

REPORT

# A Mixed Approach to International Crimes

## The Retributive and Restorative Justice Procedures of Colombia's Special Jurisdiction for Peace

April 2020



**Cover Image:** Silvia Berrocal (left), whose son was murdered by FARC, and Pastor Alape (right), a former FARC commander, discuss proposals for restorative justice projects as they walk together in the town of Apartadó, Colombia. (ICTJ/María Margarita Rivera)

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## About ICTJ

The International Center for Transitional Justice (ICTJ) 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](http://www.ictj.org)

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## INTRODUCTION

The building housing the Special Jurisdiction for Peace (SJP), Colombia's transitional justice court, sits on a corner of the always busy 7th Avenue in Bogotá. Its modern, glass facade looks out over the vibrant and ever-changing Chapinero District. Its 10 stories accommodate the various chambers of the SJP along with an army of executive and support staff. It manages to be both unassuming and at the same time an impressive presence.

In June 2019, ICTJ hosted an intense week of meetings with various members of the SJP, along with former combatants of the Public Forces of Colombia and the Revolutionary Armed Forces of Colombia-People's Army (FARC-EP), and the victims of Colombia's conflict. ICTJ Colombia routinely meets with these stakeholders as part of its work, but the aim of this week was to specifically include various international experts on restorative and transitional justice: Professor John Braithwaite,<sup>1</sup> Professor Adolfo Ceretti,<sup>2</sup> Professor Roberto Cornelli,<sup>3</sup> Maria Camila Moreno Múnera,<sup>4</sup> and Anna Myriam Roccatello.<sup>5</sup> This report is the result of these fruitful meeting with the stakeholders in the Colombian peace process.

Chapter 1 of this report gives an overview of the SJP's innovative model, which can be considered a mixed restorative-retributive judicial organ. It also examines the potential value of such a mixed procedural approach, in comparison with the failures of purely retributive justice processes to achieve the specific aims of criminal accountability in a transitional justice context. Chapter 2 examines some of the various challenges for restorative justice in general. For convenience, those challenges have been divided into five categories: victims, perpetrators, judges, communications, and due process. Chapter 3 suggests various principles that the SJP should consider to help realize some of its restorative justice aims, while Chapter 4 suggests some specific procedures that the SJP may implement to achieve those restorative justice principles. Those readers who are familiar with transitional justice, the Colombian peace process, and the SJP may wish to skip Chapters 1 and 2 and move directly to the recommendations in Chapters 3 and 4. Finally, the report concludes with reflections on some challenges of the mixed approach and offers some general suggestions for how to move forward.

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# CHAPTER 1: The Mixed Nature of the Special Jurisdiction for the Peace (SJP)

## **Evidence of the SJP's Mixed Nature**

The historic signing of the Final Peace Agreement (“Final Agreement”) in 2016 culminated in a 310-page comprehensive document that attempted to address all elements of the conflict while creating institutions that can help achieve long-term, sustainable peace. It comprises a series of agreements, divided by chapters, which address the different elements necessary for reconstruction, reconciliation, coexistence, and peacebuilding.

Chapter 1 of the Final Agreement discusses land reform aimed at transforming rural land ownership and improving the experiences of the rural population. Chapter 2 addresses political participation and the need to strengthen democratic traditions and pluralism. Through disarmament, it acknowledges that violence was a way for groups to gain political recognition and offers incentives for combatants to participate in politics peacefully. Chapter 3 enumerates the terms of the ceasefire; the processes for reintegrating FARC-EP members into the country’s economic, social, and political life; and the guarantee of security and continued commitment to fight against criminal organizations. Chapter 4 looks to solve the issue of illegal drugs, including their use, production, and commercialization. Chapter 5, titled “Victims,” creates the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (CS) mechanism, in which victims can participate in processes of reconciliation, restoration, and reparations, and highlights the centrality of victims to the Final Agreement. Finally, Chapter 6 creates mechanism to ensure that each component of the agreement is implemented and held accountable, through legislative action where necessary.

In this report, the focus is on Chapter 5 and the ability for victims to achieve justice through mixed restorative and retributive justice mechanisms. The Final Agreement recognizes that taking into consideration victim’s voices and demands is essential to achieving justice through the institutions and procedures it establishes.

The CS itself comprises five components: a truth commission, reparation measures, guarantees of non-repetition, a search unit for disappeared persons, and the Special Jurisdiction for Peace (SJP). These five mechanisms work together to compile a comprehensive catalog of victim narratives, as well as to grant fair reparations and other restorative means to help make victims feel that they have been duly heard and lay the groundwork for coexistence and non-repetition, recognizing the complex societal and institutional causes of the conflict. Though based on the

Victims' Law of 2011,<sup>6</sup> the reparation measures described in the Final Agreement aim to expand and refine the law's relevant provisions. To this end, the reparation measures guaranteed under the CS are not individual, but rather symbolic and collective. According to the Final Agreement, these symbolic and collective reparation measures include the following components: the recognition of responsibility, public apologies, the sentencing of offenders, and restorative sanctions. What the Final Agreement does not articulate, however, is that these reparations must be based on both outcomes and process through the restorative justice proceedings that the agreement envisions. This means that a restorative approach must be measured not only by the sanctions that a tribunal delivers, or the reparations ordered to redress victims' rights, but also by the quality of victims' participation and leadership during the restorative justice process.

Despite being composed of different mechanisms (the Truth Commission, the Unit to Search for Disappeared Persons, and the SJP), the CS operates in an integrated and comprehensive manner. The system's component mechanisms do not function as independent entities but rather together as an integrated body that collects victims' narratives and delivers fair reparations and other restorative justice measures. For example, the Final Agreement requires that the final rulings of the Peace Tribunal be submitted to the Truth Commission for more comprehensive documentation of the truth. For this very reason, the Final Agreement calls for collaboration protocols between the CS's different components.

The integrated nature of the CS mirrors that of the Final Agreement as a whole. Indeed, the restorative justice sanctions envisioned in the SJP proceedings must be implemented in tandem with the structural changes (rural land reform, increased political participation, and solutions to the illegal drug problem) proposed by the Final Agreement. These restorative justice projects require that perpetrators consult with victims and their representatives in proposing projects, and that they work on projects that directly contribute to the objectives stipulated in Chapters 1, 2, and 4 of the Final Agreement. Sanctions combined with infrastructural improvements that benefit affected communities will tangibly help mend the torn social fabric.

This report focuses on the SJP and the role of victims and perpetrators within its procedures. As the mechanism deputed to pursue criminal accountability, the SJP provides unique opportunities to deliver both restorative and retributive justice. This report will elaborate on these opportunities. However, it is important to note that the other elements of the CS, such as the truth commission and search unit, along with reparative justice measures and guarantees of non-repetition, could also be understood as restorative in design.

The SJP aims to achieve criminal accountability in Colombia through a mixed system of restorative and retributive justice.<sup>7</sup> Generally speaking, the SJP envisions large-scale restorative justice measures involving public acknowledgments of responsibility, as well as concrete, symbolic, and collective reparations aimed at satisfying victims while simultaneously reintegrating perpetrators.<sup>8</sup> The SJP also displays restorative justice qualities by allowing for the broadest possible amnesty to persons who participated in the armed conflict, in accordance with Article 6.5 of Protocol II of the Geneva Convention.<sup>9</sup> Along similar lines, the SJP emphasizes the importance of political participation and declares that the imposition of sanctions on perpetrators of

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<sup>6</sup> Law 1448 of 2011. The law set forth a series of specific measures to repair the damage done to victims of Colombia's internal conflict. It officially recognized that there was a universe of victims who had suffered individually, collectively, or both from human rights violations and violations of international humanitarian law as a direct result of the conflict that had affected the country since at least 1985. The law explicitly excluded the thousands of victims of violence related to ordinary crimes or the drug war in general.

<sup>7</sup> See generally The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (2016), Chapter 5.I. English edition (discussing the varied justice aims of the Comprehensive System), <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>, accessed July 12, 2019.

<sup>8</sup> Ibid., at 188-89.

<sup>9</sup> Ibid., at 160 article 37.

the armed conflict cannot legally preclude their participation in politics or the exercise of any rights to political participation.<sup>10</sup> At the same time, the SJP also entails elements of retributive justice, particularly related to the possibility of imposing jail sentences on those who do not acknowledge their responsibility in serious crimes. As will be discussed later, perpetrators can be sentenced to terms of imprisonment in some cases, and, even when they are not sentenced to prison, they can be subjected to limitation of freedom and movement.

The range of sanctions that the SJP can impose is clear indication of the SJP's innovative mixed restorative-retributive justice design. Some of the restorative justice aspects of the SJP are visible in the "Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct (Acknowledgment Chamber)," which can recommend "Special Sanctions."<sup>11</sup> Special Sanctions allow for a participating perpetrator who fully acknowledges responsibility to undertake a restorative justice project for victims.<sup>12</sup> These Special Sanctions, however, also have retributive justice elements; specifically, the SJP will place punitive "restrictions on freedoms and rights, such as freedom of residence and movement" to ensure the perpetrator completes the reparations project.<sup>13</sup>

The mix of restorative and retributive sanctions that the SJP imposes on a perpetrator depends directly on the degree to which the perpetrator acknowledges responsibility and when.<sup>14</sup> The Colombian Constitutional Court, in its revision of the Legislative Act 01/2017, which established the CS as an institution, refers to this aspect as the "Regime of Conditionality."<sup>15</sup> If, instead of fully acknowledging responsibility before the Acknowledgment Chamber, the perpetrator acknowledges it later on, fully, and in front of the First Instance Chamber in the Peace Tribunal, then the Final Agreement allows the SJP to impose an "Alternative Sanction" that is "essentially retributive [in] nature," namely, "deprivation of liberty" for five to eight years.<sup>16</sup> If a perpetrator does not acknowledge responsibility for grave and representative offenses and is found guilty, then the SJP will impose "Ordinary Sanctions...[that] perform the functions provided for in criminal legislation," namely, "deprivation of liberty" for 15 to 20 years.<sup>17</sup>

As explained, there are three potential paths by which offenders can interact with the SJP, depending on the degree of recognition of truth and responsibility acknowledged by the offender. All three paths begin in the SJP's Acknowledgment Chamber, which is responsible for assessing individual and collective responsibility for crimes.<sup>18</sup> Before its assessment, the Acknowledg-

<sup>10</sup> Ibid., at 160 article 36.

<sup>11</sup> In Spanish, these are referred to as "Sanciones Propias," which roughly translates to "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, the restrictions on liberty.

<sup>12</sup> See Final Agreement, supra note 7, at 175.

<sup>13</sup> Ibid., at 182.

<sup>14</sup> Ibid., at 175.

<sup>15</sup> See Sentencia C-674 de 2017, p.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 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," or "Regime of Conditionality").

<sup>16</sup> See Final Agreement, supra note 7, at 175.

<sup>17</sup> See Final Agreement, supra note 7, at 175-76

<sup>18</sup> See Final Agreement, supra note 7, at 154.

ment Chamber receives oral or written testimony from individuals or groups acknowledging their responsibility as perpetrators during the armed conflict, along with reports from victim's organizations.<sup>19</sup> It also receives reports from the Attorney General, military criminal justice systems, and other state institutions,<sup>20</sup> including reports involving crimes committed during armed conflict that were investigated under the Justice and Peace Law and implicated members of the military or FARC.<sup>21</sup>

After compiling all that information, the Acknowledgment Chamber then assesses based on the evidence whether or not the alleged act took place, whether the person(s) allegedly responsible did in fact participate in the act, and whether or not the act corresponds to criminal offenses that are eligible for amnesty.<sup>22</sup> If the chamber determines that there are sufficient grounds to hold the individual(s) accountable for a grave and representative crime, it notifies the concerned individual(s) of those accusations.<sup>23</sup>

At this point, perpetrators have multiple choices. Should the perpetrators, upon hearing the accusations against them by the Acknowledgment Chamber, acknowledge the truth of those accusations and their responsibility in committing those crimes, they have the opportunity to engage in a public hearing in the presence of invited victims' organizations to determine the truth and establish restorative sanctions in line with their acknowledged conduct.<sup>24</sup> This public hearing represents the first restorative justice phase envisioned by the Final Agreement that involves victims' organizations, elucidates the truth, and establishes agreement as to appropriate restorative and reparative sanctions. These restorative sanctions are community projects aimed at strengthening the social fabric of communities. Based on the severity of the crime, they can also consist of the restriction of freedoms and rights or a retributive-style limitation of liberty for a period of between five to eight years.<sup>25</sup> The public hearing results in resolutions and sanctions that, after the hearing, are sent to the Peace Tribunal's First Instance Chamber in Cases of Acknowledgment of Truth and Responsibility for review and final ruling.<sup>26</sup>

If, on the other hand, perpetrators do not acknowledge responsibility for their conduct, their case is referred to the Investigation and Prosecution Unit, which, upon determining that the case both is appropriate and has sufficient evidence, can open court proceedings before the Peace Tribunal.<sup>27</sup> Alternatively, the Investigation and Prosecution Unit can refer the case to the Chamber for the Definition of Legal Situations should it determine the perpetrator is not accountable before the Peace Tribunal because the person did not participate directly in the conduct.<sup>28</sup> If the Investigation and Prosecution Unit opens a court proceeding before the Peace Tribunal for a case of "Absence of Truth and Responsibility," it begins in the First Instance

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<sup>19</sup> Ibid.

