

RESEARCH REPORT

Transforming Social Relations

Restorative Responses to Massive Human Rights Violations

April 2024



Cover Image: Colombia's Special Jurisdiction for Peace held its first acknowledgment hearing for Case 01 on June 21-23, 2022, in Bogotá. As a public encounter between victims and former leaders of the guerrilla group Revolutionary Armed Forces of Colombia–People's Army, the event represented a decisive step in the country's restorative justice process. The hearing was broadcasted on major and alternative media outlets and livestreamed on YouTube. (Maria Margarita Rivera/ICTJ)

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About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

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Executive Summary

Restorative justice and transitional justice are closely and fundamentally related responses to crime that emphasize shared values and promote similar frameworks that seek to clarify responsibilities. They both address the inherent limitations of existing institutions: for restorative justice, the limitations of retributive systems for dealing with domestic crimes; for transitional justice, the additional limitations of conventional or compromised rule of law institutions for dealing with serious and massive international crimes. In many ways, restorative justice is at the center of transitional justice. While transitional justice scholars and practitioners have consistently applied the concepts of restorative justice, in practical terms there are few examples of restorative justice practices being explicitly integrated into transitional justice processes, especially those aimed at criminal accountability. There is also a general lack of understanding within both fields about what such integration means or requires.

Colombia's recent adoption of a restorative justice lens in its Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP), as part of the country's comprehensive transitional justice program, reflects a nascent trend toward correcting this deficit. A close look at other country contexts illustrates that certain transitional justice processes, while not necessarily explicitly incorporating restorative justice by name, may reflect its principles and methods in numerous and significant ways. At a broad level, this trend is an important element of the development within the transitional justice field of a more nuanced and comprehensive approach to accountability, one that does not exclusively focus on criminal prosecution or punishment. This study contributes to such an approach by offering reflection, clarity, and guidance on the use of a restorative justice framework or lens in responding to massive and grave human rights violations, including what such an application looks like and what its advantages, risks, opportunities, and challenges are. It draws primarily from the Colombia context but also from experiences in Sierra Leone, Tunisia, and the Philippines' Bangsamoro region.

One of the purposes of this report is to clarify what it looks like to integrate or reflect restorative justice practices and principles in efforts to deal with past abuses. Restorative justice is a process that enables individuals and communities harmed by crime and individuals responsible for that harm to participate in addressing the offence and its consequences. It often takes the form of a dialogue between victim and offender and may involve other persons directly or indirectly affected by the crime, including affected communities. The core principles of restorative justice are stakeholder participation and the repair of the harm caused to individuals, relationships, and the wider society. The aim is to re-establish the premises of peaceful co-existence. The process is meant to foster acknowledgment both of the harm done to victims and the responsibility of perpetrators not only for the conduct itself but also for the breaking of norms.

In conflict-torn contexts where norms may have lost their force and authorities may be compromised, restorative justice can help society to rediscover the reasons to believe in shared values and norms and agree to change those norms to more adequately reflect a pluralistic and inclusive society.

Restorative justice shares with transitional justice a transformative vision. The main challenge in such contexts is linking micro level individual conflicts with macro-level societal conflicts—that is, to facilitate the transformation of specific interpersonal relations in order to influence social relations broadly, thereby promoting transformation toward a peaceful society. Additional challenges include the wide scope of a conflict, which implicates and affects a significant part of the population; the prominence and complexity of a “grey zone” in which victims may become perpetrators and perpetrators may suffer violations, especially in broad and long conflicts; the heterogeneity of communities as third participants in restorative justice; and the role of the state, given that the state retains an international obligation to provide justice for violations that its own agents have perpetrated or permitted. This study provides empirical evidence on how these challenges are addressed in practice.

Case Studies

The cases examined here represent transitional societies in which responses to past violations have integrated or reflected restorative justice principles or practices in a range of ways. In Colombia, the JEP represents the most explicit case of the integration of a restorative justice approach into an institutional transitional justice process and one that benefited from the lessons of other transitional justice mechanisms in the country, such as the Truth Commission and the Justice and Peace process. The JEP itself is a criminal jurisdiction with proceedings that involve perpetrators’ public acknowledgment of responsibility and harm as well as a system of sanctions that include both restorative projects for victims and punitive measures for offenders. In Tunisia, the Truth and Dignity Commission created an arbitration and reconciliation process in which perpetrators of violations and corruption could come forward to acknowledge responsibility and request a settlement with victims. The Arbitration and Reconciliation Committee represented an experimental—if ultimately unsuccessful—application of restorative justice principles to cases and substantive matters normally solely adjudicated by a court of law.

In Sierra Leone, the Truth and Reconciliation Commission provided a platform for victims, perpetrators, and community members to participate, including in ceremonies in which perpetrators admitted their guilt and asked for forgiveness. Local actors also helped to facilitate community acceptance of ex-combatants and reconciliation between victims and perpetrators, while in the long term the decentralization of security structures recommended by the TRC has included alternative dispute resolution mechanisms. In Bangsamoro, the Transitional Justice and Reconciliation Commission (TJRC) developed an inclusive method of dialogue to enable community members to narrate collective and complex experiences called the “Listening Process.” It drew on cultural and traditional approaches to justice and conflict resolution based on the fluidity of dynamics between victims and offenders, premised on restoring relationships. The TJRC in turn recommended that such practices be supported and provided space, shaping local justice and peacebuilding programs going forward.

Research Findings

Victim-Perpetrator Dialogue

The cases demonstrate that restorative justice processes can be an effective mechanism to facilitate meaningful stakeholder participation, the acknowledgment of harm and responsibility, and the repair of harm—because they are based on direct interaction between victims and perpetrators. In Colombia, for example, the JEP was able to develop specific methodologies for meaningful participation of victims and perpetrators in the different phases of the legal proceedings, in accordance with the provisions and the spirit of the country's 2016 peace accord. Preparatory phases drew on victims' testimonies and narratives to identify harms and victims' demands and to help the parties to recognize each other as human beings. The acknowledgment hearings themselves provided a forum for actual encounters between victims and perpetrators, for victims to publicly present their harms and for perpetrators to publicly acknowledge their responsibility. Some victims participated through attendance or observation alone, while others chose to be heard for the first time. The use of this type of dialogue, however, comes with challenges, like the potential perception of asymmetry among parties, which can create tension. In Tunisia, the arbitration process demonstrated that the failure to ensure effective participation and follow a well-documented, well-prepared, and transparent process defeats the purpose of the process itself.

Engagement with Community and Society

In restorative justice, upholding the principles of stakeholder participation and repairing harm requires dialogue, not only between victim and perpetrator, but also with relevant communities and the wider society. This is especially important in the context of massive human rights violations, where the scope of crime implicates large portions of the population and repairing relationships depends not only on individual values but also societal norms. In Bangsamoro, the TJRC's Listening Process was an inclusive and extensive process of consultation, one that was explicitly understood as a dialogue aimed at encouraging ownership, building social capital, and creating a collective narrative, that could be used as a basis for formulating context-specific recommendations. In Colombia, the acknowledgment hearings demonstrated that victims' complex, representative narratives can effectively establish a link between micro-level individual experiences and macro-level societal responsibility. The public nature of the process and the role of the media were significant factors in contributing to the objectives of social pedagogy, cultural transformation, and reconciliation. In Tunisia, in contrast, the absence of a public process and the failure to engage the wider society served to undermine the overall value of the process.

Sanctions and Accountability

A restorative justice lens shifts the emphasis from punishment to reintegration and repair, without precluding retributive measures. Restorative sanctions, for example, can contribute to accountability by delivering on the assumption of responsibility and reparation, thereby generating a moral sanction and justifying more limited penal sanctions, while at the same time reintegrating perpetrators via a productive role in making society peaceful. In Colombia, the JEP uses a mixed model in which restorative sanctions can encourage perpetrators' participation, by offering the incentive of reduced and non-custodial punishment. Crucially, though, reduced punishment depends on their acknowledgment of responsibility and the implementation of the sanction. The added potential imposition of retributive sanctions helps to satisfy international standards and combat impunity, including for those in positions of power. The cases also illustrate that nonjudicial measures, which do not employ penal sanctions, can adopt a similar approach to accountability that accounts for the complex dynamics between victims

and perpetrators, as in Bangsamoro. While a restorative lens can apply to accountability for economic crimes, Tunisia's experience demonstrates the difficulty of doing so within a context of limited systemic change where the discourse of reconciliation has been instrumentalized to preserve impunity.

Integrity, Legitimacy, and Efficacy of Process

As with any transitional justice measure, the extent to which a restorative justice approach actually achieves its objectives of participation, repair, and accountability depends on the process's integrity, legitimacy, and efficacy. The design and operationalization of methods such as dialogue and alternative sanctions, for example, require specific practical and technical steps in order to protect the interests and rights of victims, offenders, and other stakeholders, ensure societal support or buy-in, and contribute to fundamental change. In Colombia and Bangsamoro, ensuring that those who play the critical roles of facilitator and coordinator maintain the trust and confidence of participants and community members requires careful attention to the selection process, stakeholder representation, adequate preparation and sensitization, and proper training. In both these cases, a particularly important element of the restorative approach was instituting a form of public listening process, which requires specific techniques, skills, and support. Conversely, as demonstrated in Tunisia, fundamental flaws in the design and process, such as the lack of oversight, transparency, and due process—including the failure to follow rules or explain the application of international standards and other ethical issues, like conflicts of interest—have fundamentally undermined the perceived independence and credibility of the effort.

External Coherence

Applying a restorative justice lens in addressing massive violations does not happen in a vacuum, but in a broader context of justice, peacebuilding, and transitional processes. This means that the design, implementation, and impact of restorative approaches depend not only on their internal processes but also on their coherence with other processes. The cases suggest that, at one level, restorative responses to massive abuses tend to be influenced by previous or parallel justice processes, and that, in turn, they can foster and shape future efforts. This can be true at both the national and local levels. In Colombia, the JEP's acknowledgment hearings drew on the experience of the Justice and Peace Law and the Truth Commission, which had demonstrated the value of dialogue. In Bangsamoro, the TJRC drew on the existing practices of Indigenous communities, which helped to create ownership and cultural resonance, and opened space for grassroots peace and justice efforts that the state can support by ensuring the necessary conditions for them. In Sierra Leone, local civil society groups and religious and traditional actors complemented the Truth and Reconciliation Commission's efforts in fostering local reconciliation, while the commission in turn recommended the decentralization of justice and security structures that have since included community-level alternative dispute resolution. In both Bangsamoro and Sierra Leone, however, opportunities were missed to create a more coherent approach that included the demobilization and reintegration of former combatants and therefore a more inclusive peace process.

Conclusion and Policy Considerations

This report offers reflection, clarity, and guidance on the application of a restorative justice framework or lens in contexts of massive and grave human rights violations, including the advantages, risks, opportunities, and challenges of such an approach. The analysis is based on experiences in Colombia, Sierra Leone, Tunisia, and the Philippines' Bangsamoro region, which represent a range of different processes, but, in our view, ones that either integrate or reflect the principles and/or practices of restorative justice. These principles include stakeholder partici-

pation and repair of harm, and the practices include the use of direct or indirect dialogue or engagement to resolve crimes by addressing their consequences. Colombia illustrates the explicit institutional integration of both principles and practices in judicial and nonjudicial processes, while the other cases are more reflective of restorative principles but also draw on both judicial and nonjudicial processes. This report contributes to the base of empirical evidence on the topic, but because that base remains limited, caution is warranted in formulating concrete recommendations for other societies. We therefore offer policy considerations that follow from our general findings.

