedicated a large part of her reflections –that culminated with *The Life of the Spirit*—to explain what she

had tried to signify with her idea that the career of Eichmann taught “the lesson of the terrible *banality of evil*”.<sup>10</sup> For Arendt, the conduct of Eichmann represented a moral phenomenon without precedent in history because she put in present terms how normal people (in the psychiatric sense of the term), anodyne (according to Arendt, Eichmann was a character of “diminished intellectual equipment”, without fanaticism, with a conscience that distinguished between good and bad (Eichmann affirmed that he had guided his life “in consonance with the moral precepts of Kant, especially with the Kantian definition of duty” and without hatred for his victims, he could make himself an architect of the most horrendous acts. Arendt found that, in a point of her life as a Nazi functionary, Eichmann no longer thought and judged in order to “conquer his innate repugnance towards crime”. From this moment onwards, he was justified before himself and, later, before others and the tribunal of Jerusalem, through “clichés” that, fundamentally, tended to suggest that he had simply followed the laws of the Third Reich and, for this reason, had acted as a functionary completer of duties (during the Final Solution, Eichmann modified the imperative kantian category in order to say “behave yourself as if the principle of your acts were the same as the acts of a legislator or common law”. The interesting point is that, through the downfall of the Nazis and their flee to Argentina, Eichmann seemed to have “recuperated” his capacity to distinguish between good and bad.

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<sup>10</sup> La reconstrucción de las ideas de Arendt que sigue a continuación está basada en *Eichmann en Jerusalén*, en uno de los textos contenidos en *Responsabilidad y juicio* (un libro póstumo editado y compilado por Jerome Kohn que contiene varios ensayos de Arendt posteriores a *Eichmann*), en *La vida del espíritu* y en las *Conferencias sobre la filosofía política de Kant*. Véanse Hannah Arendt, *Eichmann en Jerusalén*, Barcelona: Lumen, 2005 (se cita como *E*); Hannah Arendt, “Algunas cuestiones de filosofía moral”, en *Responsabilidad y juicio*, Barcelona: Paidós, 2007 (se cita como *CFM*); Hannah Arendt, *La vida del espíritu: el pensar, la voluntad y el juicio en la filosofía y en la política*, Madrid: Centro de Estudios Constitucionales, 1984 (se cita como *VE*); Hannah Arendt, *Conferencias sobre la filosofía política de Kant*, Barcelona: Paidós, 2003 (se cita como *CK*). En lo que sigue, y con el fin de evitar la proliferación de notas al pie de página, estos textos se citan en el cuerpo principal del ensayo con su acrónimo (*E*, *CFM*, *VE* o *CK*) seguido del número de la página.

Arendt relates how when in prison he was given a copy of *Lolita* by Nabokov for “her distraction” and how Eichmann became “visibly indignant” in a few days saying it was a “completely corrupted” book. In the same way, during the trial in manifested that, despite having read the *Critique of Practical Reason*, he recognized that, during the final solution, “he had stopped living in consonance with kantian principles”, but that “he had consoled himself thinking that he had stopped being the ‘master of his own acts’ and that he could not ‘change anything’”.

In sum, it can be argued that *Eichmann in Jerusalem* is the story of the moral collapse of an ordinary individual and, in this way, intends to respond to the question of “how much time does it take a normal person to overcome his innate repugnance towards crime, and what occurs to him exactly so that he can find himself in this situation”. Later, Hannah Arendt elaborated in more detail and with a larger level of generality this particular moral phenomenon. In *A Few Issues of Moral Philosophy*, she shows how the same idea of morality –that, for her, is equivalent to the distinction between good and bad—that discounted Occident and around which the greatest security is deposited, can forget, suddenly, in concrete political and social circumstances. For certain, the distinction between good and bad does not disappear and can return once the specific political and social conditions that provoke its omission cease, in order to demonstrate that we already don’t have any security about the rules that distinguish between good and bad that seem so evident to us. The trial of Arendt is precisely one of the most distinctive lessons about European Totalitarianism.

In this regard, she signaled that “we –at least the oldest of us—have aided the *complete collapse* of all moral standards established in public and private life during the decades of 1930 and 1940, not only in Hitler’s Germany, but also in Stalin’s Russia. However, the peculiar moral horror of radical Nazism settled, on the one hand, in that “it demonstrated that no one had, because of being a Nazi , been convinced *to adopt and forget, from the night to the morning*, as is said, not their social position, but their moral convictions that once accompanied them” and, on the other hand, in that the “degeneration” of morality “did not obey the action of criminals” but the action of “ordinary people that, *while* the moral norms were socially accepted, *never* dreamed that they would doubt what they had been taught to believe. It is in this point of Arendt’s reflections where here idea of a *double collapse* or the moral order appears (the expressions in cursive in the previous quotes try to mark their temporal sense). The first collapse occurs when ordinary individuals forget a morality of which “they would never dream that they doubted”, and the second collapse takes place when this forgotten morality is reestablished in “the moment in which ‘history’ announces defeat”. According to Arendt, this “sudden return to normality” is not necessarily a motive for celebration but rather bewilderment, as it “reinforces our doubts about the existence of an immutable and fixed distinction between good and bad or, said in another way, challenges the idea of bad as a “demonic” phenomenon, product of pride, envy, weakness, hatred, or greed.