<sup>20</sup> Art. 79/ Law 1957/19. In order to open a macro case, the Acknowledgment Chamber receives and compares reports on conflict-related facts presented by state institutions and civil and victims' organizations.

<sup>21</sup> Note that crimes committed by civilians, even those who belonged to the state in some capacity, require those civilians to voluntarily present themselves to the SJP. This is provided for in the Constitutional Court's Comunicado No. 55, found at Corte Constitucional [C.C] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, Comunicado No. 55 (Colom.) [hereinafter C-674/17]. See also Final Agreement, supra note 7, at 154 (detailing the reports that the SJP can receive).

<sup>22</sup> See Final Agreement, supra note 7, at 155.

<sup>23</sup> Ibid., at 153 (detailing that in cases of collective acknowledgment, the Acknowledgment Chamber will attribute individual responsibility to the members of the organization that issue the acknowledgment).

<sup>24</sup> Ibid., at 154.

<sup>25</sup> Ibid., at 165.

<sup>26</sup> Ibid., at 161-62 (establishing that the First Instance Chamber in Cases of Acknowledgment of Truth and Responsibility's role is to hand down rulings, while bearing in mind the initial proposed sanction, and to set conditions and methods for implementing the sanction, while supervising and certifying the effective fulfilment of the project with the support of the monitoring and verification bodies established by the Final Agreement).

<sup>27</sup> Ibid., at 156.

<sup>28</sup> Ibid., at 157.

Chamber, which hears such cases and hands down appropriate rulings that either acquit or convict the perpetrator and determines corresponding ordinary or alternative sanctions.<sup>29</sup> If a perpetrator is convicted of a serious crime without acknowledging responsibility, the person can be sentenced to ordinary sanctions of 15 to 20 years in prison.<sup>30</sup>

A third path opens for a perpetrator if the person acknowledges responsibility during the trial before the Peace Tribunal. In this case, depending on the severity of the crime and the completeness of the account, the perpetrator may be sentenced to alternative sanctions of imprisonment or detention for between five and eight years.<sup>31</sup> In certain cases, and depending on the circumstances that prevented the person from acknowledging responsibility from the outset of the process, the sanctions can be adjusted to a less harsh sentence or a restorative sanction.<sup>32</sup>

Taken together, the differentiated approach that the SJP uses to impose a range of sanctions of varying degrees of severity, in direct response to the timing and level of a perpetrator's acknowledgment, is clear indication of a mixed system of restorative and retributive justice.

### Why a Mixed Approach?

In contexts where a society is transitioning from a period characterized by mass atrocities such as Colombia, restorative justice offers approaches for rebuilding a society's social fabric at both the individual and communal level.<sup>33</sup> It can bring people together to respond to the needs of victims while also encouraging accountability for those who caused the harm in ways that ordinary justice mechanisms, with their limited resources, usually cannot. Hand in hand with transitional justice mechanisms, restorative justice works to redress grave human rights violations, while promoting healing and creating space for dialogue around structural and institutional reforms.<sup>34</sup>

Historically, governments have often utilized purely retributive justice frameworks to pursue justice, most notably in the trials conducted by the International Military Tribunal in Nuremberg involving former Nazi leaders.<sup>35</sup> Likewise in the former Yugoslavia, individual criminal accountability, with its focus on punishment and deterrence, was given precedence, leading to widespread criminal prosecutions, first at the international level and then later at the national level.<sup>36</sup> Over time, however, societies in transition have moved toward restorative-transitional

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid., at 166.

<sup>31</sup> Ibid., at 165.

<sup>32</sup> Ibid.

<sup>33</sup> See Jennifer J. Llewellyn and Daniel Philpott, "Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding," in *Restorative Justice, Reconciliation, and Peacebuilding*, eds. Jennifer J. Llewellyn and Daniel Philpott (New York: Oxford University Press, 2014) (explaining that due to its relational nature, restorative justice processes focus on the relationships between people and are therefore ideal in transitional settings); Rodrigo Uprimny and María Paula Saffon, De Justicia, "Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case" (2006), [www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_55.pdf](http://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_55.pdf) (interpreting restorative justice processes as ones that only work when facing small-scale criminality, but acknowledging that the two processes are not mutually exclusive and can complement one another in a new government's pursuit of justice, particularly because the primary goal of each is reconciliation).

<sup>34</sup> See Rodrigo Uprimny Yépes, María Paula Saffon Sanín, De Justia, "Transitional Justice, Restorative Justice, and Reconciliation" (2005), <https://www.dejusticia.org/en/transitional-justice-restorative-justice-and-reconciliation/> (describing the nature of transitional justice as applying in exceptional contexts of transition) and Paul Seils, ICTJ, "The Place of Reconciliation in Transitional Justice" (2017) (examining the concept of reconciliation and its relationship to the field of transitional justice).

<sup>35</sup> See generally Brianne McGonigle Leyh, "Nuremberg's Legacy Within Transitional Justice: Prosecutions are Here to Stay," *Washington University Global Studies Law Review* 15, 4 (2016): 559 (asserting that the Nuremberg military tribunals created in the wake of World War II represent the beginning of an era of international criminal prosecutions in transitional contexts, though purely prosecutorial solutions to transitional justice are not the most effective forms of peacebuilding).

<sup>36</sup> Ibid., at 28 (suggesting that the criminal sentencing in the International Criminal Tribunal for the Former Yugoslavia hoped to spill over into national criminal programs, which had been weakened as a result of the conflict). See also Elena

justice frameworks, such as in the paradigmatic example of South Africa's Truth and Reconciliation Commission.<sup>37</sup>

There is no one path for addressing the wounds and divisions that cleave societies in the aftermath of conflict or repressive rule. Depending on the context, societies may prioritize (or sequence) restorative or retributive justice processes based on the goals to be achieved, institutional capacity, and the will of the government to address the past. Although, conceptually, restorative and retributive justice seem to represent polar ends of a spectrum—at one end is the commitment to rehabilitation through reconciliation, and, on the other, the commitment to accountability through punishment<sup>38</sup>—transitional justice takes as its starting point a broader understanding of justice that is rooted in accountability as well as the recognition of victims and their right to dignity. To achieve those goals, societies may come together to address legacies of atrocity using mechanisms of transitional justice such as prosecution, vetting or lustration, reparations, reintegration, amnesty, truth seeking, institutional reforms, or some combination of those mechanisms.

The kind of measures adopted and implemented depends very much on the specific national circumstances. Peru, for example, emphasized affirming the dignity of victims and historically marginalized communities while raising awareness of the state's role in the conflict. As such, between 2001 and 2003, very soon after the end of the Peru's nearly two decades-long conflict, the country's restorative justice mechanism, the Comisión para la Verdad y Reconciliación, worked to establish the truth about what happened and to lay the groundwork for national reconciliation through its truth-seeking processes and the related public hearings.<sup>39</sup> Meanwhile, efforts to bring Alberto Fujimori to justice for crimes during the country's "dirty war" advanced much more slowly.<sup>40</sup>

Sierra Leone recognized that the marginalization of youth played an important role in the war. Its Truth and Reconciliation Commission therefore emphasized youth empowerment and addressed their experiences as ex-combatants through special hearings for children.<sup>41</sup> Separately, the Special Court for Sierra Leone brought charges against those bearing the greatest responsibility for crimes against humanity, war crimes, and other violations of international humanitarian law or serious crimes under Sierra Leonean law.<sup>42</sup> In Tunisia, where a transitional government had to deal with a legacy of authoritarianism and repression rather than armed conflict, the

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Naughton, ICTJ, "Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals" (2018).

<sup>37</sup> See "Truth and Reconciliation Commission," [www.justice.gov.za/trc/](http://www.justice.gov.za/trc/) (describing the commission's work in enabling South Africans to accept their past, compile narratives of the truth, and move toward national reconciliation). See also Rojas Andrade, *supra* note 2, at 219 (discussing the various ends of punishment, including retribution based on wrongdoing, deterrence, and rehabilitation).

<sup>38</sup> See Aaron P. Boesenecker and Leslie Vinjamuri, "Charting the Path of Justice in Peacebuilding," in *Restorative Justice, Reconciliation, and Peacebuilding*, eds. Jennifer J. Llewellyn and Daniel Philpott (New York: Oxford University Press, 2014) (establishing that the two types of goals for nations in transition are retributive and restorative, though many processes that work toward transitional justice fall somewhere in the middle).

<sup>39</sup> See Hatun Willakuy, Comisión de Entrega de la Comisión de la Verdad y Reconciliación, "Versión abreviada del Informe Final de La Comisión de la Verdad y Reconciliación" (2004), 412 (distinguishing between levels of reconciliation, including a political dimension among the state, society, and political parties; a social dimension, referring to institutions and civil society; and an interpersonal dimension at the community level).

<sup>40</sup> Peru's Congress and Chief Prosecutor moved quickly to charge former President Fujimori for crimes against humanity and lift his immunity. However, the arrest warrant that had been issued against him was only activated after he left Japan, where he had been living in exile, and travelled to Chile from which he was ultimately extradited. In 2009, Fujimori was finally convicted of human rights violations and sentenced to 25 years in prison, although he ultimately did not serve the full sentence.

<sup>41</sup> *Ibid.*

<sup>42</sup> Statute of the Special Court for Sierra Leone, January 16, 2002. In addition, separate from the commission and special court, the government as part of its disarmament, demobilization, and reintegration (DDR) program provided reintegration packages and skills training for former soldiers with the support of the international community and civil society. See Mohamed Gibril Sesay and Mohamed Suma, ICTJ, "Transitional Justice and DDR: The Case of Sierra Leone" (2009).

country's Truth and Dignity Commission was mandated to investigate corruption, economic crimes, and electoral fraud, in addition to violations of individual human rights.<sup>43</sup>

Much of the success of restorative justice procedures in a transitional justice context is related to the nature of the conflict and the effectiveness and fairness of the mechanisms put in place to address the legacy of those conflicts. For the most part, conflicts can be divided into horizontal conflicts, such as civil wars involving rival communities, and vertical conflicts, in which those in power wage war against citizens. When a horizontal conflict ends, the government must fill the social vacuum left when armed actors are demobilized, and in a way that promotes a culture that respects the rule of law.<sup>44</sup> This is particularly the case in societies where it had been acceptable to solve conflicts violently.<sup>45</sup>

The immense challenges countries face in the aftermath of horizontal conflict are illustrated by Rwanda's efforts to achieve a measure of both accountability and reconciliation in the wake of genocide. Rwanda developed community-based *gacaca* courts that aimed to bring perpetrators to justice, reveal the truth, and work toward reconciliation.<sup>46</sup> These courts operated in parallel to the national courts and the International Criminal Tribunal for Rwanda. In certain circumstances, they could issue reduced sentences for perpetrators who confessed their crimes,<sup>47</sup> as well as require them to carry out community service. Designed to be a form of community-based justice, the *gacaca* courts were intended to be more participatory.

However, Rwanda struggled to achieve those objectives in the face of an overwhelming number of cases and a paucity of resources. Although ultimately over 11,000 *gacaca* courts were established to prosecute over one million people, mostly lower-level suspects who were accused of genocide,<sup>48</sup> participation in the courts declined over time,<sup>49</sup> and the courts' impact on reconciliation remains a subject of debate.<sup>50</sup> In addition, the *gacaca* courts suffered from procedural in-

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43 See Sumaya Almajdoub, Maydan, "Transitional Justice in Tunisia: Challenges and Opportunities" (May 29, 2017), [www.themaydan.com/2017/05/transitional-justice-tunisia-challenges-opportunities/](http://www.themaydan.com/2017/05/transitional-justice-tunisia-challenges-opportunities/) (explaining that Tunisia's transition is innovative because it conceptualizes transitional justice broadly to address corruption and economic needs of the nation and regions of the country marginalized by the dictatorship).

44 See Uprimny and Saffon, *supra* note 92, at 9 (establishing the use of restorative justice frameworks in situations that have created vacuums of social control). As to contextualizing Colombia's conflict, historians differ in understanding it as a horizontal or vertical conflict. Though a civil war, many historians would argue that the conflict is in fact vertical because of the illegitimate use of violence by the state against its citizens. Indeed, perhaps Colombia is best categorized as both a horizontal and vertical conflict. See generally Comisión Histórica del Conflicto y sus Víctimas de Colombia, "Contribución al entendimiento del conflicto armado en Colombia" (February 2015) (outlining the history of the Colombian conflict and asserting that violence not only occurred on a horizontal, community level, but also on a vertical, institutionalized one).