- Dialogue in the form of encounters between victims and perpetrators can be an effective instrument of acknowledgment, participation, and repair, but it requires specific and carefully designed processes or methodologies that must include careful preparation of the parties involved. The use of this type of dialogue comes with challenges, like the potential perception of asymmetrical treatment that can create tension.
- Broader dialogue or engagement with communities and society can establish a link between the micro individual and macro societal levels, which is vital to addressing cases of mass violence. This engagement can take the form of consultations or hearings that elicit complex and representative narratives of victims and can be enhanced through a public process and the role of the media.
- Alternative or restorative sanctions can facilitate participation and repair but can also be contentious and may be legitimized or undermined depending on their relationship to complementary or parallel accountability processes. For both judicial and nonjudicial mechanisms, the recognition of the complexity of dynamics between victims and perpetrators can contribute to a more nuanced approach to accountability.
- Specific practical and technical steps are necessary to ensure the integrity and legitimacy of a restorative justice approach, including regarding facilitators, training, preparation, support, representation, oversight, independence, transparency, and fairness. Deficits in these areas can undermine the process's credibility and success.
- Restorative justice approaches can learn from, complement, inspire, and shape other justice, reconciliation, and peacebuilding processes, particularly those that share similar goals, like reintegration, in ways that can foster community/public ownership and resonance. Opportunities for establishing such coherence exist at both the local and national levels.

Introduction

Restorative justice and transitional justice are closely and fundamentally related. As restorative justice emerged in response to the limitations of retributive justice systems in the domestic prosecution of crime, transitional justice developed in those contexts where conventional rule of law institutions proved inadequate and/or inappropriate to confront massive and grave violations of human rights. Restorative justice refers to any process that enables those harmed by crime and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, with the help of a trained, impartial third party or “facilitator.” Restorative justice often takes the form of a dialogue (whether direct or indirect) between the victim and the offender and can involve, where appropriate, other persons directly or indirectly affected by the crime. This may include supporters of victims and offenders, relevant professionals, and members or representatives of affected communities.¹

The core principles of restorative justice are that the parties should be enabled to participate actively in the resolution of crime (following the principle of stakeholder participation) and that this resolution should be primarily oriented toward addressing and repairing the harm that the crime has caused to individuals, relationships, and the wider society (following the principle of repairing harm). The aim of the process is for the parties to re-establish the premise for peaceful co-existence. Scholars and practitioners of transitional justice have consistently—if at times unconsciously—applied the concepts of restorative justice since the inception of transitional justice initiatives. In fact, as a response wherein both the victim and the offender are able to resolve an incident in a non-coercive manner, restorative justice is at the *center* of transitional justice processes.²

Conceptually, both transitional justice and restorative justice emphasize similar values, including truth, accountability, reparation, non-repetition, conflict resolution, and participation.³ Both promote inclusive, non-adversarial frameworks that seek to clarify responsibilities and

¹ Committee of Ministers, Recommendation CM/Rec (2018)8 of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters, Adopted on October 3, 2018, at the 1326th meeting of the Ministers’ Deputies, II. For the purposes of this recommendation, participants in restorative justice are referred to as “the parties.” Depending on the country in which restorative justice is being used and the manner in which it is administered, it may be referred to as victim-offender mediation, penal mediation, restorative conferencing, family group conferencing, sentencing circles, or peacemaking circles, among others.

² Ruti Teitel, “Transitional Historical Justice,” in Lukas H. Meyer, ed., *Justice in Time: Responding to Historical Injustice* (Baden-Baden: Nomos Verlagsgesellschaft, 2004), 80, cited in Kerry Clamp and Jonathan Doak, “More than Words: Restorative Justice Concepts in Transitional Justice Settings,” *International Criminal Law Review* 12 (2012): 341, footnote 3.

³ *Ibid.*

prevent the past from being repeated.⁴ There is also a practical overlap between the two frameworks insofar as both can be viewed as responses to vacuums of social control created by crime, human rights violations, or generalized violence.⁵ In the case of restorative justice, this vacuum relates to the inherent limitations of the retributive model. In the case of transitional justice, the vacuum stems from the context of violent conflict, which typically causes the criminal justice system to suffer from a lack of legitimacy due to its perceived failure to exercise control.⁶ While dialogue is often the form that restorative justice takes, a “maximalist” or “outcome-oriented” approach does not reduce the notion to only processes that bring parties physically together but, instead, includes different processes oriented around the core principles of participation and repair, which allows for a greater degree of overlap.⁷

Any and all forms of justice in a transitional setting are based on (and are aimed at) the acknowledgment of the victim as an individual right holder who was wronged. Corollary to this is the offender’s assumption of responsibility. Such responsibility has to be established by a court of law to amount to criminal accountability. It is, however, through a more general assumption of responsibility—regardless of the criminal law implications—that the ground between victim and perpetrator is levelled and a restorative dialogue can be developed without any actual or perceived power imbalance favoring one party or the other. Full assumption of responsibility occurs only when the individual becomes responsible to someone else, not only for the relevant conduct itself but also for breaking norms, which the conduct represents. It therefore requires that responsibility is not only attributed externally (as occurs in criminal proceedings) but is accepted internally in terms of shifting a person’s values. This is why criminal prosecution in transitional justice contexts must seek to endorse and adhere to the shared values on which norms are based.

In a conflict-torn society where norms have lost their force and authorities are compromised, respect for the law cannot be expected or imposed.⁸ The society must rediscover the reasons why they should believe in and share the same values and norms and, when appropriate, agree to change those norms to more adequately reflect the project of a pluralistic, inclusive society, thereby triggering a positive circle of trust. Public institutions themselves, as an integral part of this endorsement process, can increase their social legitimacy and integrity and regain citizens’ trust by demonstrating inclusiveness, transparency, and accountability. As a relational form of justice, restorative justice shares with transitional justice this same transformative ambition. The challenge of a relational form of justice is to link the micro level of individual conflict with the macro societal level—that is, to facilitate the transformation of specific interpersonal relations in order to influence broadly all social relations, thereby promoting transformation toward a peaceful society.⁹

4 Rodrigo Uprimny and Maria Paula Saffon, *Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case* (University of Wisconsin, 2006), cited in Clamp and Doak, “More than Words,” 341, footnote 4.

5 Ibid.

6 Clamp and Doak, “More than Words,” 341.

7 See Isabella Bueno, Stephan Parmentier, and Elmar Weitekamp, “Exploring Restorative Justice in Situations of Political Violence: The Case of Excombatants in Colombia,” in Kerry Clamp, ed., *Restorative Justice in Transitional Settings* (Milton Park, Abingdon: Routledge, 2016), 37-55.

8 Ibid. Labels can also be difficult to apply where the state has legitimized certain acts within its own legal framework. Labels such as “victim” and “offender” remain difficult to apply where legal liability under the national penal framework is not always apparent. While restorative justice models attempt to circumvent this difficulty by conceptualizing crime as a breakdown in relationships, rather than the transgression of law, in practice the process is undoubtedly made more complex if neither side is ready to identify itself as a wrongdoer.

9 Jennifer J. Llewellyn, “Transforming Restorative Justice,” *International Journal of Restorative Justice* 4(3) (2021): 375-395.

In conflict-affected contexts, this transformative objective faces a set of additional challenges:

- A) The scope of the conflict,¹⁰ the roots and consequences of which both implicate and affect a significant part of the population.
- B) The prominence and complexity of a “grey zone,” characterized by distorted human relations and the imperative to overcome human insecurity in which victims may well become perpetrators of violations and perpetrators may suffer violations, which is especially true in broad and long-lasting conflicts.
- C) The inherent heterogeneity at the macro level of communities, which are afforded the role of the third participant in restorative justice models.¹¹
- D) The role that the state ought to play in the process, given that it retains international obligations to provide justice for—and may be viewed with suspicion as a result of—violations that its own agents have perpetrated or permitted, ensuring that those agents participate in a process that reflects what the state was and allowed to happen and applying the principles and values that reflect what it wants to become.¹²

Until recently, restorative justice principles have been explicitly applied in nonjudicial remedies, namely truth commissions. In this regard, Weitekamp et al. have suggested that the restorative dimension of truth commissions is particularly evident in two ways: “first, at the institutional level of the commission, as it provides a public forum for victims and offenders; and secondly, at the interpersonal level where individual victims and offenders can meet during or after the process of the truth commission with a view to dialogue, personal healing, or restoration in the long-term.”¹³

Another reason is the tendency to equate the concept of justice with formal and institutionalized proceedings. While this conceptualization derives from the European concept of *Illuminismo Giuridico* (or “legal enlightenment”), it has spread globally over the centuries, and it certainly constitutes the basis for rule of law principles, policies, and practice today. As in national jurisdictions, however, restorative justice has started to be used to question the efficacy of a retributive approach and to propose innovative practices to better deal with crimes and their effects, a development that has begun to influence criminal proceedings in transitional justice settings. Restorative justice and alternative sanctions—until now placed in separate fora—are becoming more interconnected and the discussion of them more prominent at the domestic and international levels. It may be the case that resistance to the idea of alternative sanctions, which are seen to “sit somewhere between punishment and amnesty,”¹⁴ is lessening as we develop a clearer understanding of their role in providing accountability.

This research report documents and investigates the progressive trend in transitional justice to expand the application of the restorative justice approach in order to complement the transformational goal of the transitional justice project. The analysis covers criminal trials. Because there are still so few judicial proceedings in transitional justice contexts with a declared restorative

10 Conflict refers to a violent or abusive confrontation.

11 Clamp and Doak, “More than Words,” 347.

12 Luke Moffett, Cheryl Lawther, Kieran McEvoy, Clara Sandoval, and Peter Dixon, “Alternative Sanctions Before the Special Jurisdiction for Peace: Reflections on International Law and Transitional Justice,” *Reparations, Responsibility and Victimhood in Transitional Societies*, Queen’s University Belfast (2023), 11.

13 Elmar G.M. Weitekamp, Kris Vanspauwen, Stephan Parmentier, Marta Valiñas, and Roel Gerits, “How to Deal with Mass Victimization and Gross Human Rights Violations: A Restorative Justice Approach,” in Uwe Ewald and Ksenija Turkovic, eds., *Large-Scale Victimization as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post-Conflict Societies* (Amsterdam: IOS Press, 2006), 217–241.

14 Moffett et al., “Alternative Sanctions,” 70.

justice approach, the study also includes cases that substantively reflect or are informed by restorative justice principles and practices. These cases demonstrate that restorative justice can be part of societal responses to massive human rights violations in a range of ways, from the more institutional, national level to the less formal, local level, but also that there are often opportunities and good reasons to more explicitly integrate restorative justice into transitional justice processes. The cases build on existing studies of other contexts, such as South Africa, Northern Ireland, Timor Leste, and Uganda.