The Arendtian celebration of the criminal trials against perpetrators of mass atrocity such as Eichmann have to do with the way in which those trials intervene in the unknown space produced by the double collapse of the moral order. For Arendt, criminals like Eichmann are distinguished from “ordinary” criminals because only their acts deal with the ideal of morality in its most profound sense (according to Arendt, “those people are not common criminals, but rather common persons that have committed crimes with more or less enthusiasm simply because they did what they were told”; that is to say, their acts are the obvious demonstration of the liability of the moral order, understood as the distinction between good and bad. Thus, to criminally judge this type of delinquent immediately puts the focus on the nature of morality and its fragility. Although Arendt does not disavow that this type of trial also has to do with the “unthinkable” facts, that invoke an “unspeakable horror” and that leave one “breathless and speechless”, this verification does not preclude “the very necessary reconsideration of the judicial categories” and the comprehension of the “strictly moral lessons” derived from the commission of acts of mass atrocity. Conforming to this idea, it is sustained that, in the context of a criminal process, it is possible to separate the own emotion from the unspeakable of “the horrible experiences, but often repulsive, in which the conduct of the people expresses a normal trial where the issue of morality and ethics is raised”. Is this focus on the issues pertaining to the individual responsibility of the perpetrator—that place where “the question that has to be asked is not: How did this system function?, but is rather: “why did the accused become a functionary of this organization?”—that, for Arendt, confers the “undeniable greatness of the judicial

proceedings". Thus, "the unspeakable horror to which I alluded before as a reaction congruent before the system in its set dissolves in the court room, in which we deal with *persons* in the *ordered discourse of accusation, defense, and trial*".

The criminal trials against responsible individuals for mass atrocity would seem to have a *peculiar* ordering effect of reality that, in another way, would be incomprehensible and intolerable. According to Hannah Arendt, the combination of the judicial form and the language of individual criminal responsibility would constitute a special form of narrative –that which tells "*why the accused became a functionary of this organization*"—that permits the understanding of the mass atrocity as a phenomenon apparently resistant to representation. In turn, this narration would produce a set of images that would explain, in contexts of transition, why we compulsively resort to criminal trials to confront mass atrocity. Its continuation developed three ideas whose conjugation sustains, in my opinion, this argument.

In the first place, Arendt comes close to the phenomenon of mass atrocity through her characterization of the type of moral phenomenon in which the actions of perpetrators like Adolf Eichmann are inscribed. The idea of the double collapse in the moral world, inside that which inscribes the banality of evil, would constitute a description of the epistemological position that we arrive to occupy in the world that surrounds us, by the effect of concrete political, social, and cultural events, it is no longer able to be explained in terms of the conceptual categories whose settling

in our way of thinking and knowing. One of these categories, according to Arendt, would be morality, understood as a distinction between good and bad, the result of which is put in check by the banality of evil. The “unspeakable” and “unthinkable” nature of mass atrocity would arise then from the existential and epistemic disorientation that produces the impossibility of understanding an accumulation of facts and actions because they exceed the categories that, in other circumstances, would permit their comprehension. Note that this way of conceiving the unrepresentable character of mass atrocity is similar to the idea of the limited event proposed by LaCapra, in the sense that this is conceived of as a *representative excess* (remember that LaCapra conceived the limited event as a that which “went beyond the imaginative capacity of conceiving and anticipating it” or that which implied an “excess” of “imaginative capability” and, thus, its representation is always “a large challenge” and appears as “unsatisfactory or lacking”).

Second, Hannah Arendt offers a theory of how to represent mass atrocity—just as that which she describes in the above paragraph—through criminal trials against perpetrators of atrocious acts. This idea advances the peculiar notion of the narrative that appears in *Eichmann in Jerusalem* as in *A Few Issues of Moral Philosophy*. Remember that Arendt affirms, on the one hand, that this class of trials centers in telling, “why the accused became a functionary of this organization” and, on the other hand, that this narrative is produced through “ordered discourse of accusation, defense, and trial”. In the light of these two affirmations, it could be affirmed that mass atrocity is represented by criminal trial through a *narrative*

*about individual responsibility that has an ordering power.* This ordering, in the theory of Hannah Arendt, would be produced from the possibilities that the trial offers in order to understand the atrocious phenomenon, for one part, and for the exercise of the human ability to *think*, on the other hand.