45 See Fabio Andres Diaz and Magda Jimenez, "Colombia's Murder Rate is at an All-Time Low but its Activists Keep Getting Killed," *The Conversation*, April 6, 2018, [www.google.com/amp/s/theconversation.com/amp/colombias-murder-rate-is-at-an-all-time-low-but-its-activists-keep-getting-killed-91602](http://www.google.com/amp/s/theconversation.com/amp/colombias-murder-rate-is-at-an-all-time-low-but-its-activists-keep-getting-killed-91602) (suggesting that a continued violence against activists stems from a history of resorting to violence to remedy conflict, along with a vacuum of control that has yet to be filled by the Colombian government as part of the peace process after the demobilization of armed actors).

46 See generally Human Rights Watch, "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts" (2011), [www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts](http://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts) (describing Rwanda's use of community-based *gacaca* courts as part of its transitional justice process).

47 Chapter IV (Penalties), Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

48 See, e.g., Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990. Rwanda's genocide law categorized suspects into groups based on their position or crime. Category 1 included those who planned, organized, instigated, supervised and led the genocide; those who acted in positions of power; and those who committed notorious murders or committed acts of sexual torture. Category 2 included those who committed intentional homicide. Category 3 were those who killed or inflicted bodily harm without the intention to kill. Category 4 included those who committed offenses against property.

49 In fact, ultimately the government began to compel participation, a move that did little to encourage reconciliation. See Human Rights Watch, "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts" (2011).

50 Lars Waldorf, ICTJ, "Transitional Justice and DDR: The Case of Rwanda" (2009).

adequacies, which included a lack of legal expertise among judges and a lack of due process for those accused.<sup>51</sup>

Countries recovering from vertical conflicts have likewise struggled to address the legacies of past atrocities while seeking to rebuild broken societal relationships. Nations such as Germany and other countries in Central and Eastern Europe after the fall of the Berlin Wall that prioritized accountability and ending militarism enacted lustration and vetting laws to remove public service employees involved in human rights violations from their posts.<sup>52</sup> Yet although these processes helped eliminate militaristic ideologies from political institutions, they were not meant to establish responsibility for crimes and did little to advance the cause of truth. Rather, as administrative processes, they merely evaluated the suitability of the concerned individual to perform in the official position the person was holding.<sup>53</sup>

In comparison, South Africa had to respond to both horizontal and vertical conflicts, in which apartheid was perpetuated both institutionally and among members of the community.<sup>54</sup> South Africa's Truth and Reconciliation Commission compiled an incredible account of truth.<sup>55</sup> It also helped achieve forgiveness and catharsis for many of those who participated, including, for example, the parents of anti-apartheid activist Amy Biehl, who forgave their daughter's murderers and established a trust in her name.<sup>56</sup> While this restorative justice process was a powerful tool in resolving the country's horizontal conflict, it left something to be desired with regard to addressing the vertical, institutional conflict. To this day, the economic disparities that resulted from apartheid policies still exist, and the commission did little to change local and national power dynamics that buttressed apartheid policies in the first place.<sup>57</sup> While South Africa's restorative justice process effectively addressed the horizontal conflict between victims and perpetrators, it unfortunately did not focus on transformative reparations that would have dealt with

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<sup>51</sup> See generally Charlotte Clapham, "Gacaca: A Successful Experiment in Restorative Justice?", *E-International Relations Students*, July 30, 2012, [www.e-ir.info/2012/07/30/gacaca-a-successful-experiment-in-restorative-justice-2/](http://www.e-ir.info/2012/07/30/gacaca-a-successful-experiment-in-restorative-justice-2/) (assessing the successes and pitfalls of Rwanda's gacaca courts); Megan M. Westberg, "Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR," *University of Kansas Law Review* 59, 2 (2010): 331 (analyzing gacaca courts in Rwanda as a tool towards transitional justice).

<sup>52</sup> See Christina Binder, University of Vienna, "Introduction to the Concept of Transitional Justice" (November 2003), [www.bundesheer.at/pdf\\_pool/publikationen/transitional\\_justice\\_sr\\_11\\_2013\\_03\\_c\\_binder.pdf](http://www.bundesheer.at/pdf_pool/publikationen/transitional_justice_sr_11_2013_03_c_binder.pdf) (discussing vetting processes as part of their transition processes). Carlos Closa Montero, European Union, "Study on How the Memory of Crimes Committed by Totalitarian Regimes in Europe Is Dealt with in the Member States" (2014), <https://op.europa.eu/en/publication-detail/-/publication/a47f10b9-405e-48b7-b406-fb758819a5e8>.

<sup>53</sup> See Timothy Garton Ash, Monuments to Transformation, "Trials, Purges, and History Lessons," in *Atlas of Transformation* (last accessed Jul. 10, 2018, 4:33pm), <http://monumenttotransformation.org/atlas-of-transformation/html/h/history/trials-purges-and-history-lessons-timothy-garton-ash.html> (describing elements of the German peace process, including its trials and lustration process, as a reflection of victor's justice).

<sup>54</sup> See Michelle Parlevliet, "Icebergs and the Impossible," in *Human Rights and Conflict Resolution in Context: Colombia, Sierra Leone, and Northern Ireland*, eds. Eileen F. Babbitt and Ellen L. Lutz (New York: Syracuse University Press, 2009) (describing how South African apartheid occurred within horizontal, or inter-community relationships, and vertical, or institutional, ones).

<sup>55</sup> See generally Roman David, "In Exchange for Truth: The Polish Lustrations and the South African Amnesty Process," *South African Journal of Political Studies* 33, 1 (2006): 81-99 (discussing the South African transitional justice model in which offenders were granted amnesty from criminal prosecution in exchange for the truth about their past acts).

<sup>56</sup> See Marianne Thamm, "Amy Biehl and Her Killers' Gift to South Africa: The Enduring Power of Restorative Justice," *Daily Maverick*, July 29, 2015, [www.dailymaverick.co.za/article/2015-07-29-amy-biehl-and-her-killers-gift-to-south-africa-the-enduring-power-of-restorative-justice/](http://www.dailymaverick.co.za/article/2015-07-29-amy-biehl-and-her-killers-gift-to-south-africa-the-enduring-power-of-restorative-justice/). See also Laura McLeod, Beyond Intractability, "Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process" (2015), [www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation](http://www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation) (suggesting that a critique of South Africa's TRC was its heavy focus on forgiveness that hindered individual reconciliation in many cases).

<sup>57</sup> See Peter Goodman, "End of Apartheid in South Africa? Not in Economic Terms," *New York Times*, Oct. 24, 2017, [www.nytimes.com/2017/10/24/business/south-africa-economy-apartheid.html?mtref=www.google.com&gwh=EB3CB53CD3514FBF170F77FBC952BEC3&gwt=pay](http://www.nytimes.com/2017/10/24/business/south-africa-economy-apartheid.html?mtref=www.google.com&gwh=EB3CB53CD3514FBF170F77FBC952BEC3&gwt=pay) (establishing that apartheid and its economic and institutional structures still exists).

the vertical one. Only recently has South Africa has begun to prosecute apartheid-era crimes, after years of immense efforts and strategic litigations.<sup>58</sup>

Given the many challenges faced by societies transitioning from conflict or repression, tensions over what to prioritize and when inevitably arise. National goals often diverge from those of the international community, which tends to prioritize retributive punishment over reintegration and restorative processes. This tension is evident in places such as Uganda, where national attempts to achieve apology, forgiveness, and reintegration through traditional rituals and amnesty have not matched international efforts to hold perpetrators to account. Although Uganda was the first state party to refer its own situation to the International Criminal Court, its relationship with the court has been ambiguous at best: part cooperative, part obstructionist. At the domestic level, the international crimes division of Uganda's High Court, which is responsible for prosecuting genocide, war crimes, and crimes against humanity, has yet to deliver a verdict in any case.<sup>59</sup>

Yet while international and domestic actors may set different justice-related priorities for transitioning societies, this does not diminish the important role that both retributive and restorative justice approaches can play and have played in providing a measure of truth and justice to victims in places where they would otherwise have little or no access to a remedy.

Colombia adopted a mixed approach to criminal justice for conflict-related crimes only after reflecting deeply on comparative experiences of transitional justice processes and lessons learned from approaches that were purely retributive or mainly restorative. In relation to purely retributive approaches, some studies show that conventional criminal tribunals (whether domestic, international, or hybrid) have proven to have little positive effect on truth and reconciliation because the specter of criminal accountability discourages perpetrators from acknowledging their responsibility and from participating in truth-seeking and other transitional justice processes.<sup>60</sup> Similarly, victims can be less likely to participate in criminal tribunals because they are more at risk of intimidation and physical harm, owing to the fact that their testimonies could result in perpetrators' incarceration.<sup>61</sup> What is more, the actual procedural mechanisms and design of criminal tribunals may simply leave less space for victims to participate in the transitional justice process than does a restorative justice approach.<sup>62</sup> Criminal tribunals and their emphasis on forensic evidence also create an adversarial atmosphere that is ill-suited for both victims and perpetrators to share their narrative and increases the risk of retraumatization.<sup>63</sup> Shortcomings such as these of a purely retributive justice approach regularly fuel advocacy for more restorative practices.

But just as a retributive justice approach has its drawbacks, so, too, can a purely restorative justice one. Some have argued that restorative justice's emphasis on reconciliation "over-determines

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<sup>58</sup> ICTJ, "In South Africa, a Ruling in an Apartheid-era Murder Case Opens Paths to Justice." November 29, 2017, [www.ictj.org/news/south-africa-apartheid-era-murder-justice](http://www.ictj.org/news/south-africa-apartheid-era-murder-justice).

<sup>59</sup> See Kylie Pearce, Monash University, "The Success and Challenges of Transitional Justice in Sierra Leone," August 1, 2012, [www.monash.edu/law/research/centres/castancentre/public-events/events/2012/sierra-leone](http://www.monash.edu/law/research/centres/castancentre/public-events/events/2012/sierra-leone) (reporting that in his speech, Emmanuel Saffa Abdulai, the founder of the Society for Democratic Initiatives, lamented the tension between the Special Court and the Truth and Reconciliation Commission, leading to a diminished effectiveness for both entities); Jennifer J. Llewellyn and Daniel Philpott, "Introduction," in *Restorative Justice, Reconciliation, and Peacebuilding*, eds. Jennifer J. Llewellyn and Daniel Philpott (Oxford, UK: Oxford University Press, 2014) (highlighting the debate in Uganda between the Acholi Religious Leaders Peace Initiative, who supported the Amnesty Act of 2000 and traditional rituals toward reintegration and restoration, and the International Criminal Court, who believed that accountability was the essential ingredient for peace).

<sup>60</sup> Martina Fischer and Olivera Simic, eds., *Transitional Justice and Reconciliation: Lessons from the Balkans*, (New York: Routledge, 2015), p. 276.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

outcomes;” in other words, the *goal* of reconciliation becomes a *demand* for reconciliation.<sup>64</sup> Additionally, a more purely restorative justice system seems to assume that perpetrators and victims are willing, or able, to come together in solidarity and reconcile.<sup>65</sup> A process based only on restorative justice does not necessarily lead to the sorts of changes in power structures that are needed to transform a political and social culture of repression and violence. In the absence of any retributive sanctions, those in power are likely to remain in power, and many victims are likely to feel that perpetrators got off easy and paid no real price for the crimes they committed. Rather, holding accountable those in power who planned, ordered, or allowed human rights violations through a retributive justice process could lead to a greater respect for human rights standards than would applying restorative justice mechanisms.<sup>66</sup> Finally, many members of society simply see restorative justice processes as less legitimate than retributive processes.<sup>67</sup>

A mixed restorative-retributive approach to criminal justice offers great promise in transitional justice contexts.<sup>68</sup> The restorative elements of such an approach often allow for a greater and more active participation of victims and perpetrators than does a purely retributive model. For instance, the prospect of restorative sanctions in return for a perpetrator’s full acknowledgment of responsibility 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 and may more effectively deter those perpetrators who are in positions of power,<sup>69</sup> while also satisfying international standards of due process and punishment for serious crimes. Furthermore, by subjecting those perpetrators who do not acknowledge their 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).<sup>70</sup> Ideally, a mixed approach will use both elements of restorative justice to pursue societal healing, by encouraging perpetrators to actively acknowledge responsibility and victims to participate fully in the proceedings, and components of retributive justice to address problems of structural power.

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64 François du Bois and Antje du Bois-Pedain, eds., *Justice and Reconciliation in Post-Apartheid South Africa* (New York: Cambridge University Press, 2008), p. 697.

65 Rodrigo Uprimmy, De Justia, “Transitional Justice, Restorative Justice, and Reconciliation: Some Insights from the Colombian Case” (2017), [www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recuso\\_55.pdf](http://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recuso_55.pdf). p.10

66 Ibid., at 16.

67 *The Economist*, “Saving Colombia’s Peace,” October 6, 2016, [www.economist.com/leaders/2016/10/06/saving-colombias-peace](http://www.economist.com/leaders/2016/10/06/saving-colombias-peace).