Case Study Summaries

Colombia

Since the signing of the 2016 peace agreement, Colombia has integrated an articulated and advanced restorative justice approach into the design of its different transitional justice processes. The Comprehensive System of Truth, Justice, Reparations, and Guarantees of Non-Recurrence includes judicial and nonjudicial mechanisms that focus on encounters between victims and perpetrators and the acknowledgment of responsibility, including the Truth Commission and the JEP. Colombia's lengthy experience in providing justice for conflict-related violations has contributed greatly to the development of a sophisticated understanding of restorative justice.

The JEP represents the most explicit case of the integration of a restorative justice approach into an institutional transitional justice process. The JEP hearings benefited, however, from lessons learned from the more than 15 years of implementing the Justice and Peace Law (ongoing) and 4 years of implementing the Truth Commission (which concluded its mandate in June 2022). The Justice and Peace Process, which began in 2005, initiated a discussion about the limitations of retributive justice, the importance of perpetrators' acknowledging responsibility, and the value of participatory proceedings in which the parties, including communities, are directly involved. The Truth Commission developed an acknowledgment strategy that included providing a platform for multiple public acknowledgments of responsibility with the participation of both victims and former combatants.

The JEP itself seeks accountability through a mixed system of restorative and retributive justice.¹⁵ It envisions large-scale restorative justice measures involving public acknowledgments of responsibility as well as concrete, symbolic, and collective reparations aimed at satisfying victims and reintegrating perpetrators.¹⁶ The JEP allows for the broadest possible amnesty for persons who participated in the armed conflict but did not commit serious crimes,¹⁷ and it declares that imposing sanctions on perpetrators cannot legally preclude their participation in politics or the exercise of rights to political participation.¹⁸ At the same time, the JEP retains elements of retributive justice, particularly related to the potential imposition of jail sentences on those

¹⁵ See generally, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (2016), chapter 5.1., English edition (discussing the varied justice aims of the Comprehensive System), <https://www.peaceagreements.org/viewmasterdocument/1845>

¹⁶ *Ibid.* at 188–89.

¹⁷ *Ibid.* at 160, art. 37.

¹⁸ *Ibid.* at 160, art. 36.

who do not acknowledge their responsibility for serious crimes, while those who acknowledge responsibility for international crimes are subjected to limitations on freedoms and rights.

One of the most important elements of the JEP's judicial proceedings that *materializes* restorative justice is the acknowledgment of responsibility hearing. The hearing is not the first encounter between victims and perpetrators, nor the first time that perpetrators admit their responsibility, but it is the first public and solemn moment of this encounter. It is before the magistrates of the Chamber for the Acknowledgment of Truth and Responsibility (*hereinafter* the Chamber for Acknowledgment), who represent the justice system, and before the general public that the victims set out their demands for acknowledgment of responsibility and the perpetrators recognize not only the crimes and conducts attributed to them but also their impacts on the lives of victims, their families, and affected communities.

The Chamber for Acknowledgment has thus far conducted five acknowledgment hearings: one in the case against the former secretariat of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, or FARC) related to the kidnapping of civilians and hostage taking of members of the military (macro-case 01), and four in the case against members of the armed forces accused of the extrajudicial execution of civilians in several regions of the country (macro-case 03). In January 2021, the first indictment in macro-case 01 was handed down, charging the former members of the FARC Secretariat, who accepted the indictment and acknowledged responsibility in writing on April 30, 2021. A public acknowledgment hearing with victims and perpetrators was held in June 2022. In macro-case 03, the chamber prioritized six subregions with a high concentration of cases and by November 2023 had handed down indictments for five of the six regions, charging several military officials. Four public acknowledgment hearings were held between April 2022 and September 2023.

The JEP macro-cases have demonstrated the importance of the link between the micro and macro and clarification at the level of individual crimes and victims and at the level of broader patterns and policies, which can be established in part through the complex narratives of victims. They have also shown the value of a public restorative process, which can foster recognition and empathy among victims, perpetrators, and communities/society.

Tunisia

In the aftermath of the 2011 revolution, Tunisia enacted Organic Law No. 2013-53, which provided for the establishment of integrated transitional justice processes to deal with past human rights violations through truth telling, accountability, and reparations for victims and to realize national reconciliation, preserve collective memory, and guarantee nonrecurrence.¹⁹ The Truth and Dignity Commission (TDC) was launched in 2014 with a four-year mandate to investigate human rights violations, electoral fraud, and corruption, as the revolution had been driven by public frustration with corruption as much as with poverty, indignity, and political repression.

The TDC sought to enable the Tunisian people to work together to restore the dignity of victims and promote accountability and reconciliation, while creating both a climate in which communities could relate to victims' experiences and a platform for constructive exchange between victims and perpetrators. At a broad level, the TDC involved elements of restorative

19 Republic of Tunisia, Organic Law No. 53 on Establishing and Organizing Transitional Justice (unofficial English translation by ICTJ), December 24, 2013, www.ohchr.org/sites/default/files/Documents/Countries/TN/TransitionalJusticeTunisia.pdf

justice in that it enabled victims to tell their stories and provided a platform for perpetrators to admit guilt while providing measures for their social reintegration.

The Transitional Justice Law called for an arbitration process in which perpetrators of human rights violations or corruption could acknowledge responsibility to the TDC and ask its Arbitration and Reconciliation Committee (ARC) to subject a case to a settlement between the perpetrator and the victim—in most corruption cases, the victim was the state. The settlement was to be reached with “the approval of victims and in accordance with principles of justice and fairness, and the recognized international standards,” and the perpetrator was required to “acknowledge his guilt in writing and offer a clear apology.”²⁰ The law also created a Dignity Fund to be funded in part by recovered ill-gotten assets surrendered to the arbitration process for reparations and made provision for a specialized criminal chamber with jurisdiction over criminalized human rights violations and economic crimes.²¹

The ARC represented an experimental application of restorative justice principles to cases and substantive matters that are normally adjudicated by a court of law. In practice, its arbitration process was very problematic due to the limited number of cases that were ultimately decided; the lack of oversight, transparency, and due process; the failure to establish and follow rules or explain the application of international standards; and other ethical issues. While it reflected restorative justice principles, such as acknowledgment of responsibility and resolution of crime with the engagement of victim and perpetrator, the process was subject to the political dynamics of how the term “reconciliation” came to be used and its instrumentalization to limit accountability. The arbitration process was also hindered by the limited amount of systemic change in the country that reduced the pressure for people to participate.

Sierra Leone

In its transition out of a 10-year civil conflict that ended in 2002, Sierra Leone addressed the widespread violations that had occurred through a unique combination of accountability, acknowledgment, and reform processes. The simultaneous operations of the UN-backed Special Court for Sierra Leone (SCSL) and the Truth and Reconciliation Commission (TRC) in the 2000s created an opportunity to advance an integrated approach to justice and social cohesion.²² These measures followed the implementation of disarmament, demobilization, and reintegration (DDR) and security sector reform (SSR) programs and were later themselves followed by a victims’ reparations program. While the notion of restorative justice was not explicitly applied in Sierra Leone, the combination of the different transitional justice, reconciliation, and reform processes certainly reflected its principles.

The SCSL’s jurisdiction was limited to prosecuting persons bearing the “greatest responsibility” for crimes committed during the war,²³ a decision based on the court’s lack of capacity to investigate and try the more than 65,000 former fighters who had committed crimes.²⁴ Based on “selection criteria” that depended mainly on the roles of the various actors,²⁵ commanders,

20 Ibid. at arts. 45 and 46.

21 Ruben Carranza, Mohamed Azer Zouari, and Ichraq Ghdiri, “The Truth About Corruption: Reviewing the Tunisia Truth and Dignity Commission’s Report on Corruption Under Dictatorship,” ICTJ, February 2024.

22 Marieke Wierda, Priscilla Hayner, and Paul van Zyl, “Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone,” ICTJ, June 2002.

23 UN Security Council, Statute of the Special Court for Sierra Leone, January 16, 2002, art. 1.

24 Sigall Horowitz, “Transitional Criminal Justice in Sierra Leone,” in Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006).

25 Ibid.

political actors, and financiers were indicted, leaving out tens of thousands of former fighters to participate in more restorative mechanisms, like the country's truth-seeking process.

The TRC provided a platform for victims, perpetrators, witnesses, and family and community members to participate and included ceremonies at the end of public hearings at which perpetrators could admit their guilt and ask for forgiveness. The commission was designed to foster healing, forgiveness, and social cohesion. For many Sierra Leoneans, it was more critical for perpetrators to directly participate in truth-seeking measures where communities could confront them than in a court, where victims' participation and experience would be more limited.²⁶ Outside of the TRC, civil society organizations, religious and traditional leaders, and other local actors played a valuable role in facilitating the community acceptance of ex-combatants and reconciliation between victims and perpetrators of violence. In the long term, community-level alternative dispute resolution mechanisms, which were part of the decentralization of security structures recommended by the TRC, have promoted collaboration among community stakeholders as a way to reduce tensions and violence related to land and other disputes.

Looking back, however, a more explicit integration of a restorative justice framework into the planning and implementation of the transitional justice processes and reintegration of ex-combatants may have led to a more coherent approach in which, among other potential outcomes, ex-combatants could have played a more active role. The absence of a restorative justice framework to regulate the relationship among mechanisms such as the SCSL, TRC, DDR program, and other processes created tension and competition, resulting in a missed opportunity for a more complementary approach. More attention could also have been paid to identifying and adapting local approaches and targeting communities across the country to own and lead the healing process.

Bangsamoro

The TJRC was set up in 2014 in Bangsamoro to provide redress for historical injustices. Its establishment was the culmination of several decades of struggle and peace talks and the signing of the 2014 Comprehensive Agreement between the government of the Philippines and the Moro Islamic Liberation Front. The commission's mandate was to promote healing and reconciliation,²⁷ and to recommend "a program for transitional justice to address the legitimate grievances of the Bangsamoro people, correct historical injustice, and address human rights violations."²⁸ The TJRC carried out its work from 2016 to 2017.

The TJRC did not frame its work in terms of restorative justice, but its operations clearly reflected its principles and practices in emphasizing and understanding the roles of and dynamics between perpetrator, victim, and community and the role of dialogue in restoring relationships. The TJRC's Listening Process, in particular, represented an inclusive, extensive method of dialogue meant to enable community members to narrate their collective and complex experiences. It drew on cultural and traditional practices of truth telling among Indigenous communities and approaches to justice and conflict resolution based on the fluidity of the dynamics between victims and offenders and on restoring relationships. It involved a careful preparatory process

²⁶ Ibrahim Bangura, transitional justice expert and lecturer at Fourah Bay College, interview, University of Sierra Leone, September 23, 2022.

²⁷ Transitional Justice and Reconciliation Commission, *Report of the Transitional Justice and Reconciliation Commission* [hereinafter *Report of the TJRC*], 2016, XIII.

²⁸ Comprehensive Agreement on the Bangsamoro (CAB), Normalization Annex, signed on January 25, 2014 (item H).

and intensive training of facilitators whom community participants could directly relate to or trust.

In addition to drawing on these local practices, the TJRC gave impetus to restorative justice at the grassroots level through its recommendations to support traditional practices in order to encourage further cultural and attitudinal change. It recommended that traditional practices be further supported and provided space, and it has shaped local- and civil society-led dispute resolution, transitional justice, and other programs going forward. The TJRC opened spaces and inspired local civil society peacebuilding and transitional justice efforts with a restorative framework. These are spaces and efforts that, going forward, the government could play a role in protecting and supporting.