To narrate how the perpetrator became a functionary of a specific criminal organization and began to commit the type of atrocious acts that he is charged with, is in large measure, the type of narrative exercise that Arendt undertakes in *Eichmann in Jerusalem*. This book exemplifies then a *form of trial* that is produced by a *peculiar form of narrating* thoughts in the world. Various times in his work, Arendt invoked Isak Dinesen when he said that “one can tolerate all the pain if he puts it in a story or he tells the story of himself”, in order to signal that *we understand* the world and *we generate* categories that permit that comprehension when we narrate concrete events. According to Arendt, the narration “reveals the significance of that which in another way would continue being an intolerable sequence of mere thoughts” because the act of “telling a story reveals significance without committing the error of defining it”.<sup>11</sup> To narrate, in sum, is to say “it exists” and, with it, “the particular facts lose their contingent character and acquire certain humanly understandable significance”.<sup>12</sup> The most obvious example of the above is, of course, in *Eichmann in Jerusalem*. By narrating the story of why Eichmann became a Nazi and committed the atrocities that he committed, Arendt intends to understand the

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<sup>11</sup> Hannah Arendt, “Isak Dinesen 1885-1963”, en *Hombres en tiempos de oscuridad*, Barcelona: Gedisa, 2001, p. 113.

<sup>12</sup> Hannah Arendt, “Verdad y política”, en *Entre el pasado y el futuro: ocho ejercicios sobre la reflexión política*, Barcelona: Península, 1996, p. 275.

type of moral phenomenon that the case involved and, from that narrative process, emerged the category of the banality of evil as that was permitted to find out about the radical novelty of the phenomenon to which it refers.<sup>13</sup> It is necessary to note the ordering of reality that emerged from the narrative allows one to understand concrete phenomena in the world and not produce a simplistic version or reduction of all this. On the contrary, in the way in which gets close to the phenomenon that is looked for on its own terms, the representation that from there emerges the same complexity of the represented object. Thus, the proposal of Arendt could constitute a response to the challenges that, according to Primo Levi, entail the representation of atrocious facts. For Levi, at the desire to “understand” acts of this class we tend to “simplify them” and put them in “black and white”, in contrast to the extreme complexity of this “grey zone” that is mass atrocity, where distinctions between “victims” and “perpetrators” or “good people” and “bad people”, particularly, lose their explicative character and clarity that they would have in other contexts.<sup>14</sup>

As has been mentioned before, the ordering character of criminal trials also would prevent the way in which these reconstruct the human ability that, in a more conspicuous way, Hannah Arendt missed in Eichmann. In the introduction to the first volume of *The Life of the Spirit*, Arendt signaled that, before the absence of “firm ideological convictions”, “of specifically malignant motivations” or of “stupidity” of

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<sup>13</sup> Arendt pone esta cuestión en evidencia en la introducción al primer volumen (“El pensar”) de *La vida del espíritu*. Allí, señaló que, tras la idea de la banalidad del mal, “no sostenía tesis o doctrina alguna, aunque fuera confusamente consciente de que iba en contra de nuestra tradición de pensamiento sobre el fenómeno del mal” (VE, 13).

<sup>14</sup> Véase Primo Levi, “Los hundidos y los salvados”, en *Trilogía de Auschwitz*, Barcelona: El Aleph, 2005, pp. 497-528.

the accused, the “only notable characteristic” of the behavior of Eichmann was his “lack of reflection (thoughtfulness)”. This observation brought Arendt to investigate the nature of the human faculties of thought and judgment, and to establish that the first—in very basic terms—is that “habit of examining all that happens or demands attention” through “the dialogue between me and myself” and that the second—in equally simple terms—is equivalent to the capacity of having an “enlarged thought” through which one intends to “visit” the points of views of others. For Hannah Arendt, the first moral collapse would occur when individuals like Eichmann stopped thinking and judging and substituted these faculties with “stereotypes, phrases, codes of conduct and of standardized expression” that “had the socially recognized function of protecting us from reality”. Apart from these ideas, it could be proposed that in the narrative that takes place in the criminal trial – “why the accused became a functionary of this organization”—the thought and the trial that missed for the defendant would be produced. In effect, by telling the story of why an ordinary person entered to form part of a criminal organization, stopped thinking and judging and began to commit countless atrocities, the trial shows how and why specifically he suspended his faculties of thought and, when he did it, he reconstructed the sense in that that thought and that judgment would have produced. In the criminal process they make the side of “stereotypes, phrases, codes of conduct and standardized expression” and they substitute these for true thought and judgment. Note how *Eichmann in Jerusalem*, in that model that would be the criminal trial, ordered the world telling how the participation of Eichmann in the

Final Solution was and in that narrative shows how things could have been another way if maybe he had stopped himself to think and judge rationally.