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

69 See Uprimmy, *supra* note 67, at 10.

70 See “Veremos qué pasa en la Corte Constitucional:’ Santos sobre modificaciones a la JEP,” *Semaná*, June 27, 2018, [www.semana.com/nacion/articulo/santos-sobre-modificaciones-a-procedimiento-de-la-jep/573300](http://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 current administration’s party, the Central Democratic Party). Those changes were ones that, following a campaign that promised radical changes to SJP based on the assumption that the Peace Agreement favored impunity over justice, both limiting the competency of the SJP over extradition and freezing the cases of ex-military members until the creation of their own special chamber within the SJP. 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 seeks 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 Duque, but also his political allies such as Paloma Valencia, in attempting to dismantle elements of the peace agreement in this way.

## CHAPTER 2: General Challenges of Restorative Justice

Although the Final Agreement calls for mixed criminal justice procedures for conflict-related crimes, it consistently emphasizes the need for restorative approaches to transitional justice. It is therefore worth noting some of the general challenges that can arise when employing restorative justice mechanisms in a transitional justice context.

### Challenges Relating to Victims

While the Final Agreement provides for restorative practices that put victims' rights at the center of the SJP processes,<sup>71</sup> such restorative justice mechanisms themselves can raise several potential challenges in relation to victims. For one, the rhetoric around restorative justice usually involves putting victims at the center of the process, yet sometimes victims are not given opportunities to participate in restorative justice mechanisms.<sup>72</sup> Thus, despite their intent to ensure victim participation, it is sometimes the case that such practices "steal the conflict" from victims in a similar way that criminal justice systems might.<sup>73</sup> That said, it cannot be assumed that victims want to participate in restorative justice processes: They may very well prefer to delegate this responsibility or task to somebody else, whether that be other victims, victims' organizations, or victims' legal counsel.<sup>74</sup>

As it does in ordinary criminal justice circumstances, massive victimization in post-conflict settings poses the problem of victim representation.<sup>75</sup> The sheer number of victims and perpetrators, coupled with limited resources, make it impossible to facilitate encounters between every victim and perpetrator.<sup>76</sup> Thus, a danger with using restorative justice mechanisms as a response to mass victimization is that they may perpetuate victims' feelings of invisibility. Relatedly, it is neither possible nor desirable to fully restore the status quo as it was for victims before the conflict, since the vulnerability they experienced then could actually have been one of the reasons for their victimization. In this sense, from a strictly retributive justice perspective, restorative justice practices will typically offer insufficient compensation to victims.<sup>77</sup>

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<sup>71</sup> See Final Agreement, *supra* note 7, at 154.

<sup>72</sup> Gerry Johnstone, "Restorative Justice for Victims: Inherent Limits?" *Restorative Justice* 5, 3 (2017): 387.

<sup>73</sup> Nils Christie, "Conflicts as Property," *British Journal of Criminology* 17, 1 (1977): 7.

<sup>74</sup> See Johnstone *supra* note 74, at 391.

<sup>75</sup> This problem is also related to due process, which is taken up in Chapter 2.

<sup>76</sup> See Final Agreement, *supra* note 7, at 167, Article 480 (acknowledging such a problem when mandating that the SJP focus on the most representative of crimes).

<sup>77</sup> Darren Bush, "Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely about Restoration," *Utah Law Review* 2003, 1 (2003): 459.

It is also important to be aware that, despite their healing-related aims, restorative justice processes can still lead to the retraumatization of victims and to victims feeling they are being treated unfairly. Provision of both long-term psychosocial care and professional preparation for any engagement with perpetrators are essential for victims. While these are crucial in any criminal proceedings, they are especially so in a restorative justice process as the nature and extent of the engagements between victims and perpetrators can be even more demanding. More importantly, if restorative justice processes are largely triggered by the actions of perpetrators or organizations that work with them, then victims can certainly feel that they are not the focus of these processes, that they are receiving less preferential treatment, and that the processes are responding primarily to the perpetrators' needs.<sup>78</sup> Victims of armed conflict may already feel that their government has abandoned them, and restorative justice processes can solidify this feeling further if they fail to treat them on equal terms with perpetrators.

### **Challenges Relating to Perpetrators**

A restorative justice system will likely be unsuccessful if it does not treat perpetrators with the same dignity that it affords to victims. As with victims, perpetrators, too, need long-term psychosocial care, and such care is mandated by the Final Agreement.<sup>79</sup> It is likewise essential to properly prepare perpetrators for any encounters with victims. Such preparation is not only critical for the psychosocial health of perpetrators, but also for that of victims as it can help prevent perpetrators from retraumatizing victims.<sup>80</sup> Finally, restorative justice mechanisms must not stigmatize perpetrators themselves. Instead, they should focus on the shamefulness of their actions and provide means through which perpetrators, by actively acknowledging their responsibility for crimes they committed, can demonstrate their willingness to reintegrate into a society where such abuses are no longer acceptable.<sup>81</sup> Restorative justice processes can also raise a number of concerns related to due process for perpetrators, which will be discussed in greater detail at the close of this chapter.

### **Challenges Relating to Judges**

Victims and perpetrators are of course not the only actors in judicial proceedings: Judges also play a critical role and face challenges. In more traditional criminal proceedings, judges are gatekeepers of the facts, procedural experts, and adjudicators. But restorative justice practice cautions against conferring such a central role on judges.<sup>82</sup> Judges may be tempted to act as mediators in restorative justice encounters; however, any restorative justice encounter between victim and perpetrator must be facilitated by restorative justice experts who do not hold another position in the institutional proceedings involving the same parties. These experts may not have any experience with atrocity crimes. Professor Adolfo Ceretti explains that judges are “equidistant” to both perpetrators and victims, meaning that they are *impartial*, while restorative justice mediators are “equiproxy,” meaning they are *equally helpful* to perpetrators and victims.<sup>83</sup> In this sense, the judge cannot act as the mediator because the judge is legally required to maintain impartiality and make decisions that are then imposed on the parties. Ceretti notes that the mediator’s job is in fact not only to treat participants impartially, but to ensure that each participant is helped equally along their restorative and reparative journey.<sup>84</sup> For example, a mediator may

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<sup>78</sup> Ibid.

<sup>79</sup> See Final Agreement, supra note 7, at 77.

<sup>80</sup> Chapter 4 explores this issue in greater depth.

<sup>81</sup> John Braithwaite, “Shame and Criminal Justice,” *Canadian Journal of Criminology* 42, 3 (2000): 282.

<sup>82</sup> Susan M. Olson and Albert W. Dzur. “Reconstructing Professional Roles in Restorative Justice Programs,” *Utah Law Review*, 2003, 1 (2003): 64.

<sup>83</sup> Adolfo Ceretti, “Restorative Justice in the SJP,” ICTJ Restorative Justice Conference, Bogotá, June 2019.

<sup>84</sup> Ibid.

need to comfort perpetrators, to let them know that they are valued and have dignity, in order to facilitate the restorative justice process. Judges, however, would not be able to perform that role without compromising their own impartiality.

Judges also face challenges on how to best incorporate disparate groups into the processes. This challenge manifests itself in different ways. The Final Agreement may rightly require that restorative justice mechanisms make every effort to include indigenous groups and to take a territory- and gender-sensitive approach in the implementation of the CS.<sup>85</sup> But at the same time, judges receive very little advice on how to actually achieve this aim. Complicating matters further is that restorative justice literature often conflates restorative justice with “traditional” or “indigenous” justice, assuming that the incorporation of a local or indigenous practice will necessarily entail a restorative justice process.<sup>86</sup> All things considered, the judges of the SJP face an enormous challenge: implementing comprehensive retributive and restorative justice proceedings that consider and include the many different groups of victims and perpetrators involved, respond to the needs of communities affected by crimes in different territories, and take an approach that is sensitive to issues of gender and to the cultures of various indigenous groups. In this sense, the SJP judges are called to design and develop a system that has no precedent in transitional justice experiences elsewhere in the world.

### **Challenges Relating to Communications**

Restorative justice poses many challenges from a communications standpoint. One such challenge regards the very definition of “restorative justice.” If the term cannot be properly defined, then its value cannot be communicated. Linked to this challenge is a legitimacy deficit—that is, when a society is not convinced of the merits of restorative justice because many of its members instead favor retributive justice.<sup>87</sup> Opening to the general public the hearings of certain cases in which perpetrators acknowledge their responsibility and broadcasting them could effectively address this legitimacy deficit. At the same time, the publicity could backfire and undermine the credibility of the process. Moreover, it is by no means easy to decide whether and which hearings should be made public. That said, victims of armed conflict themselves may be skeptical of restorative justice processes because they may not see themselves as victims of trauma who can benefit from these processes, but rather as simply people whose rights have been violated and who are entitled to justice in the form of retribution against the perpetrators.<sup>88</sup>

There are also several specific challenges related to how actors and institutions directly involved in the judicial proceedings communicate with the media and general public. Experience from

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<sup>85</sup> See Final Agreement, *supra* note 7, at 136. The trail of victims left behind by Colombia's armed conflict include victims of forced displacement, murder, forced disappearances, kidnapping, sexual violence, child recruitment, and torture. They are victims of larger systems of inequality, both in resources and in power, that enabled the conflict to burgeon as it did. Those most disproportionately affected by the conflict reflect this inequality; they are children and adolescents, farmers, indigenous, Afro-Colombians, and women. The numbers are staggering: 7.5 million people victims of internal forced displacement, as many as 220,000 killed, and at least 80,000 disappeared. In fact, around 80 percent of those who died because of the conflict were civilians. But victims of Colombia's armed conflict were not only civilians. They were also those involved in the armed conflict, children and adolescents recruited as soldiers and members of the cause who were not only affected by socioeconomic disparities but who were also denied their voice through political exclusion. See Joel Gillin, “Understanding the Causes of Colombia's Conflict: Inequality,” *Colombia Reports*, January 7, 2015, <https://colombiareports.com/understanding-colombias-conflict-inequality/>.

<sup>86</sup> William R. Wood and Masahiro Suzuki, “Four Challenges in the Future of Restorative Justice,” *Victims and Offenders* 11, 1 (2016): 158. See Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2015), 29. For various indigenous groups (Maori, Navajo, many African ethnic groups, and Tibetan Buddhists) a wrongdoing represents a wound in the community, a tear in the web of relationships. See also Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice*, Fifth Edition (Waltham, MA: Anderson Publishing, 2015), 3-6.

<sup>87</sup> See *The Economist*, *supra* note 69.

<sup>88</sup> See Johnstone *supra* note 74, at 390.

post-conflict Balkans and the International Criminal Tribunal for the former Yugoslavia demonstrate the need to train criminal judges in transitional justice contexts from the outset on how to effectively communicate to the media.<sup>89</sup> Such trainings should help judicial institutions operating in these contexts to be mindful not to exclusively broadcast one type of victim or perpetrator or case.<sup>90</sup> Judges and institutions should also be wary of communicating about their work in a way that could retraumatize victims, especially in cases of sexual violence or those involving perpetrators who do not acknowledge their responsibility.<sup>91</sup>

### **Challenges Relating to Due Process**

The SJP's restorative justice proceedings raise several concerns related to due process and the principles of presumption of innocence, the right against self-incrimination, and a right against double jeopardy.<sup>92</sup> When perpetrators are offered the benefits of a restorative justice procedure on condition that they acknowledge their responsibility,<sup>93</sup> the presumption of innocence principle is not applicable. Furthermore, because participating perpetrators acknowledge responsibility without knowing for certain that the restorative justice proceedings will be completed in good faith and as intended, there is understandable concern that they may be in fact incriminating themselves, with the possibility that their acknowledgments may be used against them in subsequent punitive proceedings.<sup>94</sup> Additional concerns relate to the right to trial, right to counsel, and right to confidentiality.<sup>95</sup> Subsequent chapters will address some of these challenges relating to due process.

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<sup>89</sup> See Fischer and Simic, *supra* note 62, at 273.

<sup>90</sup> John Braithwaite, "Restorative Justice in the SJP," ICTJ Restorative Justice Conference, Bogotá, June 2019.

<sup>91</sup> See Sibley Hawkins, ICTJ, "'You Can Change the Course of a Country': Report on the International Gender Symposium" (2017), 10. "Media stories often perpetuate certain images of women as sad, downtrodden, and weak because of their experiences. In the eyes of the media, victimhood sells more stories than resilience, activism, and strength, and women in particular must fit into this narrow conception of what it means to have been a victim of human rights violations."

<sup>92</sup> Tina S. Ikpa, "Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System," *Washington University Journal of Law and Policy* 24 (2007): 312.

<sup>93</sup> See Johnstone *supra* note 74, at 388.

<sup>94</sup> See Ikpa *supra* note 94, at 312.

<sup>95</sup> Ibid., at 312-317.