The Bangsamoro experience suggests that restorative justice could be more explicitly integrated into the formal peace and justice processes and institutions. The decommissioning and reintegration of combatants is one area in which the absence of a restorative justice lens has left some communities feeling excluded. The transitional justice and reconciliation agenda, which includes the TJRC's main recommendation to establish a National Transitional Justice and Reconciliation Commission for the Bangsamoro,²⁹ lags behind other components of the peace agreement. As efforts to implement this agenda move forward, restorative justice offers a valuable set of principles and practices. Currently, however, the political context of disinformation, historical revisionism, and shrinking democratic space in the Philippines has the potential to undermine the truth telling that sat at the heart of the TJRC, its Listening Process, and local practices.

29 See *Report of the TJRC*, chapter 4.

Research Findings

Victim-Perpetrator Dialogue

The cases demonstrate that restorative justice processes that involve dialogue between victims and perpetrators can be an effective mechanism to facilitate meaningful stakeholder participation, the acknowledgment of harm and responsibility, and the repair of harm. In Colombia, for example, the JEP established specific methodologies for the meaningful participation of victims and perpetrators, including creating multiple spaces throughout its proceedings. Preparatory phases drew on victims' testimonies and narratives to identify harms and victims' demands and to help the parties recognize each other as human beings. The acknowledgment hearings themselves provided a forum for actual encounters between victims and perpetrators, for victims to publicly present their harms, and for perpetrators to publicly acknowledge their responsibility. Some victims participated through attendance or observation alone, while others chose to be heard for the first time. The use of this type of dialogue comes with challenges, however, like the potential perception of asymmetry that can create tension. Tunisia's arbitration process demonstrated that the failure to ensure effective participation and follow a well-documented, well-prepared, and transparent process defeats the purpose of the process itself.

In Colombia, in order to guarantee the effective participation of victims and *comparecientes* ("individuals who submit to the jurisdiction of the JEP," typically offenders) in all JEP proceedings, the Governing Body, the highest administrative authority of the jurisdiction, created a Participation Commission mandated to formulate directives and methodologies for participation. The commission produced a "Manual for the Participation of Victims," which was sent to all magistrates for implementation.³⁰ In JEP's acknowledgment hearings for macro-cases 1 and 3, multiple opportunities were provided for such participation.

In macro-case 1, two preliminary phases facilitated the identification and characterization of harm and the identification of victims' demands for truth and acknowledgment of responsibility. The characterization of psychosocial harm and moral injury took into consideration the narratives of the victims accredited to the case. While some of these testimonies came from the Office of the Attorney General's databases, others were provided by victims in different spaces for participation, including during the procedural stages where they could present oral or writ-

³⁰ At the time of writing, the Participation Commission was in the process of preparing another manual for the participation of *comparecientes*.

ten testimony of the crimes they had experienced and their effects.³¹ Victims then submitted questions to the Chamber for Acknowledgment that were organized and classified into demands for truth and acknowledgment. According to the office of the lead magistrate of the case,³² “These questions are genuine efforts by the victims to understand the crimes that had negatively transformed their lives.”³³

The preparation of victims began two months before the acknowledgment hearing took place, although the victims who attended the hearing had been very active in prior stages of the judicial process. The Chamber for Acknowledgment, in convening the hearing, stipulated that victims who participate in the hearing must also attend preparatory activities.³⁴ The preparations were gradual, intended to increase knowledge about the responsibility attributed to former members of the FARC Secretariat and foster understanding of what victims would be facing in the hearing. Each victim participated in three preliminary sessions, with each lasting up to three hours. Some sessions were individual, others were held in groups. Victims were allowed to attend meetings with their psychologists and lawyers.

The perpetrators began their preparatory process ten months before the hearing, in group and individual sessions, along with their legal and psychosocial teams. In five group sessions, participants discussed the most recurrent harms in each pattern of victimization.³⁵ The methodology consisted of “materializing” the narratives of the victims in different ways (audio, role playing, videos, and photos), so that the perpetrators could practice listening to both the narratives and the underlying emotions. These preparations also sought to create an image of the other, in this case, the victims as individuals who both suffer and struggle for recognition. Additionally, the *comparecientes* had the opportunity to receive more detailed information about individual demands for truth and acknowledgment and to understand that each case could represent the wishes of other victims who did not participate.

The acknowledgment hearing itself in macro-case 01 was the space where those most responsible publicly acknowledged the crimes attributed to them before the victims and the Chamber for Acknowledgment.³⁶ The chamber defined the standard for acknowledgment in three dimensions—factual, juridical, and restorative—meaning that the *comparecientes* accepted the reality of the victims’ claim and the injustice of their suffering, the severity of what happened, and their responsibility.³⁷ The JEP carried out the hearing in three full-day sessions in which the victims presented their testimonies and demands for truth and acknowledgment of responsibility and the *comparecientes* then acknowledged their responsibility and responded to victims’ questions. Some victims participated by presenting their testimony at the hearing, others opted to attend the public hearing but not intervene, while still others were able to participate by observing the proceeding remotely as the hearing was broadcast nationally.

31 JEP, Manual on the Participation of Victims in the Special Jurisdiction of Peace, “Participation of Victims in the Proceedings Before the Chamber for Acknowledgment of Truth and Responsibility” (2020), 156–175.

32 Jurisdicción Especial para la Paz [Colombia], File Case 01, Ruling No. JLR 01-288, July 15, 2021, 8–11. Additionally, in Ruling 019 of 2021, “*El despacho profirió tres autos de traslado de demandas de verdad: Auto de 11 de abril de 2019, Auto de 6 de agosto de 2019 y Auto de 28 de octubre de 2019. También se trasladaron las demandas de verdad recibidas en el 2020 en el Auto que se corrió traslado del documento de sistematización de las observaciones de las víctimas a las versiones voluntarias, auto de 14 de agosto de 2020*,” 8.

33 The victims’ first demands for truth were transferred to the *comparecientes* in the ruling of April 11, 2019, prior to the National Collective Account and the voluntary accounts provided by former members of the different FARC blocs.

34 Chamber for the Acknowledgment of Truth and Responsibility, Ruling No. 27 of 2022, decreeing the implementation of the public acknowledgment hearing.

35 Jurisdicción Especial para la Paz, Comunicado 006 de 2021, “Reflexiones sobre el sufrimiento y el daño causado,” 2021, www.jep.gov.co/Sala-de-Prensa/Paginas/La-JEP-imputa-al-antiguo-Secretariado-de-las-FARC-Ep-cr%C3%ADmenes-de-lesa-humanidad-.aspx

36 Chamber for the Acknowledgment of Truth and Responsibility, Ruling No 027 of 2022, 10–14.

37 Ibid.

In macro-case 3, preparation for the *comparecientes* was initially carried out by both the JEP and the Truth Commission. It began with work sessions with representatives of the *comparecientes* in what was initially a nonjudicial procedure. Additionally, the Truth Commission convened a broad group of victims, as it was not limited to the victims accredited by the JEP. Two virtual workshops were carried out in 2020, three in-person sessions were held with victims in Soacha in 2021, and three virtual and two in-person workshops were organized with the broad group of *comparecientes*.³⁸ In October 2021, two *comparecientes* had a private nonjudicial encounter with victims who had organized as Madres de Falsos Positivos de Colombia. Two in-person workshops were carried out during which the *comparecientes* were presented with victims' demands for truth and acknowledgment.

The first encounter between victims and perpetrators in the Catatumbo and Cesar case (in which individuals were captured in Soacha and other towns on the outskirts of Bogotá and later presented as combat deaths in Catatumbo) took place in Ocaña over a 2-day period, 20 days before the acknowledgment hearing, with the participation of 11 perpetrators. The second encounter took place in Bogotá, with victims representing the pattern of victimization. This day-long workshop was carried out ten days before the hearing, with the participation of seven perpetrators. During the two acknowledgment hearing sessions, victims gave testimonies about what had happened to them, after which the *comparecientes* reaffirmed that what the victims said was true. Victims' primary demands focused on restoring their loved ones' good name, establishing the truth about the crimes and other perpetrators involved, and eliciting commitments to non-recurrence. Victims who had up to that moment wished to remain invisible approached the JEP and asked to be included and heard. The *comparecientes* spoke about how the victims had been selected, how the murders had been planned and executed, and how the acts had been covered up and the bodies of the victims were disappeared.

Facilitating meaningful participation through dialogue between victims and perpetrators is, of course, not without its challenges. In Colombia, for example, after the Chamber for Acknowledgment issued an indictment, the modification of the acknowledgment process affected the initial willingness of both victims and *comparecientes* to participate, increasing tensions. Both parties felt that the hearings created a contentious atmosphere, which had been encouraged by the actions of their legal representatives.

In the hearing of the Catatumbo sub-case, the presence of victims' representatives in the preparatory restorative sessions intimidated the *comparecientes*, who, after attending workshops without their legal counsel, felt that this had created asymmetry in a setting that was not meant to be adversarial in nature. Although the victims' representatives participated as observers in the preparatory workshops, the perception of asymmetry increased the tension between the *comparecientes* and the victims. There was also an important difference in the hearing methodology, as victims' representatives and their lawyers were permitted to participate in the preparatory sessions prior to the hearing and during the private encounters between victims and *comparecientes*.

Another challenge the JEP faces is facilitating meaningful preparation and participation of the parties in cases that involve high numbers of victims and perpetrators. In the Casanare sub-case of macro-case 3, for example, 80 victims and 24 perpetrators participated in the public acknowledgment hearing, leaving little time for exhaustive testimony of each victim. In this particular case, the JEP ended up extending the hearing from two to three days in order to give

³⁸ Of the total number of *comparecientes* who attended these workshops, two were cited as being the most responsible. See Chamber for the Acknowledgment of Truth and Responsibility, Ruling No. 125 of 2021.

victims sufficient time to address perpetrators and question their accounts when they felt they had been incomplete or contradictory.

Despite the JEP's focus on investigating those most responsible for the most serious crimes, victims have also increasingly demanded that direct perpetrators who were following orders from their superiors contribute to truth and acknowledgment. Since these individuals often came face to face with their victims, they may be able to offer testimony and details related to crimes committed about which other, higher-ranking members of the military or the guerrilla may not have any knowledge. Such detail carries important restorative value for families who have been seeking the truth about the more immediate circumstances surrounding the kidnappings, disappearances, and killings of their loved ones. To address this demand, the JEP has begun including brief interventions from perpetrators who were not deemed most responsible by the Chamber for Acknowledgment in the public hearings, as was the case in the Dabeiba hearing held in the framework of macro-case 3 in June 2023.