In the third place, the way in which Hannah Arendt characterizes the representation of mass atrocity through criminal trial can take one step further to suggest that representation produces a set of images that become fascinating. Although for explaining how a criminal trial (the “ordered discourse of accusation, defense, and trial”) represents mass atrocity through narration (“why the accused made himself a functionary of the organization”) that produces *images* would appeal to multiple conceptual methods, here I will show a first idea (perhaps too simple) that relates the image with the notion of an imaginary order that makes identification possible. Formerly, it was explained that Arendt can be read in the sense of characterizing criminal trials against perpetrators of atrocious acts as spaces that represent mass atrocity through its ordering. In accordance with this idea, it could be suggested that this form of representation produces the *spectacular image of the complete and reconstituted social body*. It has already been noted how mass atrocity is an “unthinkable” and “unspeakable” reality that leaves us “breathless and speechless” because it cannot be captured through the traditional categories permitted by comprehension. The state of disorientation and confusion that emerge from this epistemic situation could, in turn, be conceived as type of “rupture” or “incompleteness” of the social body. Given this state, despite the “ordering” function of criminal trial, an image would emerge in the social body that is comprehensible and, equally as much, is seen as complete and reconstituted. Thus, criminal court

would operate as a type of *mirror* that reflects an image with which we identify. The incomplete and broken social body sees itself as complete and reconstituted in the image the criminal court reflects.<sup>15</sup> The fascination that criminal courts exercise in moments of transition would derive then from the process of identification of a society that attempts to exit from the disorder and chaos and desires to move to order and peace with the image of that order and peace that derives from a criminal court in which mass atrocity has been submitted to a peculiar narrative dynamic of ordering.<sup>16</sup>

It is worth noting that, in contexts of transition, the law and criminal courts do not have the monopoly of production on images of mass atrocity. Of course other forms of representation exist (photography, film, plastic and performing arts, music, literature, amongst others) that represent the atrocious acts through particular mechanisms (that can be close to or distant from the peculiar type of representation that is provided by a criminal court, which has been characterized in this essay) that give a place to images that can complement –or possibly contradict—those that are produced by criminal courts. It would fit then to buy images of mass atrocity that are produced by criminal courts with images the acts of atrocity and emerge from

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<sup>15</sup> Estas ideas se inspiran, por supuesto, en la teoría lacaniana del estadio del espejo como formador del yo. Véase Jacques Lacan, “El estadio del espejo como formador de la función del yo tal como se nos revela en la experiencia psicoanalítica”, en *Escritos I*, México, DF: Siglo XXI, 2005, pp. 86-93. Soy consciente de las dificultades que implica echar mano de teorías que explican dinámicas psíquicas individuales para dar cuenta de fenómenos de orden colectivo o social. Recurro a esta teoría porque ofrece, de modo muy directo, una explicación de la fascinación que se establece entre el espectador y la imagen a partir de la relación de identificación que el segundo establece con la primera y del carácter constitutivo de la identificación en la formación del yo. En elaboraciones posteriores de las ideas que presento en este ensayo, espero poder dar cuenta de las relaciones entre el juicio penal y la imagen, tal como esta ha sido conceptualizada por la historia y la teoría del arte y por algunas corrientes filosóficas.

<sup>16</sup> La categoría psicoanalítica de la identificación ha sido usada en algunas corrientes de la teoría política para indicar la necesidad de llenar el “vacío” que surge en momentos de particular desorden y desorientación social. Véase, por ejemplo, Ernesto Laclau, *La razón populista*, Buenos Aires: FCE, 2005, pp. 112-116, 166.

other representative forms with the purpose of establishing which are its convergences and divergences. A study of this class would perhaps arrange a rich and complex image of what signifies the truth, justice, and reparation in processes of transition.

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Historical experience shows that transitional *justice* is firmly based on submitting perpetrators of mass atrocity to criminal courts. Despite an accumulation of difficulties and objections that compromise the possibility of these courts achieving justice, in a sense retribution and dissuasion from the concept, it does not seem that the appeal to these will diminish in the future. This incessant and obsessive recourse to criminal justice seems then to explain the fascination the images of mass atrocity generate. These are images of order and of the lost completeness in times of atrocity and whose reestablishment is being pursued in transition. The criminal court would provide us, then, a justice of images through images.