## CHAPTER 3: Principles Important to the Success of the SJP

Having considered various challenges facing the SJP and its mixed procedural approach, this chapter will present some recommendations on how it could address them.

### **Desirability of Early Acknowledgment**

The SJP should be particularly attentive to cases involving perpetrators who could acknowledge responsibility early in the proceedings. Public acts of acknowledgment of full responsibility are of great value for both demonstrating and communicating the merits and the power of restorative justice proceedings.<sup>96</sup> It is therefore recommended to identify early those cases involving perpetrators who are ready to make an act of full acknowledgment, so-called “early acknowledging perpetrators,” so that the SJP can move forward with holding public hearings that will show Colombian society the value of restorative justice processes and encourage more victims and perpetrators to participate in the proceedings. The SJP may prioritize working with these early acknowledging perpetrators and with victims who are similarly prepared for public hearings of acknowledgments and conferences on restorative justice projects. In this way and with proper safeguards in place, the SJP could foster the reconciliation processes among victims and perpetrators and thereby advance the goals of the peace process. At the same time, the SJP must not rush victims and perpetrators, ensuring instead that they are indeed ready to participate in the process.

### **Preparation of All Parties**

It is essential that all parties are thoroughly prepared ahead of their participation in the SJP proceedings. One component of such preparation is managing the expectations of both victims and perpetrators prior to each stage of the process. The SJP should clearly communicate its functions, its procedures, its procedural phases, and what victims and perpetrators can expect from the SJP overall. As part of this responsibility to manage expectations, the SJP must communicate that it is neither a purely retributive nor purely restorative judicial body, but rather a mixed system that prioritizes voluntary participation and acknowledgment over adversarial and punitive proceedings.<sup>97</sup>

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<sup>96</sup> The authors endorse public hearings of acknowledgment instead of written ones because public hearings have greater value for communications purposes and can help promote the legitimacy of the SJP. Nevertheless, they need to be carefully prepared.

<sup>97</sup> See Chapter 1 for further details on the SJP's mixed process.

As part of their preparation for participation in the SJP, victims and perpetrators must be prepared ahead of any specific victim-perpetrator encounter.<sup>98</sup> To do so, the SJP can make it clear to victims that an apology is a process and that they can request it; however, they might never receive an apology from a perpetrator or only receive one later on in the proceedings. That said, it is at the very least the right of victims to make such demands. The SJP should make clear to perpetrators that they should not demand forgiveness from victims. Demanding an apology or forgiveness runs against the participatory, non-adversarial, and voluntary nature of restorative justice mechanisms. These demands could lead to retraumatization. Moreover, a forced apology or forgiveness can be void of any restorative value.<sup>99</sup> Relatedly, perpetrators must be advised that they can *explain* their behavior, but must not attempt to *justify* their behavior.<sup>100</sup> The SJP may play a role in identifying those perpetrators who appear to be justifying rather than explaining their actions and may want to delay victim-perpetrator encounters in such cases to prevent possible retraumatization.

Fundamental to these preparations is the informed consent of all parties. Informed consent is explicit and a clear indicator of a party's level of preparation and readiness for the encounter, even if it is not perfectly reliable. The SJP must therefore obtain informed consent of victims and perpetrators prior to any encounter. At the same time, the SJP cannot assume that such informed consent is an infallible indicator of participatory readiness. Informed consent may also serve as a barometer of how well the preparation process is functioning in general: Acquiring high levels of informed consent may indicate that the procedures are functioning well, while acquiring low levels of informed consent indicate the opposite. Even though informed consent is key, it does not have to be spelled out in a written, formal document. Instead, acquiring informed consent can be an open process led by the SJP. This open and less formal process may even help legitimize the SJP, by making interactions with victims and perpetrators more personal and human and less bureaucratic, and perhaps by introducing culturally sensitive approaches. In any case, the SJP is responsible for tailoring the preparation so that the parties have all the information required to give their informed consent.

As part of the preparation process, the SJP should encourage victims and perpetrators to be accompanied by their "communities of care."<sup>101</sup> Encounters between victims and perpetrators may be tainted by power discrepancies, and such power discrepancies can further traumatize participants. To mitigate such power discrepancies, Professor Braithwaite suggests that both parties should be accompanied to their encounters by their respective communities of care.<sup>102</sup> The presence of these communities of care can help interfere with any power discrepancies by increasing the diversity of the conference.<sup>103</sup> Furthermore, communities of care may also prevent

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<sup>98</sup> Such encounters include the Public Hearing of Acknowledgment, any mediated conference on restorative justice projects, and the more indirect encounter that can occur when the Acknowledgment Chamber interviews perpetrators regarding their version of the facts, while victims observe in an adjacent room.

<sup>99</sup> See Ruben Carranza, ICTJ, "More than Words: Apologies a Form of Reparation" (2015), 18, [www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf](http://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf). "An apology must be sincere; perceptions of a lack of forthrightness can undermine an apology."

<sup>100</sup> Once again, this distinction boils down to the potential for retraumatization inherent in a perpetrator attempting to justify their actions to victims. ICTJ's discussions with members of the FARC-EP's defense team revealed that they are concerned that their efforts to "explain" might appear to be efforts to "justify." These concerns also seemed to be genuinely addressed in terms of a desire not to retraumatize victims.

<sup>101</sup> This report uses McCold and Wachtel's definition of a community of care as a group of people who "have a significant emotional connection with a victim or offender," such as parents, spouses, siblings, friends, teachers or co-workers." See Paul McCold and Ted Wachtel, International Institute for Restorative Practices, "In Pursuit of Paradigm: A Theory of Restorative Justice" (2003), paper presented at the XIII World Congress of Criminology, August 10-15, 2003, Rio de Janeiro, [www.researchgate.net/profile/Paul\\_Mccold/publication/237314664\\_In\\_Pursuit\\_of\\_Paradigm\\_A\\_Theory\\_of\\_Restorative\\_Justice/links/58deba1392851c36954572ed/In-Pursuit-of-Paradigm-A-Theory-of-Restorative-Justice.pdf](http://www.researchgate.net/profile/Paul_Mccold/publication/237314664_In_Pursuit_of_Paradigm_A_Theory_of_Restorative_Justice/links/58deba1392851c36954572ed/In-Pursuit-of-Paradigm-A-Theory-of-Restorative-Justice.pdf).

<sup>102</sup> See Braithwaite *supra* note 92.

<sup>103</sup> *Ibid.*

a perpetrator, or a victim, from acting in a counterproductive way in the encounter.<sup>104</sup> That said, the SJP must also be mindful not to conflate communities of care with “affected communities.” While there may be overlap between the two, a community of care is understood to mean the group of people that has a “significant emotional connection with either victim or offender,” whereas the affected community refers to the group of people who have been primarily affected by the perpetrators’ actions. The affected community is more associated with the offensive acts themselves, while a community of care is more connected to a specific victim or perpetrator.

### **Communicating the Value of Restorative Justice Through Representative Cases**

In the last chapter, several communications-related challenges were presented in the context of restorative justice. This section provides some possible solutions. To communicate the value of restorative justice’s value to the public, according to restorative justice experts, it is best to publicize representative cases. SJP magistrates or administrative staff tasked with outreach should use their discretion to determine which cases could be publicly broadcast as part of the effort to demonstrate the merits of the process.<sup>105</sup>

Once the SJP magistrates or other staff members have determined that a case is representative, they will need to strategize how to best communicate to the public the narrative of the grave and representative crime. Since the cases before the SJP involve mass atrocities committed by large numbers of perpetrators over long periods of time, it is impossible to accurately or effectively describe the full extent of the crimes. Similarly, it is impossible to tell the stories of every individual victim and perpetrator to the public. As a solution, the SJP could take a kaleidoscopic approach to communicating the narrative of the case, in which the testimonies of various perpetrators who acknowledge their responsibility for different constitutive acts of the crime are broadcast. Take, for example, Case 003 on extra-judicial killings (“false positives”):<sup>106</sup> Somebody admits to killing civilians, somebody admits to forging paperwork, and somebody admits to harboring prejudice against certain territories. Taken together, these public acknowledgments would present an overarching, albeit composite, narrative of the crime. This approach also offers possible solutions to two problems: limited resources to tell the story of all parties and the difficulty to capture crimes of scale in a single narrative.

### **Effectively Communicating the SJP’s Legitimacy**

An effective way to convince members of the public who desire punitive measures of the SJP’s legitimacy is to clearly explain the proceeding’s retributive justice components. For example, judges in the Acknowledgment Chamber could delineate any restrictions of liberties to which perpetrators are subject in their ruling, such as an early curfew or a restriction on travel to no more than a few miles from the perpetrator’s residence during the time the person carries out a restorative sanctions project. Additionally, the broadcasting of public hearings of acknowledgement, with the proper safeguards and preparations in place, can demonstrate a retributive justice element of the process. Namely, those Colombians who want a more punitive judicial remedy will see for themselves perpetrators facing the harm that they have caused. The SJP should publicize it when it sentences non-acknowledging offenders to the mandatory 15 to 20 years in

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<sup>104</sup> Ibid.

<sup>105</sup> In determining which cases should be publicly broadcast, the SJP may wish to consider the following questions: Are victims being represented in the current case through various ways and modalities? Are only a small percentage of affected victims willing, or able, to participate? Are victims of less tangible harms—victims of violations other than physical trauma such as economic or cultural loss of a region—represented as well? Are the perpetrators in the current case reflective of many perpetrators of the Colombian conflict as a whole? For example, in case 003, are the perpetrators from different ranks in the military demonstrating various forms of responsibility? Are the perpetrators in the current case responsible for different aspects of the grave and representative crime?

<sup>106</sup> El caso 003: “Muertes ilegítimamente presentadas como bajas en combate por agentes del Estado.”

prison or when it sentences late-acknowledging perpetrators to five to eight years in prison under the applicable provisions of the Final Agreement for alternative sanctions.

The SJP also ought to emphasize that participation in its processes will not result in due process rights violations. It should reiterate how Colombia is still bound by its obligations under international humanitarian law and international human rights law in all of the SJP's procedures.<sup>107</sup> The SJP can also communicate that the Final Agreement and the jurisdiction's applicable normative framework are sufficiently clear about conditioning the level of sanctions that a perpetrator will face upon the level of the perpetrator's acknowledgment—the so-called Regime of Conditionality.<sup>108</sup> Furthermore, the Final Agreement itself mandates that the SJP "respect fundamental rights of due process, defense, legal assistance, and the independence and impartiality of justice."<sup>109</sup> The SJP also applies the most favorable law to perpetrators, and the SJP's judgments are subject to appeal.<sup>110</sup> Such provisions should satisfy critics, especially considering the fact that the SJP is a criminal jurisdiction. The provisions, however, do not undermine the more informal but mediated interactions between victims and perpetrators that are also a part of the SJP's procedures.

### **Long-Term Psychosocial Support**

Along with preparing victims and perpetrators for participation in its proceedings, the SJP must provide sustained psychological supports throughout the process. Prior to any encounter between victim and perpetrator, the SJP must verify that both either received psychosocial support, or were offered but declined it. In this way, the SJP acts as a final safeguard against retraumatization. Restorative justice mediators should also be offered psychosocial support to ensure that they are able to carry out their duties and are not adversely affected by their exposure to the highly emotional and charged dynamics of the encounters. Long-term psychosocial support must be provided because such support is essential at every step of the process.

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<sup>107</sup> See Final Agreement, *supra* note 7, at 155; L1957/19 artículo 23.

<sup>108</sup> See generally Corte Constitucional de Colombia. Sentencia C-080 de 2018 and Sentencia C-674 de 2017.

<sup>109</sup> See Final Agreement, *supra* note 7, at 156.

<sup>110</sup> *Ibid.*

## CHAPTER 4: Procedures for Achieving the SJP's Restorative Justice Aims

Earlier, several important principles were outlined that the SJP should consider as it moves forward. This chapter offers some recommendations for specific procedures that help ensure these principles are incorporated throughout the process. The focus here is on victim-perpetrator encounters.