Tunisia's arbitration process involved limited direct encounters between victims and perpetrators, but it was nevertheless meant to represent an indirect dialogue between them in that perpetrators could come forward to acknowledge responsibility and request a settlement with victims. The settlement of crimes required—and depended on—acknowledgment from the perpetrators and the approval of the victims, and the participation of both. The TDC received a total of 25,998 requests for arbitration and reconciliation, of which 21,117 related to human rights violations. But in the end, it only issued 8 arbitration decisions on financial corruption cases and 11 on human rights violations.³⁹

The lack of perpetrator participation in the arbitration process was widely criticized and seen as a significant failure that affected the credibility and outcomes of the process. This was not limited to the arbitration process itself, however, as perpetrators also regularly declined to participate in hearings, testimonies, specialized tribunals, and regular tribunals. According to the TDC, the decisions on financial corruption cases resulted in a recovered amount for the state totaling more than 745 million Tunisian dinars (approximately USD \$271 million),⁴⁰ but a former TDC commissioner said that the committee “produced little,” that “the money didn't come through to the state. The state didn't benefit from the decisions.”⁴¹ While this was due in part to the TDC's lack of cooperation with the State Litigation Agency, it was also, according to the TDC, due in part to the lack of participation by perpetrators:

The real and practical difficulties encountered by the TDC after it started the processing of arbitration and reconciliation requests . . . consisted mainly in the Respondents' failure to respect the legal deadlines set in the manual of procedures, whether to appear before TDC, to conclude an arbitration and reconciliation convention or to issue the final arbitral award.⁴²

The arbitration process was supposed to be a tool to address the challenge of getting perpetrators to appear before the TDC and face their victims, but the perpetrators did not take this opportunity.

39 Tunisia Truth and Dignity Commission (TDC), *The Final Comprehensive Report, Executive Summary*, May 2019. Carranza et al, “The Truth About Corruption.”

40 Ibid.

41 Mohamed Ayadi, former commissioner of the TDC, interview, September 2022.

42 TDC, *The Final Comprehensive Report, Executive Summary*.

Engagement with Community and Society

In restorative justice, upholding the principles of stakeholder participation and repairing harm requires dialogue not only between the victim and the perpetrator but also involving the relevant community and wider society. This is especially important in the context of massive human rights violations, where the scope of crime implicates large portions of the population and repairing relationships depends not only on individual values but also societal norms. In Bangsamoro, the TJRC's Listening Process was an inclusive, extensive process of consultation that was explicitly understood as a dialogue aimed at encouraging victim/community ownership, building social capital, and creating a collective narrative that it could use to formulate context-specific recommendations. Colombia's acknowledgment hearings demonstrated that complex, representative narratives of victims can effectively establish a link between micro-level individual experiences and macro-level societal responsibility. The public nature of the process and the role of the media were significant factors in contributing to the objectives of social pedagogy, cultural transformation, and reconciliation. In Tunisia, in contrast, the absence of a public process and failure to engage society served to undermine the overall value of the process.

In Bangsamoro, the TJRC's Listening Process was used to gather direct input from communities affected by the conflict. In designing the process, the TJRC adopted a problem-solving approach in which community insights were triangulated with an expert review of documents and literature, field studies, and a series of policy interviews. More than 100 individuals from the Bangsamoro region and the national capital were engaged to work as facilitators, convenors, and coordinators. At the end of several months of community consultations, the TJRC had gathered the insights and guidance of over 3,300 individuals in 211 Moro, Indigenous, and settler communities in Mindanao and the Sulu archipelago.⁴³

The TJRC's Listening Process employed a community-level consultation method that resulted in "an iterative two-way process of dialogue" meant to elicit responses that would form a solid foundation for a holistic approach to transitional justice and reconciliation in the region.⁴⁴ According to the commission:

The TJRC took the decision to engage in dialogue with the intention not only of involving a wide range of constituencies and thereby eliciting a broad spectrum of ideas, but also of generating ownership and mobilizing the social capital necessary to implement its recommendations. On the ground, the consultations were conducted in a way that captured the multiplicity of experiences, differences of opinion, and the diversity of visions for the future of the communities consulted. Moreover, a focus was placed not only on the needs and expectations of the participants, but also on creative expressions of resilience formulated by various stakeholders.⁴⁵

The Listening Process was structured to enable community participants "to describe and narrate their collective experience" without following a set historical timeframe or a rigid questionnaire.⁴⁶ The responses covered events from the period of colonization to the present day, including personal and intimate recollections of collective trauma and suffering. The process garnered learnings and proposals from which the TJRC was able to develop context-specific findings and recommendations. According to one commissioner, however, the process was not fully inclusive: One of its limitations was that only Indigenous cultural communities from non-Islamized

43 TJRC, *TJRC Listening Process Report 2017*, Cotabato City and Manila, February 2017, 25.

44 *Ibid.* at 30.

45 *Ibid.* at 30.

46 *Ibid.* at 33.

groups were involved, meaning the views and perspectives of Islamized Indigenous tribes were not adequately reflected in the TJRC's report.⁴⁷

In Colombia, the JEP's macro-cases demonstrated the constant tension between clarifying each separate crime and clarifying the patterns, practices, and policies characterizing aggregated crimes. This tension can be mitigated when victims feel represented by someone who is part of a similar population group or who experienced a crime with similar characteristics. In macro-case 01, the selected group of victims was appropriate in that they represented the different dimensions of a national phenomenon. Each of the victims' narratives demonstrated the complexities of the crime and the population who had experienced it. For example, one of the victims who spoke at the hearing had been kidnapped as a child with his two brothers and mother on the Caribbean coast, a region where many cattle farming families like theirs had been affected by kidnappings. Therefore, the victim's account served to illustrate that one victim can represent the different dimensions of the seriousness of a crime and the ways in which the harms set out in the indictment were experienced.

The variety of narratives presented during the hearing also contributed to an objective of social pedagogy, which in this context is to present and explain with facts the complexity of an indictment of those who are most responsible and the acknowledgment of responsibility on a national scale. This connects to the value of a public process. Although the JEP is not obligated to hold public acknowledgment of responsibility hearings, the decision to do so was wise in fostering social pedagogy and cultural transformation. The public nature of the hearings brings the judicial process closer to the people, thus satisfying the principle of the restorative justice triad of victims, perpetrators, and communities and/or society. Additionally, a public hearing allows society to recognize and empathize with the victims' pain and the moral reflections of the *comparecientes* when they acknowledge their responsibility for the atrocities that they ordered and committed. This opportunity for deeper understanding, empathy, and solidarity during a profoundly human encounter that occurs in the hearing contributes to creating an environment and a society more conducive to reconciliation.

The JEP has frequently employed methodologies that carry important symbolic weight in order to convey its restorative mandate to a broader public. Notable examples of this approach have included carrying out public acknowledgment hearings in places where the crimes in question were committed and/or where victims currently reside, thereby signaling that it is bringing justice to the communities most affected by the armed conflict. In a symbolic act prior to the acknowledgment hearing held in Dabeiba, magistrates, *comparecientes*, and victims planted trees in the local cemetery where victims of extrajudicial executions had been buried. They were joined by the general public attending the acknowledgment hearing, thereby generating a sense of community between those present. In preparation sessions involving indigenous communities, the Chamber for Acknowledgment has also been incorporating rituals that speak to these communities' understanding of harmony and justice and has sought to coordinate proceedings with indigenous authorities. Such symbolism contributes to raising awareness of the JEP and its mandate at the local level and strengthens victims' ownership of the jurisdiction's work.

Hearings have proceeded in an emotional tone that the public was able to assimilate, in a society where people are otherwise indifferent to the judicial process, in particular individuals who had not known about the brutality committed during the armed conflict. Each session included time for listening to the victims and the perpetrators, recesses, and informational videos on the progress made on the judicial processes. The direct participation of surviving victims in the

47 Archie Buaya, Bangsamoro Human Rights Commissioner, Interview, Cotabato City, September 27, 2022.

hearings for macro-case 01 and macro-case 03 also had educational value. The public statements made in the hearing and their dissemination through the media contributed to breaking down the public apathy toward and the normalization of the acts of violence and challenged justificatory narratives. In this sense, classifying the crimes as crimes against humanity and war crimes was crucial for reinforcing the idea of what is unjust and reprehensible.

The media amplified the voices of victims who made performative interventions (like a victim of kidnapping who showed the chains that were used to tie him up during his captivity) or victims whose experiences in captivity represented the most serious aspects of kidnapping (such as sexual violence or longest duration of time in captivity).⁴⁸ The press, however, only covered the narratives of victims and not the responses of the magistrates to their demands. To counter this, the JEP has been implementing a communication strategy prior to and during territorial acknowledgment hearings that focuses on engaging local media outlets, especially radio stations, in order to optimize the hearings' coverage and increase its social and political impact. The JEP should also produce its own content to highlight how the magistrates dealt with these painful scenes, which were full of highly emotional content, to counter journalists' sensationalist approach, which tended to focus on narratives of despair, terror, and victims' impacts.

In Tunisia, in contrast, the arbitration process involved no public reconciliation with perpetrators except in the 2017 corruption case against Imed Trabelsi, the nephew of the former president's wife. This was the one case in which a perpetrator admitted to wrongdoing, publicly apologized, and asked for forgiveness as part of the formal reconciliation framework. The process was televised in a national public broadcast. Trabelsi, who was already in detention, explained how he had used state institutions to profit personally at the expense of both business competitors and state coffers.

Sanctions and Accountability

Using a restorative justice framework can shift the emphasis of justice measures from punishment to reintegration and repair, without precluding the former. Restorative sanctions, for example, can contribute to accountability by delivering on the assumption of responsibility, thereby both generating moral sanctions and justifying more limited penal sanctions, while at the same time reintegrating perpetrators toward playing a productive role in making society peaceful. In Colombia, the JEP uses a mixed restorative-retributive model in which restorative sanctions can encourage perpetrators' participation with the incentive of a reduced punishment. Crucially, though, the reduced punishment depends on the perpetrator's acknowledgment of responsibility and the JEP's implementation of sanctions. The added potential imposition of retributive sanctions helps to satisfy international standards and combat impunity, including for those in positions of power. The cases also illustrate that nonjudicial measures, while not employing any penal sanctions, can adopt a similar approach to accountability that accounts for the complex dynamics between victims and perpetrators, as in Bangsamoro. And while a restorative lens can apply to accountability for economic crimes, Tunisia's experience demonstrates the difficulty of doing so within a context of limited systemic change, in which a discourse of reconciliation is instrumentalized to preserve impunity.

48 Catalina Oquendo, "Los exjefes de las FARC Reconocen Su Crimen de Guerra 'Claro que el Secuestro es Tortura,'" *El País Bogotá*, June 22, 2022.

A mixed restorative-retributive approach to criminal justice offers great promise for transitional justice contexts.⁴⁹ The restorative elements of such an approach often allow for greater and more active participation of victims and perpetrators than a purely retributive model. For instance, it can encourage active participation in a way that an exclusively retributive model cannot. On the other hand, by retaining elements of retributive justice proceedings, a mixed approach may be better equipped to deal with vertical conflict (state repression) and may more effectively deter perpetrators in positions of power,⁵⁰ while also satisfying international standards of due process and punishment for serious crimes. Further, subjecting perpetrators who do not acknowledge responsibility to a purely retributive justice process can demonstrate to the larger public that a transitional justice process combats impunity (or at least does not equate to impunity).⁵¹ Ideally, a mixed approach uses both elements of restorative justice, to pursue societal healing by encouraging perpetrators to actively acknowledge responsibility and victims to participate fully in proceedings, and components of retributive justice, to address power structure problems. The JEP's work has also shown that the restorative justice approach, especially in its collective dimension, serves to incentivize acknowledgments among perpetrators and reduce their distrust toward the transitional justice system: Ex-combatants who appear before the JEP alongside their former, higher-ranking comrades are more likely to open up about their participation in crimes committed during the armed conflict and propose collective measures to repair victims and affected communities.

The range of sanctions that the JEP can impose is a clear indication of its innovative mixed restorative-retributive justice design. Some of the JEP's restorative justice aspects are reflected by the Chamber for Acknowledgment, which can recommend special sanctions.⁵² Special sanctions allow for a participating perpetrator who fully acknowledges responsibility to undertake a restorative project for victims.⁵³ These sanctions, however, also have retributive justice elements: The JEP places punitive "restrictions on freedoms and rights, such as freedom of residence and movement" to ensure perpetrators complete the reparations project.⁵⁴

The mix of restorative and retributive sanctions that the JEP imposes on a perpetrator depends directly on when and the degree to which the perpetrator acknowledges responsibility.⁵⁵ The

49 Although a hybrid system is novel in the context of mass victimization, John Braithwaite stated in meetings with ICTJ that empirical evidence increasingly suggests the efficacy of a hybrid approach, albeit regarding cases establishing individual responsibility in contexts of a much smaller scale.

50 See Uprimny and Saffon, "Transitional Justice, Restorative Justice and Reconciliation," 10.

51 See *Semana*, "'Veremos qué pasa en la Corte Constitucional:' Santos sobre modificaciones a la JEP," June 27, 2018, www.semana.com/nacion/articulo/santos-sobre-modificaciones-a-procedimiento-de-la-jep/573300, asserting that the changes to the Ley de procedimiento de la JEP were proposed by the Central Democratic Party. Those changes were ones that, following a campaign that promised radical changes to the JEP based on the assumption that the Peace Agreement favored impunity over justice, both limited the competency of the JEP over extradition and froze the cases of ex-military members until the creation of their own special chamber within the JEP. See also Adriaan Alsema, "How Colombia's New Government Plans to Strangle the Country's Peace Process," *Colombia Reports*, June 28, 2018, <https://colombiareports.com/how-duque-wants-to-shred-colombias-peace-process-to-pieces/>, suggesting that the Duque government was seeking to reduce the role of victims in the peace process, remove FARC members who have committed crimes from their political positions, and treat military members with immunity. Alsema cites not only former President Iván Duque Márquez, but also political allies like Paloma Valencia, in attempting to dismantle elements of the Peace Agreement in this way.

52 In Spanish, these are referred to as "*sanciones propias*," which roughly translates to "their own penalties," but both the SJP and Final Agreement refer to them in English as "special sanctions." These special sanctions are defined as "restorative sanctions that aim to redress the damages caused to victims. They include five to eight years of effective restrictions on liberty, but no incarceration, for the direct [or material] perpetrators or of between two to five years for those who indirectly participated in the crime." While special sanctions are intended to have restorative effects, they also have clear retributive elements, specifically regarding placing restrictions on liberty. Special Jurisdiction for Peace, "Count with Us for Peace Never War," 3, <https://www.jep.gov.co/Sala-de-Prensa/Documents1/What%20is%20the%20Special%20Jurisdiction%20for%20Peace.pdf>.

53 See *Final Agreement*, chapter 5, 175.

54 *Ibid.*, chapter 5, at 182.

55 *Ibid.*, chapter 5, at 175.

Colombian Constitutional Court, in its revision of Legislative Act 01/2017, which established the transitional justice system, refers to this as the “Regime of Conditionality.”⁵⁶ If the perpetrator, instead of fully acknowledging responsibility before the Chamber for Acknowledgment, acknowledges it fully later on in front of the First Instance Section of the Peace Tribunal, then the Final Agreement allows the JEP to impose an “alternative sanction” that is “essentially retributive [in] nature,” namely, “deprivation of liberty” for five to eight years.⁵⁷ If a perpetrator does not acknowledge responsibility for charged offenses, then the JEP imposes “ordinary sanctions . . . [that] perform the functions provided for in criminal legislation,” namely, “deprivation of liberty” for 15 to 20 years.⁵⁸

The acknowledgment proceedings are intended to create an environment that, on the one hand, affirms victims and allows them to meaningfully participate, and, on the other, does not dissuade perpetrators from being forthcoming and providing as much information as possible, so that at a later stage they assume maximum responsibility for serious crimes. The public hearing can be the first formal victim-perpetrator encounter in the JEP process, necessitating a carefully designed preparatory procedure, which the JEP has adopted as follows. First, a preliminary report should be circulated to perpetrators, informing them of the criminal conduct and international crimes of which they may eventually be accused. This report should be written and not merely conveyed verbally. At the same time, it is not a formal indictment. Rather, it is meant to be a preparatory measure that informs the perpetrator of what they may expect from formally participating in the JEP and allows them to begin preparing accordingly.⁵⁹ Second, in a meeting with the Chamber for Acknowledgment, before appearing at the public hearing, perpetrators must acknowledge their full responsibility for their acts.⁶⁰ Perpetrators should know in advance everything substantive that will happen at the hearing.⁶¹ This is essential to prevent victims’ re-traumatization and ensure perpetrators’ cooperation—as well as in the stages of proceedings that will follow, namely, a public hearing. Finally, during or shortly after this meeting with the

56 See Colombian Constitutional Court, Sentencia C-674 de 2017, 354–55:

Con respecto a este régimen de condicionalidades, la Corte estima que se trata de un elemento estructural del sistema de verdad, justicia, reparación y no repetición, en la medida en que la satisfacción de los derechos de la sociedad y de las víctimas resulta, no de la sumatoria o del agregado de medidas contenidas en el Acto Legislativo 01 de 2017, sino del particular esquema de articulación entre todas éstas. En esencia, este régimen de condicionalidades apunta a permitir la flexibilización en los estándares regulares y ordinarios de justicia, pero sobre la base de que esto tiene como contrapartida una ganancia en términos de acceso a la verdad, de la reparación integral a las víctimas, y de implementación de garantías de no repetición de los hechos que dieron lugar a la vulneración de derechos. Esta lógica que subyace al acto legislativo se traduce en una regla de condicionalidad, en virtud de la cual el acceso y el mantenimiento de todos los componentes del régimen penal especial para el escenario transicional, se encuentran supeditados a la contribución efectiva y proporcional a la reconstrucción de la verdad, a la reparación de las víctimas del conflicto armado, y a la implementación de garantías de no repetición.

See generally Colombian Constitutional Court, Sentencia C-080 de 2018, describing the interplay between the degree to which a perpetrator acknowledges responsibility and when, and the corresponding level of sanction imposed by the SJP as the Régimen de Condicionalidad (“Regime of Conditionality”).

57 See *Final Agreement*, chapter 5, at 175.

58 *Ibid.*, chapter 5, at 175–76.

59 In many ways this preliminary report of conduct and crimes is in the perpetrators’ best interest and can help to mitigate due process concerns. It is within the JEP’s authority to create such an informal preliminary report because L1922/18, art. 27 gives the JEP broad discretionary power to implement procedures in pursuit of a dialogical construction of the truth:

Construcción dialógica de la verdad y justicia restaurativa. En el marco de los principios de justicia restaurativa y centralidad de las víctimas previstos en el Título Primero de esta Ley, las salas, y las secciones cuando corresponda, podrán adoptar las medidas que estimen oportunas e idóneas para promover la construcción dialógica de la verdad entre los sujetos procesales e intervinientes, que propendan por la armonización y sanación individual, colectiva y territorial, y promoverán la construcción de acuerdos aplicando criterios de razonabilidad y proporcionalidad, en todas las fases del procedimiento. En algunos casos, podrán tomar en cuenta las prácticas restaurativas de las justicias étnicas.

60 This must occur prior to the Public Hearing of Acknowledgment, not only to help prevent possible re-traumatization of victims, but also to preclude criminal prosecution of the perpetrators at a later date.

61 Rehearsals could be held beforehand. This would be considered witness tampering in the ordinary criminal justice system, but in the restorative justice context, it is psychosocial preparation.

Chamber for Acknowledgment, the perpetrator decides whether they want the JEP to assign them a restorative justice project or if they wish to design a project with victims and affected communities that they would later present to the JEP for final approval.⁶²

In Bangsamoro, the TJRC's approach to accountability shows how restorative justice principles can similarly be reflected in a nonjudicial measure that highlights the complexity of human relations during periods of violence. While the TJRC drew on the UN Principles to Combat Impunity,⁶³ a mutually reinforcing framework of truth, accountability, reparations, and guarantees of nonrecurrence, it also departed from it by characterizing the dynamics between narratives of victims and perpetrators as fluid or non-binary. In its view, most cases of abuse, violation, and emblematic episodes of historical wrong take place as part of a broader series of incidents and counter-incidents that stretch back for generations. This characterization emerged from a long-held tradition of Indigenous and tribal approaches to justice and conflict resolution practiced across the Bangsamoro.⁶⁴

The cases suggest that a restorative approach to sanctions and accountability can apply not only to physical violence but also to economic crimes or the economic elements of other crimes. In Colombia, for example, the 2005 Justice and Peace Law revealed critical information about both the economic and political dimensions of paramilitarism and its relationships with state actors, public security forces, and political representatives, among other powerful actors. In Tunisia, the arbitration process applied in design to both human rights violations and corruption, but in practice mainly to corruption. In cases of human rights violations, the Transitional Justice Law stipulated that the Arbitration and Reconciliation Committee's decision did not preclude prosecution, which may have contributed to creating enough of a disincentive for perpetrators to participate, such that almost no human rights cases were brought forward for reconciliation between victims and perpetrators. There was, however, a belief among many that to avoid impunity human rights violations should only be addressed through retribution: "For socioeconomic crimes, we can imagine an arbitration process, but there won't be impunity for human rights violations. People need to be held accountable."⁶⁵ Society associated restorative justice with economic crimes and retribution with breaches of civil and political rights. Accordingly, it expected people who had committed financial crimes to restore and repay and perpetrators of human rights violations to face criminal accountability.⁶⁶

Tunisia's arbitration process was articulated not as a "restorative justice" process but as "reconciliation." With no direct translation for the concept of *restorative justice* in Arabic, the word *adalah tasallahiyya*, which means "justice of reconciliation," has been used in the context of transitional justice, including the Transitional Justice Law, TDC framework, and arbitration process. As a result, the arbitration process was subject to the political dynamics of the term *reconciliation*, which was used by both the TDC and the "economic reconciliation" bill, a political project proposed after the establishment of the TDC that sought to give amnesty to former officials and businessmen in return for private deals with the state. The "economic reconciliation" draft law was widely criticized by local and international human rights organizations and

62 See Final Agreement, at 157 (calling for the Chamber for Acknowledgment to write a resolution of conclusions based on the sanctions prescribed for the offender's conduct, which the chamber would then present to the Peace Tribunal); P.A.L. 01/2017.

63 *Report of the TJRC*, chapters 1, 11–12. See also Annex 3.

64 Not meant to shield any party from liability, it emphasizes the responsibilities of both parties and their ancestors, whose spirits are summoned by village elders in a ritual to bear witness to restoring peace in the community, according to Archie Buaya, a member of the indigenous Teduray community, Commissioner of the Bangsamoro Human Rights Commission, and Listening Process facilitator, interview, September 27, 2022.