### Prior to Formal Involvement in the SJP

The resilience of victims, their creativity, and their courage are demonstrated time and again in Colombia. Victims and perpetrators have initiated restorative justice processes organically in affected communities before any formal involvement in the SJP. As an important procedure, the SJP should inform perpetrators that any restorative justice projects benefiting victims they agree to undertake, before participating in the SJP, may eventually qualify as "Work and Activities with Reparative Content" (TOAR).<sup>111</sup> It is recommended that the SJP provide the relevant information to perpetrators prior to the beginning of formal SJP proceedings.<sup>112</sup> The SJP should ensure that perpetrators are aware of TOAR and their implications on the final sanction, with the caveat of course that the approval and consequent inclusion of TOAR in the final decision are not automatic. The SJP may wish to disseminate such information directly in the FARC-EP's Territorial Training and Reincorporation Spaces.<sup>113</sup> Similarly, the SJP may urge the Transition Strategic Command of the Ministry of Defense to share important information about

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<sup>111</sup> "Los Trabajos Obras y Actividades con Contenido Reparador." See generally Final Agreement, *supra* note 7, at 176. "As regards the members of an organization signing a peace agreement with the Government, the period of time for which they remain in Transitional Local Zones for Normalization (TLZNs) shall be regarded, where applicable, as time spent complying with the sanction, provided that during that time period they have carried out tasks, work or activities with a reparative content. At the end of the period for which they remain in the TLZNs, the tasks, work or activities with reparative content carried out by individuals under the jurisdiction of the Special Jurisdiction for Peace shall also be regarded as time spent complying with any sanction which may be imposed on them, provided that those tasks, work or activities are carried out in a perfectly defined and verifiable territorial location. Verification of the requirements and process under this paragraph shall be carried out by the Executive Secretary of the SJP, who may request the assistance of the Office of the United Nations High Commissioner for Human Rights in Colombia, and, once the Special Jurisdiction for Peace has been established, by the Tribunal for Peace." See also L1957/119, artículo 132. (Affirming the availability of reduced time sentenced for the Special Sanctions when the perpetrators have already done TOAR. This article maintains, though, that it is up to the First Instance Chamber to decide on whether the perpetrators' conduct qualify as TOAR and that such conduct must have been previously verified by the Executive Secretary).

<sup>112</sup> See Final Agreement, *supra* note 7, at artículo 131. The agreement defines such qualifying criteria as: (1) The activity carried out has provided reparations or redress to victims or has had a restorative impact; (2) Its implementation has been recognized by the verification mechanisms agreed to by the parties for each activity or work or by the verification mechanisms agreed to by the parties in Item 6.1 of the General Agreement of 24 November 2016 regarding compliance with the conditions of the CS; and (3) It is compatible with the list of sanctions.

<sup>113</sup> "Espacios Territoriales de Capacitación y Reincorporación" in Spanish.

TOAR with perpetrators from the armed forces.<sup>114</sup> Not only might such information encourage early acts of a restorative and reparative nature, but it may make the job the SJP's job easier: Perpetrators who begin working on restorative justice projects early are likely to have more refined designs of, and experience with, these sorts of projects when they come before the Acknowledgment Chamber.

### **Judicial Chamber for Acknowledgment of Truth, Responsibility, and the Determination of Facts**

#### **Submission of Reports by Victims to the SJP<sup>115</sup>**

In the spirit of the Final Agreement and to maximize the restorative effect of empowering victims, the SJP should facilitate the submission of victims' reports on the egregious violations they suffered. When and where possible, magistrates from the Acknowledgment Chamber should travel to the affected communities to collect the reports. ICTJ has learned from experience how important it is for specific groups of victims, particularly marginalized communities, to meet the judges in person and be able to share with them their stories in the manner they choose and that reflects their needs and expectations.<sup>116</sup> Furthermore, by meeting the victims face-to-face and receiving their report with solemnity (for instance, while wearing full judicial robes), magistrates can demonstrate the seriousness with which they listen to the victims. Should the judges be unable to travel to the affected community, the SJP should help arrange for representatives of the community to travel to Bogotá to submit the report.

It should be noted that the SJP can accept a preliminary report submission, even when it does not meet the formal or substantive requirements. In this case, victims may submit a final report at a later stage without ceremony in Bogotá.

#### **Voluntary Versions**

Following the submission of victims' reports, a procedural phase begins that is focused on building a consensus as to the facts of the violations alleged in the reports. Perpetrators who expressed willingness to acknowledge responsibility are encouraged to be forthcoming in this phase. To increase meaningful victim participation, the SJP should consider facilitating an indirect encounter when it conducts its initial interviews with perpetrators, whereby victims are permitted to observe the perpetrators' interviews from an adjacent room and pass along questions in a controlled fashion.<sup>117</sup> It should also be noted that the magistrates' behavior during these interviews, and in nearly all stages of the SJP, can in fact influence whether victims and

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<sup>114</sup> "Comando Estratégico Conjunto de Transición del Ministerio de Defensa" in Spanish. The group is responsible for facilitating the participation of perpetrators from the Public Forces in the SJP.

<sup>115</sup> See Final Agreement, supra note 7, at 165 (concerning "reports from Colombian victims' and human rights organizations with regard to acts committed during or because of the armed conflict, as well as from judicial or administrative sources").

<sup>116</sup> The Alianza Voces, a consortium of LGBTI rights organizations working on reports for the SJP with the support of the ICTJ, concluded its report on human rights violations against LGBTI people in the Montes de María region on July 2019. The victims mentioned in the report that they personally delivered copies of their testimonies to an SJP magistrate who attended an event organized by the organizations in the region. This event was the first time that these victims had had the opportunity to meet with representatives of the state (the Inspector General's Office was also present), as well as other victims of sexual violence. This type of event is restorative in nature in that it provides a setting for the SJP to recognize and affirm the dignity of the victims. A few days later, the consortium officially presented the report to the Acknowledgment Chamber. The victims were also in attendance and performed a sociodrama written by themselves.

<sup>117</sup> In fact, the SJP has just begun this very process in its Case 003 on extrajudicial killings or "False Positives" following the ruling in Auto 080 de 2019 II.1.8-10. Counsel for victims can be present in the interview room with the acknowledging perpetrator, similar to what has recently occurred in Case 003. Victims observing the interview should be allowed to pass on questions to the acknowledging perpetrator, through the victims' counsel who is present with the perpetrator, after the perpetrator finishes relaying his or her version of the facts.

perpetrators view the SJP as legitimate and whether they ultimately regain trust in Colombian institutions. What is paramount at this stage is that the SJP does not create an adversarial atmosphere that discourages perpetrators from acknowledging their responsibility. The acknowledgement 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 from providing as much information as possible, so that in a later stage they assume a maximum responsibility for serious crimes. The following procedural safeguards should be considered:

1. Remind victims and their representatives that the aim of the interviews is to encourage perpetrators to contribute to truth seeking and possibly acknowledgment, and that they will have additional opportunities to ask the perpetrators questions and present their side of the story.
2. At this initial stage, encourage victims to base their questions on what perpetrators have already acknowledged in the interview. Victims may be particularly well suited to ask relevant questions that might not occur to magistrates but that get at details that are important to the victims.
3. Encourage victims to ask questions that are forward looking, rather than focused on the perpetrator's past behavior or that stigmatize the perpetrator—for example, "how are you going to try to make your victims whole again?"
4. Encourage the magistrates conducting the interview to use their discretion on whether or not to allow questions to be asked.
5. Remind perpetrators they have the option to decline to answer any question, but also that a forthcoming attitude and willingness to respond to victims are more consistent with the aims of the proceedings. A reiterative silence can be interpreted as a means to conceal the truth and therefore as a breach of the Regime of Conditionality.<sup>118</sup>

### **Acknowledgment of Responsibility**

After these initial interviews with perpetrators, the SJP begins the "Acknowledgment of Responsibility" stage during which the Public Hearing of Acknowledgment ("Public Hearing") takes place. The Public Hearing offers the possibility for a mediated meeting between victim and perpetrator in which they develop and agree upon a restorative justice project.<sup>119</sup> Direct victim-perpetrator encounters are a primary goal of restorative justice systems, but these encounters should not occur without proper procedures and safeguards in place.

The Public Hearing and any preceding conference on a restorative justice project are the first formal victim-perpetrator encounters in the SJP, necessitating the following preparatory procedures. 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 an informal conversation. At the same time, it is not a formal indictment. Rather, it is meant to be a preparatory measure that informs perpetrators of what

<sup>118</sup> See Appeals Section. Interpretative Sentence, TP-SA-SENIT 1 of 2019, "Sobre beneficios provisionales, régimen de condicionalidad y participación de víctimas," Bogotá, 3 de abril de 2019, par. 270. "Pero un silencio reticente-una mentira negativa-sí puede usarse para limitar beneficios y, por tanto, considerarse apto para probar un incumplimiento del régimen de condicionalidad y, en ciertas circunstancias, contribuir en la valoración probatoria para fortalecer inferencias adversas al compareciente que pretenda beneficiarse del régimen sancionatorio procesal y sustantivo de la JEP."

<sup>119</sup> See Ley de Reglas de Procedimiento de la JEP. Ley 1922 de 2018, artículo 27, [Hereinafter L1922/18] (listing such victims' rights to participation in the SJP).

they may expect from formally participating in the SJP and allows them to begin preparing accordingly.<sup>120</sup> Second, in a meeting with the Acknowledgment Chamber, before appearing at the Public Hearing, perpetrators must acknowledge the judicial classification of their acts and their full responsibility for those acts.<sup>121</sup> There should be knowledge beforehand of everything substantive that happens in the Public Hearing, i.e., that perpetrators acknowledge full responsibility, for what conduct and crimes they take responsibility, the process, the timing and length of participation, and so on.<sup>122</sup> This prior knowledge is essential to prevent victims' retraumatization and ensure perpetrators' cooperate at this stage and in the subsequent Public Hearing. Finally, during or shortly after this meeting with the Acknowledgment Chamber, perpetrators decide whether they want the SJP to assign them a restorative justice project, or if they wish instead to design a project with victims and the affected communities, which they would later present to the SJP for final approval.<sup>123</sup>

If perpetrators do not want the SJP to assign them a project, they will need to participate in a meeting with victims and representatives of affected communities, mediated by the SJP's Executive Secretary Office, to develop a restorative justice project. Once again, victims and perpetrators must be prepared by their respective counsels, and a professional mediator should facilitate the encounter. In cases where victims and perpetrators cannot afford counsel, it will be provided to them by the SJP Office of the Executive Secretary's Autonomous System of Legal Advice and Defense.<sup>124</sup> Preparation for this encounter should include the following considerations, among others:

1. Manage the expectations of both victims and perpetrators with respect to the outcomes of the meeting, making them aware that both parties may have to compromise.
2. Explain to perpetrators that any restorative justice project must be designed with victims and approved by them.
3. Inform both perpetrators and victims about TOAR and establish whether victims and perpetrators are already in the process of executing a restorative justice project. If the perpetrators and victims indicate that they wish to continue with such a project, then the Office of the Executive Secretary should certify any TOAR already completed prior to the Public Hearing.<sup>125</sup>
4. Offer victims the opportunity to submit beforehand a list of what they would most want perpetrators to address in the design of the restorative justice projects. For example, victims may wish to highlight the FARC-EP's past environmental violence, and

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<sup>120</sup> In many ways this preliminary report of conduct and crimes is in the perpetrators' best interest and can help mitigate due process concerns. It is within the authority of the SJP to create such an informal preliminary report because L1922/18, art. 27, gives the SJP 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 intervenientes, 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."

<sup>121</sup> This must occur prior to the Public Hearing of Acknowledgment not only to help prevent possible retraumatization of victims, but also to preclude criminal prosecution of the perpetrators at a later date.

<sup>122</sup> There could even be rehearsals beforehand. This would be witness tampering in the ordinary criminal justice system, but in the restorative justice context it is psychosocial preparation.

<sup>123</sup> See Final Agreement, supra note 7, at 157 (calling for Acknowledgment Chamber 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.

<sup>124</sup> See L1957/19, artículo 115.

<sup>125</sup> Ibid., at artículo 132 (Descuento de la Sanción Propia).

therefore request a restorative justice project focused on improving the environmental health of an affected community.

5. Establish beforehand a legitimate process by which victims can choose, from among victims' groups, those they think are best suited to potentially represent them at such meetings. The SJP must facilitate and mediate this process.
6. Give victims the option to keep all personal and identifying information confidential (e.g., location of project, names of victims, and so on). Though, the SJP would still be able to publicize a summary of the project (e.g., what type of work the perpetrator is doing) in order to help communicate its merit and significance in relation to the sanction.
7. Inform victims and their affected communities that they may decline to host any restorative sanctions projects in their area if they so choose.
8. Prompt both victims and perpetrators to provide a list of individuals whom they would consider to be in their community of care. This list can help to the assess possible power imbalances between the parties ahead of the conference.
9. Carry out a risk assessment prior to the meeting in order to identify potential harms and how they may be addressed. A mediator could conduct such an assessment.<sup>126</sup>
10. Ensure that the SJP has alternative plans ready as a backup if a determination is made that the encounter is not safe or could be harmful. Such alternatives could include indirect mediation, video conferencing, telephone conferencing, the use of a two-way screen, audio or video recordings, written communication, and so on.<sup>127</sup>

The meeting between parties must be mediated by a professional restorative justice mediator provided by the SJP Office of the Executive Secretary. The mediator should not and cannot be an SJP magistrate. If the Office of the Executive Secretary does not employ sufficient mediators, it should begin the process of recruiting more as needed. The SJP must also be able to offer mediators who are able to communicate in the language that is most comfortable to victims and perpetrators. This procedural requirement reflects the provisions of the Final Agreement. Other procedural requirements include the following:

1. Ensure that no one is the recipient of the restorative justice project who does not want to be.
2. Ensure that there is time and space for reflection after the close of the meeting. Informal spaces have proven to be very conducive for unplanned restorative justice outcomes and processes.<sup>128</sup>

If victims and perpetrators come to agreement on the restorative justice project, they will publicly present the proposed project to the affected community.<sup>129</sup>

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<sup>126</sup> See UK Ministry of Justice, "Best Practice Guidance for Restorative Practice" (2011), at 11, <https://restorativejustice.org.uk/sites/default/files/resources/files/Best%20practice%20guidance%20for%20restorative%20practice%202011.pdf>.