65 Mariam Salehi, scholar specializing in Tunisia's transitional justice process, interview, September 2022.

66 Amine Ghali, former member of the drafting commission of the 2013 Transitional Justice Law, interview, September 2022.

sparked a massive opposition movement that helped to delay its passage for more than two years and reduce the scope of amnesty only to officials.⁶⁷ The eventual 2017 Administrative Reconciliation Act undermined transitional justice by reinforcing impunity for ex-officials. According to the TDC, it allowed parliament “to whitewash the perpetrators of corruption in the eyes of justice, without any accountability.”⁶⁸

The instrumentalization of the reconciliation discourse in Tunisia to preserve the status quo was part of a larger political dynamic involving changing alliances among the economic and political elite and represents part of the reason the arbitration mechanism did not work. “In competition between the TDC’s reconciliation and [President] Essebsi’s reconciliation,”⁶⁹ the discourse indicated the broader political and institutional context of limited systemic change, including in the security services and judiciary, which reduced the pressure on perpetrators to participate in the arbitration process.⁷⁰ Part of the reason perpetrators did not come forward was that “too much of the system [was] still in place. The pressure was too low on these perpetrators—they didn’t have to come forward because they were comfortable within what was left of the system.”⁷¹ Restorative justice may have been less effective in Tunisia because there were not enough sanctions, threats of sanctions, or bodies with the power to enforce sanctions to coerce perpetrators to participate.

Integrity, Legitimacy, and Efficacy of Process

As with any transitional justice measure, the extent to which a restorative justice approach actually achieves its objectives of participation, repair, and accountability depends on the process’s integrity, legitimacy, and efficacy. The design and operationalization of methods such as dialogue and alternative sanctions, for example, require specific practical and technical steps in order to protect the interests and rights of victims and stakeholders, ensure societal support or buy-in, and contribute to fundamental change. In Colombia and Bangsamoro, ensuring that those who play the critical role of facilitators and coordinators maintain the trust and confidence of participants and community members required careful attention to the selection process of those facilitators, stakeholder representatives, adequate preparation and sensitization, and proper training. In both of these contexts, a particularly important element of the restorative approach was organizing some form of a listening space, which requires specific techniques, skills, and support. Conversely, as demonstrated in Tunisia, fundamental flaws in the design and process—such as the lack of oversight, transparency, and due process, including the failure to follow rules or explain the application of international standards and other ethical issues like conflicts of interest can fundamentally undermine the effort’s perceived independence and credibility.

In Colombia, a Restorative Justice Committee was established within the JEP to advise the different chambers and sections on how to incorporate a restorative justice approach into their respective work and provide a unified conceptual framework that would enable the formulation of shared methodologies. In 2019, ICTJ carried out a series of private and public dialogues between the JEP and international restorative justice experts.⁷² In particular, the experts met with magistrates of the Chamber for Acknowledgment to discuss the public acknowledgment hearings and met with magistrates of the First Instance Section to discuss restorative sanctions.

67 Fadil Aliriza, “New Documentary Revisits Protest Campaign Against Corruption Amnesty Law,” May 24, 2019 <https://meshkal.org/new-documentary-revisits-protest-campaign-against-corruption-amnesty-law/>

68 TDC, *The Final Comprehensive Report, Executive Summary*; Mohamed Ayadi, interview, September 2022.

69 Amine Ghali, interview, September 2022.

70 Ibid.

71 Mariam Salehi, interview, September 2022.

72 Restorative justice experts included John Braithwaite, Adolfo Ceretti, Roberto Cornelli, and Anna Myriam Roccatello.

In 2020 and 2023, ICTJ then conducted two “Perpetrator-Victim Mediation and Restorative Justice” courses for JEP officials, providing participants with techniques for listening to victims, perpetrators, and the community and for conducting peaceful conflict resolution. The courses reinforced the idea that restorative justice is not only a theoretical concept but a process that can be expressed in technical and practical ways with the relevant tools and knowledge.

During the preparatory stages of the hearings, relaying victims’ demands for truth and acknowledgment to perpetrators consists of more than merely passing on information. Transferring these demands requires accompaniment during the listening process. A facilitator should be present to assist in addressing the emotions that underlie the victims’ questions. Thus far, this has been tasked to the psychosocial teams that accompany the *comparecientes*. These teams not only relay the questions made by victims but also foster reflection about the reasons why they are asking the questions.

The preparation of the magistrates of the Chamber for Acknowledgment consisted in defining their role as facilitators of the process of listening to narrations of victims and *comparecientes* during the hearing. In the work sessions, the magistrates were given methodological and conceptual tools relating to the significance of the role of judges as symbolic depositories of the law and how to amplify and paraphrase the messages of victims or perpetrators that were not clear or audible. Preparatory sessions were also carried out with the Office of the Inspector General,⁷³ to identify and analyze its role in the hearings and to consider how undetermined or absent victims could be represented through its statements.

In Bangsamoro, the TJRC had to select and train the Listening Process facilitators and coordinators. In order to gain the confidence of participating communities and stakeholders, it sought individuals who were respected and recognized professionals or personalities with a record of integrity. The influence of restorative justice practice was demonstrated in the decision to strategically situate the facilitators in communities where they were conversant with the local language and had experience with how the targeted communities traditionally opened up to engage in discussion and, therefore, might positively engage on subjects they would not otherwise be inclined to discuss with strangers. The selection process also needed to ensure that the facilitators were drawn from Muslim, Christian, and Indigenous communities that represented the broad range of Bangsamoro stakeholders’ ethno-political and socio-cultural identities. Finally, the program involved a “rigorous preparatory process” and “highly intensive training sessions.”⁷⁴

In Tunisia, in contrast, the arbitration process illustrated the negative impact of a lack of oversight, transparency, and due process, including the failure to follow rules or explain the application of international standards and other ethical issues, like conflicts of interest, all of which undermined the credibility of the process. While the Transitional Justice Law required the ARC to specify facts, corrupt conduct, and law applicable in its decisions, it also made the committee’s decisions final and non-appealable. While perpetrators of corruption were required to submit a statement of facts and the amount of ill-gotten wealth they had obtained and to apologize, the committee largely ignored these requirements. And while the law required the consent of the State Litigation Agency to conclude an arbitration agreement, the agency disagreed with the commission on major arbitration decisions because of its failure to follow its own rules. It even

73 The role of the Office of the Inspector General in Colombia is to oversee the conduct of those in public office and the functioning of public institutions, represent society before judicial bodies, defend the collective interests of society, and act as a body for monitoring constitutionality and legality before any branch of the government.

74 Archie Buaya, interview, September 27, 2022; Rufa Cagoco Guiam, Independent Working Group on Transitional Justice and Dealing with the Past in the Bangsamoro, interview, Cotabato City, September 26, 2022; Froilyn Mendoza, member of the Bangsamoro Interim Parliament, interview, Cotabato City, September 29, 2022.

challenged in court two corruption arbitration decisions reached for breaches of the law and for denying the state the right to due process.⁷⁵

Further, the ARC's decisions on corruption were not published; details on them only became public through the compulsory power of the government's Audit Court, which published a report revealing problems and ethical issues with the process, including a lack of supporting documentation. Nor did the committee have approved rules on how to conduct investigations or what it would consider criminally corrupt conduct until right before it made its only decisions.⁷⁶ According to a member of the law's drafting commission: "What we can say is they've never been 100 percent transparent, and as long as there is no transparency, there will be accusations of selection and clientelism."⁷⁷ "In hindsight," writes one scholar, "the arbitrage process was subject to critique, as it was perceived as non-transparent."⁷⁸ While the commission claimed that its arbitration decisions were based on the standards of the Financial Action Task Force and European Union, it did not explain its application of them.⁷⁹

External Coherence

The application of a restorative justice lens in addressing massive violations does not happen in a vacuum, but rather in a broader context of justice, peacebuilding, and transitional processes. This means that the design, implementation, and impact of restorative justice approaches depend not only on their internal processes but also on their coherence with other processes. The cases suggest that, at one level, restorative responses to massive abuses tend to be influenced by previous or parallel justice processes, and that, in turn, they can foster and shape future justice efforts. This can be true at both the national and local levels. In Colombia, the JEP acknowledgment hearings drew on the experience of the Justice and Peace Law and the Truth Commission, which had demonstrated the value of dialogue. In Bangsamoro, the TJRC both drew on the existing practices of Indigenous communities, which helped to create ownership and cultural resonance, and opened spaces for grassroots peace and justice efforts that the state can support by ensuring the necessary conditions for them. In Sierra Leone, local civil society and religious and traditional actors complemented the TRC's efforts in fostering local reconciliation, while the commission in turn recommended the decentralization of justice and security structures that have since included community-level alternative dispute resolution. In both Bangsamoro and Sierra Leone, however, opportunities were missed to create a more coherent approach that could have included the demobilization and reintegration of former combatants and therefore a more inclusive peace process.

The application of restorative elements in judicial proceedings is not new to Colombia. The 2006 Code of Criminal Procedure, for example, introduced a chapter on restorative justice that includes the creation of restorative programs in which criminal offenders and victims can participate. In the context of the armed conflict, the 2005 Justice and Peace Law introduced a restorative justice approach to the criminal procedure for the investigation and judgment of serious human rights violations, crimes against humanity, and war crimes committed by

75 Carranza et al, "The Truth About Corruption."

76 Ibid.

77 Amine Ghali, interview, September 2022. In a June 2018 letter, the transparency watchdog group I Watch called on the TDC to ensure that ARC Chief Khaled Krichi recused himself from arbitration decisions relating to accused persons whom his law firm represented, specifically Lazhar Sta. I Watch, "I Am Aware of the Hurt in Khaled Al-Kraishi," June 1, 2018, <https://www.iwatch.tn/ar/article/505>

78 Mariam Salehi, *Transitional Justice in Process: Plans and Politics in Tunisia* (Manchester: Manchester University Press, 2022), 128.

79 Carranza et al, "The Truth About Corruption."

paramilitary groups. The JEP acknowledgment hearings benefited from years of experience and lessons from implementing the Justice and Peace Law and the Truth Commission's responsibility processes.

Colombia's Justice and Peace Law sought to strike a balance between the effective demobilization of armed groups and the need to guarantee victims' rights by offering alternative and reduced sentences to members who demobilized and submitted to the process. To submit to the process, demobilized combatants had to confess to the crimes they had committed, contribute to clarifying the truth about these crimes and the paramilitary phenomenon, contribute to the reparation of victims, and commit to their own resocialization. Compliance with these requirements reduced one's sentence to five-to-eight years of imprisonment. An important lesson from this process has been that the broader and more frequent the spaces for encounter between victims and perpetrators, the more truth has emerged, as the encounters fostered empathy between the parties and increased the conditions for sincerity. While the Justice and Peace Law did not formally include or develop a comprehensive restorative justice approach from the outset, its almost 19 years of implementation certainly contributed to initiating discussion about the limitations of retributive justice and demonstrated the importance of acknowledging responsibility.

During the Truth Commission's operations from 2018 to 2022, a special team created within the commission carried out 67 processes of acknowledgment.⁸⁰ Its acknowledgment strategy was implemented in two ways: the "Encounters for Truth," which focused on recognizing the dignity of victims, and the "Acknowledgment of Responsibility," which focused on recognizing the responsibility of perpetrators. By the time its Final Report was presented, the Truth Commission had conducted five public acknowledgments of responsibility: three with the participation of both victims and former combatants and two with the participation of only former combatants. The Truth Commission provided several lessons about conducting acknowledgment processes within a restorative justice approach, including the importance of an emotional, cognitive, and ethical process of dialogue, with private spaces for victims and perpetrators to express their views; flexible methodologies that can be adjusted according to specific cases; identification of the narratives and messages that are to be conveyed to the parties and to society; and consideration of the symbolic and linguistic spheres. The Truth Commission's acknowledgment strategies showed that empathetic dialogue between victims and perpetrators is a realistic way to advance peacebuilding.

Restorative justice is not a new concept in the Philippines either, having gained currency in the late 1990s and early 2000s, when the government introduced initiatives to move the criminal justice system away from its more rigid and retributive justice elements, toward more community-based conflict resolution.⁸¹ In conflict-affected communities of Bangsamoro, where access to formal justice mechanisms is even more difficult than elsewhere in the Philippines, tribal and Indigenous justice processes have long proven to be effective tools for conflict resolution, healing, and reconciliation. While local civil society organizations have supported these practices in

80 Republic of Colombia, Legislative Act 01 of 2017, transitory article 2. Decree 588 of 2017, art. 2, defines its mandate as follows:

el reconocimiento de las víctimas como ciudadanos y ciudadanas que vieron sus derechos vulnerados y como sujetos políticos de importancia para la transformación del país; el reconocimiento voluntario de responsabilidades individuales y colectivas por parte de todos quienes de manera directa o indirecta participaron en el conflicto como una contribución a la verdad, a la justicia, a la reparación y a la no repetición; y en general el reconocimiento por parte de toda la sociedad de ese legado de violaciones e infracciones como algo que merece el rechazo de todos y que no se debe ni se puede repetir.

81 Sabha MacManus and Sofie Milner, "Reflections on Restorative Justice in the Philippines," *Human Rights Forum*, 2006, www.philrights.org/wp-content/uploads/2010/10/Reflections-on-restorative-justice-in-the-Philippines.pdf. See Dr. Manuel Gollosa Co, "Katarungan Pambarangay (Village Justice) – The Soul of the Parole and Probation Administration's Individualized, Community-Based Restorative Justice Programme."

their peacebuilding work, such practices had significant influence on the TJRC. According to Cecilia Jimenez-Damary, the UN Special Rapporteur on the Rights of Internally Displaced Persons and the former Philippine government designate to the TJRC, the commission “grounded [its] ultimate conceptual framework . . . to the realities in the Bangsamoro and Indigenous communities where repairing or restoring relations is given such primacy.”⁸² The Listening Process in particular mirrored Indigenous practices and rituals of oral tradition, which developed ownership on the part of communities and enhanced its cultural resonance.

The TJRC, in turn, had a positive impact on local practices that reflect restorative justice. The commission recommended the establishment of the National Transitional Justice and Reconciliation Commission for the Bangsamoro, for example, which is to have a Sub-Commission on Bangsamoro Healing and Reconciliation, which is mandated to “identify and support traditional practices of reconciliation at the community level.”⁸³ In addition, it specifically recommended that the Bangsamoro authorities and civil society, cultural, and religious leaders “develop dialogue spaces for Bangsamoro and indigenous peoples to share common stories and cultural practices/traditions that promote healing.”⁸⁴ In addition to its recommendations, the commission’s strategy of maintaining a close collaborative relationship with civil society in conflict areas enabled it to open spaces for local and civil society to lead grassroots peace efforts and inspire them to reorient their peacebuilding efforts by incorporating a mixed transitional and restorative justice lens.⁸⁵ Local organizations such as the Consortium of Bangsamoro Civil Society and the Initiatives for International Dialogue are notable examples.

Some of the experts and local practitioners whom the TJRC engaged later constituted themselves into the Independent Working Group on Transitional Justice and Dealing with the Past (IWG-TJDWP), whose mission is to build a social movement to address the legacy of systemic violence, conflict, impunity, and neglect in the Philippines. The IWG-TJDWP has organized and coordinated advocacy, lobbying, and capacity-building engagements with key national and regional government partners, raising the issue of the role of government in restorative justice. While stakeholders suggested the potential to establish a coordinative relationship with the government, to ensure that the necessary conditions and civic spaces exist for grassroots initiatives to function, a member of parliament cautioned that the involvement of local governments in conflict settlement processes can be problematic, because of the risk of officials coopting the process for their own political interests.⁸⁶

In Sierra Leone, local-level efforts to address the past also reflected restorative justice principles and practices. Local actors such as civil society organizations and religious and traditional leaders played a major role in providing healing and rehabilitation support through prayers, counseling, and traditional ceremonies that fostered the acceptance of ex-combatants back into communities and reconciliation between victims and perpetrators.⁸⁷ For example, Fambul Tok International is an organization focused on fostering reconciliation through restorative mea-

82 Cecilia Jimenez-Damary, former UN Special Rapporteur on the Rights of Internally Displaced Persons and former Government of the Philippines designate to the Transitional Justice and Reconciliation Commission, interview, September 24, 2022; Rufa Cagoco Guiam, interview, September 26, 2022; and Froilyn Mendoza, interview, September 29, 2022.

83 *Report of the TJRC*, chapter 4, part I.B.4.

84 *Ibid.* at 86.

85 Cecilia Jimenez-Damary, interview, September 24, 2022; Archie Buaya, interview, September 27, 2022; Guiamel Alim, chairperson of the Consortium of Bangsamoro Civil Society and senior coordinator of the TJRC Listening Process, interview, October 5, 2022.

86 Guiamel Alim, interview, October 5, 2022; Jimenez-Damary, interview, September 24, 2022; Archie Buaya, interview, September 27, 2022, and Froilyn Mendoza, interview, September 29, 2022.

87 Ibrahim Bangura, “Leaving Behind the Worst of the Past: Transitional Justice and Prevention in Sierra Leone,” ICTJ, 2021.

tures. It formed reconciliation committees at the sectional level to lead village-level reconciliation ceremonies, inspired by cultural tradition and in compliance with the population's wishes.

The proceeding designed by Fambul Tok is based on each community's traditions and beliefs but follows a general pattern of bringing together victims and perpetrators of violence, truth telling, and asking for forgiveness. Normally, community members sit around a bonfire to adjudicate cases, followed by cleansing ceremonies and communal feasts. Reconciliation was furthered by activities emphasizing shared interests to strengthen peace and guarantee non-repetition.⁸⁸ This process has been recognized by the African Union Panel of the Wise as having left "a positive legacy and created an advocacy tool for transformation in Sierra Leone."⁸⁹

Further, the TRC's recommendations contributed to the decentralization of justice and security structures at the community level throughout the country. These structures have promoted alternative dispute resolution activities related to family, land, community, and other disputes identified by the TRC as factors that contributed to the war, thereby reducing tension and violence at the local level. In their activities, the Provincial Security Committees, the District Security Committees, and the Chiefdom Security Committees, for example, all contributed to the prevention of conflict through proactive approaches that encourage the collaboration of community stakeholders, especially traditional and religious leaders.⁹⁰

In Bangsamoro, the adoption of restorative justice practices at the local and regional levels occurs within the broader context of the ongoing implementation of the peace process, of which transitional justice and reconciliation measures are an explicit part. One area of the peace process in which a restorative justice approach would be potentially valuable but has been so far neglected is the decommissioning and reintegration of combatants and the transformation of their camps. The dependence of reintegration on repairing relationships with affected communities and cultivating acceptance makes the inclusion of those communities particularly relevant. It is a missed opportunity that leads to perceptions of neglect, favoritism, and mistrust.⁹¹

In Sierra Leone, there was a similar untapped potential for more explicit integration of restorative justice frameworks into transitional justice and peacebuilding efforts, including the demobilization and reintegration of former combatants. The fact that transitional justice processes began as the DDR process was being concluded created an opportunity to adopt a complementary approach. But Sierra Leone failed to effectively engage former fighters, especially foot soldiers, in the transitional justice process.⁹² According to one view, the TRC and the Special Court for Sierra Leone had the opportunity to engage with ex-combatants directly and get information from the DDR process about the profiles of specific individuals, which could have helped the TRC to target individuals who could have provided useful testimonies, resulting in a more coherent approach overall.⁹³

88 Fambul Tok International, "How Fambul Tok Works," www.fambultok.org/what-is-fambul-tok/our-process#top

89 African Union Panel of the Wise, "Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity," *African Union Series*, International Peace Institute, February 2013.

90 Bangura, 39–40.

91 Cecilia Jimenez-Damary, interview, September 24, 2022; Guiamel Alim, interview, October 5, 2022; Archie Buaya, interview, September 27, 2022; and Froilyn Mendoza, interview, September 29, 2022.

92 PRIDE and ICTJ, "Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone," September 2002.

93 Transitional justice expert, interview, Freetown, Sierra Leone, August 30, 2022.

Conclusion and Policy Considerations

This report offers reflection, clarity, and guidance on the application of a restorative justice framework or lens in contexts of massive and grave human rights violations, including the advantages, risks, opportunities, and challenges of taking a restorative justice approach. The analysis is based on experiences of Colombia, Sierra Leone, Tunisia, and the Philippines's Bangsamoro region, which, while representing a range of different processes, in our view either integrate or reflect the practices and/or principles of restorative justice. These principles include stakeholder participation and repair of harm, and practices include the use of direct or indirect dialogue or engagement between perpetrators, victims, and/or affected communities to resolve crimes. Colombia illustrates the explicit institutional integration of both restorative justice principles and practices in judicial and nonjudicial processes, while the others are more reflective of a restorative justice framework but also draw on both judicial and nonjudicial processes. While this report contributes to empirical evidence on the topic, that base remains limited and therefore warrants caution on the formulation of concrete recommendations for other societies. We therefore offer policy considerations that follow directly from our general findings.

- Dialogue in the form of encounters between victims and perpetrators can be an effective instrument of acknowledgment, participation, and repair, but it requires specific and carefully designed processes or methodologies that must include careful preparation of the parties involved. The use of this type of dialogue comes with challenges, like the potential perception of asymmetry that can create tension.
- Broader dialogue or engagement with communities and society can establish a link between the micro individual and macro societal levels, which is vital to addressing cases of mass violence. This engagement can take the form of consultations or hearings that elicit complex and representative narratives of victims, and it can be enhanced through a public process and the role of the media.
- Alternative or restorative sanctions can facilitate participation and repair but can also be contentious and may be legitimized or undermined depending on their relationship to complementary or parallel accountability processes. For both judicial and nonjudicial mechanisms, the recognition of the complexity of dynamics between victims and perpetrators can contribute to a more nuanced approach to accountability.
- Specific practical and technical steps are necessary to ensure the integrity and legitimacy of a restorative justice approach, including regarding facilitators, training, preparation, support, representation, oversight, independence, transparency, and fairness. Deficits in these areas can undermine the process's credibility and success.

- Restorative justice approaches can learn from, complement, inspire, and shape other justice, reconciliation, and peacebuilding processes, particularly those that share similar goals, like reintegration, in ways that can foster community/public ownership and resonance. Opportunities for establishing such coherence exist at both the local and national levels.

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