<sup>127</sup> Ibid., at 19.

<sup>128</sup> Ibid., at 6. "Practitioners reported that in practice the informal 'tea and biscuits' time after a formal restorative meeting has finished can be the time where the most restoration happens. Reflecting this, the guidance makes clear how important this time is and how facilitators need to be alert to these 'unplanned' moments of restoration, which are often the key outcomes of a restorative process."

<sup>129</sup> To avoid outright rejection of a project, the affected community should be offered psychosocial support and preparation beforehand. The announcement of the restorative project also has value for communication purposes

In the Public Hearing, victims must be offered an opportunity to meaningfully participate.<sup>130</sup> Victims should be able to share their thoughts on the perpetrators' level of acknowledgment, comment on any restorative sanctions project, ask further questions, and make statements as they choose.<sup>131</sup>

### Resolution of Conclusions

The final stage in the Acknowledgment Chamber is the "Resolution of Conclusions." But how should the Acknowledgment Chamber structure the Resolution of Conclusions and what information should they include? The Acknowledgment Chamber should construct Resolutions of Conclusions that both provide a kaleidoscopic narrative of the grave and representative crimes and thoroughly detail the different aspects of the proposed sanctions, which are conditioned on the perpetrators' level of acknowledgment. In developing the Resolution of Conclusions, the Acknowledgment Chamber may want to proceed as follows:

1. Outline the patterns of behavior in a way that demonstrates the gravity of the crimes committed and how they represent conflict-related violence or abuse.
2. Stress that those grave and representative crimes occurred according to the accounts of both victims and perpetrators.
3. Detail the acknowledged responsibility of different perpetrators, the relationship of their functions within the criminal plan, and their role in the commission of the crimes.
4. Describe the final objective of the criminal plan involved in the case, not only each individual perpetrator's reason to take part in the plan.
5. Classify the crimes that have been committed according to applicable international criminal law.
6. If a TOAR is being considered, describe it in detail, emphasizing that elements are restorative, reparative, or retributive, so that it can be included in the special restorative justice sanction project.
7. In closing, obtain the signature of all parties: the Acknowledgment Chamber, the victims, and the perpetrators.

In order to preclude further criminal prosecution in either the Colombian criminal justice system or in the International Criminal Court (ICC), perpetrators must acknowledge in the Resolution of Conclusions that they have committed a crime as defined by international criminal law and the Colombian criminal code. The SJP and defense counsel should explain to perpetrators that they need to accept criminal responsibility in the Resolution of Conclusions in order to ensure that their case is considered legally adjudicated under domestic jurisdiction and therefore cannot be subject to further investigation by the ICC.<sup>132</sup> For the same purpose, the sanctions must emphasize the retributive justice measures alongside any reparative or restorative elements.<sup>133</sup>

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regarding the merits of restorative justice processes within Colombia's transitional justice process.

<sup>130</sup> L1922/18 artículo 27.

<sup>131</sup> Ibid.

<sup>132</sup> The authors specifically suggest that the SJP and defense counsel relay details of Article 20.3a-b of the Rome Statute regarding an already adjudicated case's admissibility at the ICC when the domestic prosecution is deemed to be "shielding" a perpetrator or the domestic prosecution is not independent or not impartial.

<sup>133</sup> Explicitly listing those elements of the sanctions that have a retributive justice component and explaining why each element should be considered retributive could lessen the concerns that the sanctions applied to fully acknowledging

The Resolution of Conclusions offers further opportunities for victims and perpetrators to participate in the SJP's restorative justice processes and to communicate their merits. The final version of the Resolution of Conclusions prepared by the Acknowledgment Chamber must be approved by perpetrators, victims, and the affected community.<sup>134</sup> They have the opportunity to sign the final Resolution of Conclusions in a public hearing of acknowledgment. Once victims and perpetrators have agreed on the final draft of the Resolution of Conclusions, the SJP should consider having perpetrators present the Resolution of Conclusions to the affected community in a public ceremony. In the ceremony, all parties involved can sign the Resolution of Conclusions or they can express their approval in other ways. It would be preferable if the Acknowledgment Chamber magistrates attended the ceremony, wearing their robes, and that the ceremony were broadcast publicly where possible.

### **First Instance Chamber in Cases of Acknowledgment of Truth and Responsibility**

Following the Resolution of Conclusions, the case moves to the First Instance Chamber in Cases of Acknowledgment of Truth and Responsibility of the Peace Tribunal ("First Instance Chamber"). The function of the First Instance Chamber is in part to verify the correspondence among the crime for which the perpetrator has acknowledged responsibility, the type of crime, whether the perpetrator is eligible for amnesty, and whether the proposed sanctions meet the legal requirements.<sup>135</sup> Since verifying such correspondences falls within the judges' authority, the recommendations below are limited to some procedural issues.

It is suggested that the SJP hold a mediated encounter between victims and perpetrators after it completes its evaluation of the Resolution of Conclusions, but before the First Instance Chamber issues its final sentence. This meeting would achieve two aims. First, it would serve as a last chance for victims to confirm their level of satisfaction with the perpetrators' level of acknowledgment, and for perpetrators to confirm their acceptance of the legal classification of their crimes according to international legal standards. This encounter would offer all parties a final opportunity to examine the design of the project. The following are some issues that might be confirmed:

1. Victims and perpetrators believe that the sanctions have been designed to be sufficiently reparative and restorative, or sufficiently retributive in terms of restrictions of liberties.
2. Perpetrators believe that they will be able to carry out the projects successfully.
3. Any restrictions of liberties are adequately elaborated.

It is recommended that the First Instance Chamber tailors some of the language of its final sentences in order to preempt any future prosecution by the ICC. Without delving into detail

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perpetrators are insufficient and do not satisfy international criminal law requirements. It will then be the job of the Peace Tribunal to make an argument in the final sentence for why the relevant sanctions satisfy the requirements under international criminal law.

<sup>134</sup> See L1922/18 artículo 27 (stating that the content of the resolution may be defined with the participation of victims). "La Sala de Reconocimiento de Verdad y Responsabilidad y Determinación de los Hechos y Conductas incluirá en la Resolución de Conclusiones el proyecto de sanciones con su contenido reparador y de medidas restaurativas que podrán ser definidas con participación de las víctimas. En ningún caso, el compareciente obtendrá beneficios económicos como consecuencia de la sanción ni de la reparación." The authors of this report, however, contend that such a project must be approved by the affected community through the appropriate mechanism. In fact, a systematic interpretation of the normative SJP framework, based on the centrality of victims, implies that the SJP must have the approval of victims.

<sup>135</sup> L1922/18 art. 29

about the Rome Statute's legal framework and the principle of complementarity,<sup>136</sup> it is worth recalling that the ICC Office of the Prosecutor (OTP) has repeatedly warned that the ICC will continue to monitor Colombia and that it will prosecute perpetrators from the Colombian conflict in the event that domestic criminal proceedings are not genuine.<sup>137</sup> The danger is that the ICC could arguably view the SJP, in approving restorative projects instead of sentencing perpetrators to prison, as acting in a manner contrary to Article 77 of the Rome Statute, which does not explicitly allow for non-custodial sentences for crimes against humanity and war crimes.<sup>138</sup> Accordingly, the ICC might argue that the SJP is merely shielding perpetrators from prosecution. While of course this is not the case, it is still advisable to include specific language in the sentences to inoculate perpetrators from prosecution by the ICC. Doing so could encourage more perpetrators to participate and could remove external, international pressure from the SJP.

By issuing sentences that meet the standards of international criminal law, the SJP can further demonstrate its impartiality, independence, and legitimacy as a judicial organ. Doing so may have the added benefit of convincing those members of Colombian society who think the SJP is not sufficiently retributive or punitive. This recommendation applies to both "fully acknowledging perpetrators" and "late-acknowledging perpetrators" in the First Instance Chamber in Cases of Absence of Acknowledgment of Truth and Responsibility who receive alternative sanctions. In such cases, though, the danger of ICC prosecution is lessened because part of the alternative sanctions requirements includes actual incarceration for five to eight years, more literally meeting the Rome Statute's Article 77 on sentencing requirements.

### **First Instance Chamber in Cases of Absence of Acknowledgment of Truth and Responsibility**

Cases involving perpetrators who do not acknowledge responsibility offer the fewest opportunities for restorative justice practices, and there is a general consensus that direct encounters between victims and non-acknowledging perpetrators are of little restorative justice value.<sup>139</sup> A direct encounter in such circumstances could likely lead to retraumatization and revictimization. Consequently, it is not recommended that the SJP convene any direct, mediated encounters between victims and non-acknowledging perpetrators. The SJP can, however, facilitate partly restorative justice processes,<sup>140</sup> such as holding small group conferences for victims in

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<sup>136</sup> See Paul Seils, ICTJ, "Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes" (2016), [www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](http://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf). Colombia has been under preliminary examination by the ICC since 2004. This means that the ICC has been doing an initial assessment of the situation: looking at the information it received or obtained from the state on alleged crimes, evaluating if the crimes fall under the ICC's jurisdiction, analyzing their admissibility and gravity, and deciding whether or not to open an investigation. The court has been looking into allegations of war crimes in the country since November 1, 2009, and alleged crimes against humanity since November 1, 2002. (Colombia acceded to the Rome Statute on August 5, 2002.) Under investigation are alleged violations by government forces, paramilitary groups, and guerilla groups. Article 17(1) is structured to deal with three different factual scenarios: The first is where national authorities are currently dealing with the same case as the ICC; the second is where the national authorities have investigated the same case and decided not to prosecute; the third is where the same case has been prosecuted at the national level.

<sup>137</sup> See Office of the Prosecutor of ICC, "Report on Preliminary Examination Activities" (2018), para. 165, [www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf](http://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf). "The OTP will continue assessing the genuineness of the proceedings carried out under the ordinary justice system, the JPL tribunals and the SJP. While noting with appreciation that the SJP is now fully operational, the OTP will continue examining developments relating to its regulations, operations and proceedings to the extent that the functioning of the jurisdiction will have a critical impact on the OTP's assessment of the admissibility of potential cases arising out of the situation in Colombia. In this context, the OTP will closely follow individual proceedings that arise from the cases initiated so far, as well as the identification of new cases selected for investigation and prosecution."

<sup>138</sup> See Rome Statute of the International Criminal Court art. 77, Jul. 1, 2002 [hereinafter Rome Statute]; See also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute, Second Edition* (Oxford, UK: Oxford University Press, 2016), 1,159.

<sup>139</sup> See Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2003), 48.

<sup>140</sup> See McCold and Wachtel, *supra* note 104, at 4.

which they can share their stories with each other. Such small group conferences should be facilitated by a professional mediator, with the aim that victim participants can be later trained to be facilitators themselves.<sup>141</sup> But how do we square this rather limited opportunity with the underlying emphasis of the Final Agreement on “putting victims at the center of the peace processes,” which would otherwise mean orchestrating mediated encounters between victims and perpetrators? The authors think that victims should still be offered the chance, if they want it, to make a statement in a public hearing where the perpetrator is present; however, the SJP must make sure that the victims are fully informed of the possible risk of retraumatization. It is not necessarily recommended that victims make such a statement, only that they be afforded the opportunity to do so if they so desire. This leads to the next point, which regards victims testifying against perpetrators.

If victims testify against non-acknowledging perpetrators, then they must be offered protective measures that fully safeguard them against reprisal.<sup>142</sup> Providing such protection is not only an important responsibility of any judicial proceeding with retributive justice elements, but doubly so in this context considering that many victims feel that the Colombian government has failed to protect them in the past. In this sense, such measures are an important aspect of rebuilding trust in Colombia's institutions and their ability to protect Colombians.

Finally, broadcasting the sentencing of non-acknowledging perpetrators offers an opportunity for the SJP to demonstrate its retributive and punitive justice elements and communicate their value to the public. Handing down punitive sentences, in line with the Final Agreement and subsequent legislation, can demonstrate that the SJP is not a purely restorative justice system and perhaps satisfy the desire of some Colombians for punitive measures against perpetrators. It might also set an example for perpetrators that it is beneficial to be forthcoming and acknowledge responsibility. Finally, it sends a message to the ICC that the SJP is by no means shielding perpetrators from prosecutions.

### **Rewriting Section**

Earlier sections have so far followed cases through the SJP's procedures that begin in the Acknowledgment Chamber. This section looks at the procedures in place for cases coming before SJP that involve perpetrators who have been involved in the Colombia's ordinary criminal justice system.<sup>143</sup> Perpetrators who have previously been convicted in the regular criminal justice system may submit a request to the Judicial Chamber for the Determination of Legal Situations, asking its Revisions Section to substitute their sentence with the one they already served.<sup>144</sup> Perpetrators who are currently being prosecuted in the ordinary criminal justice system may also submit a request to the Judicial Chamber for the Determination of Legal Situations, asking that the SJP take over the adjudication process. In cases involving members of the military forces or former FARC members, this procedure happens automatically since the SJP has special jurisdiction over these individuals.<sup>145</sup> Civilians or public servants who were not members of the armed forces can submit their cases to the SJP voluntarily if they meet the requirements of the Regime of Conditionality.<sup>146</sup> Finally, if the intent of the individual coming before the SJP through this channel is to have a previous sentence revised, the person must

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<sup>141</sup> See Lorenn Walker, International Institute for Restorative Practices, “Restorative Justice Without Offender Participation: A Pilot Program for Victims,” May 31, 2016, [www.iirp.edu/news/restorative-justice-without-offender-participation-a-pilot-program-for-victims](http://www.iirp.edu/news/restorative-justice-without-offender-participation-a-pilot-program-for-victims).

<sup>142</sup> See Final Agreement, *supra* note 7, at 172 Article 54f (mandating protective measures).

<sup>143</sup> L1957/19 artículo 97a.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, at artículo 97c.

<sup>146</sup> *Ibid.*, at artículo 84f;97a.

submit a detailed request directly to the Judicial Chamber for the Determination of Legal Situations, which may then refer it to the Revisions Section.<sup>147</sup>

Cases involving perpetrators who are already incarcerated that come to the SJP through the Revisions Section pass through many of the same procedures already discussed.<sup>148</sup> In this sense, the Revisions Section performs functions similar to those of the First Instance Chambers. Consequently, the authors suggest that the Revisions Section consider the earlier comments on sentencing language and the ICC; namely, the Revisions Section should include language in the sentences it issues that stresses the retributive justice aspects of Special Sanctions. In fact, these recommendations may be especially important for the Revisions Chamber since it will possibly commute punitive sentences into restorative justice judgements.

In reviewing correspondence for proposed sanctions, the Revisions Section must pay particular attention to the paradigm of restorative justice.<sup>149</sup> The Revisions Section will be dealing with perpetrators who either have already been incarcerated or are facing possible incarceration in the ordinary system and must be mindful to steer the conversation in the SJP away from a purely retributive and punitive model.<sup>150</sup> Essentially, a perpetrator coming before the Revisions Section, as outlined above, enters the SJP from a more retributive justice starting point: The individual has been convicted or is being investigated in the ordinary system. As a result, the Revisions Section ought to ensure that a retributive justice paradigm has not overly influenced the design of any proposed sanctions.

Cases in the Revisions Section can present a somewhat unique need among victims and their communities for preparation and psychosocial support. If the Colombian judicial system has already tried and sentenced a perpetrator, then it is possible that victims will have their wounds reopened when the Revisions Section takes up such cases. It is therefore essential that the SJP provide them with psychosocial support to prevent a revictimization that is triggered by the SJP rather than the actions of perpetrators.

### **Execution and Monitoring of Special Sanctions**

Although SJP is still some ways off from the implementation, execution, verification, and evaluation of any Special Sanctions, it is still valuable to make some preliminary recommendations. There are several logistical issues that must be addressed in order to achieve the goals of the Special Sanctions.

Based on the Final Agreement, it is incumbent on both the First Instance Chamber and the United Nations Political Verification Mission to monitor and verify the sanctions.

It is entirely possible that perpetrators complete their restorative justice projects ahead of schedule, or that a specific project is no longer feasible or achievable, which would necessitate the First Instance Chamber ordering a different restorative justice project as part of the Special

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<sup>147</sup> Ibid., at artículo 97a.

<sup>148</sup> If the Judicial Chamber for the Determination of Legal Situations determines that the perpetrator is not eligible for a pardon, and if the perpetrator's conduct is possibly related to a macro case already open in the Acknowledgment Chamber, then the person is sent to the Acknowledgment Chamber. The procedures for a fully acknowledging perpetrator whose case is already in the ordinary court system are the same, with the exception that the perpetrator arrives in the Revisions Section after the Resolution of Conclusions, rather than the First Instance Chamber. Similarly, a perpetrator who does not acknowledge responsibility moves to the Revisions Section, rather than the First Instance Chamber.

<sup>149</sup> It is noted here that the Revisions Chamber is put into the difficult situation of defining the retributive elements of a Special Sanction in order to appease the ICC. At the same time, it is recommended that chamber keep a restorative paradigm in mind.

<sup>150</sup> This situation differs from other perpetrators whose starting point is the SJP's mixed approach to justice, rather than the retributive model of the Colombian criminal justice system.

Sanctions. The First Instance Chamber may therefore need to contemplate more than one restorative project over the course of the five-to-eight-year period of implementation. This would entail the same process discussed in relation to the restorative justice project conference.

Independent monitors of the implementation of sanctions must check that the restorative projects do no undermine the rights of any perpetrators.<sup>151</sup> Not only is this a legal obligation, but it is also critical to safeguard the restorative, reparative, and reintegrative elements of the Special Sanctions.<sup>152</sup> Monitors of course should verify the health and livelihood of perpetrators, that the restorative project does not put them at risk, and that the perpetrators actually have the required skill set to execute the restorative project. The independent monitors should also assess whether or not perpetrators are denied access to their families or communities of care, by virtue of such factors as the location of the restorative justice project.<sup>153</sup> It is however important that any SJP-imposed restrictions on liberty do not undermine the restorative, reparative, and reintegrative aims of the restorative justice project.

This section concludes with two observations on the execution of sanctions. First, restorative justice projects have value for communications purposes. Successful restorative justice projects should be communicated to the Colombian public through various mediums. The SJP ought to involve perpetrators and victims in the design of such communications strategies. Doing so might in itself be a further act of procedural restorative justice, as well as demonstrate the entire procedure's contribution to prevention and reconciliation. Second, independent monitors must also confirm that the restorative justice projects do not infringe upon the rights of victims, affected communities, and the communities in which the projects take place.

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<sup>151</sup> See L1957/19 artículo 127 (explaining that these monitors are to be provided by the UN).

<sup>152</sup> See generally Final Agreement (discussing how Special Sanctions have a reintegrative aim). See also L1957/19 artículo 126 (granting the SJP the ability to impose "restrictions on liberty" that are necessary for the "execution of the sanction" and to ensure "guarantees of non-repetition"). "Comprenderán restricciones efectivas de libertades y derechos, tales como la libertad de residencia y movimiento, que sean necesarias para su ejecución, y además deberán garantizar la no repetición."

<sup>153</sup> See L1957/19 artículo 127 paragraph 2 (granting this right for "indigenous perpetrators," suggesting that the perpetrator may be told to reside in an area considered to be their ancestral homeland). "En el caso de los miembros de comunidades indígenas, el componente de restricción efectiva de la libertad de la sanción propia podrá incluir la fijación de residencia del sancionado en los territorios ancestrales de estas, garantizando en todo caso el cumplimiento del componente restaurativo y reparador de la sanción propia."

## CHAPTER 5: Conclusions

### Further Considerations and Challenges

It has been argued that the SJP should implement the principles and procedures outlined in this report in order to better achieve its restorative justice aims, which are a subset of the overall objectives of SJP and its mixed procedural approach. While it is hoped that these recommendations will contribute to and enhance the impact of the SJP's work, the authors recognize that they carry with them some potential pitfalls. This final chapter will examine some of the issues that arise as a result of these proposals, how to maybe resolve them, and what they illustrate about restorative justice generally.

#### Polarization of Colombia and the Legitimacy Deficit of the SJP

The passage of the Final Agreement in 2016 has not ended the polarization of Colombian society. By ratifying the agreement, albeit with some amendments, despite the “no” vote in the referendum, the Santos administration arguably created a legitimacy deficit for the SJP—a belief that the SJP is not democratically legitimate.<sup>154</sup> This legitimacy deficit is compounded by political polarization in Colombia that effectively divides society into two camps on this issue: those in favor of restorative justice and those who prefer to see retributive justice. A dominant narrative that the peace agreement grants impunity to perpetrators instead of imposing punishment only exacerbates this deficit.<sup>155</sup>

The proposed procedures and principles that guide this analysis, despite the best intentions, could actually worsen this situation. Most notably, the suggestions intended to advance some of the SJP's restorative justice goals could further solidify the belief among some Colombians that the SJP lets perpetrators off easy. The emphasis in this report on preparation and psychosocial support for perpetrators could be seen as evidence that the SJP is prioritizing the needs of perpetrators over those of victims. The caution expressed against adversarial proceedings could likewise inspire similar criticism. Those critics who claim that the SJP does not sufficiently punish wrongdoing could basically use any of the proposals in this report as evidence to support their position.

These problems of polarization and a lack of broad support for restorative justice processes are not unique to Colombia, but rather speak to a larger issue that restorative justice advocates

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<sup>154</sup> Marina Aksanova, “The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice,” in *Quality Control in Preliminary Examination: Volume 1*, eds. Morten Bergsmo and Carsten Stahn (Brussels: Torkel Opsahl Academic EPublisher, 2018), 268.

<sup>155</sup> Ibid.

must confront. The authors, however, do believe that these challenges can be overcome. Some of the communications strategies proposed here for the SJP, such as clearly demonstrating its retributive justice elements, can help win over critics and dismantle their arguments over time. But perhaps most importantly, the very mixed nature of the SJP's procedures is in many ways the best defense against these criticisms. By incorporating various retributive and punitive measures, alongside restorative justice elements, the SJP through its very design seeks to reverse the polarization and legitimacy deficit. The SJP is so very unique in this respect, and time will tell whether its design and work are successful.

### **Restorative Justice Does Not Mean Sacrificing Due Process**

The principles and procedures proposed in the report entail certain concerns regarding due process. As mentioned in Chapter 2, a challenge for restorative justice processes is that they can seemingly conflict with the due process right of representation. As the SJP is meant to select and adjudicate macro cases (or system crimes), it will inevitably confront the issue of admitting and dealing with a limited number of perpetrators and victims involved in those cases. The participating individuals will represent samples of all individuals involved in the cases. However, this may raise criticisms that participation and representation are limited. Similarly, this report's emphasis on the need for perpetrators to acknowledge full responsibility in a public hearing of acknowledgment, which echoes the SJP's own requirements, could be criticized on the due process grounds that it violates the presumption of innocence. Additionally, the notion that perpetrators should acknowledge full responsibility in the Acknowledgment Chamber prior to the Public Hearing raises a related concern about self-incrimination.

Implementing restorative justice procedures in the SJP does not mean that Colombia is renouncing due process. As discussed in Chapter 3, Colombia is still bound by its obligations under international law, which include full respect of due process rights. The Final Agreement furthermore recalls the same principle when articulating the SJP.

### **Retraumatization, Preparation, and Putting Victims' Rights at the Center of the SJP**

Any proceedings that put victims and perpetrators at their center cannot entirely avoid the risk of retraumatization. While it is hoped that preparing victims and perpetrators and providing them with psychosocial support will reduce the incidence of retraumatization, the danger still exists.

While indirect and direct encounters between victims and perpetrators throughout the SJP procedural stages are critical to advance the restorative justice aims of the SJP, it is equally crucial that victims are thoroughly prepared and provided with adequate psychosocial support. Such support is the most effective means for reducing the incidence of retraumatization without sacrificing the potential reconciliatory and healing qualities of restorative justice.

Along the same lines, it is important to stress that putting victims and victims' rights at the center of the SJP does not mean that victims must be involved with every aspect of the SJP. Rather, what is essential is that every stage of the SJP is designed with victims and their rights in mind. In fact, a system that puts victims' rights at its center will at times have to hold victims back from participating in certain stages. For example, a formal encounter between a victim and a non-acknowledging perpetrator will most likely further traumatize the victim. Similarly, victim participation too early in the SJP process might lead to an adversarial atmosphere that discourages a perpetrator from acknowledging responsibility, which in turn potentially denies victims the benefit of restorative justice. A victim-centered approach to restorative justice thus requires

striking a delicate balance between maximizing victims' participation and recognizing that such participation cannot occur at every single stage of the process.

### **Final Thoughts**

Colombians have the momentous task ahead of them of implementing the peace agreement in the face of international pressure and innumerable domestic obstacles. But Colombians have time and again proven their resolve to forge peace by harnessing their creativity, dedication, and expertise. The SJP's mixed procedural approach is an imaginative way to address large-scale international crimes. While this approach responds to a number of shortcomings found in criminal justice processes in other transitional justice contexts, the SJP still has its challenges. This report has attempted to address many of these challenges and offers some recommendations for new principles and procedures. If the SJP and the peace process more generally are to succeed, Colombians will need to continue using their procedural imagination.



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